No. 20-812

In the Supreme Court of the United States

LISA M. FOLAJTAR,

Petitioner,

v.

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION'S CENTER TO KEEP AND BEAR ARMS IN SUPPORT OF PETITIONER

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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.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The **Center to Keep and Bear Arms ("CKBA")** is a project of **Mountain States Legal Foundation ("MSLF")**, a nonprofit, public interest legal foundation organized under the laws of the state 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 and advance MSLF's litigation in protection of Americans' natural and fundamental right to self-defense. CBKA represents individuals and organizations challenging infringements on the constitutionally protected right to keep and bear arms. *See, e.g.*, *Caldara v. City of Boulder*, No. 20-416 (petition for writ of *certiorari* denied Nov. 16, 2020); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015). MSLF's history of involvement includes filing *amicus curiae* briefs with this Court. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (representing MSLF); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (representing *amici* Rocky Mountain Gun Owners and National Association for Gun Rights); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (representing MSLF). MSLF's *amici curiae* brief was cited in this Court's *McDonald* opinion. 561 U.S. 742, 777 n.27 (2010).

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[1] The parties were timely notified and have consented to the filing of this *amicus curiae* brief. *See* Supreme Court Rule 37.2(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

The Court's ultimate decision in this case will have a direct impact on CKBA's current clients and litigation.

STATEMENT OF THE CASE

I. HISTORICAL BACKGROUND

"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.

The language of the Second Amendment was approved by the First Congress on September 25, 1789, and sent to the states for ratification. NICHOLAS J. JOHNSON, *ET AL.*, FIREARMS LAW AND THE SECOND AMENDMENT 338 (2d ed. 2018) ("FIREARMS LAW"). "On December 15, 1791, ratified by three-quarters of the states, the Second Amendment . . . became the law of the land." *Id.*

The Second Amendment owes its existence to the Founders and Framers' deep respect for natural rights, and their intent to preserve the rights of the individual. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("WE hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); *Cotting v. Godard*, 183 U.S. 79, 107 (1901) ("[I]t is always safe to read the letter of

the Constitution in the spirit of the Declaration of Independence."); 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (Madison began the process of proposing the first constitutional amendments in 1789 with: "First, That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people.").

In so doing, the Founders and Framers drew on their knowledge of history, particularly the longstanding tradition, and even requirement, for private persons to keep and bear arms, as well as their recent need for such a right in successfully fighting the American Revolution. *See* 13 Edw. 1, st. 2, c. 5 (1285) ("Statute of Winchester") ("It is likewise commanded that every man have in his house arms for keeping the peace in accordance with the ancient assize . . . ."); 1 W. & M., 2d sess., c. 2 (1689) ("English Bill of Rights") ("That the subjects . . . , may have arms for their defence suitable to their conditions, and as allowed by law."); THE FEDERALIST NO. 46 (James Madison) ("It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it.").

George Washington and James Madison, among other Framers, "firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society." Robert

E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 614 (1982). The colonial experience and American Revolution strengthened the notion that an armed populace is essential to liberty. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 327 (1991).

Before and after our Founding, however, certain demonstrably dangerous members of society were forced to forfeit their constitutionally protected right to keep and bear arms. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms* ("*Historical Justification*"), 20 WYO. L. REV. 249, 257–72 (2020) (collecting laws related to the English and American tradition of arms prohibition for dangerous persons). The most notable examples of this were individuals supporting or engaged in violent insurrection. *See* 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1780-1805, 145–48 (1805) (Massachusetts prohibiting those "who have been or may be guilty of Treason, or giving Aid or Support to the present Rebellion," from possessing arms). Those demonstrably dangerous individuals were, at least temporarily, prevented from exercising their right to keep or bear arms. *Id.* (allowing for restoration of the right to possess arms if individuals were peaceable for a "term of three years").

In 2008, this Court decided the landmark case of *District of Columbia v. Heller*, it's first in-depth

analysis of the Second Amendment, the rights it protects, and how courts must examine challenges brought thereunder. 554 U.S. 570, 635 (2008) ("[S]ince this case represents the Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . .").

