NO. _____

In the Supreme Court of the United States

LISA M. FOLAJTAR,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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December 11, 2020

QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1), which permanently prohibits nearly all felons—even those convicted of nonviolent crimes—from possessing firearms for self-defense, violates the Second Amendment, as applied to an individual convicted of willfully making a materially false statement on her tax returns.

PARTIES TO THE PROCEEDING

Petitioner Lisa M. Folajtar was the plaintiff in the District Court and was the plaintiff-appellant in the Court of Appeals.

Respondents William P. Barr, Attorney General of the United States; Regina Lombardo, Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; Christopher A. Wray, Director of the Federal Bureau of Investigation; and the United States of America were the defendants in the District Court and were the defendants-appellees in the Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (E.D. Pa.)

Folajtar v. Att'y Gen.,
No. 5:18-cv-02717 (Feb. 22, 2019)

United States Court of Appeals (3d Cir.)

Folajtar v. Att'y Gen.,
No. 19-1687 (Nov. 24, 2020)

There are no other directly related proceedings in any court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been published in the Federal Reporter but can be found at 2020 WL 6879007 and is reproduced at App. 1–58.

The District Court's opinion is published in the Federal Supplement at 369 F. Supp. 3d 617 and is reproduced at App. 61–77.

JURISDICTION

The Court of Appeals issued its judgment on November 24, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

Subsection 922(g)(1) of Title 18 of the U.S. Code provides, in relevant part: "It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to

receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

INTRODUCTION

More than a decade ago, this Court held that the Second Amendment "confer[s] an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). At the same time, however, the Court assured that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. And although the Court refrained from "undertak[ing] an exhaustive historical analysis . . . of the full scope of the Second Amendment," it remarked that its opinion should not be read to "cast doubt on longstanding prohibitions on the possession of firearms by felons," *id.*, prohibitions that the Court labeled "presumptively lawful regulatory measures," *id.* at 627 n.26.

Shortly after *Heller*, the Court reminded the lower courts that the Second Amendment is not "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 opinion). And yet, even with that admonition, one can readily see in the years since *Heller* and *McDonald* "the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right." *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari).

The lower courts have perhaps failed no Americans more than those who have committed nonviolent

crimes, fully repaid their debts to society, and now ask merely for "a chance to reenter the community as an equal." App. 56 (Bibas, J., dissenting). Within the last decade, nonviolent felons like Petitioner—who nearly a decade ago pleaded guilty to willfully making a materially false statement on her tax returns—have brought many challenges to the federal statute, 18 U.S.C. § 922(g)(1), that permanently prohibits *all* covered felons from possessing *any* modern firearm for *any* reason. *See Medina v. Whitaker*, 913 F.3d 152, 155 (D.C. Cir. 2019) (listing challenges).

These as-applied challenges to Section 922(g)(1) have resulted in varying outcomes and degrees of success. Some courts of appeals have categorically rejected the idea that felons can even raise as-applied challenges, effectively upholding Section 922(g)(1) in all its applications. Other courts of appeals have permitted nonviolent felons to challenge certain applications of Section 922(g)(1). But many of those courts have judged these as-applied challenges under a "virtue"-based theory of disarmament, in which a conviction for a purportedly "serious" crime suffices to show that an individual lacks sufficient "virtue" to exercise her fundamental right to keep and bear arms, including for self-defense in the home.

But, as explained by multiple circuit court concurring or dissenting opinions, this "virtue"-based justification for applying Section 922(g)(1) to nonviolent felons is ahistorical, contradicts this Court's decision in *Heller*, and gives legislatures *carte blanche* to disarm virtually any individual for any legal violation, so long as the legislature attaches a sizable enough penalty to the crime. *See* App. 33–58

(Bibas, J., dissenting); *Kanter v. Barr*, 919 F.3d 437, 453–64 (7th Cir. 2019) (Barrett, J., dissenting); *Binderup v. Att'y Gen.*, 836 F.3d 336, 357–67 (3d Cir. 2016) (en banc) (Hardiman, J., concurring). Instead, "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). "[T]hat 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." *Id.*

The Court of Appeals below endorsed the dubious virtue-based theory of disarmament, and its decision warrants this Court's review for at least three reasons. First, the courts of appeals are intractably divided regarding the availability of case-by-case relief from Section 922(g)(1) and this Court's review is necessary to restore the uniformity of federal law on that question. Even the Federal Government has recognized this division among the courts of appeals and the consequent need for this Court's intervention. *See* Pet. For a Writ of Certiorari 10, 21–23, *Sessions v. Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847). Second, while the decision below correctly acknowledged that Petitioner could mount an as-applied challenge to Section 922(g)(1), the Court of Appeals adopted and extended the discredited virtue-based theory of felon disarmament and consequently held that Petitioner could be permanently stripped of her core constitutional right to self-defense even though nobody has asserted—let alone proved—that she poses any kind of danger to the community. And third,

the division among the courts of appeals as to the availability of as-applied challenges to Section 922(g)(1) is endemic of the lower courts' widespread confusion and uncertainty regarding *Heller*'s discussion of "longstanding prohibitions" that are "presumptively lawful." This confusion has operated to the significant detriment of men and women like Petitioner, who have repaid their debts to society, present no danger to others, and simply wish to reenter society with their Second Amendment rights intact.

This Court in *Heller* posited that "there will be time enough to expound upon the historical justifications for the exceptions [the Court had] mentioned if and when those exceptions come before [it]." 554 U.S. at 635. The felon "exception" is now squarely presented in this case, it has been well-ventilated in the lower courts, and the time has come for the Court to clarify that the "historical justification[]" supporting the exception is the interest in disarming only those who have demonstrated themselves to be dangerous. Applying Section 922(g)(1) to individuals who fall outside of that category, like Petitioner, is therefore unconstitutional. The Court should grant the petition for a writ of certiorari.

STATEMENT

I. Regulatory Background

"Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L.

