

No. _____

In the
Supreme Court of the United States

ZOIE H.,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of Nebraska**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2018, Nebraska amended its criminal law to disenfranchise anyone adjudicated by a juvenile court to have committed certain acts from exercising their constitutional right to possess a firearm until age 25. *See* Neb. Rev. Stat. §28-1204.05(1). While the legislature accompanied that new criminal prohibition with a requirement that the juvenile court inform a juvenile of the Second Amendment consequences of an adverse adjudication, it did not amend its laws to require a right to trial by jury for offenses that can result in a loss of Second Amendment rights well past the age of majority. The net result is that Nebraska deprives individuals of their Second Amendment rights as a collateral consequence of an adjudication in which it deprives the accused of a right to a jury trial. In the decision below, the Supreme Court of Nebraska held that neither the Second nor Sixth Amendment precludes that result, reasoning that because the automatic loss of Second Amendment rights is imposed as a collateral consequence of the adjudication, and not as a direct criminal punishment, it does not implicate the Sixth Amendment at all. In so holding, the court undermined both constitutional rights and broke sharply with decisions from this Court and others.

The question presented is:

Whether the Second and Sixth Amendments permit a state to deprive an individual of the Second Amendment right to keep and bear arms based on the commission of an offense while denying the accused a right to a jury trial for that offense.

PARTIES TO THE PROCEEDING

Petitioner, the defendant-appellant below, is Zoie H. Her full name is disclosed in a sealed envelope provided with this petition. Respondent, the plaintiff-appellee below, is the State of Nebraska.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings: *In re Zoie H. v. State of Nebraska*, No. S-18-1028 (Neb. Jan. 24, 2020). There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

The decision below holds that the Second and Sixth Amendments permit an individual to be deprived of her Second Amendment right to keep and bear arms as an automatic consequence of an offense as to which she has no right to a jury trial. That decision cannot be reconciled with this Court's Second or Sixth Amendment jurisprudence, and it conflicts with decisions of other state courts of last resort.

This Court has made clear beyond cavil that the Second Amendment protects an individual and fundamental constitutional right that cannot be subjected to second-class treatment. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). This Court also has long held that the Sixth Amendment guarantees a right to a jury trial for any "serious" offense, and that the "seriousness" of an offense is assessed by considering the severity of the consequences the legislature imposes for its commission. *See Blanton v. City of N. Las Vegas*, 489 U.S. 538 (1989); *Duncan v. Louisiana*, 391 U.S. 145 (1968). Together, those principles compel the conclusion that if the legislature wants to make the loss of Second Amendment rights a consequence of conviction of an offense, then it must afford the accused the protection of the right to a trial by a jury of her peers.

In the decision below, the Supreme Court of Nebraska held the state can disregard both constitutional guarantees without violating either. In particular, it held that a juvenile may be deprived of her Second Amendment rights *until she reaches the age of 25* via an adjudication conducted (over her

objection) entirely by a judge. That decision conflicts with a decision from the Supreme Court of Nevada that refused to allow that simultaneous denial of Second and Sixth Amendment rights, and instead held that if the state wants to use a conviction to deprive an individual of Second Amendment rights, then it must afford the accused a right to a trial by jury.

Making matters worse, the Supreme Court of Nebraska reached its dual-threat conclusion through reasoning that would allow states to impose all manner of severe penalties, including the disenfranchisement of other constitutional rights, without respecting the Sixth Amendment guarantee. According to the decision below, the Sixth Amendment is concerned *only* with those consequences that flow *directly* from the statute that imposes the offense, not those that flow from a “collateral” source, like a separate statute. In other words, even though a determination that petitioner committed the offenses in question *automatically* deprived her of her Second Amendment rights for six years *after* she reaches the age of majority, the court held that this undisputed and automatic consequence is *irrelevant* to the Sixth Amendment analysis.

That reasoning squarely conflicts with decisions of this Court and others. Indeed, *Blanton* itself—one of this Court’s seminal Sixth Amendment jury-trial-right cases—treated as highly relevant to its analysis a civil penalty that was no less “collateral” than the one imposed here. It could hardly be otherwise. A rule that looked only to penalties enumerated in the offense itself would provide a roadmap for states to deprive defendants of Sixth Amendment protections.

Such a rule would also systematically under-protect Second Amendment rights, which are commonly lost as a “collateral” consequence of separate criminal prohibitions, rather than through “direct” sentencing conditions.

Such a rule would have particularly troubling consequences for juvenile justice systems. Those systems generally need not provide jury trials precisely because they do not deprive individuals of constitutional rights well into adulthood. If a state wants to transform such a system into one that can deprive the accused of her full suite of constitutional rights into adulthood, then it cannot do so without complying with the Sixth Amendment’s most basic guarantee. Put differently, the state cannot deprive the accused of her constitutional right to a jury trial on the rationale that this is just a juvenile proceeding, and then tell an adult that she has no Second Amendment right to keep and bears arms because of the result of a bench trial. The state cannot disregard both constitutional guarantees. This case thus provides the Court with an opportunity to reaffirm that the Second and Sixth Amendments both protect rights that are fundamental.

