No. 20-902

In The Supreme Court of the United States

KENNETH E. FLICK,

Petitioner,

v.

MERRICK B. GARLAND,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The government's brief in opposition is incoherent. It acknowledges—as it must—the plain circuit conflict on the question of whether 18 U.S.C. § 922(g)(1) is subject to as-applied challenges. But without any explanation, it denies that Flick's case has anything to do with that dispute. The claim is mystifying. If the Eleventh Circuit did not, in this case, reject the availability of as-applied challenges to 18 U.S.C. § 922(g)(1), what *did* it do?

Erring further, the government suggests that Flick's case cannot implicate a circuit conflict because no other court has decided an as-applied challenge brought by an unknown twin—another person who committed the exact same copyright offenses and has the exact same personal circumstances (presumably, another notable inventor, business leader, philanthropist and family man). The argument is unserious. As-applied challenges can create circuit conflicts without posing the exact same fact patterns—especially where the dispute concerns whether such challenges are available in the first place.

The government offers an interesting alternative history of the right to bear arms, but that only serves to highlight, not diminish, the conflict currently besetting the courts of appeals. And it fails to explain why the circuit conflict it identifies, raised by Flick's petition, would not warrant this Court's resolution. It does. The petition should be granted.

I. The Government Acknowledges the Circuit Conflict as to Whether Felon Disarmament Laws Are Subject to As-Applied Challenges. It Should Have Acknowledged that the Eleventh Circuit's Decision Is Encompassed Within That Conflict.

The government concedes, as it must, the existence of a circuit conflict. *See*, *e.g.*, BIO 3 ("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)"). As the government frames it, some courts "have held that Section 922(g)(1) is not subject to as-applied Second Amendment challenges," while "other courts of appeals have left open the possibility of as-applied relief from Section 922(g)(1)," and the Third Circuit has "actually held that Section 922(g)(1) violated the Second Amendment in [some] of its applications," BIO 6 (citations omitted).

Indeed, the Third, Seventh, and D.C. Circuits agree that felon disarmament laws are subject to as-applied Second Amendment challenges, Pet. 12-14; the First, Eighth, and Ninth Circuits have held the question open, Pet. 15-16; and the Fourth, Sixth, Tenth, and now Eleventh Circuits foreclose such claims, Pet. 16-18.

Flick's case squarely falls within this conflict—his claim is recognized or remains available in some courts but not others, including the court that heard his case.

In the government's view, however, Flick "contends 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." BIO 5 (citation omitted).

To be sure—the fact that courts disagree about the availability of as-applied challenges to Section 922(g)(1) is not merely Flick's contention. As noted *supra*, the government spells out this exact conflict on the very next page of its opposition. Nor is this conflict a mere abstraction. It has real–life consequences for countless Americans, and for public safety in general. In *Binderup*, when the government found itself on the losing side of this conflict, it petitioned this Court for certiorari. And if this case does not involve the conflict over "whether as-applied challenges to Section 922(g)(1) may ever proceed," what *does* it involve?

The Eleventh Circuit's decision could have been better reasoned, but it could not have been clearer. It stands as lucid as it is wrong. The court invoked an earlier challenge to Section 922(g)(1) where "the circumstances surrounding [the felon's] possession [were deemed] irrelevant because of his status as a felon," and then offered that "[o]ur reasoning in [that case] applies equally to Flick's as-applied challenge and thus forecloses it." Pet. App. 3a (internal quotation marks and citations omitted).

The court of appeals never reached the merits of Flick's claim. Flick lost his case because the court of appeals flatly held that as-applied challenges to Section 922(g)(1) may never proceed. The government cannot avoid a clear circuit conflict—one it describes

itself—by denying the existence of the Court of Appeals' central holding.

II. Legal Conflicts Do Not Require Exact Facts.

Apart from the circuit conflict it acknowledges, as to whether Section 922(g)(1) is subject to as-applied challenges, BIO 6, the government apparently believes that there exists a conflict that turns on the particular "offenses and circumstances" at issue in *Binderup*. BIO 3. But Flick allegedly cannot present a circuit conflict, because he "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 [his] criminal history." BIO 5.

The arguments are incongruent. If a circuit conflict requires that two cases present precisely the same factual circumstances, and *Binderup*, at least, created a circuit conflict, what case other than *Binderup* had *Binderup*'s peculiar facts? *Binderup* was "based on different offenses and circumstances than those presented" in *all* other cases. BIO 3.

