NO. 20-812

In the Supreme Court of the United States

LISA M. FOLAJTAR,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In the decade that has passed since this Court's landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the "lower courts have struggled to determine the proper approach for analyzing Second Amendment challenges." *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of certiorari). The resulting quagmire is perfectly illustrated by the federal courts' conflicting treatment of non-violent offenders—like Petitioner—who have long since paid their debt to society, who have never posed any threat of violence, and who ask the court to consider whether the Second Amendment allows the Government to forever bar them from keeping arms. The federal courts of appeals are intractably divided over the question whether such non-dangerous individuals may challenge the application of Section 922(g)(1)'s lifetime firearm ban as-applied, under the Second Amendment.

Respondents *concede* that the lower courts are squarely divided over the question presented. They try to diminish the depth of the split (unpersuasively), but they cannot deny that the split exists. Respondents also briefly suggest that this case does not *implicate* the lower-court division of authority, but that is incorrect: Petitioner squarely raised an as-applied challenge to Section 922(g)(1) at every stage, and the courts below addressed it—even though the claim would have been simply nonviable in at least three other federal circuits.

Nor can Respondents deny that the matter is worthy of this Court's time. After all, just four years ago, *Respondents themselves* represented to the Court that the very same "high-stakes" "circuit conflict" presented in this case "warrants this Court's review." Pet. For a Writ of Certiorari 10, 23, *Sessions v. Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847).

The only thing that has changed since Respondents uttered those words is that this cert-worthy split *has deepened and matured*. The time has come to resolve it.

1. The lower courts are squarely divided over the question presented. While the court below entertained Petitioner's as-applied Second Amendment claim, it would have been facially deficient in at least three Circuits—the Fourth, Tenth, and Eleventh—which have categorically foreclosed as-applied challenges to Section 922(g)(1)'s lifetime firearms ban. *See Hamilton v. Pallozzi,* 848 F.3d 614, 626 (4th Cir. 2017); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009). It also very likely would have been a non-starter in the Fifth and Sixth Circuits. *See United States v. Massey*, 849 F.3d 262, 265 (5th Cir. 2017); *United States v. Carey*, 602 F.3d 738 (6th Cir. 2010).

Since Respondents cannot deny the existence of this circuit conflict, they instead attempt to diminish the depth of the split. They do not succeed. In addition to the court below, two courts of appeals have held that as-applied review of individual applications of

922(g) is available. In *United States v. Williams*, the Seventh Circuit *entertained precisely such a claim*—concluding "that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge," 616 F.3d 685, 692 (7th Cir. 2010); *see also Kanter v. Barr*, 919 F.3d 437, 443 (7th Cir. 2019). And the D.C. Circuit has likewise "left room for as-applied challenges to the statute." *Id.*; *see Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019). Another three Circuits have also indicated receptiveness to such challenges. *See United States v. Adams*, 914 F.3d 602, 605 (8th Cir. 2019); *United States v. Phillips*, 827 F.3d 1171, 1176 (9th Cir. 2016); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011).

To be sure, only the Third Circuit has *decided in favor* of an as-applied challenge to Section 922(g)(1). *See Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016). But that hardly means that such challenges *are not available* in any other circuits; they clearly are (though these courts all apply an erroneous standard, as discussed below). Indeed, many such as-applied challenges *have in fact been heard and considered* in these other circuits. *See, e.g.*, *Kanter*, 919 F.3d 437; *Baer v. Lynch*, 636 F. App'x 695 (7th Cir. 2016); *United States v. Shields*, 789 F.3d 733 (7th Cir. 2015).

Respondents next assert that this case "neither involves the circuit conflict created by *Binderup* nor provides an appropriate vehicle in which to resolve it." BIO 8. Wrong again. While the courts below ultimately applied an incorrect standard to Petitioner's

challenge, they entertained and considered her claim—leading to lengthy, dueling opinions that take up 25 pages of the Federal Reporter. And there is no dispute that if she had resided and brought suit in Colorado, Florida, or North Carolina, she would instead have been stopped at the courthouse door.

