No. 20-812

In the Supreme Court of the United States

LISA M. FOLAJTAR, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's as-applied challenge to 18 U.S.C. 922(g)(1), the federal statute that bars convicted felons from possessing firearms.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-58) is reported at 980 F.3d 897. The opinion of the district court (Pet. App. 61-77) is reported at 369 F. Supp. 3d 617.

JURISDICTION

The judgment of the court of appeals (Pet. App. 59-60) was entered on November 24, 2020. The petition for a writ of certiorari was filed on December 11, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2011, petitioner pleaded guilty to willfully making a material false statement in a tax return in violation of 26 U.S.C. 7206(1) (2006), a federal felony punishable by imprisonment of up to three years and a fine of up to $100,000. Judgment 1. Petitioner was sentenced to

three years of probation, including three months of home confinement with an electronic monitoring device. Judgment 2-3.

Under 18 U.S.C. 922(g)(1), the longstanding federal statute that disarms felons, petitioner's 2011 conviction precludes her from possessing a firearm. Pet. App. 4. In 2018, petitioner filed this suit in the Eastern District of Pennsylvania, claiming that Section 922(g)(1) violates the Second Amendment as applied to her. *Id.* at 5.

The district court granted the government's motion to dismiss petitioner's complaint. Pet. App. 61-79. The court held that, although the Third Circuit had accepted an as-applied challenge to Section 922(g)(1) in *Binderup* v. *Attorney General United States*, 836 F.3d 336 (2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017), petitioner's as-applied challenge failed under the framework set out in that opinion. Pet. App. 71-76.

2. The Third Circuit affirmed. Pet. App. 1-58.

The court of appeals observed that, in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court had made clear that its decision did not cast doubt on longstanding "prohibitions on the possession of firearms by felons." Pet. App. 6 (quoting *Heller*, 554 U.S. at 626). The court acknowledged that, in *Binderup*, the en banc court had held that the Second Amendment allows as-applied challenges to felon disarmament statutes. *Id.* at 5-10. The court explained, however, that under *Binderup*, an as-applied challenge can succeed only if (at a minimum) the challenger can show that she was not previously convicted of a "serious crime." *Id.* at 5. The court concluded that petitioner's offense was serious: petitioner's offense was a felony; it involved "willfully depriv[ing] the Government of its property";

and petitioner's offense was "no less serious than larceny, one of the nine common law felonies, or forgery, one of the first felonies in the United States." *Id.* at 27.

Judge Bibas dissented. Pet. App. 30-58. He concluded that the Second Amendment allows disarming only "dangerous" felons, not all felons. *Id.* at 31. In Judge Bibas's view, petitioner's tax-fraud offense did not show that she was dangerous. *Id.* at 58.

ARGUMENT

Petitioner renews her contention (Pet. 11-36) that 18 U.S.C. 922(g)(1) violates the Second Amendment as applied to her. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. In particular, this case does not involve the circuit conflict created by *Binderup* v. *Attorney General United States*, 836 F.3d 336 (2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017), in which the Third Circuit held that Section 922(g)(1) violated the Second Amendment as applied to two individuals based on different offenses and circumstances than those presented here. The Third Circuit ruled in this case that petitioner could not prevail even under its own standard.

In any event, the Court denied the government's petition for a writ of certiorari in *Binderup*. See *Sessions* v. *Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847). The Court has since denied numerous other petitions raising similar questions about Section 922(g)(1)'s constitutionality as applied to particular offenses. See, *e.g.*, *Torres* v. *United States*, No. 20-5579 (Dec. 14, 2020); *Medina* v. *Barr*, 140 S. Ct. 645 (2019) (No. 19-287); *Michaels* v. *Whitaker*, 139 S. Ct. 936 (2019) (No. 18-496); *Rogers* v. *United States*, 138 S. Ct. 502 (2017) (No. 17-69); *Hamil-*

ton v. *Pallozzi*, 138 S. Ct. 500 (2017) (No. 16-1517); *Massey* v. *United States*, 138 S. Ct. 500 (2017) (No. 16-9376); *Phillips* v. *United States*, 138 S. Ct. 56 (2017) (No. 16-7541). The same result is warranted here.

1. Federal law has long restricted the possession of firearms by certain categories of individuals. One frequently applied disqualification, 18 U.S.C. 922(g)(1), generally prohibits the possession of firearms by any person "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). Congress enacted that disqualification because the "ease with which" firearms could be acquired by "criminals" was "a matter of serious national concern." S. Rep. No. 1097, 90th Cong., 2d Sess. 19, 28 (1968); see Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. IV, §§ 901(a)(2), 902, 82 Stat. 225, 226.

In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment protects "the right of law-abiding, responsible citizens" to possess handguns for self-defense. *Id.* at 635. Consistent with that understanding, the Court stated that "nothing in [its] opinion should be taken to cast doubt" on certain well-established firearms regulations, including "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626. The Court described those "permissible" measures as falling within "exceptions" to the protected right to keep and bear arms. *Id.* at 635. And the Court incorporated those exceptions into its holding, stating that the plaintiff in *Heller* was entitled to keep a handgun in his home "[a]ssuming that [he] is not disqualified from the exercise of Second Amendment rights," *ibid.*—that is, assuming "he is not a felon and is not insane," *id.* at 631.

