No. 20-902

IN THE

Supreme Court of the United States

KENNETH E. FLICK,

Petitioner,

v.

ROBERT M. WILKINSON, ACTING ATTORNEY GENERAL,

Respondent.

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

BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, AND INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1) is unconstitutional as applied to someone who committed a nonviolent crime more than 30 years ago?

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INTEREST OF *AMICI CURIAE*[1]

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

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

policy research organization based in Denver. The Institute's briefs in *Heller* and *McDonald* (under the name of lead *amicus* International Law Enforcement Educators & Trainers Association) were cited by Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*). The Institute's briefs and scholarship by Research Director David Kopel were cited last term in *New York State Rifle & Pistol Association v. City of New York* (Alito, J., dissenting), and *Rogers v. Grewel* (Thomas, J., dissental).

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

INTRODUCTION AND SUMMARY OF ARGUMENT

In *District of Columbia v. Heller*, this Court affirmed that the core right protected by the Second Amendment is "an individual right" rather than a collective right. 554 U.S. 570, 582 (2008). Despite this pronouncement, lower courts have repeatedly failed to "afford the Second Amendment the respect due an enumerated constitutional right." *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissental).

Among those failed by the lower courts are those permanently deprived of a firearm for self-defense due to a nonviolent offense. The federal government argues that under 18 U.S.C. § 922(g)(1), Ken Flick permanently loses his Second Amendment rights because of his conviction. It does not matter that his

crime was nonviolent, that he is rehabilitated, or that his offense occurred over 30 years ago.

The government justifies this position by arguing that the right to bear arms is limited to "virtuous" citizens. While virtue-based exclusions have been applied to civic rights such as voting and jury duty, there is no historical justification for applying the test to individual rights. Yet for the past decade, lower courts have applied the virtue test to the Second Amendment, relegating it to second-class status. But just as a nonviolent conviction does not suspend an individual's First or Fourth Amendment rights, it should not suspend their Second Amendment rights.

Besides its ahistorical basis, the virtue test is flawed because the felony label is not the touchstone to determine an individual's virtuousness. While at common law the label was reserved for capital crimes, today a felony "is whatever the legislature says it is." *Folajtar v. Att'y Gen.*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *56 (3d Cir. Nov. 24, 2020) (Bibas, J., dissenting). A legislature has carte blanche to make almost any crime a disqualifying one under § 922(g)(1) by setting the maximum penalty so that the offense is "serious." *Id.* at *7 (citing *Binderup v. Att'y Gen.*, 836 F.3d 336, 349 (3d Cir. 2016) (en banc)). By allowing legislatures to determine the scope of the Second Amendment, court dilute the right's fundamentality. This rule is far from narrowly tailored, labeling almost all felons (and some misdemeanants) as dangerous because some are.

ARGUMENT

I. THE VIRTUE TEST IS INAPPROPRIATE FOR INDIVIDUAL RIGHTS

Since *Heller*, lower courts have grappled over the constitutionality of various laws covering firearms. This is true for § 922(g)(1), as circuits are split as to whether as-applied challenges are permitted and, if so, what test is proper for them.

Section 922(g)(1) makes it unlawful for any person convicted of "a crime punishable by imprisonment for a term over one year" to possess a firearm. Four circuits employ a virtue-based test to limit the right to keep and bear arms to those who have not committed a felony. Although a virtue test might be appropriate to certain communally exercised rights, it is inappropriate for individual rights. There is "no evidence that virtue exclusions ever applied to individual, as opposed to civic, rights." *Kanter v. Barr*, 919 F.3d 437, 463 (7th Cir. 2019) (Barrett, J., dissenting). If the government wants to permanently strip an individual of his rights, it must demonstrate that the deprivation is only as broad as necessary for the government to achieve its interest.

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

In denying petitioner relief, the court below did not reach the merits of Flick's claim. Instead, it foreclosed his as-applied challenge by relying solely on its own precedent. *Flick v. Att'y Gen.*, 812 F. Appx. 974, 975 (11th Cir. 2020) ("Our reasoning in [*United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010)] applies equally to Flick's as-applied challenge."). It did not matter

that Flick's conviction was nonviolent, that he was rehabilitated, or that Georgia restored his civil rights. All that mattered was his felony conviction.

