No. 20-_____

In The
Supreme Court of the United States

KENNETH E. FLICK,

Petitioner,

v.

JEFFREY A. ROSEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1987, Ken Flick was convicted of criminal copyright violation and smuggling for importing counterfeit cassette tapes. Flick served a four-and-a-half month sentence in a halfway house, successfully completed community service and probation, and made restitution to the Recording Industry Association of America.

Flick has no other criminal record. A notable inventor, Flick is a peaceful, law-abiding citizen active in philanthropic, religious and civic affairs. Yet on account of his counterfeit cassette tape convictions, 18 U.S.C. § 922(g)(1) permanently bars Flick's possession of firearms.

The Third, Seventh, and D.C. Circuits hold that individuals convicted of felonies may challenge the application of firearm dispossession laws under the Second Amendment, although the basis for such challenges remains unsettled. The First, Eighth, and Ninth Circuits have expressed openness to such challenges, while the Fourth, Sixth, Tenth, and Eleventh Circuits bar them.

The question presented is:

Whether the Second Amendment secures Ken Flick's right to keep and bear arms, notwithstanding his convictions for importing and selling counterfeit cassette tapes thirty-three years ago.

LIST OF PARTIES

The petitioner is Kenneth E. Flick, who was the plaintiff and appellant below.

The respondent is Jeffrey A. Rosen, in his official capacity as Acting Attorney General of the United States. Former Attorney General William P. Barr was the appellee below. Barr's predecessors in office, Jefferson B. Sessions, III, and Matthew G. Whitaker (acting) were defendants in the district court.

LIST OF PROCEEDINGS

1. *Flick* v. *Sessions*, United States District Court for the District of Columbia, No. 1:17-cv-00529-TSC. The Court transferred the case to the United States District Court for the Northern District of Georgia on March 30, 2018.

2. *Flick* v. *Sessions*, United States District Court for the Northern District of Georgia, No. 1:18-cv-01531-TCB. The court entered its judgment on February 12, 2019.

3. *Flick* v. *Attorney General*, United States Court of Appeals for the Eleventh Circuit, No. 19-11433. The court of appeals entered its judgment on July 20, 2020. The court of appeals denied petitioner's petition for rehearing en banc on October 21, 2020.

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Kenneth E. Flick respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Few of this Court's pronouncements have splintered the courts of appeals as much as the statement that felon disarmament is "presumptively lawful"

under the Second Amendment. *District of Columbia* v. *Heller*, 554 U.S. 570, 626-27 n.26 (2008).

Legal presumptions tend to be rebuttable. And while legislatures have wide latitude to define crimes and classify them as felonies, they are not free to cast people out from the Constitution's protection. Accordingly, three circuits hold that people legislatively labeled "felons" may retain or regain the right to possess firearms. Another three circuits have acknowledged that possibility. But in four other circuits, whatever the legislature decides is the only and final word—anyone classified as a "felon" forever loses the fundamental right to keep and bear arms.

Unfortunately, even courts that allow as-applied challenges to felon disarmament laws have proven unable or unwilling to articulate the grounds meriting relief. Everyone agrees that the government may disarm dangerous people, but conflicts abound as to the status of those whose possession of arms would spell no special risk. Over forceful arguments pointing to dangerousness as the only historical basis for disarmament, courts that allow as-applied challenges tend to hold that individuals merit relief only if they remained "virtuous" despite their conviction, a status that felony classification is typically said to revoke. How one's offense might be distinguished from other felonies that indicate a lack of virtue is never explained.

If this problem concerned a normal constitutional right, courts might have developed approaches to resolving it. But the disfavored Second Amendment is at

issue. And so the dominant trend has been to guide as little as possible, if not at all; to suggest theoretical avenues for relief in non-qualifying cases, only to retract the suggestions in more meritorious cases; and to declare that claimants fall short of qualifying without defining the qualifications. Awaiting further percolation in the lower courts would be a waste of time. Not for lack of opportunity, enough of the circuits have said all that they are willing to say on the subject. The lower courts may be busy incarcerating people for violating felon disarmament laws, but they are uninterested in answering the Second Amendment question of when such laws go too far. For its part, the federal government sought this Court's intervention when it lost on this issue. *See* Pet. For a Writ of Certiorari, *Sessions* v. *Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847).

Ken Flick presents an excellent vehicle by which these important issues may finally be resolved. Over three decades ago, Flick imported counterfeit cassette tapes, netting him felony convictions for copyright infringement and smuggling. By any measure, Flick has long been fully rehabilitated. Flick is a model citizen, and nothing in his positively remarkable life's story suggests that Flick's possession of firearms poses any heightened risk. Yet without discussion, the court of appeals held to its decade-old summary declaration that those declared "felons" lack Second Amendment rights. This Court should review the judgment refusing Flick relief, and resolve these recurring issues of national importance that have split the courts.