The Court noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." *Id.* at 626. Presumably, the Court based its statement on the historically supported prohibitions on known, dangerous persons—but that point was not and has not been subsequently clarified by this Court.

II. LEGAL BACKGROUND

Currently, federal law prohibits an individual from possessing firearms who "has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). This prohibition was not codified until 1968.

Prior to 1968, the federal government enacted its first sweeping prohibition on dangerous persons owning firearms in 1938, preventing individuals convicted of a "crime of violence" from transporting, shipping, or receiving firearms or ammunition in commerce. Federal Firearms Act, Pub. L. No. 75-785, §§ 2(e) & (f), 52 Stat. 1250, 1251 (1938). A "crime of violence," was defined as "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." *Id.* § 1(6).

In 1961, that prohibition was expanded to cover individuals convicted of a "crime punishable by imprisonment for a term exceeding one year." An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

The expansion in 1961, and the codification of the current 18 U.S.C. § 922(g)(1) in 1968, mark the federal government's first time prohibiting individuals from transporting or possessing firearms for committing nonviolent offenses.

Since the enactment of 18 U.S.C. § 922(g)(1), and this Court's statement in *Heller* regarding prohibitions on felons, many lower courts have all but rubber stamped 18 U.S.C. § 922(g)(1)'s prohibition—regardless of the nature of the underlying offense or its relation to the protections afforded by, or excepted from, the Second Amendment.

III. FACTUAL AND PROCEDURAL BACKGROUND

In 2011, Ms. Folajtar was charged by the United States 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 of up to $100,000. Pet.App.3. Ms. Folajtar pleaded guilty and was sentenced to three months of home confinement, three years' probation, a $10,000

fine, and a $100 assessment. Pet.App.3. Ms. Folajtar paid back taxes, penalties, and interest to the IRS amounting to approximately $250,000. Pet.App.3. Ms. Folajtar has been an upstanding citizen since her conviction and has had no further legal issues.

Years later, Ms. Folajtar attempted to purchase a firearm to use for self-defense. Pet. at 7. Ms. Folajtar, however, was prohibited from purchasing or possessing a firearm under 18 U.S.C. § 922(g)(1) as a result of her nonviolent false statements conviction. Pet. at 7.

Ms. Folajtar brought suit in the United States District Court for the Eastern District of Pennsylvania alleging the lifetime ban on firearm possession imposed on her by 18 U.S.C. § 922(g)(1) violates the Second Amendment. Pet.App.5. The district court granted the federal government's motion to dismiss, determining that Ms. Folajtar was within the class of individuals that should be prevented from possessing firearms pursuant to 18 U.S.C. § 922(g)(1). Pet.App.62, 76. The district court reasoned that Ms. Folajtar's nonviolent conviction was nonetheless a "serious" crime, and thus Ms. Folajtar could not state a plausible Second Amendment claim, being outside of its protections. Pet.App.65–76.

Ms. Folajtar appealed to the United States Court of Appeals for the Third Circuit, which, over a dissent, affirmed the district court's holding. Pet.App.5. The Third Circuit applied the "virtue" test, established in *Binderup v. Attorney General United States of America*, to analyze Ms. Folajtar's challenge.

Pet.App.9–10 ("In looking to the historical justification for limiting the right to bear arms, we have recognized that many scholars agreed that 'the right to bear arms was tied to the concept of a virtuous citizenry[;] . . . accordingly, the government could disarm "unvirtuous citizens."'") (quoting *Binderup*, 836 F.3d 336, 348 (3d Cir. 2016) (Ambro, J., plurality opinion) (alterations in 3d Cir. Opinion)). The "virtue" test, set forth in *Binderup* and applied by the Third Circuit, states that "unvirtuous citizens" are those that commit "a serious criminal offense, violent or nonviolent." Pet.App.9 (quoting *Binderup*, 836 F.3d at 348).

The Third Circuit determined Ms. Folajtar's false statements conviction was a "serious crime" because it entailed deceit and reflected grave misjudgment. Pet.App.28. "By making a tax return that she knew to be false, Folajtar willfully deprived the Government of its property." Pet.App.27.