Indeed, this Petition presents an *ideal* vehicle to resolve the persistent circuit conflict over the availability of as-applied challenges. There is no dispute that Petitioner's single, isolated offense—making a false statement on her tax return—was not violent or indicative of any dangerousness. App. 33 (Bibas, J., dissenting). And that obviates any risk that the Court could become mired in a narrow, fact-bound dispute over the dangerousness of a particular prior offense. Of course, if this Court affirms the panel majority's standard governing as-applied challenges—or if it declares such challenges unavailable—then Petitioner will not ultimately be able to obtain a firearm. But that only makes the case an "[in]appropriate vehicle," BIO 8, if one grants Respondents the assumption that they are *inevitably going to prevail on the merits*. That is not the standard for granting the writ.

Finally, there can be no question that the question presented merits this Court's review. At stake is nothing less than whether non-violent people like Petitioner may be categorically excluded from the Second Amendment's guarantee, or whether they can be welcomed as "equal member[s] of society" if they have served their time and pose no danger. App. 32, 58 (Bibas, J., dissenting). Indeed, after *Binderup* was

handed down, Respondents affirmatively told this Court that because of the critical importance of this conflict between the circuits—over the constitutional limits on a provision that "form[s] the basis for thousands of criminal prosecutions and tens of thousands of firearm-purchase denials each year"—the Court's "review is warranted." Pet. 10, 23, *Binderup*, 137 S. Ct. 2323. That was true then, and it is true today.

Indeed, the need for this Court's review has only become *more urgent* in the four years since Respondents requested it. Far from resolving itself, the division in the lower courts has metastasized: since 2017, several additional circuits have lined up on one side of the division or the other. *Compare Medina*, 913 F.3d 152, *and Adams*, 914 F.3d 602, *with Hamilton*, 848 F.3d 614; *see also Massey*, 849 F.3d at 265; *Stimmel v. Sessions*, 879 F.3d 198, 203 (6th Cir. 2018). And the substance of the lower-court debate over the issue has also substantially matured. Two years after the decision in *Binderup*, then-Judge Barret's dissent in *Kanter* comprehensively analyzed the pertinent historical materials, in a way that "goes well beyond the sources in *Binderup*." App. 35 (Bibas, J., dissenting). The lengthy opinions below provide additional helpful insight. *Compare* App. 13–26, *with* App. 35–55 (Bibas, J., dissenting).

For that reason alone, the fact that the Court has previously "denied numerous other petitions raising similar questions," BIO 3, plainly supplies no good reason to deny this one. Nearly all of the unsuccessful petitions invoked by Respondents were filed *before*

then-Judge Barret's opinion in *Kanter*, Judge Bibas's opinion below, or both. "Wise adjudication has its own time for ripening," *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., respecting the denial of the petition for writ of certiorari), and whatever the state of the law in 2017 or even 2019, there can be no doubt that the question presented is ripe for this Court's review now.

2. The Court should also grant review to correct the Court of Appeals' mistaken conclusion that the conviction of a non-violent but "serious" crime suffices to permanently taint the offender as an "unvirtuous" citizen, forever banished from the Second Amendment's protective sphere. App. 9. That rule—and the "virtue"-based theory that undergirds it—are flatly contrary to the Second Amendment's text and history. *See* Amicus Br. of American Constitutional Rights Union 9–13 (Jan. 14, 2021).

"History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter*, 919 F.3d at 451 (Barret, J., dissenting). In 17th-century England—where the right codified by our Second Amendment first germinated—the Government possessed the authority to disarm individuals actually "dangerous to the Peace of the Kingdom," Militia Act of 1662, 13 & 14 Car. 2, c. 3, § 13 (1662), as well as those who actively carried arms with the malicious intent "to terrify the King's subjects," *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686); *see* Amicus Br. of Mountain States Legal Foundation 17–19 (Jan. 14,

2021). And on this side of the Atlantic, the American Colonies—and later States—similarly disarmed certain narrow groups of individuals then thought to pose a present, acute danger of lawless violence, such as Native Americans or those who refused to swear allegiance to the newly independent American regime. *See Binderup*, 836 F.3d at 368 (Hardiman, J., concurring); Amicus Br. of Firearms Policy Foundation, *et al.* 6–8 (Jan. 12, 2021).