OPINIONS BELOW

The Eleventh Circuit's opinion, App.1a-3a, is reported at 812 F. App'x 974. The Northern District of Georgia's opinion and order dismissing the case, App.4a-10a, is unreported. The opinion of the District Court for the District of Columbia transferring the case, App.11a-18a, is reported at 298 F. Supp. 3d 205.

JURISDICTION

The court of appeals entered its judgment on July 20, 2020, and denied a timely petition for rehearing en banc on October 21, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, 18 U.S.C. §§ 921(a)(20), 922(g)(1), 924(a)(2), and the relevant historical versions of 17 U.S.C. § 506(a) (1982), and 18 U.S.C. §§ 545 (1982) and 2319(b)(1)(A) (1982), are reproduced at App.21a-24a.

STATEMENT OF THE CASE

A. Regulatory Background

In 1938, Congress prohibited individuals convicted of a "crime of violence" from shipping or receiving firearms in interstate commerce. Federal Firearms Act, Pub. L. No. 75-785, §2(e), (f), 52 Stat. 1250, 1251 (1938) ("FFA").[1] In 1961, Congress broadened this prohibition's scope to include individuals convicted of nonviolent crimes, replacing the "crime of violence" predicate with "crime punishable by imprisonment for a term exceeding one year." *See* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

In 1968, Congress prohibited the possession of firearms by individuals convicted of crimes punishable by over a year's imprisonment. Although courts generally refer to this prohibition, now codified at 18 U.S.C. § 922(g)(1), as the "felon in possession" statute, *see*, *e.g.*, *Johnson* v. *United States*, 576 U.S. 591, 595 (2015), the statute itself does not use "felony" terminology.[2]

Nearly all offenses punishable by over a year's imprisonment trigger Section 922(g)(1)'s prohibition. The prohibition applies broadly, regardless of the predicate

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[1] "The term 'crime of violence' means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." FFA § 1(6), 52 Stat. at 1250.

[2] All further statutory references are to Title 18 of the United States Code unless noted otherwise.

offense's link to violence or classification as a felony or misdemeanor. However, the scheme excludes convictions "pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices," and state misdemeanors "punishable by a term of imprisonment of two years or less." Section 921(a)(20). Moreover, convictions that have been "expunged, or set aside or for which a person has been pardoned or has had civil rights restored" do not trigger the prohibition, unless such action "expressly provides that the person may not ship, transport, possess or receive firearms." *Id.*

A violation of Section 922(g)(1) is punishable by fine and imprisonment of up to ten years. *See* Section 924(a)(2).

B. The Second Amendment

This Court began its interpretation of the Second Amendment "with the strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Heller*, 554 U.S. at 581. It did not detail the Second Amendment right's full contour, but held (among other conclusions) that "law-abiding, responsible citizens" enjoyed the right. *Id.* at 635.

In guiding dictum, this Court afforded presumptive validity to "longstanding prohibitions on the possession of firearms by felons," among other restrictions, because such laws might reflect the right's "scope" as would be revealed by "historical analysis." *Id.* at 626-27 & n.26. "Constitutional rights are enshrined with

the scope they were understood to have when the people adopted them." *Id.* at 634-35.

"The Founding generation had no laws . . . denying the right [to keep and bear arms] to people convicted of crimes." Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009). "Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding." *Id.*

C. Ken Flick

1. Married since 1974, Ken Flick and his wife raised three children and enjoy five grandchildren. The couple has now lived in Douglasville, Georgia for over thirty years. Complaint ¶ 24.

Flick is a prolific and notable inventor and entrepreneur. He currently owns over 150 U.S. patents and numerous parallel foreign patents. *Id.* ¶ 27. Since 2003, Flick's holding company has earned over $50 million in revenue from licensing his patent portfolio to various companies in the car audio and security industry. *Id.* ¶¶ 28-29. Flick's inventions have significantly contributed to various essential automotive technologies. *Id.* ¶¶ 31-32. Moreover, his former distribution business has sold millions of car alarms, directly employing nearly 100 Atlanta workers. *Id.* ¶¶ 33-34. Flick continues to manage his patent and licensing portfolio and invent new products. *Id.* ¶ 30.

2. Between January, 1985 and June, 1986, under financial distress, Flick made a serious lapse of judgment. He facilitated the counterfeiting of cassette tapes overseas, and their importation into the United States for sale at flea markets. *Id.* ¶ 10.