Neither court appropriately looked to the text, history, and tradition of the Second Amendment to determine the extent to which individuals could be prohibited from exercising their constitutionally protected right to keep and bear arms. Instead, both courts incorrectly applied the "virtue" test to evaluate Ms. Folajtar's character and the question of whether her conviction was "serious." The courts should have evaluated Ms. Folajtar's actions to determine if she is a "dangerous person," as is required by the Second Amendment.

SUMMARY OF THE ARGUMENT

This Court should grant *certiorari* in this matter in order to vindicate the text, history, and tradition test as the appropriate test for courts to assess challenges brought pursuant to the Second Amendment. Additionally, this Court should grant *certiorari* to review the breadth of 18 U.S.C. § 922(g)(1), which unconstitutionally prohibits nonviolent Americans, such as Ms. Folajtar, from possessing firearms for life.

Not only did *Heller* affirmatively establish the text, history, and tradition test, but both *Heller* and *McDonald* operate as guides on how to navigate the analysis. First, a court must examine the text of the Second Amendment through the lens of its historical meaning at the time it was enacted and ratified. Once the court has thus established the scope of the right, it must then look to historical and traditional regulations to determine what, if any, traditional regulation of arms was considered appropriate. Finally, the court must parse the challenged statute or regulation to determine if it is consistent with historical and traditional regulations.

Despite this Court's instruction, when evaluating challenges brought against 18 U.S.C. § 922(g)(1), certain circuits, as outlined in Ms. Folajtar's Petition, have opted to employ a "virtue" or "seriousness" test. The "virtue" or "seriousness" test, however, does not have any basis in the text, history, and tradition of the

Second Amendment. Others circuits, meanwhile, have correctly advanced the "dangerousness" test, which although sometimes flawed in application, is based on the original public meaning of the Second Amendment and finds support in historical and traditional regulations. The lack of adherence to appropriate historical and traditional analysis warrants this Court's grant of *certiorari* in this matter.

If the district court and Third Circuit had applied the text, history, and tradition test in the underlying case, those courts would have found that 18 U.S.C. § 922(g)(1), as applied to Ms. Folajtar, is unconstitutional. The lifetime prohibition on firearms ownership based on a nonviolent conviction, felony or not, imposed by 18 U.S.C. § 922(g)(1) impermissibly prohibits activity that falls within the historical scope of the Second Amendment and does not comport with any historical or traditional regulations of the same activity.

ARGUMENT

I. THIS COURT HAS ALREADY SET FORTH THE APPROPRIATE TEST TO ANALYZE SECOND AMENDMENT CHALLENGES

Courts must begin by analyzing the text, history, and tradition of the Second Amendment when determining whether a modern firearm regulation is constitutional.

Employing this Court's precedent, courts must first look to the text and history of the Second Amendment to determine the "scope of the right." *Heller*, 554 U.S. at 652. While the pure textual analysis allows the court to partially determine the scope of the right, this Court recognized that looking to the historical landscape is necessary because "the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'" *Id.* at 599 (alterations in original) (citing *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)). Once the scope is established, the court should then look to traditional regulation, which is "the public understanding of [the] legal text in the period after its enactment or ratification." *Id.* at 605. Finally, the court must parse the challenged regulation to determine if it fits within the history and tradition of arms regulation. *See id.* at 631–35 (analyzing traditional regulation of firearms against D.C.'s restrictive handgun regulations).

Restrictions that that comport with the historical and traditional regulation of arms in our early history are constitutionally sound. A court may draw analogues between modern arms and traditional regulations, just as courts regularly do when evaluating First Amendment protections for electronic speech. *See Heller*, 554 U.S. 570, Transcript of Oral Argument, at 77 (Chief Justice Roberts: "[Y]ou would define 'reasonable' in light of the restrictions that existed at the time the amendment was adopted . . . . [Y]ou can't take it into the marketplace was one restriction. So that would be—we are talking about lineal descendents (*sic*) of the arms but

presumably there are lineal descendents (*sic*) of the restrictions as well."); *see also Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("Nor does it mean that the government is powerless to address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach is to reason by analogy from history and tradition.") (citation omitted).

