No. 20-1706

In the
Supreme Court of the United States

LEEVAN ROUNDTREE,
Petitioner,
v.

STATE OF WISCONSIN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. This case raises important, unsettled questions regarding whether an as-applied challenge can ever be raised against a categorical, permanent firearm dispossession law. 1

II. Answering the questions presented will not commit the Court to any particular outcome as to any particular felon dispossession law in any particular circumstances. 6

III. Alternatively, the Court should hold the petition pending the decision in *New York State Rifle & Pistol Ass'n v. Bruen*. 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Binderup v. Attorney General,
836 F.3d 336 (3d Cir. 2016) (en banc)..... 4, 5, 7, 8

District of Columbia v. Heller,
554 U.S. 570 (2008) 3, 9

Holloway v. Attorney General,
948 F.3d 164 (3d Cir. 2020)..... 4

In re United States,
578 F.3d 1195 (10th Cir. 2009) 3

Kanter v. Barr,
919 F.3d 437 (7th Cir. 2019) 3, 8, 9

New York State Rifle & Pistol Association v. Bruen, No. 20-843..... 9, 10

Silvester v. Becerra,
138 S. Ct. 945 (2018) 9

Tennessee v. Garner,
471 U.S. 1 (1985) 5

OTHER AUTHORITIES

Order Denying Certiorari, *Sessions v. Binderup*,
No. 16-847 (June 26, 2017) 5

REPLY BRIEF FOR PETITIONER

I. This case raises important, unsettled questions regarding whether an as-applied challenge can ever be raised against a categorical, permanent firearm dispossession law.

The State's primary argument against certiorari is to claim that, despite the substance of the decision below, the Wisconsin Supreme Court "did not preclude Roundtree or felons like him from bringing as-applied challenges," and in fact "ruled in [his] favor" by "entertain[ing] Roundtree's as-applied challenge to the state felon-disposition law." Br. in Opp. 1, 7. This reading of the decision below is inaccurate. The State is ignoring what the Wisconsin Supreme Court majority actually said.

The majority explicitly refused to "create a hierarchy of felonies" and held that the State may dispossess ***anyone*** who "commit[s] a crime serious enough that the legislature has denominated it a felony." Pet. App. 19a–20a. This holding is broad and unequivocal, renders irrelevant Mr. Roundtree's particular offense and his individual circumstances, and leaves no room for any other non-violent felon to challenge the constitutionality of Wisconsin's dispossession law. If another non-violent felon attempted to raise an as-applied claim against that law in the wake of the decision below, the claim would be both futile and meaningless. Under the majority's opinion, any person convicted of "a crime serious enough that the legislature has denominated it a felony" is subject to dispossession.

Indeed, both dissents below acknowledged that the majority's opinion is not limited to Mr. Roundtree. It instead applies to every current and future nonviolent felon in Wisconsin, including "the hapless possessor of fish who runs afoul of the record-keeping requirements of Chapter 29 of the Wisconsin Statutes." Pet. App. 56a (Grassl Bradley, J., dissenting). As Justice Grassl Bradley explained, "the majority uph[eld] the constitutionality of Wisconsin's categorical ban on the possession of firearms by ***any person convicted of a felony offense***." Pet. App. 29a (emphasis added). Justice Hagedorn, meanwhile, explained that the majority's opinion "disarm[s] ***all those who have committed a felony of whatever kind***." Pet. App. 58a. The State's superficial misreading of the decision below does not change what the majority actually held. Nor does that misreading provide any help to the very real litigants in Wisconsin who now have no fair opportunity to challenge the permanent loss of their Second Amendment rights. The court did not rule in Mr. Roundtree's "favor" below or "entertain" his as-applied challenge. Mr. Roundtree lost, categorically, because the Wisconsin Supreme Court refused to meaningfully adjudicate his as-applied claim challenging the State's categorical, permanent, and unyielding dispossession law.

For that reason, the opinion below does, in fact, place the Wisconsin Supreme Court in the "group of courts" holding that all felons are categorically "excluded from the Second Amendment's protections." Br. in Opp. 9–11. As the State admits, there is an acknowledged "circuit split between federal courts of appeals on whether state-law felons can bring as-applied challenges to federal (or analogous state)

felon-dispossession laws," and this Court should consider granting certiorari in "a case from that group." Br. in Opp. 9, 11. The State attempts to place the opinion below on the more favorable side of the jurisdictional split but, again, the State mischaracterizes the opinion in making this attempt. Like the Fourth, Tenth, and Eleventh Circuits, the Wisconsin Supreme Court has now affirmatively "rejected the notion that *Heller* mandates an individualized inquiry" when reviewing a challenge to a felon dispossession law. *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009).