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska is reported at 937 N.W.2d 801 and reproduced at App.1-18.

JURISDICTION

The Supreme Court of Nebraska issued its opinion on January 24, 2020. On March 19, 2020, this Court extended the deadline to file any petition for a

writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment provides: “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 Sixth Amendment provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...” U.S. Const. amend. VI.

Nebraska’s prohibition on the possession of firearms, codified at Revised Statute §28-1204.05, is reproduced at App.19.

STATEMENT OF THE CASE

A. Legal Background

In its seminal decision in *District of Columbia v. Heller*, this Court held that the Second Amendment “confer[s] an individual right to keep and bear arms.” *Heller*, 554 U.S. at 595. Two years later, the Court held that this right is not just individual but fundamental, applicable against state and local governments, and entitled to the same robust protections as other fundamental rights enshrined in the Constitution. *See McDonald*, 561 U.S. at 778 (plurality op.) (“[T]he 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.”); *id.* at 806 (Thomas, J., concurring in part and concurring in the judgment)

“agree[ing]” that “the right to keep and bear arms ... is ‘fundamental’”). While *Heller* made clear that it should not “be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons,” 554 U.S. at 626, it likewise cast no doubt on the proposition that such prohibitions must rest on a conviction obtained in accordance with the full panoply of substantive and procedural protections the Constitution guarantees.

Among those guarantees is the right to a trial by a jury of one’s peers. Indeed, “[t]he Framers believed a defendant’s right to demand a jury trial was so important that they included it in the U.S. Constitution twice.” Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 Wake Forest L. Rev. 1, 49-50 (2019). Although the Constitution already provided that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury,” U.S. Const. art. III, §2, cl. 3, the Framers enumerated the right again in the Sixth Amendment. That belt-and-suspenders approach reflected the importance the Framers placed on the right. John Adams and Thomas Jefferson disagreed about much, but not about the importance of the jury-trial right. Adams proclaimed that “[r]epresentative government and trial by jury are the heart and lungs of liberty,” *Rauf v. State*, 145 A.3d 430, 465 n.216 (Del. 2016) (quoting Statement of John Adams (1774)), while Jefferson described the jury-trial right “as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution,” Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 3 *The Writings of Thomas Jefferson*, at 71 (H. A. Washington ed., 1859).

Of course, like the Second Amendment, the Sixth Amendment guarantee is not absolute; “there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.” *Duncan*, 391 U.S. at 159. In particular, the right attaches only to adjudications of “serious” offenses. *Blanton*, 489 U.S. at 541. The most important indication of the seriousness of an offense is the “severity of the penalty” the legislature has “authorized for [the offense’s] commission.” *Frank v. United States*, 395 U.S. 147, 148 (1969). For “[i]n fixing the maximum penalty for a crime, a legislature ‘include[s] ... a judgment about the seriousness of the offense.’” *Blanton*, 489 U.S. at 541 (alteration in original) (quoting *Frank*, 395 U.S. at 149).¹

Critically, that inquiry focuses not only on “the maximum authorized period of incarceration” for a crime, but also on “any *additional* statutory penalties” that follow from a conviction. *Blanton*, 489 U.S. at 543 (emphasis added). Accordingly, while a misdemeanor offense punishable by six months in prison or less ordinarily will not trigger the jury-trial right, it will if a conviction also carries with it additional penalties

¹ At one point, the inquiry into “whether an offense was ‘petty,’ and therefore not covered by the Sixth Amendment” called for an “examin[ation of] the nature of the offense and whether it was triable by jury at common law.” Emily Ahdieh, *The Deportation Trigger: Collateral Consequences and the Constitutional Right to A Trial by Jury*, 30 Geo. Mason U. Civ. Rts. L.J. 65, 66 (2019); see *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930). The Court ultimately shifted the emphasis away from historical analogies and toward “a more objective analysis, focusing on ‘indications of the seriousness with which society regards the offense.’” Ahdieh, *supra*, at 66 (quoting *Frank*, 395 U.S. at 148).

sufficiently “severe that they clearly reflect a legislative determination that the offense in question is a serious one.” *Id.* Applying that test, the Supreme Court of Nevada has held that if the legislature wants to make the loss of Second Amendment rights a consequence of a misdemeanor conviction, then it must provide the defendant with the right to a trial by jury. *See Andersen v. Eighth Judicial Dist. Ct. in & for Cty. of Clark*, 448 P.3d 1120 (Nev. 2019).

B. Factual and Procedural Background

1. This case arises out of a juvenile proceeding against petitioner Zoie H. As a general matter, this Court has held that states may maintain separate juvenile justice systems that do not provide a right to trial by jury. *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (plurality op.). But as Justice White explained in his concurring opinion providing the fifth vote for that outcome, that is because the typical juvenile adjudication does not carry with it the consequences of a criminal conviction:

Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be. [And a] typical disposition in the juvenile court where delinquency is established may authorize confinement until age 21, but it will last no longer[,] and[,] within that period[,] will last only so long as

his behavior demonstrates that he remains an unacceptable risk if returned to his family.

