No. 20-782

In The
Supreme Court of the United States

RAYMOND HOLLOWAY, JR.,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, et al.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case squarely presents the circuit split identified in *Binderup v. Att'y Gen. United States*, regarding the proper legal standard for determining disqualification of an individual from the right to keep and bear arms. 836 F.3d 336, 357 (3d Cir. 2016) (en banc). The *Binderup* standard as applied in this case was predictably unreliable, unprincipled, and contrary to the historical understanding of the right to keep and bear arms. Indeed, the federal government sought review of the same standard in *Binderup*, where it similarly argued that the Third Circuit's "ill-defined multifactor standard" "contradicts the historical understanding of the right to bear arms," "cannot be performed with sufficient reliability," and "departs from the decisions of other circuits." Pet. For a Writ of Cert. 10, 25, *Sessions v. Binderup*, (No. 16-847).

Today, Respondents ignore their prior stance and oppose review because the outcome favored them this time around. Their suggestion, BIO 4, that the split created by *Binderup* is not implicated here is incorrect and conflates the merits of how the competing tests for disqualification might be resolved with the certworthy question of whether the proper legal standard was applied. While the government may indulgently imagine it could prevail under any competing legal standard, that is not what the court below held and is a question for *after* the proper legal standard is determined—not one that would interfere with reaching the Question Presented here.

This Court's review is even more warranted today than when the government sought review. The circuit conflict is now deeper and more developed. And the virtuous-citizen theory that forms the foundation of the Third Circuit's multifactor test has been thoroughly debunked. Meanwhile, the number of Americans whose fundamental rights are being denied based on this unpredictable standard continues to grow.

ARGUMENT

I. Which regulations are presumptively lawful under the Second Amendment is an important question on which the circuits are split.

The lifetime firearms ban resulting from Holloway's nonviolent misdemeanor conviction was considered presumptively lawful by the Third Circuit, based on this Court's declaration that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful."[1] App. 72; *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008). But Holloway is not a felon, and there is nothing longstanding about the ban that applies to him.

[1] Respondents claim that this Court has made "repeated statements that convicted felons fall outside the scope of the Second Amendment." BIO 6. To the contrary, this Court has merely deemed prohibitions for felons "presumptively"—not conclusively—lawful. *Heller*, 554 U.S. at 627 n.26.

Respondents attempt to lump Holloway in with felons by arguing that "[n]o sound basis exists to accord constitutional significance to the 'minor and often arbitrary' state-law distinctions in labeling particular crimes as misdemeanors or felonies." BIO 7 (quoting *Tennessee v. Garner*, 471 U.S. 1, 14 (1985)). The irony of that position is palpable, given that the application of 18 U.S.C. § 922(g)(1) turns on such arbitrary state-law distinctions—including whether an offense is labeled a felony (or labeled at all), § 921(a)(20), and whether a state chooses to micro-manage sentences versus leave discretion to its judges to match sentences to the severity of the offense within a broad range.

Here, for example, Holloway's conviction gave the sentencing judge considerable latitude and Holloway was sentenced to the absolute minimum—90 days' confinement on a work-release program, Pet. 4—well less than the statutory cut-off of two years. That the judge had discretion to impose a greater sentence for a more serious offense within the broader law is of no constitutional significance.

The case Respondents cite to support their claim that a crime's "maximum penalty" should determine its severity, *Lewis v. United States*, 518 U.S. 322 (1996), did not address the Second Amendment or the distinction between felonies and misdemeanors. It addressed the right to a jury trial, which involves very different considerations regarding the potential loss of a defendant's procedural rights.

Here, focusing on only the maximum sentence rather than the actual sentence imposed is arbitrary as to jurisdictions that favor greater judicial discretion—they may have precisely the same view of the seriousness of Holloway's conduct as jurisdictions that create narrower tranches of violations with narrower sentencing ranges within those tranches. Indeed, in most jurisdictions where the gradations in offenses *are* more narrowly defined by law, Holloway would not have been disqualified under § 922(g)(1). Pet. 8.