Flick fully cooperated with the government's investigation, waived indictment, and pled guilty to copyright violation, 17 U.S.C. § 506(a) (1982), 18 U.S.C. § 2319(b)(1)(A) (1982), and smuggling, 18 U.S.C. § 545 (1982). Complaint ¶ 13. Flick is thus forever barred from possessing firearms per Section 922(g)(1), and refrains from possessing firearms. *Id.* ¶ 7.

The government credited Flick's prompt acknowledgment of wrongdoing and significant cooperation. *Id.* ¶¶ 13-14. The district court sentenced Flick to four months in a half-way house for having smuggled the cassette tapes, and to five years of probation for copyright infringement. *Id.* ¶ 16. It also ordered Flick to make restitution in the amount of $184,549, and to perform 150 hours of community service. *Id.* Pursuant to an agreement among Flick, the Recording Industry Association of America, and the government, the district court reduced the restitution amount to $60,000 and the probation period to two years. *Id.* ¶¶ 17-18. Flick made the required restitution. *Id.* ¶ 2. Furthermore, in atonement for his crime, Flick donated $100,000 to MusiCares, the GRAMMY Foundation's charitable arm that provides substance abuse counseling and recovery services to musicians. *Id.* ¶ 38.

3. The cassette convictions are Flick's only contact with the criminal justice system. *Id.* ¶ 23. Flick actively engages in civic affairs. He is dedicated to his faith and attends church services regularly. Flick is also philanthropic, having donated over $10 million to charities since 1987. *Id.* ¶ 35-37.

Leading members of the community, including business leaders, religious leaders, and elected local, state, and federal representatives, can attest to Flick's law-abiding nature and responsible citizenship since his non-violent 1987 convictions. *Id.* ¶ 39. The Georgia State Board of Pardons and Paroles restored Flick's civil and political rights, including his right to keep and bear arms under state law. *Id.* ¶ 41. Upon its own investigation, the Canadian government indefinitely approved Flick's rehabilitation, removed his immigration bar, and issued him a permit for border crossings. *Id.* ¶ 42. The U.S. Attorney who prosecuted Flick supports the restoration of Flick's rights based on his personal knowledge of Flick, and on Flick's reputation in the community, his extensive civic work, his religious and charitable contributions, and his professional accomplishments as a leader in the vehicle safety and security field. *Id.* ¶ 43.

D. Proceedings Below.

1. Flick brought suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief from Section 922(g)(1)'s application, pursuant to 28 U.S.C. §§ 1331, 1343, and

2201-2202. The district court granted the government's motion to transfer the case to the United States District Court for the Northern District of Georgia per 28 U.S.C. § 1404(a). App.18a.

2. The Northern District of Georgia granted the government's motion to dismiss the case. Applying the familiar two-step framework for resolving Second Amendment cases, the district court held that Flick's claim failed at step one on account of his felony record. "As the Eleventh Circuit has explicitly held, 'statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment.'" App.8a (quoting *United States* v. *Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam) (other citation omitted)).

Flick noted that neither the pleadings nor the opinion in *Rozier* reflected any argument that sought to distinguish Mr. Rozier from the felon class. Per Flick, *Rozier*'s quoted holding is thus inapposite in considering his as-applied challenge. The district court disagreed. It reasoned that *Rozier* involved an as-applied claim, because the defendant in that criminal matter claimed the right to possess a gun for, specifically, home defense. App.8a. In turning aside that challenge, the district court held that *Rozier* categorically precluded all potential constitutional challenges to Section 922(g)(1).

3. The Eleventh Circuit affirmed. Endorsing the view that *Rozier* precludes all challenges to Section 922(g)(1), it offered only that "we are bound to follow a prior precedent unless and until it is overruled by this

court en banc or by the Supreme Court." App.3a (internal quotation marks omitted). The court of appeals denied Flick's timely petition for rehearing en banc. App.19a.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are split on the question of whether the Second Amendment offers individualized relief from felon firearm prohibitions.

"[E]very federal court of appeals to address the issue has held that § 922(g)(1) does not violate the Second Amendment on its face." *Kanter* v. *Barr*, 919 F.3d 437, 442 (7th Cir. 2019) (citations omitted). But "courts of appeals are split as to whether *as-applied* Second Amendment challenges to § 922(g)(1) are viable." *Id.* (citations omitted). The same considerations apply to state felon disarmament laws. *See*, *e.g.*, *Hamilton* v. *Pallozzi*, 848 F.3d 614 (4th Cir. 2017) (challenge to Md. Code Ann., Pub. Safety §§ 5-133(b)(1) and 5-205(b)(1)).[3]

More specifically, the circuits that are open to as-applied challenges are open to them on individualized, not categorical grounds. The basis for relief in such courts defies definition, but never turns on

[3] While some state felon disarmament laws mirror Section 922(g)(1)'s criteria, others are substantially narrower, targeting only enumerated offenses or types of offenses. *See*, *e.g.*, 18 Pa. C.S. § 6105(b); N.J. Stat. Ann. § 2C:39-7.

widely-applicable criteria, such as whether the offense was violent.

