No. 17-6808

IN THE SUPREME COURT OF THE UNITED STATES

WANSOLO HUGHLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

FRANCESCO VALENTINI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's as-applied Second Amendment challenge to his conviction for violating 18 U.S.C. 922(g)(1), which makes it unlawful for a felon to possess a firearm that has previously traveled in interstate commerce.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-6808

WANSOLO HUGHLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 691 Fed. Appx. 278.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2017. A petition for rehearing was denied on August 16, 2017 (Pet. App. B1). The petition for a writ of certiorari was filed on November 13, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Missouri, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 20 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A2.

1. On July 26, 2014, Kansas City police officers received a complaint that petitioner and two other men were selling drugs at a bar and refusing to leave the premises. Presentence Investigation Report (PSR) ¶¶ 3-4. The officers arrested the three men on trespassing charges and impounded petitioner's car, which was parked outside. PSR ¶ 4. During an inventory search of the car, the officers found two pistols, ammunition, and a small quantity of marijuana. PSR ¶ 5. Petitioner admitted that the items in the car were his and stated that he needed a firearm for protection. PSR ¶ 6.

2. A federal grand jury returned an indictment charging petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A1. Petitioner was subject to Section 922(g)(1) because of two prior Missouri felony convictions. In 1995, petitioner was convicted of unlawful use of a weapon, in violation of Mo. Rev. Stat. § 571.030.1(1) (Supp. 1995), for carrying a concealed shotgun.

PSR ¶ 27. In 1994, petitioner was convicted of possessing crack cocaine. PSR ¶ 25. Those convictions had resulted in concurrent sentences of five and three years of imprisonment. PSR ¶¶ 25, 27. After his release from prison, petitioner's probation was repeatedly revoked for violations including possession of a controlled substance, drug use, failure to report, and failure to complete drug treatment. PSR ¶ 27. In addition, between 1996 and 2015, petitioner was convicted of eight misdemeanor offenses, including stealing, driving while his license was suspended or revoked, driving under the influence of drugs or alcohol, trespassing, and disorderly conduct. PSR ¶¶ 28-35.

Petitioner moved to dismiss the indictment, arguing that Section 922(g)(1) violates the Second Amendment as applied to him. Pet. App. A1. The district court adopted a magistrate judge's recommendation and denied the motion. Ibid. Petitioner then entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss. Ibid. The court sentenced petitioner to 20 months of imprisonment, to be followed by three years of supervised release. Ibid.; Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A2. The court observed that it had previously rejected as-applied Second Amendment challenges to Section 922(g)(1) where "the challenger had a violent felony or was otherwise among those historically not entitled to Second Amendment protections," -- that is, where the

challenger had not shown that he was "'no more dangerous than a typical law-abiding citizen.'" Id. at A1 (quoting United States v. Woolsey, 759 F.3d 905, 909 (8th Cir. 2014)). The court then determined that petitioner had failed to make that showing because he had "multiple felonies" and had "repeatedly violated his probation terms." Id. at A1-A2. For example, the court observed that, at the time of his 1995 firearms offense, petitioner was "carr[ying] a concealed shotgun while possessing illegal drugs." Id. at A2. When petitioner was arrested in this case, the police similarly "found two firearms * * * in [petitioner's] car along with illegal drugs." Ibid. The court found that petitioner's conduct "ha[d] not been typical of a law-abiding citizen." Ibid. And it reasoned that "[r]estricting gun possession by felons -- even nonviolent ones -- differs meaningfully from restricting citizens who have not been convicted of serious offenses from having guns in their home[s] for self-defense." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 8-15) that Section 922(g)(1) violates the Second Amendment as applied to him. The court of appeals correctly rejected that argument, and its nonprecedential decision does not conflict with any decision of this Court or another court of appeals. This Court has recently and repeatedly denied petitions for writs of certiorari involving as-applied Second Amendment challenges to Section 922(g)(1) and

similar state laws. See, e.g., Hamilton v. Pallozzi, No. 16-1517 (Dec. 4, 2017); Massey v. United States, No. 16-9376 (Dec. 4, 2017); Phillips v. United States, 138 S. Ct. 56 (2017) (No. 16-7541); Sessions v. Binderup, 137 S. Ct. 2323 (2017) (No. 16-847). The same result is warranted here.

1. Federal law has long restricted the possession of firearms by certain categories of individuals. The most frequently applied disqualification is 18 U.S.C. 922(g)(1), which makes it unlawful for a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to "ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Congress enacted that disqualification based on its determination that the "ease with which" firearms could be acquired by "criminals * * * and others whose possession of firearms is similarly contrary to the public interest" was "a matter of serious national concern." S. Rep. No. 1097, 90th Cong., 2d Sess. 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) (plurality opinion) (quoting Heller, 554 U.S. at 626).

2. Petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals, and no such conflict exists. Only one court of appeals, the Third Circuit, has held Section 922(g)(1) unconstitutional in any of its applications. See Binderup v. Attorney General, 836 F.3d 336 (2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017). The decision below does not conflict with the Third Circuit's decision

in Binderup because petitioner could not prevail under the standard adopted by the controlling opinion in that case.

a. Until 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). The Fifth, Tenth, and Eleventh Circuits have held that Section 922(g)(1) is not subject to individualized as-applied Second Amendment challenges. See, e.g., United States v. Massey, 849 F.3d 262, 265 (5th Cir.), cert. denied, No. 16-9376 (Dec. 4, 2017); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009), cert. denied, 559 U.S. 970 (2010); id. at 1049-1050 (Tymkovich, J., concurring); United States v. Rozier, 598 F.3d 768, 771 (11th Cir.), cert. denied, 560 U.S 958 (2010). Other courts of appeals, including the Eighth Circuit, have "left open the possibility that a person could bring a successful as-applied challenge to [Section] 922(g)(1)." United States v. Woolsey, 759 F.3d 905, 909 (8th Cir. 2014); see Pet. App. A1-A2.[1] But before

[1] See also Hamilton v. Pallozzi, 848 F.3d 614, 626 & n.11 (4th Cir.) (holding that "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment," but "leav[ing] open the possibility" of challenges by individuals convicted of state-law misdemeanors), cert. denied, No. 16-1517 (Dec. 4, 2017); United States v. Williams, 616 F.3d 685, 693 (7th Cir.) ("[Section] 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent.") (emphasis added), cert. denied, 562 U.S. 1092 (2010); United States v. Phillips, 827 F.3d 1171, 1173, 1176 & n.5 (9th Cir. 2016) (rejecting an as-applied Second Amendment

Binderup, no circuit had held Section 922(g)(1) unconstitutional 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) (emphasis omitted) (collecting cases).

b. In Binderup, two individuals sought a declaratory judgment that Section 922(g)(1) could not constitutionally be applied to them because they had been convicted of nonviolent state-law misdemeanor offenses for which they served no prison time and because their subsequent conduct showed that they could possess firearms without endangering themselves or others. 836 F.3d at 340. The en banc Third Circuit agreed by a fractured 8-7 vote, with no single opinion garnering a majority on the Second Amendment issue.

Ten of the 15 judges on the en banc court concluded that individuals convicted of "serious" crimes forfeit their Second Amendment rights. Binderup, 836 F.3d at 348-349 (opinion of Ambro, J.); id. at 396 (Fuentes, J., concurring in part and dissenting in part). Seven of those judges would have held that, consistent

---

challenge while reserving "the question of whether there are limits on Congress's and the States' ability to define any old crime as a [disqualifying] felony * * * consistent with the Second Amendment"), cert. denied, 138 S. Ct. 56 (2017); Schrader v. Holder, 704 F.3d 980, 991 (D.C. Cir.) (stating that the plaintiff may have had a valid as-applied claim, but deferring that question "to a case where the issues are properly raised and fully briefed"), cert. denied, 134 S. Ct. 512 (2013).

with "history," "tradition," and this Court's decision in Heller, all of the offenses covered by Section 922(g)(1) are sufficiently "serious" to warrant a firearms disability because those offenses are punishable by more than a year of imprisonment -- the traditional definition of a felony. Id. at 396 (Fuentes, J., concurring in part and dissenting in part); see 1 Wayne R. LaFave, Substantive Criminal Law § 1.6(a), at 48 (2d ed. 2003).

Judge Ambro and two of his colleagues took a different view. Judge Ambro stated that courts should presumptively "treat any crime subject to [Section] 922(g)(1) as disqualifying" under the Second Amendment "unless there is a strong reason to do otherwise." Binderup, 836 F.3d at 351. But he concluded that the particular offenses committed by the Binderup plaintiffs "were not serious enough to strip them of their Second Amendment rights." Ibid. And he further concluded that Section 922(g)(1) did not survive Second Amendment scrutiny as applied to those plaintiffs because the government had not shown that the plaintiffs' backgrounds and post-conviction conduct made them "more likely to misuse firearms" or that they were "otherwise irresponsible or dangerous." Id. at 355-356 & nn. 7-8.