Id. at 552 (White, J., concurring). Accordingly, the Court has since cautioned that courts must “eschew ‘the “civil” label-of-convenience which has been attached to juvenile proceedings” and instead “candidly appraise[]” their actual nature when “determining the applicability of constitutional rights” to juvenile proceedings. *Breed v. Jones*, 421 U.S. 519, 529 (1975).

Consistent with that caution, Nebraska carefully constructed its juvenile justice system to ensure that it focuses on rehabilitating juveniles, not punishing criminals. Like most states, a primary goal of Nebraska’s system is “[t]o remove juveniles ... from the criminal justice system whenever possible” and to reduce the future commission of crimes through “the provision of social and rehabilitative services” to juveniles and their families. Neb. Rev. Stat. §43-246(3). Accordingly, while a juvenile adjudicated by the juvenile justice system to have committed an offense can be subject to restrictions like probation, *id.* §43-286(1)(a)(ii)(A), or commitment to the Office of Juvenile Services, *id.* §43-412, “a juvenile committed under the [juvenile code cannot] be confined after he or she reaches the age of majority” (which is 19 in Nebraska), *id.* §43-289, and “[n]o adjudication by the juvenile court upon the status of a juvenile shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction,” *id.* §43-280.

Or at least that used to be the case. In 2018, the Nebraska legislature enacted a provision that imposes a new and fundamentally different disability on juveniles adjudicated under the juvenile code. Specifically, the legislature amended its general criminal prohibitions on possession of a firearm to include a new category:

[A] person under the age of twenty-five years who knowingly possesses a firearm commits the offense of possession of a firearm by a prohibited juvenile offender if he or she has previously been adjudicated an offender in juvenile court for an act which would constitute a felony or an act which would constitute a misdemeanor crime of domestic violence.

Id. §28-1204.05(1). “Possession of a firearm by a prohibited juvenile offender is a Class IV felony for a first offense and a Class IIIA felony for a second or subsequent offense.” *Id.* §28-1204.05(2). Class IV felonies are punishable by up to two years in prison, and Class IIIA felonies are punishable by up to three years in prison. *Id.* §28-105.

This disability is not imposed through the juvenile code itself, but rather as part of the ordinary criminal code. And unlike the consequences available under the juvenile code, which by law cannot carry past the age of majority, this new prohibition on possessing a firearm applies for six years *after* a juvenile turns 19. Recognizing the inadequacy of the juvenile justice system’s less formal procedures to address the deprivation of a constitutional right well past the age of majority, the legislature imposed along with this

new prohibition a new requirement that the juvenile court “explain the specific legal consequences that an adjudication ... will have on the juvenile’s right to possess a firearm.” *Id.* §43-261.01. But while Nebraska warns the juvenile about the adult consequences of an adverse adjudication, it does not couple that notice with an opportunity to a trial by jury. The result is that while an *adult* accused of the offenses that trigger that prohibition would be constitutionally entitled to a jury trial, a juvenile accused of such offenses is not afforded the same protection, even though that juvenile adjudication can now produce the adult consequence of the loss of Second Amendment rights *after* the age of majority.

2. In 2018, Nebraska filed felony attempted theft charges against petitioner in Lancaster County juvenile court. App.3. The state alleged that petitioner and a friend had attempted to steal a car as it was being fueled up outside a convenience store in Lincoln. App.2. Attempted theft by unlawful taking of something worth \$5,000 or more is a felony under Nebraska law. App.3; *see* Neb. Rev. Stat. §§28-201(4)(c), 28-511, & 28-518(1).

In addition to moving to quash, petitioner filed a jury-trial demand. App.3. As she explained, under §28-1204.05, a juvenile court determination that she committed the attempted theft offense would directly and automatically result in the deprivation of her fundamental constitutional rights under the Second Amendment until she reached the age of 25. Accordingly, she argued that §28-1204.05 “effectively transforms a juvenile adjudication for an act which

would be a felony ... into a serious criminal offense to which the right to a jury trial attaches.” App.9.

The juvenile court rejected that argument. Because Nebraska requires all juvenile court proceedings to “be conducted before the court without a jury,” Neb. Rev. Stat. §43-279(1), the court denied her jury-trial demand. App.4-5. The court then held a bench trial at which the state’s witnesses identified petitioner as the perpetrator of the alleged offense and estimated the value of the vehicle in question. App.5. The court ultimately credited those witnesses and found that petitioner had committed the alleged offense. App.6.

3. Petitioner appealed, and the Supreme Court of Nebraska granted her petition to bypass the intermediate appellate court. But the court affirmed the juvenile court’s conclusions, holding, *inter alia*, that the Sixth Amendment right did not apply to petitioner’s juvenile adjudication. App.9-16.