As explained in the petition, and as the State's brief in opposition concedes, the federal courts are split in at least three ways: (1) some circuits explicitly recognize the viability of as-applied challenges to felon dispossession laws, (2) others, like the court below, categorically foreclose as-applied challenges to dispossession laws, and (3) others have yet to take a position. Pet. 16–22. Furthermore, even courts that recognize the availability of as-applied challenges use divergent constitutional standards to evaluate them. The Seventh and D.C. Circuits (like the majority below) require no specific evidence regarding the actual felony that triggered dispossession. Pet. 25–26 (explaining that the *Kanter* court relied on studies regarding broad classes of nonviolent offenders that then-Judge Barrett described as "lump[ing] all nonviolent felons together"); *see also* Pet. App. 55a (Grassl Bradley, J., dissenting) (explaining that the majority "[a]bandon[ed] any pretense of conducting an individualized inquiry"). By contrast, the Third Circuit requires individualized consideration, including an analysis of the particular "crime of

conviction" as well as specific evidence about the challenger. Pet. 6, 24 (citing *Binderup v. Attorney General*, 836 F.3d 336, at 351 (3d Cir. 2016) (en banc) (opinion of Ambro, J.) and *Holloway v. Attorney General*, 948 F.3d 164, 172–77 & n.10 (3d Cir. 2020)).

While the State claims that these differences in the legal framework across jurisdictions are not "meaningful," the fact that the Third Circuit ruled ***in favor of*** an as-applied challenger belies that claim. *Binderup*, 836 F.3d 336. Whether a reviewing court conducts an individualized analysis does matter—indeed, it can be dispositive. The State attempts to ignore this fact, claiming that the Third Circuit's decision in *Binderup* is irrelevant because it involved offenders convicted of state-law misdemeanors rather than state-law felonies. Br. in Opp. 15. But that merely highlights the question that is in desperate need of resolution by this Court—do the facts and circumstances actually matter to the analysis (as is true for every other as-applied challenge), or are arbitrary legislative labels dispositive?

The offenses at issue in *Binderup*, like Mr. Roundtree's conviction for failure to pay child support, carried lengthy possible prison sentences (up to five years). 836 F.3d at 340 (opinion of Ambro, J.). According to seven of the reviewing judges in *Binderup*, the offenses, despite being labeled "misdemeanors," were "serious by definition," were "functionally felonies," and, in any event, "the distinction [between felonies and misdemeanors] is minor and often arbitrary." 836 F.3d at 388, 391–92 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments) (quoting

Tennessee v. Garner, 471 U.S. 1, 14 (1985)). But like Mr. Roundtree, the *Binderup* challengers were nonviolent, did not reoffend, and ***never spent time in prison***. *Id*. at 340; Pet. App. 55a ("Roundtree was never incarcerated").[1] The question is whether facts like these should matter in the constitutional analysis, regardless of whether a particular offense is given the arbitrary label of a "felony" or a "misdemeanor." According to the decision below, the facts and circumstances pertaining to the individual challenger are irrelevant. According to *Binderup*, those facts are critical. This Court needs to resolve the conflict.

The State also makes the claim that the petition should be denied because the Court has denied other petitions seeking review of the federal felon dispossession law. Br. in Opp. 24–29. But the need for certiorari has not diminished since the United States attempted to seek review in *Binderup* four years ago. Order Denying Certiorari, *Sessions v. Binderup*, No. 16-847 (June 26, 2017). The jurisdictional split is not receding; it continues to deepen. As the law currently stands, the accident of geography determines whether

[1] The State attempts to change the record, falsely claiming that Mr. Roundtree did in fact serve time in prison for failure to pay child support, although the State does not know "how much jail time Roundtree actually served." Br. in Opp. 17 n.10. The State should know better than to make a reckless factual misstatement like this one. As the "notes from the sentencing hearing reflect," *id*., Mr. Roundtree's sentence was ***stayed*** to give him the opportunity to bring his child support obligations current and to satisfy other terms of his probation. "[T]he sentencing court ***did not*** send Roundtree to prison" and "the record shows he made full restitution by paying what he owed." Pet. App. 54a (Grassl Bradley, J., dissenting) (emphasis added).

a person permanently dispossessed of Second Amendment rights can even bring an as-applied challenge. Basic fairness requires that, whatever the outcome in any particular case, the availability of as-applied review should be uniform across jurisdictions.

Additionally, while it is true that this Court has recently declined to accept review of cases challenging the federal dispossession law, those cases asked this Court a very different question: whether the federal law should be struck down under various particular sets of facts. Pet. 3–4 n.2. The petition here, in contrast, asks only whether as-applied review should be available and whether, in conducting that review, a court must analyze the particular non-violent felony of which the challenger was convicted. The questions here pertain only to whether the playing field should be level and consistent across jurisdictions, not who should win in any particular case.

