No. 20-782

In the Supreme Court of the United States

RAYMOND HOLLOWAY, JR., PETITIONER

v.

ROBERT M. WILKINSON, ACTING ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS 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 the possession of firearms by individuals convicted of felonies and misdemeanor crimes punishable by more than two years of imprisonment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-63) is reported at 948 F.3d 164. The opinion of the district court (Pet. App. 64-86) is reported at 349 F. Supp. 3d 451.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2020. A petition for rehearing was denied on July 9, 2020 (Pet. App. 89-90). The petition for a writ of certiorari was filed on December 3, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2002, petitioner was convicted in Pennsylvania of driving under the influence of alcohol. Pet. App. 4. The charge was dismissed after he completed a rehabilitation program. *Ibid.*

In 2005, petitioner was convicted of driving under the influence at the highest rate of alcohol, in violation of 75 Pa. Cons. Stat. Ann. § 3802(c) (West 2005). Pet. App. 4. Petitioner had been found to have a blood alcohol level of 0.192—a figure that reflects consuming eight or more alcoholic drinks in one hour. See *ibid.*; Michigan Liquor Control Commission, Alcohol Impairment Chart. Pennsylvania classified petitioner's crime as a first-degree misdemeanor and made it punishable by three months to five years of imprisonment. See 75 Pa. Cons. Stat. Ann. § 1104(1) (West 2005); *id.* § 3804(c)(2). Petitioner served a three-month term of confinement under a work-release program. Pet. App. 67.

2. Under 18 U.S.C. 922(g)(1), the longstanding federal statute that disarms people convicted of felonies or of misdemeanors punishable by more than two years of imprisonment, petitioner's 2005 conviction precludes him from possessing a firearm. Pet. App. 3-4; see 18 U.S.C. 921(a)(20). Petitioner filed this suit in the Middle District of Pennsylvania, claiming that Section 922(g)(1) violates the Second Amendment as applied to him. Pet. App. 4.

The district court granted petitioner summary judgment. See Pet. App. 64-86. The court held that, under the Third Circuit's decision in *Binderup* v. *Attorney General United States*, 836 F.3d 336 (2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017), petitioner's crime was insufficiently serious to justify disarmament under the Second Amendment. See Pet. App. 78.

3. The Third Circuit reversed. Pet. App. 1-63.

The court of appeals observed that, in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court had made clear that its decision did not "cast doubt on

longstanding prohibitions on the possession of firearms by felons." Pet. App. 6 (quoting *Heller*, 554 U.S. at 626). The court of appeals acknowledged that, in *Binderup*, the en banc court had held that the Second Amendment allows as-applied challenges to felon disarmament statutes. *Id.* at 8. The court explained, however, that under Judge Ambro's controlling opinion in *Binderup*, an as-applied challenge can succeed only if (at a minimum) the challenger can show that "he was not previously convicted of a serious crime." *Id.* at 13. The court noted that, under Judge Ambro's opinion, factors relevant to seriousness include "(1) whether the crime of conviction was classified as a misdemeanor or felony, (2) whether the criminal offense involves violence or attempted violence as an element, (3) the sentence imposed, and (4) whether there is a cross-jurisdictional consensus as to the seriousness of the crime." *Id.* at 13 n.10.

Applying that framework, the court of appeals held that petitioner's offense was sufficiently serious to justify disarming him. Pet. App. 14-25. The court stated that "[t]here is no question that drunk driving is a serious and potentially deadly crime." *Id.* at 17 (quoting *Virginia* v. *Harris*, 558 U.S. 978, 979 (2009) (Roberts, C.J., dissenting)). The court further observed that individuals "who drive with a [blood alcohol level] significantly above the . . . limit of 0.08% and recidivists * * * [are] the most dangerous offenders." *Ibid.* (quoting *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2179 (2016)). The court also noted that "thirteen individuals were killed every two weeks in Pennsylvania from alcohol-related accidents"; that "'[m]ore than half of all fatal alcohol-related accidents [were] caused by * * * those people whose BACs are .16 or above'"; and that "'one-

third of drunk driving arrests involve[d] repeat offenders.'" *Id.* at 21-22 (citations omitted; brackets in original). The court acknowledged that Pennsylvania had classified petitioner's offense as a misdemeanor, but observed that petitioner's recidivist drunk driving offense constitutes one of the "numerous misdemeanors involv[ing] conduct more dangerous than many felonies." *Id.* at 19 (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 14 (1985)).