The court did not (and could not) dispute that, as an automatic result of the juvenile court proceedings, petitioner is now legally prohibited, on pain of incarceration for two years, from possessing a firearm until she is 25 years old. *See* App.9, App.11-12. Instead, relying on prior precedent holding that a post hoc criminal prohibition on possession of a firearm by a convicted felon is not an additional “penalty” for Ex Post Facto Clause purposes, the court held that §28-1204.05 is not relevant to the Sixth Amendment analysis *at all* because it is “a collateral consequence” of the juvenile adjudication, “not part of the punishment imposed for that” adjudication. App.12 (citing *State v. Peters*, 622 N.W.2d 918 (Neb. 2001)).

The court then went on to reject the alternative argument that it should “extend[] the right to jury trial to juvenile adjudications” *with or without* the loss of Second Amendment rights, as some states have done. App.14. But the court closed by reiterating that it rejected petitioner’s Sixth Amendment claim not just because this was a juvenile proceeding, but because it “rejected the premise that §28-1204.05 imposes a penalty for juvenile adjudication.” App.16.

REASONS FOR GRANTING THE PETITION

The decision below holds that an individual may be deprived of her Second Amendment rights based on a finding that she committed an offense made in a proceeding in which her request for a jury trial was denied. That conclusion cannot be reconciled with the Second and Sixth Amendments, or with cases from this Court and others. Worse still, the reasoning of the decision below would allow juveniles to be disenfranchised from exercising all manner of constitutional rights well into their adult years, as long as the disenfranchisement was a collateral consequence of a separate statute rather than part of the sentence for the offense. That untenable decision readily warrants this Court’s review.

This Court has squarely held that the right protected by the Second Amendment is both individual and fundamental. To be sure, one can forfeit that right by engaging in certain types of criminal conduct. But if the government wants to use the commission of a crime as a basis to deprive someone of a fundamental constitutional right, then it must give the accused the protections the Constitution guarantees in a criminal proceeding imposing

significant consequences—including the right to a jury trial. That result follows directly from this Court’s Sixth Amendment cases, which have long held that the Sixth Amendment guarantees a jury trial for any offense that carries with it severe penalties. Like incarceration for more than six months, the loss of the fundamental right to keep and bear arms is undoubtedly sufficiently severe to “clearly reflect a legislative determination that the offense in question is a serious one,” *Blanton*, 489 U.S. at 543, and so necessitates the protection of a trial by jury.

Applying that principle, the Supreme Court of Nevada has held that the Sixth Amendment guarantees a right to trial by jury for *any offense* that carries as a consequence of conviction the loss of Second Amendment rights, even if it is a misdemeanor with a short sentence that otherwise would not trigger the jury-trial right. In this case, the Supreme Court of Nebraska reached the opposite conclusion, holding that the state may deprive petitioner of her Second Amendment rights based on an offense adjudicated via a bench trial. While the juvenile system, like most misdemeanors, generally need not furnish a jury-trial right, here, an adjudication carries with it the loss of Second Amendment rights well into petitioner’s adult years. Yet the decision below not only approved that unconstitutional result, but employed reasoning that could permit states to deny all manner of constitutional rights as a collateral consequence of convictions imposed without a right to a trial by jury. According to the decision below, the automatic loss of Second Amendment rights is *wholly irrelevant* to the Sixth Amendment analysis so long as it stems from a statute other than the one that sets forth the offense.

That reasoning is flatly inconsistent with this Court's precedent, as *Blanton* itself considered alongside the statutorily authorized term of incarceration civil penalties that stemmed from other "collateral" statutory provisions. By failing to abide by that teaching, the decision below provides a roadmap for states to eviscerate the jury-trial right.

That concern is particularly acute when it comes to Second Amendment rights. Both the federal government and the states routinely prohibit the possession of a firearm by persons convicted of certain crimes *collaterally, i.e.*, by making it a *separate crime*, not just a sentencing consequence of the underlying offense. By declaring those separate provisions irrelevant to the Sixth Amendment analysis, the decision below invites states to extend those (and all manner) of constitutional disabilities to misdemeanor offenses. It also invites states to use their nominally *civil* juvenile systems to impose *criminal* penalties on juveniles well past the age of majority, all while refusing to extend the jury-trial right to those disenfranchising proceedings. Such results, exemplified by this case, run contrary to the whole thrust of this Court's juvenile justice cases. Those cases decline to apply the Sixth Amendment jury-trial right to juvenile proceedings on the assumption that they are rehabilitative, not punitive, and are addressed to the unique circumstances of juveniles, not to imposing penalties that disenfranchise individuals until their mid-twenties.

This case thus presents an excellent opportunity not only to reaffirm that the right protected by the Second Amendment is a fundamental one, but to make

clear that states may not impose the loss of that constitutional right (or any other) as a penalty for an offense without providing the procedural protections the Constitution guarantees someone accused of a serious crime, and to ensure that the juvenile justice system is not exploited to deprive juveniles of their constitutional rights long past the age of majority.