& PUB. POL'Y 695, 708 (2009). In 1938, Congress for the first time restricted anyone's access to firearms: it 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) ("FFA"). The FFA defined "crime of violence" to include only "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." FFA § 1(6), 52 Stat. at 1250. In enacting the FFA, "Congress sought . . . to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (internal citations and quotation marks omitted).

Congress first expanded this prohibition in 1961 to include nonviolent criminals by replacing the "crime of violence" element 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, 757 (1961). In 1968, Congress again expanded the prohibition by replacing the "receipt" element of the 1938 law to "possession," giving 18 U.S.C. § 922(g)(1) its current form. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. VII, § 1202, 82 Stat. 197, 236.

Section 922(g)(1) includes all offenses punishable by more than one year's imprisonment—violent and nonviolent—except for convictions "pertaining to

antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices," 18 U.S.C. § 921(a)(20)(A), state misdemeanors "punishable by a term of imprisonment of two years or less," *id.* § 921(a)(20)(B), or "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored," *id.* § 921(a)(20).

It is a felony to violate Section 922(g)(1), punishable by fine and up to ten years' imprisonment. *Id.* § 924(a)(2).

II. Factual Background

In 2011, the United States filed a criminal information in the U.S. District Court for the Eastern District of Pennsylvania charging Petitioner Lisa M. Folajtar with a single count of willfully making a materially false statement on her tax returns, a felony punishable by up to three years' imprisonment and a fine up to $100,000. *See* 26 U.S.C. § 7206(1). Accepting responsibility for her actions, Petitioner pleaded guilty and was ultimately sentenced to three-years' probation, including three months of home confinement, a $10,000 fine, and a $100 assessment. She also paid the IRS approximately $250,000 in back taxes, penalties, and interest.

Years later, Petitioner sought to lawfully purchase and possess a handgun and long gun for self-defense within her home. Yet, because of her 2011 felony

conviction, Petitioner is barred by federal law, 18 U.S.C. § 922(g)(1), from ever possessing a firearm.[1]

III. Procedural History

In 2018, Petitioner filed a lawsuit in the District Court alleging that application of Section 922(g)(1) to her violated her Second Amendment right to possess firearms. The District Court had jurisdiction under 28 U.S.C. § 1331. The United States moved to dismiss Petitioner's suit, arguing that, "[b]ecause Folajtar pleaded guilty to a federal felony, she is categorically excluded from the class of citizens entitled to possess a firearm." App. Vol. II 26, *Folajtar v. Att'y Gen.*, No. 19-1687 (3d Cir. June 20, 2019).

Applying the Third Circuit's precedents in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), and *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), the District Court determined that Petitioner did not state a plausible Second Amendment claim

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[1] The U.S. Code authorizes the Attorney General to remove Petitioner's prohibition if she submits an application establishing "that the circumstances regarding the disability, and [her] record and reputation, are such that [she] will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). But since 1992, "Congress has repeatedly barred the Attorney General from using appropriated funds to investigate or act upon [such relief] applications," thus rendering the provision "inoperative." *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007) (quotation marks omitted). Prior to 1992, the Federal Government granted Section 925(c) relief to thousands of individuals for a multitude of different crimes, some of which were far more egregious than Petitioner's. *See* Br. of the Appellant 20–29*, Folajtar v. Att'y Gen.*, No. 19-1687 (June 20, 2019).

because she was convicted of a "serious" crime. *See* App. 65–76.

On appeal, the Court of Appeals affirmed the District Court's holding. The Third Circuit acknowledged that it "permit[ted] Second Amendment challenges to § 922(g)(1) as applied to individuals." App. 7. The Court of Appeals further reasoned that in such as-applied challenges, it followed a "two-pronged approach first announced in *Marzzarella*," asking (1) whether the "law hampers conduct falling within the scope of the Second Amendment's guarantee," and if so, (2) whether "the law can survive heightened scrutiny." App. 8 (quotation marks omitted).

Relying on its prior en banc decision in *Binderup*, the Court of Appeals reiterated its view that because "the right to bear arms was tied to the concept of a virtuous citizenry," "the government could disarm 'unvirtuous citizens.' " App. 9 (quoting *Binderup*, 836 F.3d at 348). And, according to the Court of Appeals, "[t]he category of 'unvirtuous citizens' . . . covers any person who has committed a serious criminal offense, violent or nonviolent." App. 9 (quoting *Binderup*, 836 F.3d at 348). Moreover, when examining the "seriousness" of a crime, the Court of Appeals would "presume the judgment of the legislature is correct and treat any crime subject to § 922(g)(1) as disqualifying unless there is a strong reason to do otherwise." App. 10 (quoting *Binderup*, 836 F.3d at 351).

Applying this test, the Court of Appeals held that Petitioner's violation of 26 U.S.C. § 7206(1) constituted a "serious crime" because it "necessarily entail[ed] deceit" and "reflect[ed] grave misjudgment."

App. 28 (quotations omitted). Because the Court of Appeals concluded that Petitioner's offense fell outside "the scope of the Second Amendment's guarantee" to possess firearms, it did not scrutinize Section 922(g)(1) further. App. 28 (quotation omitted).

Judge Bibas dissented. He first argued that neither *Heller* nor *Binderup* "decided whether nondangerous felons should lose their Second Amendment rights." App. 30 (Bibas, J., dissenting). Second, Judge Bibas argued that the majority's test—"whether the legislature labeled the crime a felony"—"conflicts with the historical limits on the Second Amendment." App. 31. After exhaustively canvassing the history, which had already been addressed at length by Judge Hardiman, *see Binderup*, 836 F.3d at 367–74 (Hardiman, J., concurring), and then-Judge Barrett, *see Kanter v. Barr*, 919 F.3d 437, 453–64 (7th Cir. 2019) (Barrett, J., dissenting), Judge Bibas concluded that "the limit on the Second Amendment right was pegged to dangerousness, not some vague notion of 'virtue,' " App. 35 (Bibas, J., dissenting). And because "[n]obody claims that Lisa Folajtar poses a danger," it followed that Section 922(g)(1) could not be constitutionally applied to her. App. 58.