Two years later, a plurality of the Court "repeat[ed]" *Heller*'s "assurances" that its holding "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" *McDonald* v. *City of Chicago,* 561 U.S. 742, 786 (2010) (quoting *Heller,* 554 U.S. at 626).

The historical record supports this Court's repeated statements that convicted felons fall outside the scope of the Second Amendment. "*Heller* identified as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting 554 U.S. at 604), cert. denied, 562 U.S. 1303 (2011). That report expressly recognized the permissibility of disarming citizens "for crimes committed." *Ibid.* Other sources reinforce the permissibility of preventing felons from possessing firearms. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995) ("[F]elons, children, and the insane were excluded from the right to arms."); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from the right to keep and bear arms]."); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 28-29 (1868) (explaining that the term "the *people*" has traditionally been interpreted in certain contexts to exclude "the idiot, the lunatic, and the felon").

2. Petitioner does not contend that any court of appeals has held that Section 922(g)(1) violates the Second Amendment as applied to an individual with petitioner's criminal history. Rather, petitioner contends (Pet. 11-35) that courts of appeals disagree over the abstract question whether as-applied challenges to Section 922(g)(1) may ever proceed. But this case does not involve that conflict. Only the Third Circuit has actually validated an as-applied challenge to Section 922(g)(1), and in this very case, the Third Circuit held that petitioner could not prevail under its standard.

Until the Third Circuit's decision in *Binderup*, the courts of appeals were "unanimous" in holding "that [Section] 922(g)(1) is constitutional, both on its face and as applied." *United States* v. *Moore*, 666 F.3d 313, 316 (4th Cir. 2012). In particular, the Fifth, Tenth, and Eleventh Circuits have held that Section 922(g)(1) is not subject to as-applied Second Amendment challenges. See *United States* v. *Massey*, 849 F.3d 262, 265 (5th Cir.), cert. denied, 138 S. Ct. 500 (2017); *United States* v. *McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), cert. denied, 559 U.S. 970 (2010); *United States* v. *Rozier*, 598 F.3d 768, 771 (11th Cir.) (per curiam), cert. denied, 560 U.S. 958 (2010). As petitioner observes (Pet. 13-18), other courts of appeals have left open the possibility of as-applied relief from Section 922(g)(1). See *United States* v. *Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011), cert. denied, 565 U.S. 1271 (2012); *Hamilton* v. *Pallozzi*, 848 F.3d 614, 626 & n.11 (4th Cir.), cert. denied, 138 S. Ct. 500 (2017); *United States* v. *Williams*, 616 F.3d 685, 693 (7th Cir.), cert. denied, 562 U.S. 1092 (2010); *United States* v. *Adams*, 914 F.3d 602, 605-607 (8th Cir. 2019); *Medina* v. *Whitaker*, 913 F.3d 152, 160

(D.C. Cir.), cert. denied, 140 S. Ct. 645 (2019). But before *Binderup*, no court of appeals had actually held that Section 922(g)(1) violated the Second Amendment in any of its applications, and the courts of appeals had "consistently upheld applications of [Section] 922(g)(1) even to non-violent felons." *United States* v. *Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (collecting cases) (emphasis omitted).

In *Binderup*, a fractured en banc Third Circuit held that Section 922(g)(1) could not constitutionally be applied to two individuals who had been convicted of crimes that state law denominated as misdemeanors, who had served no prison time, and whose subsequent conduct showed that they could possess firearms without endangering themselves or others. See 836 F.3d at 340-341. No single opinion garnered a majority on the Second Amendment issue, but the Third Circuit has since recognized Judge Ambro's opinion as controlling. See *Holloway* v. *Attorney General United States*, 948 F.3d 164, 170-171 (3d Cir. 2020), petition for cert. pending, No. 20-782 (filed Dec. 3, 2020). Judge Ambro took the view that courts should presumptively "treat any crime subject to [Section] 922(g)(1) as disqualifying" under the Second Amendment. *Binderup*, 836 F.3d at 351. But Judge Ambro concluded that the particular crimes at issue (corrupting a minor and carrying a handgun without a license) were not disqualifying in light of four factors: (1) the relevant state legislature had classified the offenses as misdemeanors rather than felonies, (2) the offenses were non-violent, (3) the *Binderup* plaintiffs received only minor sentences, and (4) there was no "cross-jurisdictional" consensus regarding the seriousness of the *Binderup* plaintiffs' crimes. *Id.* at 352.

In this case, the Third Circuit held that petitioner could not prevail even under the *Binderup* standard. See Pet. App. 26-29. This case thus neither involves the circuit conflict created by *Binderup* nor provides an appropriate vehicle in which to resolve it. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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