I. The Decision Below Squarely Conflicts With Decisions Of Other State Courts Of Last Resort.

1. This Court has held unequivocally that the right to keep and bear arms is fundamental—indeed, is no less fundamental than any other enumerated right. And while some courts nonetheless have persisted in treating that right as decidedly second-class, *see N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring), all should agree that the Second Amendment at the very least protects the right to possess a firearm for self-defense in one’s home. After all, that was the square holding of *Heller*. *See* 554 U.S. at 635. To be sure, *Heller* made clear that this right can be forfeited, and that it did not mean to “cast doubt on longstanding prohibitions on the possession of firearms by felons.” *Id.* at 624. But the obvious assumption underlying that caveat was that someone becomes a felon who has forfeited Second Amendment rights only as a result of a process that guaranteed the accused the Sixth Amendment right to a jury trial.

After all, it has long been settled law that the jury-trial right extends to all felonies. *See Hallinger v. Davis*, 146 U.S. 314, 318 (1892). The right serves “to prevent oppression by the Government,” as it provides

“an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” *Duncan*, 391 U.S. at 155-56. Of course, like other fundamental constitutional rights, including the Second Amendment, the Sixth Amendment jury-trial right is not absolute. “So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment’s jury trial provisions.” *Id.* at 160; *see generally* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 979 (1926). But the right unquestionably extends both to felonies and to all other crimes for which “objective indications” demonstrate “the seriousness” of “the offense.” *United States v. Nachtigal*, 507 U.S. 1, 3 (1993) (per curiam) (quoting *Blanton*, 489 U.S. at 541).

In determining whether a particular offense is “serious” for purposes of the Sixth Amendment, this Court has instructed that “[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature,” as the latter “is ‘far better equipped to perform the task.’” *Blanton*, 489 U.S. at 541. Instead, to assess the “seriousness” of a crime, courts must look to an objective measure: the severity of the penalties the legislature has chosen to authorize for those who commit it. *Id.* at 542. A maximum authorized term of incarceration of more than six months is categorically a “severe” penalty, and thus renders an offense categorically “serious” for jury-trial purposes. *Id.* at 543; *see also Baldwin v. New York*, 399 U.S. 66, 71 (1970). And while a maximum authorized term of

incarceration of six months or less renders an offense presumptively “petty” (and thus not within the scope of the jury-trial guarantee), a defendant can overcome that presumption by “demonstrat[ing] that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious’ one.” *Blanton*, 489 U.S. at 543.

2. Applying those principles, the Supreme Court of Nevada held that any offense that results in the loss of Second Amendment rights “clearly reflect[s] a legislative determination that the offense is a serious one,” and thus that a defendant “facing the charge is entitled to the right to a jury trial.” *Andersen*, 448 P.3d at 1124. *Andersen* arose after the Nevada legislature amended its firearm-possession prohibition to include persons convicted of misdemeanor battery constituting domestic assault. Because that amendment rendered the loss of Second Amendment rights a consequence “that automatically and directly flows from a conviction for misdemeanor domestic battery,” the court concluded that it rendered the offense sufficiently “serious” to trigger the jury-trial right. *Id.*

In reaching that conclusion, the *Andersen* court distinguished the loss of Second Amendment rights from other potential penalties, such as “a fine in the range of \$200 to \$1,000, loss of one’s driver’s license for a period of 90 days, and mandatory attendance of an alcohol abuse education course at the defendant’s expense.” *Id.* Unlike those penalties, the court explained, the deprivation of a fundamental

constitutional right “is so severe as to categorize the offense as serious” and to trigger the right to a trial by jury. *Id.*

The Supreme Court of Nebraska reached the opposite result here. Just like the Nevada legislature, the Nebraska legislature recently amended its firearm possession laws to include a new category—namely, anyone under the age of 25 who was “adjudicated an offender in juvenile court for an act which would constitute a felony or an act which would constitute a misdemeanor crime of domestic violence” if committed by an adult. Neb. Rev. Stat. §28-1204.05(1). An adult defendant charged with any of those potentially disenfranchising offenses is entitled to a jury trial. The same is not true of a juvenile offender accused of the juvenile analogs.

The Nebraska legislature recognized that the potential loss of Second Amendment rights well into adulthood was significant enough to require a juvenile defendant to be warned of the consequence. But it did not accompany that warning with any new procedural rights, such as an entitlement to a jury-trial. Unlike a plea colloquy where the accused is warned that she is voluntarily forgoing constitutional rights by entering into a plea, a juvenile offender in Nebraska is simply warned that she risks losing Second Amendment rights, without any opportunity to invoke Sixth Amendment rights.² Nonetheless, unlike the

² The legislature did provide a mechanism to petition for the *restoration* of Second Amendments lost by virtue of a juvenile adjudication. *See* Neb. Rev. Stat. §28-1204.05(4). But that restoration mechanism just underscores that the deprivation is

Nevada high court, the Nebraska high court concluded that this loss of Second Amendment rights does not render the underlying offense sufficiently “serious” to trigger the Sixth Amendment jury-trial right. App.16. Thus, under the decision below, Nebraska can use an offense as a basis for denying Second Amendment rights for six years *after* the age of majority, without providing a right to a jury trial. In the Supreme Court of Nebraska’s view that result is fully consistent with the Second and Sixth Amendments.

