No. 20-902

In the Supreme Court of the United States

KENNETH E. FLICK, PETITIONER

v.

ROBERT M. WILKINSON, ACTING ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT 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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 812 Fed. Appx. 974. The opinion of the district court (Pet. App. 4a-10a) is not published in the Federal Supplement but is available at 2019 WL 11499102.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2020. A petition for rehearing was denied on October 21, 2020 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on December 29, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the 1980s, petitioner smuggled hundreds of thousands of counterfeit tapes containing copyrighted music

into the United States and sold them to the public as genuine. D. Ct. Doc. 19-4, at 19-23 (May 14, 2018); D. Ct. Doc. 19-5. He pleaded guilty to willful infringement of a copyright, in violation of 17 U.S.C. 506(a) (1982) and 18 U.S.C. 2319(b)(1)(A) (1982), and smuggling goods into the United States, in violation of 18 U.S.C. 545 (1982). Pet. App. 2a. Each crime was a federal felony, and each was punishable at the time by up to five years of imprisonment. *Ibid.* Petitioner was sentenced to four months in a halfway house and two years of probation. *Ibid.*

Under 18 U.S.C. 922(g)(1), the longstanding federal statute that disarms convicted felons, petitioner's felony convictions preclude him from possessing a firearm. Pet. App. 2a-3a. In 2017, petitioner filed this suit, claiming that Section 922(g)(1) violates the Second Amendment as applied to him. *Id.* at 5a.

The district court dismissed petitioner's suit. Pet. App. 4a-10a. The court considered itself bound by the Eleventh Circuit's holding in *United States* v. *Rozier*, 598 F.3d 768 (per curiam), cert. denied, 560 U.S. 958 (2010), that the disarmament of felons complies with the Second Amendment. Pet. App. 7a-10a.

The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-3a. The court explained that, in *Rozier*, it had held that "statutes disqualifying felons from possessing a firearm * * * do not offend the Second Amendment." *Id.* at 3a (citation omitted). The court concluded that "[its] reasoning in *Rozier* applies equally to [petitioner's] as-applied challenge and thus forecloses it." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 11-30) that Section 922(g)(1) violates the Second Amendment as applied to him. 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. Petitioner could not prevail even under the standard applied by the Third Circuit in *Binderup*. In any event, the Court denied the government's petition for a writ of certiorari in that case. See *Sessions* v. *Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847). It has since denied numerous other petitions raising similar questions. 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); *Hamilton* 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. 11-18) 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 petitioner could not prevail under the standard adopted by the Third Circuit.

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. 12-16), 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.

Petitioner's as-applied challenge would not prevail even under the Third Circuit's standard. First, and most importantly, the predicate crimes in this case are felonies. Pet. App. 2a. Judge Ambro stated in *Binderup* that when, as here, the predicate offense "is considered a felony by the authority that created the crime," an individual seeking to bring an as-applied challenge to Sec-

tion 922(g)(1) faces an "extraordinarily high" and "perhaps even insurmountable" burden. 836 F.3d at 353 n.6. Second, whereas the *Binderup* plaintiffs received "not a single day of jail time," *id.* at 352, petitioner was sentenced to four months in a halfway house, see Pet. App. 2a. Finally, because petitioner was convicted of federal felonies rather than state offenses, this case raises no concern about the absence of a "cross-jurisdictional consensus" on the seriousness of the offenses. *Binderup*, 836 F.3d at 352.

This case thus neither involves the circuit conflict created by *Binderup* nor provides an appropriate vehicle in which to resolve it. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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