Although it was joined by only two other judges, this portion of Judge Ambro's opinion appears to reflect the narrowest ground for the en banc court's judgment and therefore to constitute "the law of [the Third] Circuit." Binderup, 836 F.3d at 356 (opinion

of Ambro, J.). The remaining votes for the judgment were supplied by five judges who joined Judge Hardiman's concurring opinion. Judge Hardiman disagreed with the majority's conclusion that all individuals who commit "serious" crimes forfeit their Second Amendment rights. Instead, he stated that the Second Amendment excludes only those who "have demonstrated that they are likely to commit violent crimes." Id. at 370. And he concluded that Section 922(g)(1) could not be applied to the Binderup plaintiffs because their offenses did not involve "any violence or threat of violence" and because "their subsequent behavior confirms their membership among the class of responsible, law-abiding citizens." Id. at 376-377.

c. The court of appeals' decision in this case does not conflict with the Third Circuit's decision in Binderup because petitioner could not prevail under the legal standard articulated in Judge Ambro's controlling opinion in Binderup. That is true for two independent reasons.

First, petitioner's felony offenses -- unlawful possession of a concealed shotgun and possession of crack cocaine -- were sufficiently "serious" to justify a firearms disability under Judge Ambro's approach. At the time of petitioner's convictions, Missouri classified both offenses as felonies. See Mo. Rev. Stat. §§ 571.030.1(1), 571.030.4 (Supp. 1995) (making it a felony to knowingly carry a concealed firearm); Mo. Rev. Stat. § 195.202

(1994) (same for possession of crack cocaine). The Binderup plaintiffs' predicate offenses, though punishable by more than a year of imprisonment, were classified as "misdemeanors" under state law. 836 F.3d at 351 (opinion of Ambro, J.). Judge Ambro placed great weight on that classification, explaining that where, as here, the relevant predicate offense "is considered a felony by the authority that created the crime," an individual seeking to bring an as-applied challenge to Section 922(g)(1) faces an "extraordinarily high" burden that is "perhaps even insurmountable." Id. at 353 n.6.

Judge Ambro also stressed that the Binderup plaintiffs received sentences that were "minor * * * by any measure" and that included "not a single day of jail time." Binderup, 836 F.3d at 351-352 (opinion of Ambro, J.). Here, in contrast, petitioner received concurrent sentences of five and three years for his firearm and drug convictions. PSR ¶¶ 25, 27. Judge Ambro also specifically rejected the argument that only "violent" offenses can qualify as "serious." Binderup, 836 F.3d at 348.

Second, and in any event, Judge Ambro concluded that Section 922(g)(1) may validly be applied even to individuals whose offenses were not "serious" if their background and other circumstances show that they may be "irresponsible or dangerous" with firearms. Binderup, 836 F.3d at 355. In Judge Ambro's view, that standard was not satisfied in Binderup because each plaintiff had been

convicted of a single offense decades earlier, and had otherwise led a law-abiding, responsible life. See id. at 356. Petitioner is in an entirely different situation.

At the time of his arrest in this case, petitioner was in possession of two firearms, including one with a 30-round magazine, along with illegal drugs. Pet. App. A2; PSR ¶¶ 3-5. Credible information provided to law enforcement also indicated that petitioner was engaged in drug trafficking. PSR ¶ 3. Since his felony convictions in the mid-1990s, moreover, petitioner has been convicted of eight misdemeanor offenses, including stealing, driving while his license was suspended or revoked, driving under the influence of drugs or alcohol, disorderly conduct, and trespassing. PSR ¶¶ 28-35. And petitioner repeatedly violated the terms of his probation, which resulted in multiple revocations. PSR ¶ 27; Pet. App. A2. Petitioner's lengthy and recent pattern of criminal conduct provides powerful reason to conclude that he is both "likely to misuse firearms" and "otherwise irresponsible or dangerous." Binderup, 836 F.3d at 355-356 (opinion of Ambro, J.). Those aspects of petitioner's background would foreclose his Second Amendment challenge under Judge Ambro's approach even if his felony convictions did not qualify as "serious."[2]

[2] Petitioner's background and history would also preclude him from obtaining relief under Judge Hardiman's approach because his repeated and recent offenses provide ample grounds to conclude that he "has been, or would be, dangerous, violent, or irresponsible with firearms." Binderup, 836 F.3d at 377 (Hardiman,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

FRANCESCO VALENTINI
Attorney

JANUARY 2018

J., concurring in part and concurring in the judgments); see id. at 376 (observing that "drug trafficking" is "closely related to violent crime") (citation omitted).