3. The Supreme Court of Nebraska is not alone in holding that a legislature may deprive an individual of her fundamental Second Amendment rights based on a conviction obtained without the jury-trial right that the Sixth Amendment guarantees. To be sure, some of those decisions appear to be the product of unduly narrow pre-*Heller* conceptions of the Second Amendment. *See, e.g., United States v. Combs*, No. 8:05CR271, 2005 WL 3262983, at *3 (D. Neb. Dec. 1, 2005) (“a lifetime ban on possession of firearms is hardly as onerous as a fifteen-year driver’s license suspension”); *State ex rel. McDougall v. Strohson (Cantrell)*, 945 P.2d 1251, 1256 (Ariz. 1997) (“to hunt or possess a firearm for self-protection, while admittedly very important to some people, does not present the type of universal grave consequence we have found in cases invoking a right to jury trial”). But others have openly embraced the proposition even after *Heller* that the loss of Second Amendment rights—even permanently—is not a “serious” penalty.

automatic once a juvenile is adjudicated to have committed a qualifying offense.

For example, in *United States v. Jardee*, the court acknowledged that there is “no question that a lifetime prohibition against possessing weapons is a substantial infringement upon one’s rights,” but nonetheless declared it “not of the same order of magnitude as the severe deprivation of liberty that results from six months’ incarceration.” No. 4:09-MJ-091, 2010 WL 565242, at *4 (D.N.D. Feb. 12, 2010). Likewise in *United States v. Snow*, the court reached its conclusion by reasoning that a *permanent* loss of Second Amendment rights is less serious than the “myriad of restraints on an individual’s liberties and constitutional rights” that the *temporary* probation that may accompany a petty crime entails. No. 11-0149-SU, 2011 WL 5025535, at *3 (D. Or. Oct. 21, 2011); *cf. United States v. Chavez*, 204 F.3d 1305, 1313-14, 1313 n.5 (11th Cir. 2000) (assuming without deciding that Second Amendment protects an individual right, but finding no right to jury trial simply because Congress did not provide one).

Those decisions are difficult to square with courts’ willingness to find the Sixth Amendment triggered by consequences that do not involve the forced relinquishment of fundamental constitutional rights. For instance, multiple courts have held that the Sixth Amendment *does* require a right to trial by jury for an offense that renders a noncitizen removable under federal immigration law—even though there is no constitutional right for a noncitizen to remain in the country, even though removal is not automatic, and even though the consequence of removability is not imposed by the sovereign that created the underlying offense. *See, e.g., People v. Suazo*, 118 N.E.3d 168, 174-75 (N.Y. 2018); *Miller v. United States*, 209 A.3d

75 (D.C. 2019). The decision below thus leaves Nebraskans with fewer procedural protections against the loss of a fundamental constitutional right than noncitizens in other jurisdictions are guaranteed for the loss of a privilege that is not constitutionally protected.

That disconnect is untenable and underscores that the decision below cannot be squared with the basic protections of the Second and Sixth Amendments. The Sixth Amendment prevents the imposition of severe consequences without the fundamental right to trial by jury. A loss of the equally fundamental right to keep and bear arms well into adulthood plainly qualifies as a severe consequence. If non-constitutional consequences are sufficiently severe to trigger the Sixth Amendment, yet a complete loss of Second Amendment rights for years is not, then nothing is left of this Court's admonition that "the right recognized in *Heller* [is not] a second-class right." *McDonald*, 561 U.S. at 780 (plurality op.).

II. The Decision Below Is Wrong.

This Court's review is all the more critical because the decision below is patently wrong as a matter of Sixth Amendment jurisprudence, and provides a roadmap for states to deprive individuals of all manner of fundamental rights without the safeguard of a jury trial. It would be troubling enough if the Supreme Court of Nebraska had simply held that the loss of Second Amendment rights was relevant to the severe-consequences calculus, but was insufficiently "severe" to trigger a jury-trial right. But the court actually went further and held that the loss of

petitioner's Second Amendment rights was not even relevant to the severe-consequences inquiry because "the prohibition on possessing firearms contained in §28-1204.05 is not part of the juvenile code, but, rather, it is contained within the statutory provisions governing criminal offenses." App.12. In other words, the Supreme Court of Nebraska treated an *automatic* consequence of petitioner's adjudication as *irrelevant* to the Sixth Amendment inquiry simply because it is housed in a separate statute, as opposed to being imposed directly as part of the sentence for the offense.

Nor did the court rest its analysis on or limit its decision to some special aspect of the juvenile system. Rather, the court relied principally on an earlier Nebraska case involving whether the loss of Second Amendment rights as a consequence of an *adult* felony conviction should be considered part of the "penalty" for the underlying offense. In that case, the court concluded that "the statutory prohibition on possessing firearms may be a collateral consequence of a prior felony conviction, but it is not part of the punishment imposed for that prior felony conviction." App.13; *see State v. Peters*, 622 N.W.2d 918 (Neb. 2001). Applying that same reasoning here, the court concluded that the new firearm-possession prohibition likewise cannot be considered a penalty, even though it follows automatically from an adjudication that a juvenile committed the offense. App.12-16.