A. The Third, Seventh, and D.C. Circuits have held that felon firearm prohibitions are subject to as-applied Second Amendment challenges.

1. The Third Circuit has repeatedly held that individuals, including felons, may raise as-applied challenges to firearm dispossession laws. But after a promising start, it has become quite unclear as to what the criteria for relief might be.

Initially, the Third Circuit held that an individual may obtain relief from Section 922(g)(1)'s prohibition by "present[ing] facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." *United States* v. *Barton*, 633 F.3d 168, 174 (3d Cir. 2011). The "historically barred" class consisted of those "likely to commit violent offenses." *Id.* at 173-74.

In *Binderup* v. *Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), the Third Circuit split 8-7 in upholding two as-applied constitutional challenges to Section 922(g)(1). The majority fractured as to why the Second Amendment secured the challengers' right to possess firearms. Five judges would have followed *Barton*, and determined that the challengers prevailed because there was no reason to believe that they have a "propensity for violence." *Id.* at 380 (Hardiman, J.,

concurring in part and concurring in the judgments). Three judges offered that the challengers retained the Second Amendment's protection at step one because their misdemeanors (corruption of a minor, and carrying a gun without a license, respectively) were not "serious." *Id.* at 351-53 (Ambro, J., concurring). The government then failed to meet its step two burden of showing that the challengers' possession of firearms would endanger public safety. *Id.* at 353-57. The remaining seven judges dissented, arguing that all crimes falling within Section 922(g)(1)'s ambit are "serious," and thus ineligible for as-applied relief. *Id.* at 388 (Fuentes, J., dissenting).

Judge Ambro's *Binderup* plurality offered that "there are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights," *id*. at 351 (Ambro, J., concurring), though it noted that where crimes are labeled felonies, "the individual's burden would be extraordinarily high—and perhaps even insurmountable." *Id.* at 353 n.6. The Third Circuit later confirmed the *Binderup* plurality as controlling precedent, but added another indicia of seriousness barring Second Amendment relief: whether the offense "presents a potential for danger and risk of harm to self and others." *Holloway* v. *Att'y Gen.,* 948 F.3d 164, 173 (3d Cir. 2020) (citations and footnote omitted).

Most recently, the Third Circuit held that

> the legislature's decision to label an offense a felony is generally conclusive in our analysis of seriousness, and while we do not foreclose

> the possibility that a legislature could be overly punitive and classify as a felony an offense beyond the limits of the historical understanding, a "non-serious felony" would be rare.

Folajtar v. *Att'y Gen.*, No. 19-1687, 2020 U.S. App. LEXIS 37006, at *9-*10, 2020 WL 6879007 (3d Cir. Nov. 24, 2020) (footnote omitted).

2. The Seventh Circuit held that "*Heller* referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *United States* v. *Williams*, 616 F.3d 685, 692 (7th Cir. 2010). Although a divided Seventh Circuit panel denied as-applied relief to a felon whose crime it found egregious, it still acknowledged that relief remains available to others. *Kanter*, 919 F.3d at 443, 450 n.12; *see also Hatfield* v. *Barr*, 925 F.3d 950 (7th Cir. 2019).

3. The D.C. Circuit is also open to as-applied claims, though on what basis remains unclear. "To prevail on an as-applied challenge, [a felon] would have to show facts about his conviction that distinguishes him from other convicted felons encompassed by the § 922(g)(1) prohibition." *Medina* v. *Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019). "[I]t may be possible for a felon to show that his crime was so minor or regulatory that he did not forfeit his right to bear arms by committing it. . . ." *Id.*

B. The First, Eighth, and Ninth Circuits acknowledge the potential for as-applied relief from felon firearm prohibitions.

1. The First Circuit acknowledges that this Court "may be open to claims that some felonies do not indicate potential violence and cannot be the basis for applying a categorical [firearms] ban," or, phrased differently, "that [this] Court might find some felonies so tame and technical as to be insufficient to justify [a firearms] ban." *United States* v. *Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011).

2. The Eighth Circuit has "yet to address squarely whether § 922(g)(1) is susceptible to as-applied challenges." *United States* v. *Adams*, 914 F.3d 602, 605 (8th Cir. 2019) (citation omitted). But it rejected an as-applied challenge to Section 922(g)(1) where the felon "has not shown that he is no more dangerous than a typical law-abiding citizen." *United States* v. *Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (internal quotation marks omitted).