Like the perfunctory analysis by the court below, other courts' analyses are flawed. While several circuits permit as-applied challenges, to date the Third Circuit is the only circuit to find § 922(g)(1) unconstitutionally applied. *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc). Courts that allow as-applied challenges use a "virtue" or "seriousness" test that disarms "any person who has committed a serious criminal offense, violent or nonviolent." *Folajtar v. Att'y Gen.*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *7 (3d Cir. Nov. 24, 2020) (quoting *Binderup*, 836 F.3d at 348); *Kanter*, 919 F.3d at 450 (finding that mail fraud is a "serious federal felony" justifying permanent firearms deprivation); *Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019) (finding that a felony conviction is determinative and that passage of time or evidence of rehabilitation are not relevant). In practice, the felony label acts as a complete bar to as-applied challenges.[2]

History shows that the virtue test might be appropriate in dealing with the rights to vote, serve on juries, and serve in some public offices.[3] *See*, *e.g.*,

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

[3] Virtue exclusions from civic rights were explicit. *See, e.g.*, Ala. Code § 3438 (1852) (limiting jury service to those "esteemed in the community for their integrity, fair character and sound judgment"); Iowa Code § 1630 (1851) ("good moral character

Binderup, 836 F.3d at 369 n.14 (Hardiman, J., concurring) (noting the history of felon disenfranchisement and that jury service and public-office eligibility are not fundamental rights); Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 29 (1st ed. 1868) (arguing that disenfranchising classes of people with a "want of capacity or of moral fitness" was well-documented). The virtue theory conceives of the right to bear arms as one 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 thus "belonged only to virtuous citizens." *Kanter*, 919 F.3d at 462–63 (Barrett, J., dissenting).[4]

[and] sound judgment"); Act of Feb. 2, 1811, ch. 158, § 2, in 4 Laws of the State of Delaware, at 445, 449 (Bradford & Porter eds., 1816) ("sober, substantial and judicious freeholders, lawful men, of fair characters"). But there are no explicit virtue exclusions for the right to bear arms. *See Kanter*, 919 F.3d at 463 (Barrett, J., dissenting).

Juries are expected to embody the elevated moral judgment of the community. Because civic rights were to the benefit the community, there was an emphasis on moral competence and civic responsibility. Steven G. Grey, *The Unfortunate Revival of Civic Republicanism*, 141 U. Pa. L. Rev. 801, 806 (1993).

[4] Compare the exclusion of felon jurors to felon witnesses. At common law, felons were disqualified as witnesses. In *Rosen v. United States*, 245 U.S. 467, 471 (1918), this Court found that a felon was competent to testify, concluding that "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court." The difference is that jury service is a civic right exercised

But *Heller* expressly rejected the notion that the right to keep and bear arms was a collective right, holding instead that "the Second Amendment confer[s] an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. The scholarship that the four virtue-test-applying circuits relied on came pre-*Heller*. *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *42–50 (Bibas, J., dissenting). From the colonial period through the Early Republic and the 19th century, there were no laws that disarmed peaceable citizens based on a supposed lack of virtue. Rather, disarmament laws focused on dangerousness. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249 (2020). Given the importance of history to the Court's Second Amendment jurisprudence, it is inappropriate to use an ahistorical test to strip people of individual rights.

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

Courts "treat no other constitutional right so cavalierly" as they do the Second Amendment. *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting). The Tenth Circuit does not treat the right to bear arms as equally important as the right to marry. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) ("The risk inherent in firearms . . . distinguishes the Second Amendment right from other fundamental rights . . . such as the right to marry and the right to be free from viewpoint

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for the community, while bearing witness is part of a defendant's personal Sixth Amendment right of compulsory process.

discrimination."). Although the Court in *Heller* often cited First Amendment principles as guides to Second Amendment interpretations, some lower courts have refused to do so. *See, e.g.*, *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 124 n.28 (3d Cir. 2018). This despite the Court's direction in *Heller* and *McDonald* to consider the Second Amendment with the same care afforded other rights. *Rogers v. Grewal*, 140 S. Ct. 1865 (2020) (Thomas, J., dissental) ("Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework."). *See generally* David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 Tenn. L. Rev. 419 (2014).