History shows, however, that the Government's ability to disarm individuals "extends only to people who are *dangerous*." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). It *does not* allow the Government to ban all former criminal offenders, or even felons, from possessing arms "simply because of their status as felons." *Id.* Indeed, as Judge Bibas noted in dissent below, "I cannot find, and the majority does not cite, any case or statute from [the Founding] era that imposed or authorized such bans." App. 37 (Bibas, J., dissenting). The snippets of evidence cited by Respondents do not fill this breach.

As an initial matter, this Court did not, as Respondents pretend, settle the issue in either *Heller* or *McDonald*. Yes, *Heller* described "longstanding prohibitions on the possession of firearms by felons" as "presumptively lawful." 554 U.S. at 626, 627 n.26. But the *Heller* Court *nowhere* purported to definitively demarcate the nature or boundaries of that or any other limitation on the Second Amendment's scope—as is evident from the Court's statement that it had not conducted "an exhaustive historical analysis" of the

matter, from its characterization of these limits as "*presumptively* lawful," and from its express declaration, at the end of the opinion, that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id.* at 626, 627 n.26, 635 (emphasis added); *see Kanter*, 919 F.3d at 445 ("*Heller* did not answer this question.").

Respondents assert that *Heller*'s statement that the plaintiff there would be entitled to obtain a firearm only "[a]ssuming that [he] is not disqualified from the exercise of Second Amendment rights," 554 U.S. at 635, effectively "incorporated [the identified] exceptions into its holding," BIO 4. But like the earlier discussion of "presumptively lawful" measures it references, this passage plainly does not definitively settle the nature or scope of any disqualifications. Nor does the passage of *McDonald* that Respondents cite go any further in defining the boundary lines of the limitations that, it notes, *Heller* presumed. *See McDonald*, 561 U.S. at 786.

Turning from precedent to history, Respondents assert that "[t]he historical record supports" the categorical exclusion of all "convicted felons [from] the scope of the Second Amendment." BIO 5. Not so. Respondents' principal piece of evidence is the proposal by the *dissenters* in the 1787 Pennsylvania ratifying convention to add a constitutional provision stating that "no law shall be passed for disarming the people or any of them *unless for crimes committed, or real danger of public injury from individuals*." 2 Bernard

Schwartz, *The Bill of Rights: A Documentary History* 662, 665 (1971) (emphasis added). The first sign of trouble is that this document failed to command a majority of *even a single State's convention*. "A single failed proposal is too dim a candle to illumine the Second Amendment's scope." App. 38 (Bibas, J., dissenting).

Moreover, even setting aside the provenance of the Pennsylvania dissent, its language is ambiguous at best. The proposal *could* be read Respondents' way, as excluding *both* "those who have committed any crime—felony or misdemeanor, violent or nonviolent" *and* "those who have not committed a crime but nonetheless pose a danger to public safety." *Kanter*, 929 F.3d at 456 (Barrett, J., dissenting). But it can just as readily be read as "capturing one group: those who pose a danger to public safety, whether or not they have committed a crime." *Id.* And since "no one even today reads this provision to support the disarmament of literally all criminals, even nonviolent misdemeanants," *id.*, the most plausible interpretation is the second one—which does not support Respondents' "virtue"-based theory at all.

Two other state-convention proposals affirmatively *undermine* Respondents' theory. Massachusetts proposed a right to keep arms limited to "peaceable citizens," and New Hampshire would have allowed disarmament only of "such as are or have been in Actual Rebellion"—demonstrating not that the right was limited to virtuous citizens, but rather that it did not "extend to certain categories of people deemed too

dangerous to possess firearms." *Binderup*, 836 F.3d at 367 (Hardiman, J., dissenting).

