No. 16-847

IN THE
Supreme Court of the United States

DANA J. BOENTE, ACTING ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

DANIEL BINDERUP, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE BRADY CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The mission of the Brady Center is to cut gun deaths in half by 2025. The Brady Center has a substantial interest in ensuring that gun laws are properly interpreted to effectuate the congressional intent to reduce the threat of gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving the constitutionality and interpretation of gun laws, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Castleman*, 134 S. Ct. 1405 (2014), *Abramski v. United States*, 134 S. Ct. 2259 (2014), *Henderson v. United States*, 135 S. Ct. 1780 (2015), and *Voisine v. United States*, 136 S. Ct. 2272 (2016).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amicus* also represent that all parties were provided notice of *amicus*'s intention to file this brief at least 10 days before it was due and that the parties have consented to the filing of this brief. Those written consents are being filed contemporaneously with this brief.

INTRODUCTION

The United States has already demonstrated that the courts of appeals are split on whether 18 U.S.C. § 922(g)(1) is subject to as-applied constitutional challenges. That fact alone justifies granting the petition. The Brady Center files this brief to highlight additional factors that counsel in favor of certiorari.

First, Section 922(g)(1) reflects Congress's reasoned policy judgment that individuals who have committed misdemeanors punishable by more than two years in prison – which traditionally have been categorized as felonies – should not be permitted to possess firearms, absent expungement, pardon, or restoration of civil rights. That judgment is supported by the evidence. Compared to those without prior convictions, non-violent misdemeanants who purchase firearms are four times more likely to commit violent crimes in the future. Given that evidence, the Second Amendment does not preclude Congress from regulating gun ownership by those convicted of serious crimes.

Second, the broad standards announced by the court of appeals put a tremendous burden on district courts, which will now face a wave of new suits raising as-applied challenges. Courts will be left to adjudicate those challenges using two separate balancing tests, both of which are guided by a handful of indeterminate and subjective factors. Congress rejected that kind of individualized balancing of policy factors almost 25 years ago because the costs of errors were high and the administrative burdens were overwhelming. Courts will fare no better at the same task.

STATEMENT

1. Subject to certain exceptions, 18 U.S.C. § 922(g)(1) makes it a crime for a person convicted of either a felony punishable by more than one year in prison or a misdemeanor punishable by more than two years in prison, *see* 18 U.S.C. § 921(a)(20)(B), to possess a firearm. Traditionally, crimes punishable by more than one year have been considered felonies. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.6 (2d ed. 2015).

a. In its current form, that prohibition has been on the books since 1968, when Congress determined that the acquisition of firearms by those convicted of serious crimes posed a danger to public safety and to public figures. *See* Gun Control Act of 1968, Pub. L. No. 90-618, tit. I, § 102, 82 Stat. 1213, 1220 (codified at 18 U.S.C. § 922(g)(1)); *see also* S. Rep. No. 90-1097, at 28 (1968) (describing the ban's purpose). As this Court has recognized, "[t]he principal purpose of the federal gun control legislation . . . was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, *criminal background*, or incompetency.'" *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (quoting S. Rep. No. 90-1501, at 22 (1968)) (emphasis added).

b. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court characterized the prohibition embodied in Section 922(g)(1) as "longstanding" and noted that nothing in *Heller* should be read to "cast doubt" on it. *Id.* at 626. Indeed, federal criminal prohibitions on felons' possession of firearms date back to 1938. *See* Federal Firearms Act, ch. 850, § 2(d)-(f), 52 Stat. 1250, 1250-51 (1938) (prohibiting the transfer through interstate commerce of a firearm to a person convicted of a crime of violence or a

fugitive from justice). And, at common law, felons "were excluded from the right to arms" because they did not count as "virtuous citizen[s]." Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995); *see also* Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 (1986).

2. In 1993, Congress strengthened Section 922(g)(1) with the passage of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) ("Brady Act").

The Brady Act requires an individual to pass a background check before buying a firearm from a federally licensed firearms dealer, with limited exceptions. *See* 18 U.S.C. § 922(d), (t); 28 C.F.R. § 25.6 (requiring a gun dealer to query the National Instant Criminal Background Check System ("NICS") before selling a firearm). Conducting the background check requires NICS to determine whether "receipt of a firearm by [a purchaser] would violate [18 U.S.C. § 922(g) or (n)] or State law." 18 U.S.C. § 922(t)(5). Partly because Section 922 is categorical, such a determination can be made very quickly: On average, NICS responds to queries in less than 10 minutes.[2] From 1998 through 2014, more than 56% of all NICS denials were individuals barred by Section 922(g)(1).[3]

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[2] *See* Fed. Bureau of Investigation, *About NICS*, https://www.fbi.gov/services/cjis/nics/about-nics (last visited Feb. 2, 2017).

[3] *See* Office of the Inspector General, U.S. Dep't of Justice, *Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System* 6 (Sept. 2016), https://oig.justice.gov/reports/2016/a1632.pdf (last visited Feb. 3, 2017).