3. The Ninth Circuit has "suggested it is far from settled whether someone can mount an as-applied Second Amendment challenge where the underlying felony is so minor and does not have a historical analogue in the Founding era." *United States* v. *Torres*, 789 F. App'x 655, 658 (9th Cir. 2020) (Lee, J., concurring). "Our court has not directly addressed this issue." *Duncan* v. *Becerra*, 970 F.3d 1133, 1149 n.9 (9th Cir. 2020) (citing *United States* v. *Phillips*, 827 F.3d 1171 (9th Cir. 2016)). No personal criteria were at issue in *Phillips*, which rejected a categorical challenge to basing

Section 922(g)(1)'s disability upon a traditional, if non-violent felony, but the court otherwise left open the as-applied question. "Can a conviction for stealing a lollipop . . . serve as a basis under § 922(g)(1) to ban a person for the rest of his life from ever possessing a firearm, consistent with the Second Amendment? That remains to be seen." *Phillips*, 827 F.3d at 1176 n.5.

Notably, the Ninth Circuit rejected an as-applied challenge to Section 922(g)(9)'s prohibition on firearms possession by domestic violence misdemeanants where the claimant "alleged no other facts about himself and his background that would distinguish him from any other domestic violence misdemeanant." *Fortson* v. *L.A. City Attorney's Office*, 852 F.3d 1190, 1194 (9th Cir. 2017) (citing *Binderup*, 836 F.3d at 346) (other citation omitted)).

C. The Fourth, Sixth, Tenth, and Eleventh Circuits do not acknowledge the prospect of relief from felon firearm prohibitions.

Three circuits share the Eleventh Circuit's rejection of as-applied relief from felon firearm prohibitions.

1. The Fourth Circuit previously "recognized the possibility that an as-applied challenge to a felon disarmament law could succeed in rebutting the presumption [of lawfulness]." *Hamilton*, 848 F.3d at 622-23 (citation omitted). But it now bars such claims unless "the felony conviction is pardoned or the law

defining the crime of conviction is found unconstitutional or otherwise unlawful." *Id.* at 626 (footnote omitted). Of course in such cases, no as-applied challenge is required. Pardoned offenses are excluded from the federal prohibition, *see* Section 921(a)(20), and the writ of *corum novis* or state expungement procedures would address convictions for crimes that can no longer be crimes.[4]

2. The Sixth Circuit has repeatedly "declined to 'read *Heller* to require an individualized hearing to determine whether the government has made an improper categorization' and questioned 'the institutional capacity of the courts to engage in such determinations.'" *Stimmel* v. *Sessions*, 879 F.3d 198, 210 (6th Cir. 2018) (quoting *Tyler* v. *Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 698 n.18 (6th Cir. 2016) (en banc)). Although these cases involved other prohibitions, there is no reason to suspect that the Sixth Circuit would depart from this approach in the felon disarmament context.

3. The Tenth Circuit "rejected the notion that *Heller* mandates an individualized inquiry concerning felons pursuant to § 922(g)(1)." *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (citing *United States*

[4] In theory, the Fourth Circuit remains open to as-applied claims by misdemeanants swept within "felon disarmament laws." *Hamilton*, 843 F.3d at 626 n.11.

v. *McCane*, 573 F.3d 1037 (10th Cir. 2009)) (unpublished order but attached to published dissent).[5]

II. The court of appeals erred as a matter of precedent, reason, and history.

1. In dismissing Flick's challenge, the Eleventh Circuit eschewed any discussion of his claim's merits. It did nothing more than cite to its earlier per curiam opinion in *Rozier*, which was equally bereft of any discussion beyond a simple reading of *Heller* as foreclosing all constitutional challenges to Section 922(g)(1).

That reading is wrong. Even if "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful," *Heller*, 554 U.S. at 626-27 & n.26, "presumptively lawful" does not mean "always lawful under any and all circumstances." Rather, "presumptively lawful" means that the disarmament of a felon is presumed—but *only* presumed—to be consistent with the traditional right to arms.

"Unless flagged as irrebutable, presumptions are rebuttable." *Binderup*, 836 F.3d at 350 (citations omitted). "A presumption of constitutionality 'is a presumption

[5] The government often claims that the Fifth Circuit has foreclosed as-applied challenges to Section 922(g)(1), but that is far from clear. On plain error review, the Fifth Circuit rejected only a felon's claim that Section 922(g)(1) is unconstitutional because he lacked a violent intent in possessing the gun. *United States* v. *Scroggins*, 599 F.3d 433 (5th Cir. 2010).