That reasoning is impossible to reconcile with this Court's precedents. As this Court has made clear, the Sixth Amendment analysis focuses on *all* "penalties" the legislature "attaches to the offense," not just those set forth in the statute enumerating the offense.

Blanton, 489 U.S. at 542; *cf. Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that the Sixth Amendment right to counsel entitles defendant to be advised of “collateral” consequences of conviction). Any other result would let technicalities trump fundamental constitutional guarantees. Indeed, in *Blanton* itself, one of the penalties the Court considered stemmed from a separate *civil* statute enumerating certain offenses that triggered suspension or revocation of a driver’s license. *See* Nev. Rev. Stat. §483.460(1)(c)(1987). The Court did not dismiss that penalty out of hand simply because it was imposed as a “collateral” civil consequence of conviction or was codified in a different section of the code. It instead considered it alongside all the other penalties to which the conviction subjected the defendant, and found it insufficient to trigger the jury-trial right only because the Court could not “say that a 90-day license suspension is that significant as a Sixth Amendment matter, particularly when a restricted license may be obtained after only 45 days.” 489 U.S. at 544 & n.9.

The same was true in the Supreme Court of Nevada’s decision in *Andersen*. There too, the prohibition on possessing a firearm was (like most such prohibitions) housed in a separate statute, not in the domestic battery statute itself. *Andersen*, 448 P.3d at 1123. But the court found that separation of no moment to the Sixth Amendment inquiry, because the loss of Second Amendment rights “automatically and directly flow[ed] from a conviction for misdemeanor domestic battery.” *Id.* at 1124. Nor has the statutory source of other consequences that follow automatically from a conviction mattered to other courts considering whether an offense is sufficiently “serious” to trigger

the jury-trial right. *See, e.g., Suazo*, 118 N.E.3d at 174; *Miller*, 209 A.3d at 75.

This Court's approach makes eminent sense, for a rule that focused only on penalties enumerated in the statute setting forth the offense itself would empower the government to manipulate the Sixth Amendment analysis at will. Technicalities of statutory codification cannot trump the substance of the severe-consequences analysis. To conclude otherwise would produce untenable results. One need look no further than the Supreme Court of Nebraska's own precedent to confirm that. According to that court, the 15-year suspension of driving privileges that follows directly from a driving-under-the-influence conviction is sufficiently "serious" to trigger the Sixth Amendment's jury-trial mandate. *See State v. Wiltshire*, 491 N.W.2d 324, 327 (Neb. 1992), *overruled on other grounds, State v. Louthan*, 595 N.W.2d 917 (Neb. 1999); *see also Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990) (same). Yet under the decision below (and the *Peters* decision on which it relied), that result would be different if the 15-year license disability was moved to a different statute. Nothing of consequence turns on whether a disability—or worse yet a disenfranchisement of a constitutional right—is part of the authorized sentence or rather an automatic consequence of a separate statute.

Indeed, if anything, an *automatic* consequence of conviction—whether imposed directly or collaterally—would seem to be an even more accurate measure of the seriousness of an offense than the authorized sentence, for it cannot be ameliorated by the judge during sentencing. While this Court's cases focus

principally (although certainly not exclusively) on the *maximum* penalty for an offense, *see, e.g., Lewis v. United States*, 518 U.S. 322, 326 (1996); *Duncan*, 391 U.S. at 158-62, surely a statutory *minimum* term of incarceration is an objective indication that the legislature considered an offense more serious than one that need not be punished by any incarceration at all. Mere *potential* consequences of conviction should not carry greater weight than consequences that are certain to follow, just because the legislature decides to enumerate the latter in a different section of the code.³

III. This Is An Excellent Vehicle To Resolve Unsettled Issues Of Constitutional Law.

The question presented is exceptionally important to vindicating the fundamental guarantees of both the Second and the Sixth Amendment. It is commonplace for states to prohibit the possession of firearms by individuals convicted of certain offenses. Indeed, the federal government and virtually every state make it a crime for certain persons to possess a firearm,

³ That conclusion follows *a fortiori* from *Padilla*. Although deportation “is not, in a strict sense, a criminal sanction,” as it is “not within the sentencing authority of the state trial court,” this Court nonetheless found it relevant to the Sixth Amendment right-to-counsel analysis when it follows as “nearly an automatic result” of being adjudged to have committed a certain offense. *Padilla*, 559 U.S. at 364-66. If the Sixth Amendment right to counsel entitles a defendant to be informed of an arguably collateral consequence of conviction that is not even imposed by the same sovereign, then surely the Sixth Amendment right to a jury trial cannot be indifferent to consequences that the *same* sovereign has determined should flow automatically from a finding that the accused committed the offense.

including those convicted of certain offenses. See *Firearm Prohibitions: Summary of State Law*, Giffords Law Center, <https://bit.ly/3ec4WwR> (last visited June 18, 2020). To be sure, those offenses are typically felonies, to which the Sixth Amendment jury-trial right attaches. But as *Andersen* and the statutory framework here confirm, that is not a hard-and-fast rule. And whatever room for debate there may be over whether the Second Amendment can tolerate the loss of the right to keep and bear arms based on the commission of a misdemeanor or juvenile offense, see Tr. of Oral Argument 36:17-19, *Voisine v. United States*, No. 14-10154 (U.S. Feb. 29, 2016) (“JUSTICE THOMAS: Can you think of another constitutional right that can be suspended based upon a misdemeanor violation of a State law?”), there should be no serious debate that if the legislature wishes to impose that harsh penalty, then it must accompany it with the protection of the right to a trial by jury. Simply put, a state may not deprive an individual of her fundamental Second Amendment rights based on a conviction obtained without the jury-trial right that the Sixth Amendment guarantees.