Even aside from the historical record, Judge Bibas further concluded that the majority's test—accepting as a "serious crime" virtually any offense the legislature labels a "felony"—was mistaken because "[t]he category is elastic, unbounded, and manipulable by legislatures and prosecutors," and "[t]he Second Amendment right to keep and bear arms should not hinge on such arbitrary, manipulable distinctions." App. 52–54.

REASONS FOR GRANTING THE PETITION

The standards for granting a petition for a writ of certiorari are satisfied when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(a), (c).

These criteria are met here. The decision below—which entertained Petitioner's as-applied challenge to Section 922(g)(1)—squarely conflicts with the decisions of at least three—and possibly five—other circuit courts, each of which preclude any as-applied challenges to Section 922(g)(1). The Court of Appeals also decided an important issue of federal law—whether nonviolent felons may be permanently stripped of their Second Amendment rights—based on a clear misreading of both *Heller* and the historical record. This Court should therefore definitively settle the question and hold that Section 922(g)(1) is unconstitutional as applied to those convicted of nonviolent felonies, like Petitioner. In doing so, the Court should take the opportunity to instruct the lower courts as to what *Heller* meant when discussing "longstanding prohibitions" that are "presumptively lawful." 554 U.S. at 626, 627 n.26.

I. The Court Should Resolve the Division Among the Courts of Appeals as to Whether Felons May Raise As-Applied Challenges to Section 922(g)(1).

In *District of Columbia v. Heller*, this Court referred to a set of "presumptively lawful regulatory measures," 554 U.S. 570, 627 n.26 (2008), including "longstanding prohibitions on the possession of firearms by felons," *id.* at 626. In light of this language, "every federal court of appeals to address the issue has held that § 922(g)(1) does not violate the Second Amendment on its face." *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019).

Many felons have attempted to raise as-applied challenges to Section 922(g)(1) and other felon-in-possession statutes, and those challenges have spawned a divergent variety of approaches. In particular, "courts of appeals are split as to whether *as-applied* Second Amendment challenges to § 922(g)(1) are viable." *Id.* Some courts of appeals—like the Third Circuit—have permitted felons to raise as-applied challenges. But at least three other courts of appeals have categorically denied felons the opportunity to challenge the application of Section 922(g)(1) to their individual circumstances.

This division among the courts of appeals has persisted for nearly a decade and the time has come for the Court to resolve it. Indeed, even the Federal Government sought this Court's review on this very question nearly four years ago. *See* Pet. For a Writ of Certiorari 10, 21–23, *Sessions v. Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847). Far from resolving itself, the division that the Federal Government identified in

2017 has both persisted and widened, demonstrating an intractable conflict among the courts of appeals. This Court's intervention is thus necessary to ensure a uniform application of the Second Amendment.

A. At Least Three Courts of Appeals Permit As-Applied Challenges to Section 922(g)(1).

1. Shortly after this Court decided *Heller*, the Seventh Circuit quite sensibly recognized that because "*Heller* referred to felon disarmament bans only as 'presumptively lawful,' " that "by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (joined by O'Connor, J.); *see also Binderup v. Att'y Gen.*, 836 F.3d 336, 350 (3d Cir. 2016) (en banc) (opinion of Ambro, J.) (explaining that "[u]nless flagged as irrebut[t]able, presumptions are rebuttable" and that *Heller*'s "presumptively lawful" language confirms that an as-applied showing of unconstitutionality is possible). More recently, the Seventh Circuit has reiterated that it has "left room for as-applied challenges to the statute." *Kanter*, 919 F.3d at 443.

In identifying those nonviolent felons for whom Section 922(g)(1) may be constitutionally applied, the Seventh Circuit in *Kanter* asked whether the challenger was "convicted of a serious federal felony for conduct broadly understood to be criminal, and he did not face a minor sentence." *Id.* at 450. The Seventh Circuit further indicated that so long as an individual is convicted of a "black-letter *mala in se* felon[y] reflecting grave misjudgment and maladjustment"

and "significant disrespect for the law," such a "serious felony conviction prevents him from challenging the constitutionality of § 922(g)(1) as applied to him." *Id.* (quotations omitted). In a lengthy dissent described at greater length below, *see infra* Part II.A, then-Judge Barrett explained that the virtue-based understanding of the right to keep and bears that undergirds the "serious crime" standard lacks any basis in the historical record. *See Kanter*, 919 F.3d at 453–64 (Barrett, J., dissenting).

2. The D.C. Circuit, like the Seventh, has entertained the possibility of a successful as-applied challenge to Section 922(g)(1). In *Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir. 2019), the court "reject[ed] the argument that non-dangerous felons have a right to bear arms." *Id.* at 159. The *Medina* court nonetheless conceded that it may be "open to debate" whether some crimes, such as "a misdemeanor arising from a fistfight," "removes one from the category of 'law-abiding and responsible' " citizens. *Id.* at 160 (quoting *Heller*, 554 U.S. at 635). But the Court concluded that "[t]hose who commit felonies however, cannot profit from [the] recognition of such borderline cases," and "are not among those entitled to possess arms." *Id.*

Although the D.C. Circuit withheld judgment on whether "it is ever possible for a convicted felon to show that he may still count as a law-abiding, responsible citizen," it ultimately concluded that because the plaintiff was convicted "a serious crime, *malum in se*, that is punishable in every state," and "within the scope of moral turpitude," he had shown "disregard for the basic laws and norms of our society"

sufficient to differentiate him from someone who is "law-abiding" under *Heller*. *Id.* (quotation marks omitted). The court noted that even though it could "be possible for a felon to show that his crime was so minor or regulatory that he did not forfeit his right to bear arms by committing it," the plaintiff had not made such a showing. *Id.*