This does not mean that no Second Amendment restrictions are permitted. History shows that the right to keep and bear arms "was not unlimited, just as the First Amendment's right of free speech was not." *Heller*, 554 U.S. at 595. We can and should continue restrictions on firearms for those who pose a genuine danger, but any deprivation must be narrowly tailored. After all, the Constitution would not allow a permanent deprivation of every felon's First or Fourth Amendment right simply because the offense was "serious."

1. Felons maintain their First Amendment rights.

No court would strip a felon's First Amendment rights solely because of their lack of virtuousness. This past May, the U.S. Bureau of Prisons released Michael Cohen, President Trump's former attorney, as authorities tried to slow the spread of COVID-19 in federal prisons. Matt Zapotosky, "Michael Cohen

Released from Federal Prison Over Coronavirus Concerns," Wash. Post, May 21, 2020, https://wapo.st/3hNv57O. Cohen was ordered back to prison, however, after tweeting that he was writing a book. In a hearing on this reimprisonment, Judge Alvin Hellerstein released Cohen, saying that the government retaliated against him solely "because of his desire to exercise his First Amendment rights." Benjamin Weiser & Alan Feuer, "Judge Orders Cohen Released, Citing 'Retaliation' Over Tell All Book," N.Y. Times, July 23, 2020, https://nyti.ms/3rVF9jy. If the circumstances were different and the court applied the virtue test to Cohen, it would only have looked at his felony conviction to determine whether he still had his First Amendment rights.

2. Suspending Fourth Amendment rights for felons would also be unconstitutional.

Courts don't treat the Fourth Amendment so cavalierly either. Protections against "unreasonable" searches apply both to those with and without a criminal record. No court would allow legislatures to deprive all felons of their Fourth Amendment rights even though it would arguably improve public safety.

Proponents of the near-blanket ban on firearm possession for nonviolent felons point to recidivism rates. *See Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *25; *Kanter*, 919 F.3d at 449 (highlighting several studies showing a connection between nonviolent offenders and risk of future violent crime); *Kaemmerling v. Lappin*, 553 F.3d 669, 683 (D.C. Cir. 2008) ("[C]ertain groups—such as property offenders—have an even higher recidivism rate than

violent offenders, and a large percentage of the crimes nonviolent recidivists later commit are violent.").

There are two principal problems with the use of recidivism rates to support firearm bans. First, the statistics lump all nonviolent felons together with burglars and drug dealers, without taking account individual characteristics that make some riskier than others. *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *59 (Bibas, J., dissenting). Second, recidivism rates would also support stripping Fourth Amendment rights, because the government has a significant interest in curbing crime. Given that many felons are likely to reoffend, allowing police to regularly search their homes would deter crimes. But if a legislature abridged Fourth Amendment rights en masse under the belief that it would improve public safety, would courts blindly defer to that judgment? Just as it would be unconstitutional to indiscriminately abridge Fourth Amendment rights, so too for the Second Amendment.

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

Courts justify the application of the virtue test by claiming that it "accords proper deference to the legislature," as legislatures are "'far better equipped than the judiciary' to make sensitive public policy judgments." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *15–16 (quoting *Kachalsky*, 701 F.3d at 97). Proponents also cite to administrative concerns, arguing that the alternative dangerousness test endorsed would give districts courts the "unenviable task of weighing the relative

dangerousness of hundreds of offenses already deemed sufficiently serious to be classified as felonies." *Id.* at *18. But courts can use objective factors, such has having a clean record since the offense, to mitigate administrative concerns.