Sections II and III of the *Heller* majority opinion operate as a roadmap of how courts should undertake this text, history, and tradition analysis. 554 U.S. at 576–628. Section IV then applies the analysis to the underlying facts of that case. *Id.* at 628–36. First, the *Heller* Court engaged in a thorough analysis of the text of the Second Amendment "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.'" *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) and citing *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824)). After analyzing the grammar, diction, syntax, and punctuation of the text, the Court then looked to contemporaneous and analogous state constitutional provisions. *Id.* at 600–03. The Court next turned to the historical and traditional interpretation of the Second Amendment, specifically the period "immediately after its ratification through the end of the 19th century." *Id.* at 605. Finally, the *Heller* Court specified that certain longstanding limitations on the right to keep and bear arms are presumptively lawful. *Id.* at 626 ("Like most rights, the right secured

by the Second Amendment is not unlimited.").[2] The *Heller* Court, however, did not elaborate on the extent of those "longstanding prohibitions." *Id.* at 626–27.

The *McDonald* Court engaged in a similar examination: first, looking to *Heller*'s textual analysis, 561 U.S. at 767–68, then to the historical scope, *id.* at 768–69, and eventually to traditional treatment and regulation, *id.* at 769–78.[3] The *McDonald* court reiterated that certain longstanding regulatory measures would withstand this inquiry. *Id*. at 786. Again, the Court did not explore the extent of those longstanding measures. *Id.*

A clear recitation of this *Heller* and *McDonald* analysis occurs in a dissent authored by then-Judge Kavanaugh in *Heller II*:

> "Constitutional rights," the [*Heller*] Court said, "are enshrined with the scope they

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[2] This Court produced an illustrative, but non-exhaustive list of regulations which presumably comported with the text, history, and tradition of the Second Amendment. *Heller*, 554 U.S. at 626–27 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.").

[3] Given this Court was considering incorporation under the Fourteenth Amendment, the Court also looked to historical and traditional regulation surrounding the ratification of that Amendment. *McDonald*, 561 U.S. at 770–78.

> were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." [*Heller*, 554 U.S.] at 634–35. The scope of the right is thus determined by "historical justifications." *Id.* at 635. And tradition (that is, post-ratification history) also matters because "examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification" is a "critical tool of constitutional interpretation." *Id.* at 605 (emphasis omitted).

670 F.3d at 1271–72 (Kavanaugh, J., dissenting). "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition . . . ." *Id.* at 1271 (Kavanaugh, J., dissenting).

Despite the clear guidance in *Heller* and *McDonald*, lower courts have failed to consistently and adequately evaluate Second Amendment challenges, including as-applied challenges to 18 U.S.C. § 922(g)(1), in light of the text, history, and tradition of the Second Amendment. Neither "virtue" nor "seriousness" is based in the original public meaning of the Second Amendment. Both encompass far more conduct than our Founders and Framers intended to serve as a basis for forfeiture of an individual's natural and fundamental right to keep and bear arms.

II. THIS COURT SHOULD GRANT *CERTIORARI* TO APPLY THE TEXT, HISTORY, AND TRADITION TEST TO PROHIBITED PERSONS

Subsequent to this Court's decisions in *Heller* and *McDonald*, a number of circuits across the nation have evaluated challenges to 18 U.S.C. § 922(g)(1) using the "virtue" or "seriousness" test. In so doing, however, those circuits have not engaged in the appropriate historical analysis required by this Court.

If the lower courts had evaluated the text, history, and tradition of the Second Amendment, in examining the appropriateness of 18 U.S.C. § 922(g)(1) as applied to Ms. Folajtar, those court would have found Ms. Folajtar is not among the class of citizens that can be prohibited from possessing arms.

A. The Text of the Second Amendment

This Court has already set forth an in-depth, textual analysis of the Second Amendment in both *Heller* and *McDonald*. First, the Second Amendment protects, at minimum, the natural rights to self-defense and to keep and bear arms:

> [I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that

> it "shall not be infringed." As we said in *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L.Ed. 588 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ."

Heller, 554 U.S. at 592; *see McDonald*, 561 U.S. at 778 (quoting *Cruikshank*). Importantly, "'[k]eep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*." *Heller*, 554 U.S. at 583 (emphasis in original).