3. The Third Circuit, as demonstrated by the decision below, also "permit[s] Second Amendment challenges to § 922(g)(1) as applied to individuals." App. 7. In *Binderup*, 836 F.3d 336, the court, sitting en banc, fractured along three lines, but ten of the fifteen judges agreed that "in the context of an as-applied challenge to § 922(g)(1), a challenger must prove that he was not previously convicted of a serious crime" and if the challenger makes such a showing, "the burden shifts to the Government . . . to prove that the regulation at issue survives intermediate scrutiny." *Id.* at 356 (opinion of Ambro, J.); *see also Holloway v. Att'y Gen.*, 948 F.3d 164, 171 n.7 (3d Cir. 2020). Seven of those ten judges—a plurality of the en banc court—expressly held in *Binderup* that the historical justification for disarming felons was "tied to the concept of a virtuous citizenry," and that "persons who have committed serious crimes forfeit the right to possess firearms much the way they forfeit other civil liberties." 836 F.3d at 348–49 (plurality opinion) (citations and internal quotation marks omitted).

While ten of the judges in *Binderup* agreed that persons who committed "serious crimes" could not successfully raise an as-applied challenge to Section 922(g)(1), those judges diverged as to what counted as

a "serious crime" sufficient to preclude a constitutional challenge. Three judges reasoned that the court should "presume the judgment of the legislature is correct and treat any crime subject to § 922(g)(1) as disqualifying unless there is a strong reason to do otherwise." *Id.* at 351 (opinion of Ambro, J.). In *Binderup*, that three-judge coalition ultimately found such a "strong reason" and held that Section 922(g)(1) could not be constitutionally applied to an individual convicted of corrupting a minor under Pennsylvania law or an individual convicted of unlawfully carrying a handgun without a license under Maryland law. *See id.* at 340.

Meanwhile, the seven remaining judges who endorsed the "serious crime" standard for as-applied challenges to Section 922(g)(1) maintained that "all crimes currently within § 922(g)(1)'s scope are serious by definition." *Id.* at 388 (Fuentes, J., dissenting). Those seven judges rejected the notion "that courts must "determin[e] whether crimes are serious enough to destroy Second Amendment rights on a case-by-case basis" because, in their view, "Congress has made a reasoned judgment that crimes currently covered by § 922(g)(1) . . . *are* serious enough to support disarmament." *Id.* at 396 (quotation marks omitted).

Finally, the remaining five judges on *Binderup* court agreed with the three-judge controlling opinion that Section 922(g)(1) is "subject to as-applied constitutional challenges," and that Section 922(g)(1) was in fact unconstitutional as applied to the challengers there. *Id.* at 357 (Hardiman, J., concurring). But the five concurring judges also disagreed with the plurality's holding that the

"traditional justifications underlying felon dispossession" were rooted in "virtue." *Id.* at 358. Rather, according to the concurring judges, the exclusion of felons from the scope of the Second Amendment's protections was centered on "the time-honored principle that the right to keep and bear arms does not extend to those likely to commit violent offenses." *Id.* at 367. Under this "dangerousness" standard, "non-dangerous persons convicted of offenses unassociated with violence may rebut the presumed constitutionality of § 922(g)(1) on an as-applied basis." *Id.* at 358. And applying this dangerousness standard, the five-judge concurrence concluded that the challengers in *Binderup*—who were each convicted of "nonviolent misdemeanors"—were "no more dangerous than a typical law-abiding citizen," and therefore could not be constitutionally disarmed under Section 922(g)(1). *Id.* at 374, 375.

Therefore, at least three courts of appeals permit as-applied challenges to Section 922(g)(1),[2] although

[2] Three other courts of appeals appear not to have foreclosed as-applied challenges to Section 922(g), albeit only tentatively so. *See United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) (rejecting as-applied challenge because defendant had two prior convictions for "serious drug offenses" but noting that the court "may be open to claims that some felonies do not indicate potential violence and cannot be the basis for applying a categorical ban," and "might even be open to highly fact-specific objections"); *United States v. Adams*, 914 F.3d 602, 605 (8th Cir. 2019) (explaining that the court "ha[s] yet to address squarely whether § 922(g)(1) is susceptible to as-applied challenges" and suggesting that "to succeed on an as-applied challenge" the challenger must establish "that his prior felony conviction is insufficient to justify the challenged regulation of Second Amendment rights"); *United States v. Torres*, 789 F. App'x 655,

each appears also to have adopted a standard for assessing such challenges—based on the "seriousness" of an individual's crime—that departs from the historical standard for disarmament centered on dangerousness. *See infra* Part II.A.

B. At Least Three Courts of Appeals Do Not Permit As-Applied Challenges to Section 922(g)(1).

1. In contrast with the Third, Seventh, and D.C. Circuits, the Tenth Circuit has long disclaimed any prospect for individuals challenging Section 922(g)(1) on an as-applied basis. Instead, the court has "rejected the notion that *Heller* mandates an individualized inquiry concerning felons pursuant to § 922(g)(1)." *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (citing *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)); *see also United States v. Gieswein*, 887 F.3d 1054, 1064 n.6 (10th Cir. 2018) (explaining that *McCane* "foreclose[d]" any argument that Section 922(g)(1) "is unconstitutional as applied").

2. Like the Tenth Circuit, the Eleventh Circuit has similarly foreclosed as-applied challenges to Section 922(g)(1). In *United States v. Rozier*, 598 F.3d 768, 771

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658 (9th Cir. 2020) (Lee, J., concurring) (interpreting the Ninth Circuit's precedents in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), and *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016), to conclude that "it is far from settled whether someone can mount an as-applied Second Amendment challenge where the underlying felony is so minor and does not have a historical analogue in the Founding era").