That should not be surprising. "An as-applied attack" contends that a law's "application to a particular person under particular circumstances deprived that person of a constitutional right." *United States* v. *Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (citations omitted). That hardly means that as-applied cases cannot form circuit conflicts. The facts of a particular as-applied challenge are often irrelevant to at least some of

the legal questions presented, questions such as, is the challenger's legal theory recognized?

It is unclear why the government argues that Flick would have lost his claim under the two-step, multi-factor test set out in Judge Ambro's *Binderup* plurality. Flick never argued under that test—he argued that he is not dangerous. If the *Holloway* and *Folajtar* petitions show anything, they show that Judge Ambro's *Binderup* test is elastic, changing from case to case. That should not be surprising. Judge Ambro himself told us that "there are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights," *Binderup*, 836 F.3d at 351, "no fixed rules for determining whether an offense is serious," *Holloway* v. *Att'y Gen.*, 948 F.3d 164, 172 (3d Cir. 2020).

In any event, Judge Ambro's test has not been adopted by the other courts that would have recognized or at least explored the merits of Flick's claim, in contrast to the Eleventh Circuit's approach. The circuit conflict is real.

III. The Circuit Conflict Regarding As-Applied Second Amendment Challenges to Felon Disarmament Laws Urgently Requires This Court's Resolution.

The government sails past the copious historical evidence marshaled by Flick, his amici, Judge Hardiman's concurrence in *Binderup*, Judge Bibas's dissent in *Folajtar* v. *Att'y Gen.*, 980 F.3d 897 (3d Cir. 2020), and then-Judge Barrett's dissent in *Kanter* v.

Barr, 919 F.3d 437 (7th Cir. 2019). Rather than engage with this material, the government invokes conclusions from three scholars, and the statement by the dissenters from Pennsylvania's ratifying convention that "expressly recognized the permissibility of disarming citizens 'for crimes committed.'" BIO 5 (citations omitted). But as then-Judge Barrett explained, "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). No one, except perhaps the Attorney General. "If 'crimes committed' refers only to a subset of crimes, that subset must be defined; using 'real danger of public injury' to draw the line is both internally coherent and consistent with founding-era practice." *Id.*

Ignoring the substantial scholarly and judicial opposition to the government's claim does not make that opposition go away. This dispute should be resolved by this Court, on this case's merits.

Can this Court forever avoid addressing the Second Amendment issues raised by felon disarmament laws? The Attorney General thinks so. He aptly notes that this Court has denied not only the government's petition for a writ of certiorari in *Binderup*, but that "[i]t has since denied numerous other petitions raising similar questions." BIO 3 (citations omitted). Tripling down, he employs nearly identical language in opposing two other pending petitions. *See* Br. In Opposition, *Folajtar* v. *Garland*, No. 20-812, at 3-4; Br. In Opposition, *Holloway* v. *Garland*, No. 20-782, at 4-5.

Flick welcomes the government's concession that this petition, and all those many like it—including the government's petition in *Binderup*—have raised questions that are at least "similar." BIO 3 (citations omitted). Of course these petitions are more than similar. They have all asked the same essential questions: whether Congress can define the contours of a fundamental constitutional right, and whether this Court meant what it said when offering that prohibitions on the possession of arms by felons are only "presumptively lawful." *District of Columbia* v. *Heller*, 554 U.S. 570, 626-27 & n.26 (2008).

If the circuit conflict that this decision reflects was cert-worthy when the Solicitor General petitioned on it four years ago in *Binderup*, the fact that this Court has continued to let pass an endless stream of petitions on the topic emanating from the lower courts' confusing morass is not an argument *against* granting Flick's petition. The rule of "better late than never" is especially salient considering that nearly all of these cases, like this one, have arisen in the context of our nation's most pervasively applied gun laws.

Critical constitutional questions, bearing on the liberties of countless Americans and the government's paramount interest in public safety, should not be avoided for the sake of avoidance, or on account of judicial inertia. When this Court observed that felon disarmament laws were only "presumptively lawful," *Heller*, 554 U.S. at 626-27 & n.26, it did not explain the circumstances under which the presumption might be overcome because "there will be time enough

to expound upon the historical justifications for the exceptions [to Second Amendment rights] we have mentioned if and when those exceptions come before us." *Id.* at 635. Thirteen years and a mess of lower court opinions later, that time has arrived. This Court should retire the government's "numerous other petitions" boilerplate, grant this petition, and finally bring clarity to this field.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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