Yet the decision below provides a roadmap for states to evade those basic constitutional guarantees. After all, firearm possession restrictions are almost always housed in separate criminal provisions. That is not because they are deemed less serious than other penalties for the underlying offense. To the contrary, they are separately codified so that the legislature may impose *additional* penalties on those who fail to abide by the disenfranchisement worked as an automatic condition of the earlier conviction. But under the decision below, that effort to impose *more*

serious consequences on a failure to comply with the restrictions imposed as a consequence of the earlier offense actually causes the disenfranchisement to drop out of the Sixth Amendment severity analysis altogether. That cannot be right. And while the most immediate impact may be on Second Amendment rights, because of the proliferation of offender-in-possession laws, the threat to constitutional rights is by no means confined to the Second Amendment context. If the Sixth Amendment truly is indifferent to any consequence that does not come from the statute of conviction, then states could impose all manner of penalties for misdemeanors and juvenile offenses without providing jury-trial rights.

That rule has particularly troubling implications for juveniles and juvenile proceedings. The whole justification for not extending the full panoply of constitutional rights to juvenile proceedings is that those proceedings are rehabilitative, rather than punitive, and focused on the special needs of juveniles. This Court has admonished that it is not enough to label the whole juvenile system quasi-civil. Instead, courts must “candidly appraise[]” their actual nature when “determining the applicability of constitutional rights.” *Breed*, 421 U.S. at 529. Consistent with that admonition, states—including Nebraska—have recognized that they cannot use a civil juvenile process to impose criminal sanctions. *See* Neb. Rev. Stat. §43-280 (“No adjudication by the juvenile court upon the status of a juvenile shall be deemed a conviction ... [or] operate to impose any of the civil disabilities ordinarily resulting from conviction.”). Instead, just as *Blanton* demands the full panoply of constitutional protections if the state chooses to convert a

traditionally petty offense into a serious one by increasing the penalties that flow from a conviction, it likewise demands those same protections if the state chooses to attach criminal consequences to a juvenile offense.

Notably, the Supreme Court of Nebraska did not suggest otherwise. Instead, the court *accepted* the premise that petitioner would be entitled to a jury trial if the loss of Second Amendment rights for the first six years of her adulthood was a “penalty” for the offense with which she was charged. App.10. The court took issue only with whether that loss is in fact a “penalty,” based on its misguided view that only those penalties enumerated in the law defining the offense matter. App.12-13. That reasoning eviscerates the central premise of this Court’s justification for declining to extend the jury-trial right to juvenile proceedings—namely, that a juvenile court is “engaged in determining the needs of the child and of society rather than adjudicating criminal conduct.” *Kent v. United States*, 383 U.S. 541, 554 (1966).

One can certainly debate whether that premise remains true as a general matter. *See, e.g.*, Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at all Stages of the Juvenile Court Process*, 60 Rutgers L. Rev. 175, 182 (2007) (discussing “the increasingly punitive edge of the juvenile justice system”). But once a state crosses the line into imposing *criminal* consequences on a juvenile that last well past the age of majority, it can no longer seriously be said that it is engaged in an effort to determine “the needs of the child.” *Kent*, 383 U.S. at 554. Yet the decision below

would leave states free to impose all manner of criminal consequences as a result of juvenile adjudications that lack the Constitution's procedural protections, so long as they are set forth somewhere other than in the juvenile code.

This case proves the point. No adult can be deprived of the fundamental right to keep and bear arms through a conviction absent an exercise or knowing waiver of the jury-trial right. Every adult charged with a felony in Nebraska is entitled to a jury trial, as is every adult charged with a misdemeanor crime of domestic violence. *See State v. Lintz*, 902 N.W.2d 683, 684 (Neb. 2017). Juveniles (like petitioner) are thus the only Nebraskans who can have their fundamental firearm rights taken away from them for several years of their adulthood without the protection of a jury trial, "the only anchor ... by which a government can be held to the principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *supra*. Nothing in *McKeiver* or any of this Court's other juvenile justice precedents supports that untenable result. If it did, then that would be ample justification to reconsider *McKeiver's* fractured holding.

None of that means that Nebraska may not prohibit juveniles determined to have committed serious offenses from possessing a firearm after they reach the age of majority. It simply means that if Nebraska wants to deprive a juvenile of her Second Amendment rights for the first six years of her adulthood, then just as Nevada must do if it wants to deprive misdemeanants of their Second Amendment rights, it must give her the right to a trial by jury.

Both the Second Amendment and the Sixth Amendment demand nothing less.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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