(11th Cir. 2010), the court interpreted *Heller* to imply "that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id.* at 771. The court thus held that "statutory restrictions of firearm possession, such as § 922(g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people" and that any felon "by virtue of his felony conviction, falls within such a class." *Id.*; *see also Flick v. Att'y Gen.*, 812 F. App'x 974, 975 (11th Cir. 2020) (holding that the "reasoning in *Rozier* applies equally to [a plaintiff's] as-applied challenge and thus forecloses it").

3. Although the Fourth Circuit once seemed to entertain "the possibility that an as-applied challenge to a felon disarmament law could succeed in rebutting the presumption [of lawfulness]," *Hamilton v. Pallozzi,* 848 F.3d 614, 622–23 (4th Cir. 2017) (citation omitted), that court now bars such claims unless "the felony conviction is pardoned or the law defining the crime of conviction is found unconstitutional or otherwise unlawful," *id.* at 626; *see also Medina*, 913 F.3d at 155 (noting that the Fourth Circuit has "rejected [the possibility of] as-applied challenges by convicted felons" to Section 922(g)(1)). This illusory "opportunity" for felons to regain their Second Amendment rights is not, in truth, an avenue for felons to bring as-applied challenges to Section 922(g)(1). A pardoned offense cannot even trigger Section 922(g)(1)'s application, *see* 18 U.S.C. § 921(a)(20), and the writ of *corum nobis* or a state expungement procedure would address invalid convictions.

4. Finally, although the Fifth and Sixth Circuits have not squarely addressed the viability of as-applied challenges to Section 922(g)(1), their precedents suggest that they are not amenable to them. Before *Heller*, the Fifth Circuit had held that Section 922(g)(1) "does not violate the Second Amendment," period. *United States v. Darrington,* 351 F.3d 632, 633–34 (5th Cir. 2003). The court has consistently maintained that *Heller* "provides no basis for reconsidering *Darrington*," choosing instead to "reaffirm *Darrington* and the constitutionality of § 922(g)," *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009)—without any indication that *Darrington* may be abrogated with respect to as-applied challenges. *See also United States v. Massey*, 849 F.3d 262, 265 (5th Cir. 2017).

Likewise, the Sixth Circuit, relying on *Heller*, "has rejected Second Amendment challenges to § 922(g)(1)." *Stimmel v. Sessions*, 879 F.3d 198, 203 (6th Cir. 2018). In *United States v. Carey*, 602 F.3d 738 (6th Cir. 2010), the court stated flatly that "prohibitions on felon possession of firearms do not violate the Second Amendment," *id.* at 741, and the court upheld Section 922(g)(1) in seemingly all its applications without any individualized inquiry, even though the statute admittedly "disarms even non-violent felons," *Stimmel*, 879 F.3d at 211; *see also Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 688 (6th Cir. 2016) (en banc) (lead opinion) (citing *Carey* to suggest that challenges to Section 922(g)(1) can be resolved "solely in reliance on *Heller*'s precautionary language").

In sum, at least three courts of appeals—and potentially five—have categorically foreclosed any as-applied challenges by felons to Section 922(g)(1). These decisions irreconcilably conflict with decisions discussed above and therefore justify this Court's intervention.

II. The Court of Appeals Erred in Holding that Section 922(g)(1) Is Constitutional As Applied to Petitioner.

The court of appeals below erred in holding that because Petitioner's conviction involved a "serious crime" she could be permanently stripped of her fundamental right to keep and bear arms, even for use in her home for self-defense. Indeed, the lower court's entire analysis was predicated on the mistaken assumption that the "seriousness" of Petitioner's crime—rather than its relation to violence and dangerousness—dictated whether she retained her Second Amendment right to keep and bear arms.

As the exhaustive historical analyses presented by highly respected appellate judges shows, "the limit on the Second Amendment right was pegged to dangerousness," App. 35 (Bibas, J., dissenting), not to whether one's crime was so "serious" that it exhibited some lack of "virtue." And because "[n]obody claims that Lisa Folajtar poses a danger" based on her tax-related felony conviction, "neither history nor precedent supports disarming her." App. 58.

A. History Shows That Second Amendment Rights Were Limited Only For Dangerous Felons.

Because the history of felon disarmament has already been fully presented by Judge Hardiman's concurrence in *Binderup*, 836 F.3d at 367–74, then-Judge Barrett's dissent in *Kanter*, 919 F.3d at 453–64, and Judge Bibas's dissent below, App. 33–58, Petitioner here will only summarize their basic findings.

Although "[t]he best historical support for a legislative power to permanently dispossess all felons would be founding-era laws explicitly imposing—or explicitly authorizing the legislature to impose—such a ban," scholars and judges thus far "have not been able to identify any such laws." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting); *see also* App. 37 (Bibas, J., dissenting) ("Little evidence from the Founding supports a near-blanket ban for all felons. I cannot find, and the majority does not cite, any case or statute from that era that imposed or authorized such bans.").

To begin, the English common-law tradition did not endorse blanket disarmament of all felons. For instance, "officers of the Crown had the power to disarm anyone they judged to be 'dangerous to the Peace of the Kingdom,' " *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting) (quoting Militia Act of 1662, 13 & 14 Car. 2, c. 3, § 13 (1662)), and "English common law 'punish[ed] people who [went] armed to terrify the King's subjects' with imprisonment and forfeiture of their 'armour,' " *id.* (quoting *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686)); *see also* App. 35–36

(Bibas, J., dissenting). Likewise, because they "were presumptively thought to pose a similar threat or terror," "Parliament also disarmed Catholics." *Kanter*, 919 F.3d at 457 (Barrett, J., dissenting); *see also* Marshall, *supra*, at 723.