Judge Fisher dissented. Pet. App. 26-63. He emphasized that Pennsylvania had classified petitioner's crime as a misdemeanor, that petitioner's offense lacked the use of force as an element, and that petitioner received the minimum sentence. *Id.* at 34-47.

ARGUMENT

Petitioner renews his contention (Pet. 9-21) that 18 U.S.C. 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. The Third Circuit ruled in this case that petitioner could not prevail even under its own standard.

In any event, the Court denied the government's petition for a writ of certiorari in *Binderup*. See *Sessions* v. *Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847). The Court also recently denied a petition for a writ of certiorari presenting the question whether Section 922(g)(1)

violates the Second Amendment as applied to the crime of drunk driving. See *Torres* v. *United States*, No. 20-5579, (Dec. 14, 2020). And the Court has denied numerous other petitions raising similar questions about Section 922(g)(1)'s constitutionality as applied to particular offenses. See, *e.g.*, *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). A definitional provision states that "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include * * * any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. 921(a)(20)(B). 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 citi-

zens "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").

Pennsylvania, to be sure, classifies petitioner's offense as a misdemeanor rather than a felony. See Pet. App. 3. But the term "felony" is "commonly defined to mean a crime punishable by imprisonment for more than one year," *Burgess* v. *United States*, 553 U.S. 124, 130 (2008), and Pennsylvania makes petitioner's offense punishable by up to five years of imprisonment, see Pet. App. 3. No sound basis exists to accord constitutional significance to the "minor and often arbitrary" state-law distinctions in labeling particular crimes as misdemeanors or felonies. *Tennessee* v. *Garner*, 471 U.S. 1, 14 (1985). "[N]umerous misdemeanors involve conduct more dangerous than many felonies," *ibid.*, and a crime's "maximum penalty," not its label, is the best measure of "the legislature's judgment about the offense's severity," *Lewis* v. *United States*, 518 U.S.

322, 326 (1996). Furthermore, the state-law felony-misdemeanor distinction could not form the basis for a viable constitutional rule, because "some States * * * do not label offenses as felonies or misdemeanors" at all. *Burgess*, 553 U.S. at 132.

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. 9-21) 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 in this very case, the Third Circuit held that petitioner could not prevail under its standard.

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. 13-18), 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 in the decision below, the Third Circuit recognized Judge Ambro's opinion as controlling. See Pet. App. 9. 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.

In this case, the Third Circuit held that petitioner could not prevail even under the *Binderup* standard. See Pet. App. 14-25. This case thus neither involves the circuit conflict created by *Binderup* nor provides an appropriate vehicle in which to resolve it.

3. Unable to establish a circuit conflict on the concrete issue whether a person with petitioner's criminal history may be disarmed, petitioner argues (Pet. 9-18) that there is a circuit conflict about what analytical framework courts should use when deciding as-applied challenges to Section 922(g)(1). But petitioner overstates the extent of the disagreement, and in any event, this case would not be an appropriate vehicle to consider that issue because petitioner has not shown that he could prevail under *any* circuit's approach.

Petitioner errs in suggesting (Pet. 16) that his challenge might have succeeded in the First, Sixth, and Eighth Circuits, which he characterizes as "prefer[ring] a test based on dangerousness." The First and Sixth Circuit decisions that petitioner cites do not involve Section 922(g)(1) at all. The First Circuit's decision in *United States* v. *Rene E.*, 583 F.3d 8 (2009), cert. denied, 558 U.S. 1133 (2010), involved a ban on juvenile possession of handguns, see *id.* at 15; and the Sixth Circuit's decision in *Stimmel* v. *Sessions*, 879 F.3d 198 (2018), involved a challenge to 18 U.S.C. 922(g)(9)'s ban on possession of firearms by domestic-violence misdemeanants, see 879 F.3d at 204. And although the Eighth Circuit decision that petitioner cites "left open the possibility that a person could bring a successful as-applied challenge to § 922(g)(1)," it did not actually

accept such a challenge. *United States* v. *Woolsey*, 759 F.3d 905, 909 (2014).

In any event, the Third Circuit focused on the dangerousness of petitioner's underlying offense, observing that individuals "who drive with a [blood alcohol level] significantly above the . . . limit of 0.08% and recidivists * * * [are] the most dangerous offenders." Pet. App. 17 (quoting *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2179 (2016)). In the court's view, petitioner's recidivist drunk driving offense qualifies as one of the "numerous misdemeanors involv[ing] conduct more dangerous than many felonies." *Id.* at 19 (quoting *Garner*, 471 U.S. at 14). Petitioner thus cannot establish that his as-applied challenge to Section 922(g)(1) could succeed under any standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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