With § 922(g)(1) tied to the maximum punishment of an offense, legislatures' have been given the power to define the scope of the Second Amendment. Legislators wanting to limit possession of firearms can do that by designating almost any offense a felony. The statute does not account for the nature of the offense, the length of time elapsed since the offense, or the punishment given to the felon. All that matters is the maximum possible punishment. While the government should be able to balance interests and define crimes and sentences, restrictions on Second Amendment rights should not turn entirely on the label applied to an offense.

More problematic is that, in blessing the virtue test, lower courts have paid mere lip service to concerns about legislatures' unfettered power. A near-blanket rule that strips fundamental rights based on any felony is overinclusive.

A. The Felony Label Is Manipulable and Leads to Disparate Outcomes for the Same Offense

1. Modern felonies are far removed from common-law felonies.

Section 922(g)(1) prohibits firearm possession by persons convicted of crimes "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Its application is not limited to

violent crimes, applying to nearly all felons and some misdemeanants, making it "wildly overinclusive." Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 721 (2007).

Courts justify their application of the virtue test arguing "[w]hen the legislature designates a crime as a felony, it signals to the world the highest degree of societal condemnation for the act." *Medina*, 913 F.3d at 160. If only this were true. Dissenting in *Folajtar*, Judge Bibas described the definition of a felony as "elastic, unbounded, and manipulable by legislatures and prosecutors." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *56 (Bibas, J., dissenting). Judge Bibas recognized what this Court recognized almost 80 years ago: the term felony "is a verbal survival which has been emptied of its historic content." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272 n.2 (1942).

At common law, the term "applied to only a few select categories of serious crimes." Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. Rev. 163, 195 (2013). "Felony" was a category "used to designate such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender." *Bannon v. United States*, 156 U.S. 464, 468 (1895) (citing *Ex parte Wilson*, 114 U.S. 417, 423 (1885)).

Moreover, the statutory prohibition for criminal conviction is *not* limited to offenses that a legislature has designated as a felony. The prohibition applies to any crime, including misdemeanors, for which the potential maximum sentence is over one year.

To see how far-removed today's felonies are from the common law, consider a few examples. In *United States v. Yates*, the Supreme Court reversed a conviction for impeding a federal investigation, a violation of 18 U.S.C. § 1519, for a fisherman's disposal of three undersized grouper that were 1.25 inches under the required 20-inch size. 574 U.S. 528, 531–35 (2015). Transporting lottery tickets across state lines when one state forbids lottery tickets carries a maximum penalty of two years in prison. 18 U.S.C. § 1301. Finally, in Pennsylvania, reading another person's email without permission is a third-degree felony, punishable by up to seven years. Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. Crim. L. & Criminology 709, 719 n.44, 46 (2010). There are currently thousands of criminal statutes and regulations that would allow Congress to disarm people for statutory felonies that were not contemplated by the common law.

2. Courts err in deferring to the felony label when the government uses the label arbitrarily.

In justifying the felony-misdemeanor dichotomy, courts opine that "when a legislature chooses to call a crime a misdemeanor, we have an indication of non-seriousness that is lacking when it opts instead to use the felony label." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *9 (quoting *Binderup*, 836 F.3d at 353 n.6 (en banc)); *Kanter*, 919 F.3d at 444. The lower court's deference to the felony label is illegitimate given that the government has admitted that the "felony-misdemeanor distinction is 'minor

and often arbitrary.'" *See, e.g.*, *Binderup*, 836 F.3d at 374 (en banc) (Hardiman, J., concurring) (quoting Gov't *Binderup* Br. 19).