The American colonies enacted similar laws, which were tailored to disarming the dangerous. This concern with dangerousness was usually manifested in laws targeting disloyalty because they viewed the disloyal as "potentially violent and thus dangerous." App. 36 (Bibas, J., dissenting). For instance, as in England, "[s]ome colonies, like Virginia and Massachusetts, disarmed Catholics 'on the basis of allegiance, not on the basis of faith,' 'with the intent of preventing social upheavals' and 'rebellion.' " *Id.* (quoting Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 157 (2007)). "After all, confiscation of guns from those who refused to swear an oath of allegiance was meant to deal with the potential threat coming from armed citizens who remained loyal to another sovereign." *Kanter*, 919 F.3d at 457 (Barrett, J., dissenting) (quotation marks omitted); *see also Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012) ("American legislators had determined that permitting [those who refused to swear an oath of allegiance] to keep and bear arms posed a potential danger.").

Practices during the American Revolution similarly show a predominant focus on disarming the dangerous. For example, "Massachusetts and

Pennsylvania disarmed loyalists to the Crown who refused to swear allegiance to the state or the United States to eliminate[] the opportunity for [them] to violently protest the actions of the [state] government." App. 36 (Bibas, J., dissenting) (quotation marks omitted). And "Connecticut likewise disarmed seditious loyalists because 'the welfare of the people was jeopard[iz]ed through the hostile influence of Tories.' " *Id.* (quoting G.A. Gilbert, *The Connecticut Loyalists*, 4 AM. HIST. REV. 273, 281–82 (1899)). "It did so on the advice of the Continental Congress to 'secure every person, who, going at large, might in their opinion endanger the safety of the colony or liberties of America.' " *Id.* (quoting Gilbert, *supra*, at 281).

Importantly, the disarming of loyalists was *not* about virtue—"[l]oyalists were potential rebels who were dangerous before they erupted into violence." App. 37.

Turning finally to the adoption of the Constitution itself, the only evidence "coming remote close" to justifying a blanket ban on felon firearm possession "lies in proposals made in the New Hampshire, Massachusetts, and Pennsylvania ratifying conventions." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting). But a careful examination of those proposals shows that they too are "mostly consistent with focusing on dangerousness." App. 37 (Bibas, J., dissenting). That is because "[t]he concern common to all three is not about felons in particular or even criminals in general; it is about threatened violence and the risk of public injury." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting).

A majority of the New Hampshire ratifying convention recommended that a bill of rights guarantee that "Congress shall never disarm any citizen, *unless such as are or have been in actual rebellion*." 1 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 326 (2d ed. 1891)) (emphasis added). And in the Massachusetts convention, Samuel Adams proposed adding language to the Constitution providing that the document "be never construed to authorize Congress to . . . prevent the people of the United States, *who are peaceable citizens*, from keeping their own arms." 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 675, 681 (1971) (emphasis added).

Neither of these proposed amendments (only one of which was even endorsed by a majority of a convention) broadly approved disarming all felons. Rather, the New Hampshire proposal—concerning "actual rebellion"—targeted the specific violent crime of "rebellion," which was the "traiterous taking up arms, or a tumultuous opposing the authority of the king, etc. or supreme power in a nation." *Kanter*, 919 F.3d at 455 (Barrett, J., dissenting) (quoting Rebellion, 2 *New Universal Etymological English Dictionary* (4th ed. 1756)). Thus, while the New Hampshire proposal "reflects support for disarming rebels, it does not say anything about disarming those who have committed other crimes, much less nonviolent ones." *Id.*

And although Samuel Adams's proposed language to the Massachusetts convention—regarding "peaceable citizens"—swept somewhat more broadly

than the New Hampshire proposal, its concern with whether individuals are "peaceable" was clearly centered on their propensity to violence, whether or not it was connected to crime. *See* 1 Samuel Johnson, *A Dictionary of the English Language* (5th ed. 1773) (defining "peaceable" as "[f]ree from war; free from tumult"; "[q]uiet; undisturbed"; "[n]ot violent; not bloody"; "[n]ot quarrelsome; not turbulent"). And to the extent that "peaceability" was connected to criminal conduct, a "breach of the peace" was connected directly to danger and violence. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 327 & n.2 (2001) (noting some "variations in the common-law usage of the term 'breach of the peace' " but assuming that the definition "entail[ed] at least a threat of violence"); Michael Dalton, *The Country Justice* 9 (1727) ("The Breach of th[e] Peace seemeth to be any injurious Force or Violence moved against the Person of another, his Goods, Lands, or other Possessions, whether by threatening words, or by furious Gesture, or Force of the Body, or any other Force used in terrorem.").

That leaves only the proposal from the Pennsylvania Minority, which suggested adding language to the Constitution specifying that "no law shall be passed for disarming the people or any of them *unless for crimes committed, or real danger of public injury from individuals* . . . ." 2 Schwartz, *supra*, at 662, 665 (emphasis added). While it is possible to read this proposal broadly to capture "those who have committed any crime—felony or misdemeanor, violent or nonviolent," as well as "those who have not committed a crime but

nonetheless pose a danger to public safety," such a reading is implausible given that *no one*—either at the Founding or today—reads the language of "crimes committed" in the proposal "to support the disarmament of literally all criminals, even nonviolent misdemeanants." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting). The more reasonable interpretation of "crimes committed" would "refer[] only to a subset of crimes," defined by the succeeding language of "real danger of public injury." *Id.* Such an interpretation would draw a line around those who commit *dangerous* crimes that is "both internally coherent and consistent with founding-era practice." *Id.*

In any event, if the Pennsylvania Minority's proposal had carried a broader meaning, "the proposal does not clarify the meaning of the Second Amendment: it was suggested by a minority of the Pennsylvania ratifying convention that failed to persuade its own state, let alone others. A single failed proposal is too dim a candle to illumine the Second Amendment's scope." App. 38 (Bibas, J., dissenting). Indeed, given that "proposals from other states that advocated a constitutional right to arms did not contain similar language of limitation or exclusion," 919 F.3d at 455 (Barrett, J., dissenting), the Pennsylvania Minority's outlier proposal is hardly probative of the Second Amendment's original meaning.