Second, the right protected is an individual right, not a collective right tied to militia service. *Id.* at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

Third, based on the historical scope, the Second Amendment protects a fundamental right. *McDonald*, 561 U.S. at 778 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

Finally, the Second Amendment is incorporated, via the Fourteenth Amendment, against the states. *Id.* at 791 ("We therefore hold that . . . the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

The Court in this matter need not rehash its textual analysis and can rely on the analysis from *Heller* and *McDonald*.

B. The History and Tradition of Prohibited Persons

Because the rights protected by the Second Amendment are not unlimited, the next step of the analysis is to determine whether there is a history and tradition of prohibiting the activities prohibited by the modern law or regulation in question, thereby allowing the modern regulation to withstand constitutional scrutiny. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."). Here, when analyzing the breadth of 18 U.S.C. § 922(g)(1), as applied to Ms. Folajtar, it is evident that a lifetime prohibition on firearms ownership based on a nonviolent false statements conviction is unconstitutional.

1. English Common Law

In the English Common Law tradition, laws prohibiting demonstrably dangerous individuals from possessing arms date back to at least the Fifteenth Century. *See, e.g.*, Greenlee, *Historical Justification*, 20 WYO. L. REV. at 257–61 (collecting laws related to the English tradition of arms prohibitions for dangerous persons). These laws, however, often used religious or class distinctions to denote "dangerousness."

During the Welsh Revolt from 1400 to 1415, the Crown prohibited "Welshmen from henceforth bear[ing] any manner [of] Armour within such City, Borough, or Merchant Town, upon Pain of Forfeiture of the same Armour, and imprisonment until they have made Fine in this behalf." 2 Hen. 4, c. 12 (1401-1402).

In the first half of the Seventeenth Century, similar prohibitions were applied to Catholics, who "were excluded from the right to arms because they were considered potentially disloyal and seditious." JOHNSON, FIREARMS LAW 133; *see* STUART ROYAL PROCLAMATIONS, VOL. 1: ROYAL PROCLAMATIONS OF KING JAMES I 1603-1625, 247–48 (James F. Larkin & Paul I. Hughes eds., 1973) ("A Proclamation for the due execution of all former Laws against Recusants . . . ; And for disarming of them as the Law requires. [Whitehall 2 June 1610]."); STUART ROYAL PROCLAMATIONS, VOL. 2: ROYAL PROCLAMATIONS OF KING CHARLES I, 1625-1646, 736–37 (James F. Larkin ed., 1973) ("A Proclamation commanding Popish Recusants to repair to their own dwellings . . . And for disarming of them, as the Law requireth. [Whitehall 11 November 1640]."). Later, English Parliament enacted a broad prohibition on Catholics possessing arms, but allowed them to keep arms "for the defence of his House or person," with permission from the justice of the peace. 1 W. & M., c. 15 (1688).

In the latter half of the Seventeenth Century, "dangerous and disaffected persons," were subject to seizure of their arms. *See* 8 DANBY PICKERING, THE STATUTES AT LARGE, FROM THE TWELFTH YEAR OF KING

CHARLES II. TO THE LAST YEAR OF KING JAMES II. INCLUSIVE. 39–40 (1763) ("And for the better securing the peace of the kingdom . . . the said respective lieutenants, or any two or more of their deputies, are hereby enabled and authorized from time to time, by warrant under their hands and seals . . . to search for and seize all arms in the custody or possession of any persons or persons whom the said lieutenants . . . shall judge dangerous to the peace of the kingdom . . . ."); 27 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1684-1685, 26 (F.H. Blackburne Daniell & Francis Bickley eds., 1938) ("May 20 [1684]. Windsor. The Earl of Sunderland to the Earl of Bath. His Majesty, having received an account concerning the arms seized from dangerous and disaffected persons in Cornwall, would have you give order to your Deputy Lieutenants that such of them as are useful for arming the militia be deposited for that purpose . . . .").

While these early prohibitions almost exclusively focused on religious minorities, the reason for such focus was the king's concern of violent conflict. This English Common Law tradition informed our early colonial legislation.