. . . [about] the existence of factual conditions supporting the legislation. As such it is a *rebuttable* presumption.'" *Id.* at 361 n.6 (Hardiman, J., concurring) (quoting *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 209 (1934)).

> [W]e doubt the Supreme Court couched its first definitive characterization of the nature of the Second Amendment right so as to completely immunize this statute from any constitutional challenge whatsoever. Put simply, we take the Supreme Court at its word that felon dispossession is *presumptively* lawful.

Id. (internal quotation marks omitted).

2. The preclusive reading of "presumptively lawful" is also nonsensical, creating a new creature in our constitutional order: The fundamental right whose dimensions are drawn by legislatures. But legislatures may not define a fundamental right's contours. "[F]uture legislatures" cannot override "the scope [rights] were understood to have when the people adopted them." *Heller*, 554 U.S. at 634.

Section 922(g)(1) broadly applies on the basis of an offense's potential sentencing range. But "[a] crime's maximum possible punishment is 'purely a matter of legislative prerogative,'" *Binderup*, 836 F.3d at 351 (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 274 (1980)), "subject only to 'constitutional prohibitions on irrational laws,'" *id.* (quoting *Heller*, 554 U.S. at 628 n.27) (other citation omitted). The government has pressed

that point here before. "[A]s this Court has emphasized, the distinction between felonies and misdemeanors 'is minor and often arbitrary,' and 'numerous misdemeanors involve conduct more dangerous than many felonies.'" Pet. 16, *Binderup*, 137 S. Ct. 2323 (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 14 (1985)).[6] Felonies in some states may not even be crimes in others. If this sort of legislative determination sufficed to place people outside the Second Amendment's scope, wholesale permanent denial of a fundamental right would effectively be subject to rational-basis review. *Binderup*, 836 F.3d at 351.

Courts cannot defer to legislative decisions in defining a fundamental right's scope. Affirming relief, both *Binderup* authors used the phrase "puts the rabbit in the hat" to dismiss the notion that sentencing classifications, without more, remove individuals from the right's scope. *Binderup*, 836 F.3d at 350 (Ambro, J.); *id.* at 365 n.11 (Hardiman, J., concurring).

"Why not" exclude people from the Second Amendment's scope for "all misdemeanors?" *United States* v. *Chovan*, 735 F.3d 1127, 1148 (9th Cir. 2013) (Bea, J., concurring).

> Why not minor infractions? Could Congress find someone once cited for disorderly conduct to be "not law-abiding" and therefore to have forfeited his core Second Amendment right?. . . . Why should we not accept every congressional determination for who is or is

[6] Note the government's emphasis on dangerousness.

> not "law-abiding" and "responsible" for Second Amendment purposes?

Id. "Why not? Because *Heller* was a constitutional decision. It recognized the scope of a passage of the Constitution. The boundaries of this right are defined by the Constitution. They are not defined by Congress." *Id.*

3. The Second Amendment's framers understood copyright infringement. U.S. Const. art. I, § 8, cl. 8. Were they transported to the year 1987, the framers could have grasped how "the Progress of Science and the useful Arts," *id.*, led to cassette tapes and the music they contained. Yet James Madison and 1791's ratifying public would have all been mystified as to how the Second Amendment could tolerate the federal government's disarmament of Ken Flick on account of his cassette convictions. The Eleventh Circuit's decision here, and the decisions of the other circuits that either refuse all as-applied challenges to Section 922(g)(1) or make "virtuousness" the basis for relief, are incompatible with the historical understanding of the right to keep and bear arms.

Blackstone recalled that in the medieval period, criminally-accused clergy were often afforded the benefit of being tried in lenient ecclesiastical courts, thereby avoiding the King's punishment. 5 St. George Tucker, Blackstone's Commentaries [Book Four] *365-*68 (1803). Over time, the "benefit of clergy" of avoiding capital punishment was extended more broadly throughout society, often on the condition of sustaining

alternative punishment. By Blackstone's day, commoners committing their first offense were "discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment . . . or, in case of larciny, upon being transported for seven years, if the court shall think proper." *Id.* at *373.

And having received alternative punishment, a first-time felon was "restored to all capacities and credits, and the possession of his lands, as if he had never been convicted." *Id.* at *374.