In the end, "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety. But neither the convention proposals nor historical practice supports a legislative power to

categorically disarm felons because of their status as felons." *Id.* at 458.

Not only that, but the "virtue"-based theory of disarmament endorsed by the Third Circuit (and several others) has no foundation in the historical record. After carefully parsing the "eight academic articles and decisions of six other circuits," that the plurality in *Binderup* relied upon to support its virtue-based theory of the Second Amendment, Judge Bibas below found that "all these articles and cases show that the virtue theory is flimsy" because "[m]ost of the evidence dovetails with dangerousness," App. 48 (Bibas, J., dissenting); many of the virtue-centered articles did not cite primary sources (apart from the ratifying conventions) supporting disarming nondangerous felons; some did not even discuss felons at all; and some rested on a collective-rights reading of the Second Amendment that was emphatically rejected by *Heller*, *see* App. 39–48.

In particular, the virtue theory of the Second Amendment conceives of the right to keep and bear arms as a "civic 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). But *Heller* expressly rejected the notion that the right to keep and bear arms protected by the Second Amendment was a civic right, holding instead that "the Second Amendment confer[s] *an individual right* to keep and bear arms," *Heller*, 554 U.S. at 595 (emphasis added); *see also Kanter*, 919 F.3d at 464 (Barrett, J., dissenting) ("The

Second Amendment confers an individual right, intimately connected with the natural right of self-defense, and not limited to civic participation (i.e., militia service)."). And because no one has ever presented evidence that virtue-based exclusions have been applied to *individual rights*—like the freedoms of speech or religion—"they don't apply to the Second Amendment." *Kanter*, 919 F.3d at 463 (Barrett, J., dissenting).

One final historical argument often proffered in favor of blanket felon disarmament maintains "that the states permanently extinguished the rights of felons, either by death or operation of law, in the eighteenth and nineteenth centuries," and "[b]ecause felons were routinely executed or stripped of all rights . . . explicit provisions depriving them of firearms would have been redundant." *Id.* at 458. But the factual premise for this argument—that "the 'idea of felony' was intertwined with the punishments of death and civil death," *id.*—is not borne out by the history. As the quantity of designated felony offenses in England and the American colonies grew, "so did the variations on punishment, especially in the American colonies." *Id.* at 459. This development, in turn, led to the death penalty becoming "less prevalent," and "felonies became decoupled from the common-law doctrine of civil death," which was "a transitional status in the period between a capital sentence and its execution" that "extinguished most of a felon's civil rights." App. 50 (Bibas, J., dissenting) (quotation marks omitted).

As "states moved away from capital punishment to imprisonment," the meaning of civil death "had to

change." *Id.* Courts then ultimately "settled uncomfortably on an American version of civil death that required explicit statutory authorization and deprived a felon of many, but not all, rights." App. 51 (quoting *Kanter*, 919 F.3d at 460 (Barrett, J., dissenting)). "And for felons sentenced to less than life, the courts understood their rights as 'merely *suspended* during the term of the sentence.' " *Id.* (quoting *Kanter*, 919 F.3d at 461 (Barrett, J., dissenting)).

At bottom, therefore, "[f]elons serving a term of years did not suffer civil death; their rights were suspended but not destroyed" and "a felony conviction and the loss of all rights did not necessarily go hand-in-hand." *Kanter*, 919 F.3d at 461 (Barrett, J., dissenting). And because felony convictions and permanent civil death "did not go hand-in-hand," "[t]hose who ratified the Second Amendment would not have assumed that a free man, previously convicted, lived in a society without any rights and without the protection of law." *Id.* History thus "confirms that the basis for the permanent and pervasive loss of all rights cannot be tied generally to one's status as a convicted felon or to the uniform severity of punishment that befell the class." *Id.*

The upshot of this history clear: felons do not "lose their Second Amendment rights solely because of their status as felons." *Id.* at 464. Rather, "the state can take the right to bear arms away from a category of people that it deems dangerous." *Id.*

B. The Virtue-Based "Seriousness" Standard Treats the Second Amendment as a Second-Class Constitutional Right.

Aside from the dearth of historical evidence supporting a virtue-based "seriousness" standard for disarmament, the virtue-theory has yet another vice: it "gives legislatures unfettered power over a fundamental right." App. 49 (Bibas, J., dissenting). Indeed, the Court of Appeals' standard for determining whether a crime is sufficiently "serious" as to justify disarmament essentially boils down to whether the legislature "labels a crime a felony," given that the label is "generally conclusive," subject to some undefined, hypothetical handful of "rare exceptions" that "might be too minor to count" as "serious." App. 30.

The Court of Appeals' "extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label." App. 32. This "mushy standard that sets no limit," *id.*, would be foreign to any other constitutional right. For instance, no court—including this one—would give legislatures free rein to define their criminal law to deprive all felons of their First Amendment rights to free exercise or speech. This Court "treat[s] no other constitutional right so cavalierly" as the Court of Appeals treated the Second Amendment below. *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting). By allowing Congress to permanently disarm individuals who commit nonviolent offenses—like uttering obscenities on air, reading another's email without permission, or even opening up a bottle of

ketchup and putting it back on the supermarket shelf, *see* App. 51–52 (Bibas, J., dissenting)—the Court of Appeals effectively "relegated the Second Amendment to a second-class right." *Voisine*, 36 S. Ct. at 2291 (Thomas, J., dissenting) (cleaned up).

As Judge Bibas forcefully explained below, "[m]ost felonies today are far removed from those capital crimes at common law. We often see little rhyme or reason in which crimes are labeled felonies" and "a felony is whatever the legislature says it is. The category is elastic, unbounded, and manipulable by legislatures and prosecutors." App. 51–52 (Bibas, J., dissenting). "The Second Amendment right to keep and bear arms should not hinge on such arbitrary, manipulable distinctions." App. 54.