Furthermore, while the government may conveniently eschew "labels" now, *Heller* explicitly named "felons" as the category of presumptively disqualified persons. That label has historic significance, and it is not for the courts of appeals to expand the category based on hostility to the Second Amendment as a whole.

Respondents do not address the conflict in the circuits over which regulations are presumptively lawful. But their criticism of the felony-misdemeanor distinction and their dissatisfaction with the Third Circuit's approach bolster the need for further review.

II. The standard regarding whether and how any presumption of lawfulness can be rebutted is an important question on which the circuits are split.

Respondents admit that lower courts are split over whether and how any presumption of lawfulness can be rebutted via as-applied challenges under the Second

Amendment. BIO 8 (recognizing a split between circuits allowing such challenges and those that do not). Even so, Respondents understate the scope of the split among the courts that allow as-applied challenges.

Of those courts, the Third, Fourth, Ninth, and D.C. Circuits apply a virtue-based test, while the First, Sixth, and Eighth Circuits prefer a dangerousness test. Pet. 14–18. Thus, four circuits forbid as-applied challenges, four prefer a virtue test, and three prefer a dangerousness test. *Id.* at 13–18.

Respondents' only meaningful response is to claim that the crime of driving under the influence would satisfy even the dangerousness test. This argument was expressly rejected by the factfinder in this case, Pet. 6–7; App. 82, 84, and in any event, goes to the merits rather than the need to determine the relevant standard. At a minimum, any questions about the application of a proper standard to the facts of this case should be addressed on remand in the first instance, and are not a barrier to granting certiorari.

The extensive lower-court confusion alone is reason enough to grant review and clarify the proper standard. Several Ohio Supreme Court justices recently sought such assistance in reviewing a limitation on the right to possess firearms:

> It is worth stating here that deciding this case would have been much simpler if this court had only had more guidance in this area. Hopefully, upon seeing the scores of pages that this court has added to the subject today,

> the United States Supreme Court will consider this issue and will provide some much-needed clarity on how to approach a challenge to a law or regulation under the Second Amendment.

State v. Weber, 2020-Ohio-6832, 2020 WL 7635472, ¶118 n.4 (Fischer, J., dissenting). This case provides an ideal vehicle for the Court to provide much-needed clarity on Second Amendment challenges, especially those involving prohibited persons.

1. Historically, only dangerous persons likely to use firearms for illicit purposes were disarmed.

"The 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).

"In England," people were disarmed if they were judged "dangerous to the Peace of the Kingdom," went "armed to terrify the King's subjects," or were "thought to pose a similar threat or terror" based on what would now be unconstitutional prejudice towards their religion. *Kanter v. Barr*, 919 F.3d 437, 456–57 (7th Cir. 2019) (Barrett, J., dissenting) (citations omitted).

"The American colonies had similar laws. They were particularly fearful of the disloyal, who were potentially violent and thus dangerous." *Folajtar v. Att'y*

Gen. United States, 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting); *see also id.* (some colonies disarmed loyalists during the American Revolution to prevent violent protests). And at the Constitution's ratifying conventions, New Hampshire, Massachusetts, and Pennsylvania proposed arms guarantees with limitations reflecting a concern "not about felons in particular or even criminals in general," but "about threatened violence and the risk of public injury." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting).[2]

Since Holloway filed his petition with this Court, two state supreme court justices have conducted historical analyses and found that potential for violence was the motivating factor in founding-era firearm regulations. *See Weber*, 2020-Ohio-6832, at ¶118 (DeWine, J., concurring) (finding "considerable historical evidence that restrictions on firearm use by those who presented a present danger to others fell outside the Second Amendment right"); *State v. Roundtree*, 2021 WI 1, ¶129 (Hagedorn, J., dissenting) (finding that historical firearm regulations were "aimed at persons or classes of people who might violently take up arms against the government in rebellion, or at persons who posed a more immediate danger to the public").