II. Answering the questions presented will not commit the Court to any particular outcome as to any particular felon dispossession law in any particular circumstances.

Respondent spends a significant portion of the brief in opposition arguing the merits of this case. Br. in Opp. 18–29. Again, whether Mr. Roundtree should prevail in a remand to the Wisconsin Supreme Court, after this Court clarifies whether as-applied challenges to felon dispossession statutes are available under the Second Amendment, is not the question. Whether Mr. Roundtree is entitled to raise as-applied arguments against his dispossession, and have a reviewing court genuinely consider those arguments, is the question.

For example, in re-litigating the merits, Respondent claims that the majority below correctly concluded that its version of intermediate scrutiny is proper for as-applied challenges to firearm dispossession laws. The level or type of scrutiny, however, is not the subject of the petition and, ultimately, matters less than whether a reviewing court genuinely considers the individual circumstances of the challenger. The two dissents in this case employed significantly different standards of review (strict scrutiny on the one hand, intermediate scrutiny on the other) but nevertheless both concluded that Mr. Roundtree should prevail in his as-applied challenge. Pet. 13–15. The same was true in *Binderup*. Two groups of judges used significantly different standards to adjudicate an as-applied challenge to the federal felon dispossession law. Ultimately, those two groups of judges arrived at the same outcome, despite significantly different reasoning, because they both seriously considered the individual circumstances of the challengers. *Binderup*, 836 F.3d at 356–57 (opinion of Ambro, J.); *id.* at 374–79 (opinion of Hardiman, J.). The dissent, meanwhile, refused to engage in a genuine as-applied analysis, concluding that "the Second Amendment does not permit this kind of as-applied challenge." *Id.* at 411 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). This underscores the necessity of ***first*** determining whether a genuine as-applied analysis is required by the reviewing court. After that basic, unsettled question is answered, courts (including, if necessary, this one) can decide what level of scrutiny is proper and how that level of scrutiny should be applied in practice.

The State also asserts that this Court should deny the petition because any true as-applied framework would be unworkable. The State argues that "requir[ing] courts to rank felonies by amorphous dangerousness standards would seemingly usurp the legislature's authority to define and categorize crimes." Br. in Opp. 21. Certainly, arguments like those are worth considering if this Court grants certiorari. They are precisely the arguments the Third Circuit and other courts have been wrestling with, and about which they desperately need definitive guidance. *E.g.*, *Binderup*, 836 F.3d at 407 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments) (arguing that as-applied challenges to felon dispossession laws will be "doctrinally unnecessary and administratively unworkable"); *Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting) (arguing that "the government does not get a free pass simply because Congress has established a categorical ban" (quotation marks and citations omitted)). Notably, the Third Circuit has permitted genuine as-applied challenges to felon dispossession laws for years now, and there is no evidence (or suggestion by the State in its brief in opposition) that the sky is falling in Pennsylvania, New Jersey, and Delaware. But regardless of which argument is correct, the legal approach that governs the states of the Third Circuit should be consistent with the way the Second Amendment is applied and enforced everywhere else, including in Wisconsin.

Finally, the State defends the Wisconsin Supreme Court's reliance on generalized statistics about "public order" offenses to justify dispossessing Mr. Roundtree. Br. in Op. 22–23. That, again, is the very question. It

is undisputed that the statistics at issue provided generalized information about "public order" offenders as a class, rather than specific information related to individuals like Mr. Roundtree who fail to pay child support. This Court should grant certiorari to determine whether lumping Mr. Roundtree in with bail jumpers and other potentially violent criminals, rather than considering his individual circumstances, is consistent with the constitution. *Kanter*, 919 F.3d at 467 (Barrett, J., dissenting) (declining to "lump all nonviolent felons together" in conducting an as-applied analysis).

III. Alternatively, the Court should hold the petition pending the decision in *New York State Rifle & Pistol Ass'n v. Bruen*.

Finally, if the Court declines to grant the petition now, the petition should be held until this Court decides *New York State Rifle & Pistol Association v. Bruen*, No. 20-843. In the 12 years since *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court has provided only minimal guidance on the Second Amendment. *See, e.g.*, *Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) ("We have not heard argument in a Second Amendment case for nearly eight years. . . . And we have not clarified the standard for assessing Second Amendment claims for almost 10."). Although the State is correct that the issues raised in this case differ from the issue in *New York State Rifle*, any guidance from this Court in the underdeveloped area of the Second Amendment will likely have at least some bearing on how lower courts consider felon dispossession cases. If that turns out not to be true,

the Court will have the option to deny the petition after *New York State Rifle* is decided.

CONCLUSION

The petition should be granted. Alternatively, the petition should be held and disposed of as appropriate in light of the Court's upcoming decision in *New York State Rifle & Pistol Association*.

Respectfully submitted,

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