Because the Court of Appeals' "seriousness" standard is, in truth, no standard at all, it cannot—and should not—displace the dangerousness standard supported by the historical evidence. *See supra* Part II.A. The court below therefore erred and this Court should grant the petition for a writ of certiorari to restore the Second Amendment to its rightful place in the Court's constitutional jurisprudence.

III. The Question Presented Warrants the Court's Review Because the Courts of Appeals' Mistaken Interpretations of *Heller* Threaten the Fundamental Right to Keep and Bear Arms.

Section 922(g)(1) has had a massive effect on firearm possession over the last fifty years. As the United States itself has represented to this Court, Section 922(g)(1) "form[s] the basis for thousands of

criminal prosecutions and tens of thousands of firearm-purchase denials each year." Pet. 23, *Binderup*, 137 S. Ct. 2323. And a substantial number of those prosecutions and firearm-purchase denials involve nonviolent felons like Petitioner. Thus, the continued application of Section 922(g)(1) to nonviolent felons will permanently deprive these individuals of the core constitutional right "to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635; *see McCane*, 573 F.3d at 1048–49 (Tymkovich, J., concurring) ("[T]he broad scope of 18 U.S.C. § 922(g)(1)—which *permanently* disqualifies *all* felons from possessing firearms—would conflict with the 'core' self-defense right embodied in the Second Amendment.").

That these individuals were once convicted of felonies does not undermine the importance of their claims. As Judge Bibas explained below:

> Felons are more than the wrongs they have done. They are people and citizens who are part of "We the People of the United States." So they too share in the Second Amendment "right of the people to keep and bear Arms," subject only to the historical limits on that right.

App. 32–33 (Bibas, J., dissenting) (citation omitted). If the Court of Appeals incorrectly interpreted the historical limits of the Second Amendment right, as Petitioner submits, then thousands of nonviolent felons who have repaid their debts to society have been—and will continue to be—permanently deprived of a fundamental, natural right that St. George Tucker once described as "the true palladium of liberty." *Heller*, 554 U.S. at 606; *see also McDonald v. City of*

Chicago, 561 U.S. 742, 769 (2010). And one can hardly doubt that the "*permanent* disqualification from the exercise of a fundamental right" is a "severe" burden for nonviolent felons like Petitioner. *Kanter*, 919 F.3d at 465 (Barrett, J., dissenting).

Moreover, review of the question presented is separately warranted because of the need for this Court to clarify the doctrinal boundaries suggested by *Heller*, which briefly noted a set of "presumptively lawful regulatory measures," 554 U.S. at 627 n.26, including "longstanding prohibitions on the possession of firearms by felons," *id.* at 626. This somewhat cryptic language, made with the cautious caveat that the Court did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," *id.*, and unelaborated upon by this Court since *Heller*, has prompted a series of vexing questions for the lower courts to address. Then-Judge Barrett helpfully enumerated some of those questions in *Kanter*:

> The constitutionality of felon dispossession was not before the Court in *Heller*, and because it explicitly deferred analysis of this issue, the scope of its assertion is unclear. For example, does "presumptively lawful" mean that such regulations are presumed lawful unless a historical study shows otherwise? Does it mean that as-applied challenges are available? Does the Court's reference to "felons" suggest that the legislature cannot disqualify misdemeanants from possessing guns? Does the word "longstanding" mean that prohibitions of recent vintage are suspect?

919 F.3d at 453–54 (Barrett, J., dissenting).

While the lower courts have spilled much ink in their attempts to decode *Heller*, it should now be apparent that without further guidance from this Court, they have primarily misunderstood how to read and apply *Heller*'s discussion of "presumptively lawful" longstanding regulations in light of, and consistent with, its overall methodology and core holdings.

Heller established that courts interpreting the Second Amendment must be "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' " 554 U.S. at 576 (quoting *United States v. Sprague,* 282 U.S. 716, 731 (1931)); *see also id.* at 625 (describing the Court's "adoption of the original understanding of the Second Amendment"). And because it "codified a *pre-existing* right," courts must likewise consult "the historical background of the Second Amendment." *Id.* at 592. It was *that* historical background preceding and surrounding the time of the Founding that confirmed not only "that the Second Amendment conferred an individual right to keep and bear arms" but that "the right was not unlimited, just as the First Amendment's right of free speech was not." *Id.* at 595.

Heller's methodological focus on the original meaning of the Second Amendment and its historical backdrop must guide lower courts in their assessment of restrictions on the right to keep and bear arms. After *Heller*, it became incumbent upon lower courts to consider the "historical justifications" for any

regulation of Second Amendment rights. *Id.* at 635. This Court recently confirmed as much in *Gamble v. United States*, 139 S. Ct. 1960 (2019), explaining that *Heller* defined the scope of the right to keep and bear arms based on "the public understanding in 1791 of the right codified by the Second Amendment." *Id.* at 1975.

Thus, any presumptive lawfulness of a prohibition like Section 922(g)(1) is surely rebutted under *Heller* so long as a challenger, like Petitioner here, can establish that the prohibition's coverage sweeps beyond the historical justifications for firearm regulations as they existed in 1791. But rather than engage in this kind of historically grounded analysis, or make any attempt to reconcile the "tension between *Heller*'s dictum and its underlying holding," *McCane*, 573 F.3d at 1047 (Tymkovich, J., concurring), many lower court judges have, as Judge Tymkovich predicted, "continue[d] to simply reference the applicable *Heller* dictum and move on," *id.* at 1050. That approach falls far short of what *Heller* demands.

The lower courts' misguided treatment of *Heller* has infringed on nonviolent felons' Second Amendment rights for far too long. The question presented here warrants review because it provides the Court with an opportunity to finally set the lower courts on a clear, historically accurate doctrinal path that recognizes *both* the Government's interest in public safety and nonviolent felons' interests in exercising their core constitutional right to self-defense in the home on equal terms with other nondangerous citizens.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 11, 2020