Skipping ahead eight decades, Respondents next invoke Justice Cooley's 1868 Treatise on Constitutional Law. But even assuming this late-nineteenth-century work accurately set forth the "the public understanding in 1791 of the right codified by the Second Amendment," *Gamble v. United States*, 139 S. Ct. 1960, 1975 (2019), the fact of the matter is that Cooley's reference to exclusion of "the idiot, the lunatic, and the felon" from the body of "*The People*" was made in, and limited to, the specific context of determining "those persons who are permitted . . . to exercise the elective franchise." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *29 (1871). Because the right to vote is the paradigmatic "civic right," Cooley's discussion sheds no light whatsoever on the limits that apply to the Second Amendment's "*individual* right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592 (emphasis added); *see Kanter*, 929 F.3d at 462–64 (Barrett, J., dissenting) (discussing difference between civic rights and individual rights); *Binderup*, 836 F.3d at 371 n.16 (Hardiman, J., dissenting); Amicus Br. of the Cato Institute, *et al.* 4–5 (Jan. 14, 2021).

Respondents attempt to fill the gap in primary-source support for their theory with secondary sources, but the two law-review articles they cite cannot fill the void of primary sources. Professor

Reynolds's *A Critical Guide to the Second Amendment* asserts that "felons, children, and the insane were excluded from the right to arms" based on the "classical republican" theory "of the 'virtuous citizen,' " but the only support he offers for that proposition are citations to two other law-review articles that, in turn, are based entirely on the Pennsylvania, Massachusetts, and New Hampshire ratification-convention proposals discussed above. 62 TENN. L. REV. 461, 480 (1995); *see* App. 40–41 (Bibas, J., dissenting). The other article, Robert Dowlut's *The Right to Arms*, similarly asserts that "infants, idiots, lunatics, and felons" are excluded from the Second Amendment right. 36 OKLA. L. REV. 65, 96 (1983). But again, the sources cited for the assertion collapse upon inspection: the only references are to Cooley's irrelevant discussion of voting rights, and three 19th-century state constitutions that limited the right to arms "to 'free white men' " but did not refer to criminals at all. *Id.* at 96 n.147.

3. Finally, the Court should also grant review to clear up the conflict and confusion that has prevailed among the lower courts, more generally, surrounding the "longstanding" "presumptively lawful regulatory measures" identified in *Heller*. 554 U.S. at 626–27 & n.26. Courts have divided over the implications of *Heller*'s characterization of the limits in question as "presumptively" valid—with some reading it as inviting as-applied challenges to the identified limits, *Williams*, 616 F.3d at 692; others interpreting it as creating a presumption that a plaintiff may rebut "by

showing the regulation does have more than a de minimis effect" on the Second Amendment right, *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1253 (D.C. Cir. 2011); and still others understanding it as merely an indication of the tentative nature of the Court's identification of the specific regulatory measures it singled out, *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010).

Similarly, while *Heller* adopted an explicitly originalist approach to the Second Amendment, *see* 554 U.S. at 576–77, 634–35, many lower courts have eroded the original meaning of the Second Amendment's protections by blessing categories of restrictions that date back no later than *the early-to-mid-twentieth century*—and that are plainly not "fairly supported by [a] historical tradition" dating back to the Founding, *id.* at 627—as nonetheless outside the Second Amendment's scope. *See Heller II*, 670 F.3d at 1253–54; *NRA v. BATFE*, 700 F.3d 185, 196 (5th Cir. 2012). The result has been a steady expansion of restrictions deemed sufficiently "longstanding" to count as presumptively constitutional, directly at odds with this Court's instructions that the scope of the Second Amendment must be dictated by the understanding of the people who adopted it, not "future judges" who may "think that scope too broad." *Heller*, 554 U.S. at 635.

The Court should grant review to clarify the proper role of the "presumptively lawful regulatory measures" identified by *Heller* in the Second Amendment analysis.

CONCLUSION

The Court should grant the writ.

March 30, 2021

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