2. Colonial Law

The colonial laws surrounding firearm prohibition continued to discriminate based on religion or class but still specifically focused on those deemed dangerous to the colony or local community.

As early as 1644, New York prohibited slaves, without permission of their masters, from possessing arms. 2 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 687 (James B. Lyon ed., 1894). In 1637, Massachusetts disarmed individuals who were deemed to support seditious activity (heresy against the church). EDWARD JOHNSON, JOHNSON'S WONDER-WORKING PROVIDENCE: 1628-1651, 175 (J. Franklin Jameson ed., 1910) ("[T]hose in place of government caused certain persons to be disarmed in the severall (*sic*) Townes, as in the Towne of Boston, to the number of 58, in the Towne of Salem 6, in the Towne of Newbery 3, in the Towne of Roxbury 5, in the Towne of Ipswitch 2, and Charles Towne 2.").

This history of prohibiting possession of arms by those deemed to be "dangerous" continued through to our late-colonial history. For example, in 1736, Virginia permitted constables to seize arms from individuals that rode or went "offensively armed, in Terror of the People." GEORGE WEBB, THE OFFICE OF AUTHORITY OF A JUSTICE OF PEACE 92–93 (1736).

This was especially true as the Revolutionary War approached. By the 1770s, however, the class of dangerous persons was focused less upon religious or ethnic minorities and instead focused much more narrowly upon loyalists and British sympathizers. In 1775, Connecticut prohibited individuals that "by writing or speaking, or by any overt act, defamed the resolves of Congress, or the acts or proceeding of the Assembly respecting their rights and privileges," from

possessing arms. G.A. Gilbert, *The Connecticut Loyalists*, 4 AM. HIST. REV. 273, 282 (1899).

In March 1776, the Continental Congress made a general request to all colonies to disarm all those "who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies, against the hostile attempts of the British fleets and armies." 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, 205 (1906).

As war brewed, those most dangerous to their communities were those that aided the British forces.

3. Our Early Republic

Once the United States declared independence, the threat remained the same—those loyal to the British Empire.

Instead of making general requests, the Continental Congress began to specifically call for some states to disarm "disaffected persons." 8 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, 678–79 (1907) ("Resolved, That the executive authorities of the states of Pensylvania and Delaware, be requested to cause all persons within their respective states notoriously disaffected, forthwith to be apprehended, disarmed, and secured, till such time as the respective states think they may be released without injury to the common cause.").

Many states answered Congress's call, including Massachusetts, New Jersey, North Carolina, and Pennsylvania. *See* Greenlee, *Historical Justification*, 20 WYO. L. REV. at 264–65 (collecting state disarmament statutes for those "disaffected and dangerous to the present Government.") (citations and quotations omitted).

The question of protecting the individual right to keep and bear arms, while allowing the government to prohibit dangerous individuals from possessing arms also arose during ratification discussions in various states. *See* BERNARD SCHWARTZ, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 681 (1971) (Samuel Adams of Massachusetts proposed an amendment "that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms . . ."); [4] *see also* Pet. at 24–27 (analyzing ratification discussions in depth).

One of the earliest acts of insurrection also informs the prohibition of arms for dangerous individuals. At the end of 1786, Massachusetts suffered an armed uprising, known today as Shays' Rebellion. In response, Massachusetts enacted a law in 1787 prohibiting individuals "who have been or may be guilty of Treason, or giving Aid or Support to the present Rebellion," from possessing arms. 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF

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[4] Peaceable, at the time, meant: "1. Free from war; free from tumult. 2. Quiet; undisturbed. 3. Not violent; not bloody. 4. Not quarrelsome; not turbulent." 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

MASSACHUSETTS FROM 1780-1805, 145–48 (1805). Massachusetts' prohibition was not permanent, as individuals who were peaceable for a "term of three years," could regain their rights. *Id.*

This review of history and tradition is not intended to be exhaustive. Overall, however, this sampling of regulations on prohibited persons evidences that such prohibitions were focused on individuals who exhibited dangerous and violent behavior towards their communities, states, and nation. Our early Republic was guilty of considering some unprotected minorities as presumptively dangerous, which mistake we, as a nation, have always endeavored to correct. Now, this Court should grant *certiorari* to ensure that nonviolent felons, who are not demonstrably dangerous to their communities, are not prohibited from possessing arms for life.