Because a state can define how it punishes crimes, the jurisdiction in which the offense occurs can have huge consequences on the Second Amendment. An individual who commits a crime in one state might lose his gun rights, whereas someone who committed the same crime in another state would retain his rights. This is seen with DUI laws, as many states treat a second DUI as an offense that does not implicate § 922(g)(1). *Holloway v. Att'y Gen.*, 948 F.3d 164, 192 (3d Cir. 2020) (Fisher, J., dissenting). But there are eight jurisdictions where a second DUI does implicate it. *Id.* As a result, the statute's dependence on how a state classifies and punishes a crime "results in an underinclusive application that raises constitutional concerns." *Id.*

Courts' deference to the felony label is even more concerning considering that Congress has already determined that some serious, nonviolent felonies do not warrant a lifetime firearm ban. The definition of the term "felony" used in 18 U.S.C. § 922 excludes "any Federal or State offenses 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). There is no principled basis as to why Flick's convictions for importing and selling counterfeit cassettes over 30 years ago is worthy of a lifetime firearm ban and an antitrust violation is not. At the very least, the government must justify the disparate treatment. Otherwise, the distinction is entirely arbitrary.

3. The felony label is no more administrable than a dangerousness label.

Courts have also rationalized their use of the virtue test by claiming that it avoids administrative problems and provides consistency. *Kanter*, 919 F.3d at 450; *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011). The D.C. Circuit opined that using "an amorphous 'dangerousness' standard to delineate the scope of the Second Amendment would require the government to make case-by-case predictive judgments." *Medina*, 913 F.3d at 159–60. These courts rely in part on deference to Congress, which concluded that "the dangerousness inquiry was a 'very difficult' and time-intensive task." *Kanter,* 919 F.3d at 450; *Binderup*, 836 F.3d at 403 (Fuentes, J., concurring in part, dissenting in part and from the judgment) (arguing that Congress's conclusion that the dangerousness test was unworkable "should have a profound impact on our tailoring analysis"); H.R. Rep. No. 102-619, at 14 (1992).

The circuit courts' leeway in adopting an overinclusive law based on administrative concerns is curious considering that states have created more narrowly tailored laws for felon dispossession. Some states have taken the "very difficult" approach and prohibited those who are dangerous from possessing firearms. *See*, *e.g.*, Mont. Code Ann. §§ 45-8-313, 45-8-314, 45-8-321 (prohibiting firearm possession if conviction involved "dangerous" weapon); Wyo. Stat. § 6-8-102 (stripping rights of those convicted of "violent felony"). Other states follow the dangerousness approach but provide a list of specific

offenses. *See*, *e.g.*, N.J. Stat. Ann. §§ 2C:39-7, 2C:58-3, 2C:58-4; 18 Pa. Cons. Stat. §§ 6105.

With fears of recidivism, other states have implemented blanket bans for a period post-sentence. *See*, *e.g.*, Mich. Comp. Laws §§ 28.424, 750.224f (rights restored three years after completion of sentence); La. Rev. Stat. Ann. § 14:95.1(C) (ten years for violent crimes, drug felonies, and sex offenses); N.M. Stat. Ann. § 30-7-16 (ten years); Kan. Stat. Ann. § 21-6304 (distinguishing felonies and providing restoration timelines).

Finally, some states restrict the way felons can possess firearms. *See*, *e.g.*, Tex. Penal Code § 46.04 (felons lose right for five years but can keep a firearm in their home after that time); Ala. Code. § 13A-11-70(1) (felons can possess long guns for self-defense but not handguns); S.C. Code Ann. § 16-23-30 (same); Tenn. Code Ann. §§ 39-17-1307, 39-17-1316 (same).

These state statutes show that Congress can create an administrable law that is also more narrowly tailored. Concerns about judicial economy concerns do not outweigh Second Amendment rights or a plaintiff's access to the courts. As Justice Scalia put it: "When a litigant claims that [the] legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional as applied to him." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting).

Although Congress is in the best position to make policy judgments, it cannot define a fundamental right's scope nor can it legislate outside constitutional limits. To deal with administrability concerns, courts

can use rules of thumb such as the length of time between crime and the present, the type of crime, and the sentence given. As seen here, prohibiting firearms based solely on the arbitrary felony classification leads to absurd and unconstitutional results.

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

1. Legislatures control the scope of punishment.

Usually, what a state decides to punish as a crime is "purely a matter of legislative prerogative." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *56 (Bibas, J., dissenting) (citing *Rummel v. Estelle*, 445 U.S. 263, 274 (1980); *Heller*, 554 U.S. at 628 n.27). However, it is different when a fundamental right is at stake. With § 922(g)(1), the power to determine a felony also provides the legislature the power to determine the Second Amendment's scope.