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[2] Offenders who were disqualified in the founding era often regained their rights – *e.g.*, by completing their sentence, providing a surety, swearing allegiance to the state, or proving that they no longer posed a threat. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 268–69 (2020).

Historically, a propensity for armed violence was the touchstone for disarmament.

2. The virtuous-citizen test common in a plurality of circuit courts has been historically debunked.

A plurality of circuit courts embraces a virtuous-citizen test, despite that test lacking historical support.

The Third Circuit applied a virtuous-citizen test here, but Respondents do not defend it. Indeed, the government has previously denounced the Third Circuit's virtue-based test as "a test with no foundation in this Court's decisions or the history of the right to bear arms." Pet. 15, *Binderup*, 137 S. Ct. 2323.

As then-Judge Barrett explained, "*Heller* forecloses the 'civic right' argument on which a virtue limitation depends" because "virtue exclusions don't apply to individual rights." *Kanter*, 919 F.3d at 463, 469 (Barrett, J., dissenting). It was no surprise then, that the parties in that case introduced no "evidence that founding-era legislatures imposed virtue-based restrictions on the right" to keep and bear arms. *Id.* at 451; *see also Folajtar*, 980 F.3d at 915–19 (Bibas, J., dissenting) (analyzing every source commonly cited to support the theory and concluding that "each layer lacks historical support or even undermines" the theory and that it is based on "scholars and courts' citing one another's faulty analyses"); *Weber*, 2020-Ohio-6832, at ¶88 n.3 (DeWine, J., concurring) ("I find that

[virtue] explanation less persuasive and underprotective of the Second Amendment right"); *Roundtree*, 2021 WI 1, at ¶94 (Hagedorn, J., dissenting) ("The virtuous citizenry standard lacks any foundation in the historical backdrop to the Second Amendment."). Despite the virtue test's lack of historical foundation, it remains binding precedent in a plurality of circuit courts.

What is more, the virtue test can easily be abused to suppress constitutional rights. Indeed, every crime, many civil offenses, and all sorts of disfavored speech can be said to reflect a certain lack of "virtue." If overall moral fitness is the test, one wonders where a motivated court or legislature might stop in attempting to disqualify large swaths of the population from Second Amendment protection.

The proper test for rebutting a presumptive disqualification is an important question that divides the circuit courts, that is well presented by this case, and that should be resolved by this Court.

3. Respondents' claim that the regulation here is longstanding is erroneous, provides no support for disarming Holloway, and does not alter the need for this Court's review.

Lacking any meaningful defense of the virtuous-citizen theory, Respondents vaguely contend that Holloway can forever be disarmed because "[f]ederal law has long restricted the possession of firearms by certain categories of individuals." BIO 5. This is false, and

as a merits-focused claim, it does not alter the need for this Court's review.

The first federal law prohibiting anyone from possessing firearms was enacted in 1968—seven years prior to the enactment of the handgun ban struck down in *Heller*. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. VII, § 1202, 82 Stat. 197, 236.[3]

What is more, before the mid-twentieth century, no state law forbade peaceable persons like Holloway from possessing firearms either. *See* Greenlee, *Historical Justification for Prohibiting Dangerous Persons*, 20 WYO. L. REV. at 261–75.

Respondents' sources offer little support. Two law review articles provide only general statements about felons, infants, and the insane historically being denied the right. Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 96 (1983); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995). And one of those acknowledges that modern-day bans on nonviolent felons might contradict history. Reynolds, *A Critical Guide*, 62 TENN. L. REV. at 481 n.90. Another source discusses classes of people—*not* misdemeanants—historically

[3] Persons convicted of a "crime of violence" were prohibited from acquiring firearms in 1938, but they could continue to possess any firearms they owned at the time of their conviction. Federal Firearms Act, Pub. L. No. 75-785, § 2(e), (f), 52 Stat. 1250, 1251 (1938).

excluded from voting. 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). And the final source is the proposal by the Pennsylvania Dissent of the Minority at the ratifying convention. As then-Judge Barrett explained, this proposal is most reasonably interpreted as excluding people who commit crimes "suggesting a proclivity for violence." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting).