III. THE LOWER COURTS' ANALYSIS AND APPLICATION OF 18 U.S.C. § 922(g)(1) DOES NOT COMPORT WITH THE TEXT, HISTORY, AND TRADITION OF THE SECOND AMENDMENT

The lower courts' application of the "virtue" or "seriousness" test to assess whether Ms. Folajtar can be prevented from possessing a firearm for the rest of her life does not comport with the historical and traditional Second Amendment regulations regarding the same subject matter.

Ms. Folajtar's petition goes to great length describing the test employed by the Third Circuit

below and the flaws of that analysis. *See* Pet. at 21 ("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."). Prohibitions in our early Republic did not ask if a citizen was "virtuous" or had committed a "serious" crime. Instead, governments asked if individuals, through act or association, were a known danger to their communities and their nation.

Some circuits and judges have recognized this divergence. For example, Section II(A) of Judge Hardiman's partial concurrence in *Binderup* notes that "[t]he most germane evidence available directly supports the conclusion that the founding generation did not understand the right to keep and bear arms to extend to certain categories of people deemed too dangerous to possess firearms."[5] 836 F.3d at 367–70

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[5] While Judge Hardiman correctly concluded that firearm prohibitions were limited to dangerous individuals, Judge Hardiman reasoned that "people who have demonstrated that they are likely to commit violent crimes have no constitutional right to keep and bear arms." *Binderup*, 836 F.3d at 370 (Hardiman, J., concurring in part). As addressed by then-Judge Barrett in her dissent in *Kanter v. Barr*, the historical record supports the conclusion that dangerous individuals retain a constitutionally protected right to keep and bear arms, but that right can be suspended. *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) ("[T]he question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all.").

(Hardiman, J., concurring in part). Then-Judge Barrett, in her dissent in *Kanter v. Barr*, also recognized "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety," however "neither the convention proposals nor historical practice supports a legislative power to categorically disarm felons because of their status as felons." 919 F.3d at 458 (Barrett, J., dissenting). Even here, Judge Bibas dissented from the Third Circuit majority opinion below, noting "[t]he right historical test is not virtue, but dangerousness." Pet.App.33.

Based on Ms. Folajtar's Petition, the historical and traditional analysis presented above, and additional historical sources available to this Court,[6] the lower courts' analysis of 18 U.S.C. § 922(g)(1) and the Second Amendment is flawed. Text, history, and tradition do not support a complete prohibition on firearm possession by nonviolent individuals, felons or not. The "virtue" or "seriousness" test, as employed by the lower courts, other circuits across the nation, and presented by Ms. Folajtar in her Petition is significantly broader than what is allowed under the Second Amendment.

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[6] Then-Judge Barrett's dissent in *Kanter* and Judge Bibas' dissent below engage in thorough analyses of the history and tradition of prohibiting dangerous individuals from possessing arms. *Kanter*, 919 F.3d at 454–64 (Barrett, J., dissenting); Pet.App.33–48.

This Court has clearly established that Second Amendment challenges must be analyzed based on the text of the Second Amendment, as well as the historical and traditional limitations on the right to keep and bear arms. This brief is not meant to serve as a complete sampling of pre- and post-ratification regulations surrounding the disarmament of dangerous persons. Instead, it underscores that the lower courts here, and indeed lower courts across the nation, are incorrectly applying 18 U.S.C. § 922(g)(1), by evaluating the "virtue" of individuals, rather than their "dangerousness" towards their communities and the nation. A thorough analysis is warranted in instances, such as here, where the inappropriate application of federal law results in tens of thousands of nonviolent Americans from exercising their constitutionally protected rights permanently. *See* Pet. at 32–33. This Court should grant *certiorari* to evaluate the appropriate scope of 18 U.S.C. § 922(g)(1), based on the text, history, and tradition of the Second Amendment, as applied to Ms. Folajtar, and as will continue to be applied to countless other, nonviolent Americans.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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