If a legislature wanted to curb firearm possession, it could designate any minor offense—say, jaywalking—as punishable by more than one year's imprisonment and vigorously enforce it. Some may argue that courts would find the offense of "felony jaywalking" to be a bridge too far, possibly under the Eighth Amendment. But if a legislative committee made findings that purportedly showed jaywalking to be a serious threat to the community, is it seriously likely our deferential courts would gainsay the determination? Thus, legislatures effectively have the power to narrow the Second Amendment. But "[c]onstitutional rights are enshrined with the scope

they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 834–35.

Deference to the felony label to determine the seriousness of an offense is also misguided because sentencing reflects a culmination of factors. While a maximum possible punishment is "certainly probative" of the offense's potential seriousness, the wide range of punishments for an offense makes the maximum punishment a poor indicator of the actual seriousness of the defendant's personal conduct. *Holloway v. Sessions*, 349 F. Supp. 3d 451, 457 (M.D. Pa. 2018). As the court in *Binderup* recognized, judges must not "defer blindly" to maximum punishments because "some offenses may be 'so tame and technical as to be insufficient to justify the ban.'" 836 F.3d at 350–51 (quoting *Torres-Rosario*, 658 F.3d at 113).

When determining a sentence, courts might consider the history and characteristics of the defendant, and a judge's sentence may reflect a compromise resulting from plea bargaining. Under the lower court's test, it doesn't matter if the convicted person served time in prison for over a year. The only thing that matters is the maximum punishment. In fact, three in ten felony convictions do not result in a prison sentence. Bureau of Justice Statistics, *Felony Sentences in State Courts*, 2006 – Statistical Tables (Dec. 2009). The judicial decision to impose no incarceration at all indicates that the offense was not relatively serious. Here, Ken Flick was sentenced to four months in a halfway house and five years of probation. For over 30 years, Flick has been a model citizen, donating millions of dollars to charity and

being active in his community. Yet his Second Amendment rights are defined by the worst thing he did, more than three decades ago.

2. The government's data on recidivism rates conflate one-time offenders with repeat violators.

Courts also cite to recidivism statistics to justify the blanket ban. The Third Circuit found that "there is good reason not to trust felons, even non-violent ones, with firearms." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *24. The majority in *Kanter* also approvingly cited studies linking nonviolent convictions to later offenses involving violence. 919 F.3d at 449. But the cited data do not distinguish between first-time offenders like Ken Flick and those with repeat records. *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *59 (Bibas, J., dissenting). Moreover, stripping a person's fundamental rights based on projected crimes unrelated to past criminal acts is a dangerous proposition. *Id.* All the evidence shows—and the government does not dispute—that Ken Flick is now a responsible, law-abiding citizen.

3. There are relatively few constitutional limits to punishments legislatures can impose when dealing with felony sentences of a few years.

A legislature could punish a crime so severely it would violate the Eighth Amendment's protection against cruel and unusual punishments. But this is a high bar to reach. *See, e.g.*, *Ewing v. California*, 538 U.S. 11 (2003) (upholding 25-year sentence for stealing golf clubs under California's three-strikes law). And when a sentence involves "only" several

years, Eighth Amendment jurisprudence provides very little judicial review.

Legislatures have nearly limitless power over whether to classify legal violations as felonies. Recognizing the possibility of abuse, courts have acknowledged the possibility that "a legislature could be overly punitive and classify as a felony an offense beyond the limits of the historical understanding." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *10. Yet despite the opportunity to enunciate any standards for when felony disarmament goes too far, the courts seem uninterested in providing any. *Medina*, 913 F.3d at 161 ("We need not decide today if it is ever possible for a convicted felon to show that he may still count as a 'law-abiding, responsible citizen.'"); *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *28 (Bibas, J., dissenting) ("Though in theory a few felonies might be too minor to count, the majority never defines this caveat."). However, courts also have stated that "a felony is generally conclusive in our analysis of seriousness" and nonserious felonies would be "rare." *Id.* at *9–10. Indeed, the challenger's burden for restoration of Second Amendment rights is "extraordinarily high." *Id.*; *see also Binderup*, 836 F.3d at 353.