There is no longstanding tradition of disarming nonviolent criminals and every court that upholds such a prohibition contradicts *Heller*'s declaration that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." 554 U.S. at 634–35.

Regardless, such historical debates are for the *merits* of the case once granted, and do not diminish the need for the debates to be resolved in the first place. That the government disagrees with both Petitioner and the Third Circuit about the proper test only furthers the need for review.

III. The splits within the lower courts determine the outcome of this case.

Respondents claim that Holloway is "[u]nable to establish a circuit conflict on the concrete issue whether a person with petitioner's criminal history may be disarmed" and, in any event, "the Third Circuit held that petitioner could not prevail even under the

Binderup standard." BIO 10. But the unprincipled evolution of the *Binderup* standard is precisely why review is needed and why the history-based standard proposed by Petitioner and many other jurists is more appropriate.

As Judge Fisher concluded in his dissent, under the original *Binderup* test, all four factors favored Holloway. Pet. 8; App. at 34–50. The majority did not dispute this. Pet. 7; App. 18, 23–24. But because "there are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights" under the multifactor *Binderup* test, App. 13; *Binderup*, 836 F.3d at 351 (Ambro, J., opinion), the majority added a new factor: "potential for danger and risk of harm to self and others," Pet. 7–8; App. 15. That every original *Binderup* factor favored Holloway but the majority could rule against him by inventing a new factor illustrates precisely why this case is an ideal vehicle for review of the multifactor test.

To be clear, the majority's new factor, "potential for danger and risk of harm to self and others," is different from the dangerousness standard that has historically restricted the right to arms. The historical test for firearms regulations is whether the person was "likely to use *firearms* for illicit purposes." *Binderup*, 836 F.3d at 357 (Hardiman, J., concurring) (emphasis added). *See also* App. 42 (Fisher, J., dissenting) ("the principal historical evidence from the Founding period suggests that the majority's 'risk of harm' standard is too broad").

Holloway, by contrast, has never threatened violence nor used a firearm for illicit purposes. His conviction had nothing to do with a firearm, and there is no reason to believe that he would pose a present danger to the public if armed. *See Binderup*, 836 F.3d at 377 (Hardiman, J., concurring) ("To be sure, Suarez's 1998 DUI conviction was a dangerous act—but not in the sense of the traditional concerns motivating felon dispossession."); *Begay v. United States*, 553 U.S. 137, 145 (2008) (holding that drunk driving is not a "violent felony" under the Armed Career Criminal Act because it does not involve "purposeful, violent, and aggressive conduct").

Pennsylvania does not believe Holloway is dangerous. Holloway's DUI conviction never prevented him from purchasing or possessing firearms under Pennsylvania law. Pet. 5; App. 76–77. And as *amicus* Firearms Policy Foundation explained, "[u]nder Pennsylvania law, his right to drive a motor vehicle was suspended for 18 months, not for life," FPF Br. 3 (citing 75 Pa. Con. Stat. § 3804(e)(2)(ii)). Moreover, other states do not find people like Holloway dangerous either. Across the country, "only about one in five individuals behaving *exactly as Holloway did* would be barred from possessing a firearm under § 922(g)(1)," thus making "the statute as applied here . . . 'wildly underinclusive.'" App. 55, 58 (Fisher, J., dissenting) (emphasis in original).

CONCLUSION

As the government itself conceded in its efforts to seek review in *Binderup*, there is "no reason to think that the conflict will resolve itself absent this Court's intervention or that the relevant legal issues have not been sufficiently developed." Reply Br. for the Pet'rs 5, *Binderup*, 137 S. Ct. 2323. The Court should grant certiorari.

Respectfully submitted,

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