The American experience mirrored that described by Blackstone. "Throughout the seventeenth and eighteenth centuries, capital punishment in the colonies was used sparingly." *Kanter*, 919 F.3d at 959 (Barrett, J., dissenting) (internal quotation marks omitted). "By the time the Constitution was ratified, James Wilson observed that while the term 'felony' was once 'very strongly connected with capital punishment,' that was no longer true." *Id.* (citations omitted). The concept of "civil death," originally "a transitional status in the period between a capital sentence and its execution" during which a felon had lost his rights, "came to be understood 'as an incident of life conviction.'" *Id.* at 459 (internal quotation marks and citations omitted). Carefully reviewing the historical record, then-Judge Barrett demonstrated that "a felony conviction and the loss of all rights did not necessarily go hand-in-hand . . . Those who ratified the Second Amendment would not have assumed that a free man, previously

convicted, lived in a society without any rights and without the protection of law." *Id.* at 461.

Only the disarmament of violent felons is consistent with longstanding historical practice. C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009). English authorities had long disarmed people on account of their perceived dangerousness. *Kanter*, 919 F.3d at 456-57 (Barrett, J., dissenting). Consistent with this tradition, "[t]he most germane evidence available directly supports the conclusion that the founding generation did not understand the right to keep and bear arms to extend to certain categories of people deemed too dangerous to possess firearms." *Binderup*, 836 F.3d at 367 (Hardiman, J., concurring).

Records of the Massachusetts, New Hampshire, and Pennsylvania ratifying conventions support this understanding. At the Massachusetts ratifying convention, Samuel Adams proposed that the "Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Journal of Convention: Wednesday February 6, 1788, *reprinted in* Debates and Proceedings in the Convention of the Commonwealth of Massachusetts Held in the Year 1788, at 86 (Boston, William White 1856). New Hampshire's convention proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 761 (1971). The

dissenters at Pennsylvania's ratification convention offered that people could be not be disarmed "unless for crimes committed, or real danger of public injury." *Id.* at 662, 665 (internal quotation marks omitted). But "no one even today reads this provision to support the disarmament of literally all criminals, even nonviolent misdemeanants." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting). The limiting principle is contained in the language referencing "real danger of public injury." *Id.*

If early Americans believed that the government could disarm non-dangerous people, that understanding was not reflected in any of their laws. "In 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." *Id*.

Not surprisingly, zero historical evidence supports the notion that people were disarmed for being "unvirtuous."

> We have found no historical evidence on the public meaning of the right to keep and bear arms indicating that "virtuousness" was a limitation on one's qualification for the right—contemporary insistence to the contrary falls somewhere between guesswork and *ipse dixit*.

Binderup, 836 F.3d at 372 (Hardiman, J., concurring). "Though the list" of historical surveys allegedly supporting the virtuousness theory of disarmament "looks long and impressive, that impression is misleading." *Folajtar*, 2020 U.S. App. LEXIS 37006, at *41 (Bibas, J., dissenting). "On close inspection, each layer lacks historical support or even undermines" the claim. *Id.* at *41-*42; *see id.* at *42-*47.

And "[t]his 'virtue' standard—especially in the pliable version articulated by the Government—is implausible because the 'civic republican' view of the scope of the Second Amendment is wrong." *Binderup*, 836 F.3d at 371 (Hardiman, J., concurring). The view is "closely associated" with the discredited collective rights notion of the Second Amendment, and "stems from a misreading of an academic debate" concerning "the *rationale* for having the right to keep and bear arms in the first place" rather than who enjoys the right. *Id.* at 371-72 (Hardiman, J., concurring).

The court of appeals' reflexive rejection of Flick's as-applied challenge defies precedent, reason, and history. Considering the split of authority, and the issue's importance, that decision warrants this Court's review.

III. This Court should resolve the circuit conflict regarding felon firearm prohibitions, and this case supplies an ideal vehicle for doing so.

Too many Americans have waited long enough for clarity regarding the important issues raised by Flick's

case. The lower courts are not rising to the task. This Court should take the opportunity presented here to provide the necessary guidance.

1. Flick is not the only responsible, law-abiding citizen whose fundamental rights are violated by a boundless application of felon disarmament laws. "Section 922(g)(1) is by far the most frequently applied of Section 922(g)'s firearms disqualifications, forming the basis for thousands of criminal prosecutions and tens of thousands of firearm-purchase denials each year." Pet. 23, *Binderup*, 137 S. Ct. 2323 (footnote omitted). Moreover, "'[b]ans on the possession of firearms by convicted felons are the most common type of gun control regulation' in the States." *Id.* at 23-24 (quoting Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 721 (2007)).

Countless applications of Section 922(g)(1) and its analogues make little sense. In Massachusetts, a second conviction of selling a pig without a license would trigger Section 922(g)(1). Mass. Gen. Law c. 129, §§ 39, 43. The preceding three Presidents would have been permanently disarmed had they possessed their marijuana in Arizona. *Binderup*, 836 F.3d at 372 n.20 (Hardiman, J., concurring) (citation omitted). Anyone redeeming out-of-state bottle deposits in Michigan, such as *Seinfeld*'s Newman and Kramer, or stealing $150 from a Pennsylvania library, faces federal disarmament, *id.* (citations omitted), as would anyone who opens a bottle of ketchup and returns it to a New Jersey supermarket shelf, *Folajtar*, 2020 U.S. App.