In practice, "extraordinarily high" is a euphemism for "impossible." "[N]o circuit has held the law unconstitutional as applied to a convicted felon." *Medina*, 913 F.3d at 155. The reason for the extraordinary/impossible standard is that legislative classification of a crime as a felony puts people on notice that they are "committing a serious offense" and will "forfeit their rights under the Second

Amendment." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *18.

As a practical matter, even the most learned lawyers cannot know the full scope of offenses that are denominated as felonies. *See* Mike Chase, *How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender* (2019). Even if a mere mortal could know all the federal and state felonies, "extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *33 (Bibas, J., dissenting).

This Court has long upheld the rule that when legislatures attach a label that will constrict constitutional rights, the labeling is subject to careful scrutiny. *See*, *e.g.*, *Jenkins v. Georgia*, 418 U.S. 153 (1974) (while "obscene material" may be prohibited, Georgia statute that encompassed an R-rated film went too far). The Court has usually not needed to police the meaning of "felony." But whatever the word "felony" means, it is not a synonym for the permanent loss of constitutional rights. A person convicted of fraud or criminal defamation still enjoys the freedom of speech. A person who has served her full sentence, including parole, for felony burglary, still enjoys Fourth Amendment rights in her own home. A police officer who is convicted of a felony for violating due process rights still enjoys his own due process rights.

Only one right in the Bill of Rights may be taken away forever by the whim of what the legislature does or does not label a "felony." The petitioner here is not challenging the lifetime loss of constitutional rights for convicted felons who have proven themselves to be

violently dangerous. The question instead is whether there are some limits to stripping the practical right of self-defense from persons who, while once having poor virtue, have never behaved dangerously.

C. Restrictions of Fundamental Rights Need to Be Grounded in Constitutional Text and History

The ability of the legislature to define the scope of the Second Amendment appears even more inapt when compared to the First Amendment. In *R. A. V. v. St. Paul,* this Court held that obscenity and fighting words are unprotected by the First Amendment. 505 U.S. 377, 383 (1992). While Congress can restrict speech that amounts to obscenity or fighting words, "it may not substantially redefine what counts as obscenity or fighting words." *Binderup*, 836 F.3d at 372 n.20 (en banc) (Hardiman, J., concurring). Yet in the Second Amendment context, the government argues that Congress and state legislatures have the right to define the types of criminals excluded from the right to keep and bear arms.

This is not a small problem. There are 15 million ex-felons who have had their Second Amendment rights stripped. *See* Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010*, 6–7 (2011)). In the most recent year that BJS published figures for state felony convictions, 18.2 percent of all state felony convictions were for violent offenses. Bureau of Justice Statistics, *supra*. Even though most convicted felons committed a nonviolent offense, only a select few can exercise their Second Amendment right due to an ahistorical virtue test.

The historical evidence supports a different proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. As then-Judge Barrett noted, "[t]his is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting). The danger test also justified the disarming of those who refused to pledge loyalty to the colonies. "Loyalists were potential rebels who were dangerous before they erupted into violence." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *39 (Bibas, J., dissenting). Similarly, "[r]ebels posed a risk of insurrection and so were dangerous." *Id.*

The case for keeping firearms away from those who have demonstrated violent behavior is strong. Even so, some tailoring is essential. Under the virtue test, there is no tailoring. Instead, it's a near-blanket ban that defers to how the legislature labels a crime. But the Second Amendment demands more than kowtowing to legislatures. The proper test is to look to history which supports that all citizens enjoyed the Second Amendment unless they posed a danger. Because Ken Flick is not dangerous, his Second Amendment rights must be restored to him.

CONCLUSION

The Court should grant the petition and use this case to provide clarity about how to evaluate restrictions on the Second Amendment.

Respectfully submitted,

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