LEXIS 37006 at *55 (Bibas, J., dissenting) (citations omitted).

Beyond its absurdity and injustice, the unchecked application of felon disarmament laws can also be dangerous. It must be remembered that the Second Amendment reflects the policy judgment that securing people's means of self-defense has value. When non-dangerous, law-abiding people regain access to firearms, they can save lives. For example, one police officer owes his life to the fact that Thomas Yoxall, convicted of felony theft in 2000, successfully asked that his conviction be reduced to a misdemeanor so that he might restore his firearm rights. Yoxall later used his gun to save an Arizona trooper who had been shot and was being beaten to death on the side of a highway. Megan Cassidy, *A visceral reaction with no time to spare: Arizona man gives emotional account of saving DPS trooper*, Arizona Republic, Jan. 24, 2017, https://bit.ly/2GaIt76. The unclear benefit to having maintained Yoxall's prohibition would have carried a high price.

2. Right or wrong, Flick's challenge raises an important constitutional issue warranting careful consideration. The Eleventh Circuit's dismissive treatment of the matter—a per curiam citation to an earlier, unreasoned per curiam opinion—is emblematic of the courts' "hear no evil, see no evil" approach to Second Amendment claims regarding felon disarmament. The court of appeals spared the Federal Reporter more pages of bad history, but it left countless law-abiding,

responsible Americans no closer to their fundamental rights than on the day before this Court decided *Heller*.

The lower courts know that there is a problem here. More often than not, they acknowledge it. But when presented with substantial claims for relief by plainly non-dangerous individuals, even courts that have recognized the need for reform, blink. And they do so without meaningful guidance.

The Seventh and D.C. Circuits have acknowledged that felons might regain their Second Amendment rights. But in denying relief, they have failed to clearly enunciate any standards for doing so. *Kanter*, 919 F.3d at 443; *Medina*, 913 F.3d at 161.

The Third Circuit acknowledged dangerousness as the proper basis for disarmament in *Barton*, but then, Mr. Barton—a dealer in drugs and stolen, unmarked firearms—was not going to qualify for relief. The standard shifted to "virtuousness" in *Binderup*, a misdemeanor case where felony classification was but one of four factors to be balanced. By the time a relatively minor tax felon came before that court, felon-status was all-but dispositive, with no clear guidance as to how it might be distinguished. *Folajtar*, 2020 U.S. App. LEXIS 37006, at *9-*10.

The Fourth Circuit followed a similar pattern. It had repeatedly acknowledged the prospect of as-applied relief from firearms dispossession laws, including Section 922(g)(1), once holding that "a litigant claiming an otherwise constitutional enactment is invalid as

applied to him must show that his factual circumstances remove his challenge from the realm of ordinary challenges." *United States* v. *Moore*, 666 F.3d 313, 319 (4th Cir. 2012); *see also United States* v. *Pruess*, 703 F.3d 242, 245 (4th Cir. 2012); *United States* v. *Smoot*, 690 F.3d 215, 221 (4th Cir 2012). But no Fourth Circuit claimant was a good candidate for relief until James Hamilton came along. Hamilton, a nonviolent offender, had his firearms rights restored at the convicting state (Virginia) and federal level. He became, of all things, a Federal Protective Officer with the Department of Homeland Security, carrying a gun on the job defending federal property. But Hamilton lived in Maryland, a state that refused to relax its felon disarmament ban notwithstanding the restoration of his rights. And so the Fourth Circuit held that felons could only obtain relief if they were pardoned or could have their convictions set aside. *Hamilton*, 848 F.3d at 626. The prospect of relief it had earlier held out was illusory.

One could argue that of all Second Amendment disputes, the felon disarmament question has been the subject of relatively less resistance among the lower courts. And still, nothing much will come of further litigation until this Court weighs in.

3. Ken Flick presents an excellent vehicle for addressing this issue. Flick's decades-old disabling convictions did not in any sense indicate that his possession of firearms would pose any kind of risk. Neither does anything else in Flick's record, which establishes only that he is a law-abiding, responsible citizen who has contributed significantly to our

nation's well-being through his innovation, philanthropy, and social leadership. The decision below is straightforward in its error, and its dismissive approach all but invites its precedent to be "overruled . . . by the Supreme Court." App.3a (internal quotation marks omitted). This Court should act on that suggestion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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