3. By statute, felons may obtain relief from Section 922(g)(1)'s ban through operation of either state or federal law.

a. Under Section 921(a)(20)(B), "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of" Section 922. 18 U.S.C. § 921(a)(20)(B). Similarly, Section 925(c) permits any "person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition" to apply for relief from such prohibition. *Id.* § 925(c). The Attorney General or his delegatee[4] may grant such relief "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Id.*

b. Since 1992, however, Congress has prohibited ATF from using appropriated funds "to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, tit. I, 106 Stat. 1729, 1732.[5] As a result, the sole avenue for relief from Section 922(g)(1)'s possession ban is through expungement, pardon, or the restoration of civil rights.

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[4] The Attorney General has delegated the responsibility for reviewing applications under Section 925(c) to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). *See* 27 C.F.R. § 478.144.

[5] Congress has renewed that prohibition in each subsequent year. *See Logan v. United States*, 552 U.S. 23, 28 n.1 (2007) (collecting citations).

4. Respondents Daniel Binderup and Julio Suarez filed separate suits in the Eastern and Middle Districts of Pennsylvania, respectively, challenging the constitutionality of Section 922(g)(1)'s ban as applied to them. Both district courts undertook a broad review of respondents' crimes, personal histories, and subsequent behavior. After doing so, both courts held that Section 922(g)(1) was unconstitutional as applied to them. *See* Pet. App. 215a-238a; *id.* at 262a-270a. The two appeals were heard in the first instance by separate panels. After oral argument but before decision was rendered, the court of appeals *sua sponte* consolidated the two cases and ordered rehearing *en banc*.

a. In a deeply fractured opinion, the *en banc* court of appeals affirmed by a vote of 8-7. There was no opinion for the court on the Second Amendment question. Three separate opinions were filed.

b. Judge Ambro's plurality opinion announced the judgment of the court.[6] Pet. App. 2a-42a. A seven-judge plurality joined part of that opinion and concluded that the appropriate standard for as-applied Second Amendment challenges is the two-step inquiry set down in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), and that felons and others convicted of a "serious offense" generally lack Second Amendment rights. Pet. App. 12a-28a.

In a portion of his opinion joined by only two other judges, Judge Ambro set out two separate and complicated balancing tests to determine both (a) whether crimes are sufficiently serious to strip those who commit them of Second Amendment rights; and (b) whether the application of Section 922(g)(1) to an

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[6] Judge Ambro's opinion was unanimous in rejecting respondents' statutory claim. Pet. App. 9a-12a.

individual who has not committed a "serious offense" survives intermediate scrutiny. *Id.* at 28a-42a. Judge Ambro found both that respondents' crimes were not sufficiently serious and that the law as applied to them did not survive intermediate scrutiny.

c. Judge Hardiman, in an opinion joined by four other judges, concurred in the judgment. Judge Hardiman would have held that only those whose prior conduct demonstrates a likelihood of violent criminality in the future lose their Second Amendment rights. Pet. App. 43a-92a. On that basis, Judge Hardiman concluded that Section 922(g)(1) is unconstitutional as applied to anyone without a likelihood of future violence. *Id.* at 56a.

d. Judge Fuentes, joined by six other judges, dissented from the judgment. He would have held that Congress's decision to treat all convictions covered by Section 922(g)(1) as disqualifying of Second Amendment rights was reasonable and well supported by history and existing precedent. Pet. App. 93a-161a.

ARGUMENT

I. Congress's Judgment That Certain Classes of Criminals Should Not Possess Firearms Is a Sound One and Should Not Be Disturbed

A. Congress Has Made a Sound Policy Judgment To Promote Public Safety

Gun violence is a serious problem in our country. As of 2010, the gun homicide rate in the United States was more than 25 times higher than it was in other "high-income" countries.[7] In 2015, firearms

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[7] Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-income OECD Countries, 2010*, 129 Am. J. Med. 266, 266 (2016), http://www.amjmed.com/article/S0002-9343(15)01030-X/pdf.

were used to commit 12,979 homicides (an increase of 2,034 over the previous year).[8] Children and teens aged 18 or under accounted for 1,181 of the firearm homicides in 2015 (an increase of 147 over 2014).[9] In 2014 – the last year for which the statistic is available – more than 81,000 people in the United States suffered non-fatal injuries from firearms.[10]

Congress's determination that certain types of criminals should not be permitted to possess firearms is sensible and well supported. Individuals convicted of crimes – including non-violent crimes styled as misdemeanors by state law – are more likely to commit future gun crimes than are those who have not been convicted of any crimes. Compared with those without a criminal history, handgun purchasers with one prior misdemeanor conviction are *five times* more likely to be charged with a future violent crime, while those with one prior misdemeanor that involved neither firearms nor violence are more than *four times* more likely to be charged with a future violent crime.[11] Handgun purchasers with one prior alcohol-related conviction, such as driving under

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[8] *See* Centers for Disease Control & Prevention, *Fatal Injury Reports, National and Regional, 1999-2015*, https://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html (last visited Feb. 3, 2017).

[9] *See id.*

[10] *See* Centers for Disease Control & Prevention, *Nonfatal Injury Reports, 2001-2014*, https://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html (last visited Feb. 3, 2017).

[11] *See* Garen J. Wintemute et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 J. Am. Med. Ass'n 2083, 2085-86 (1998) (reporting relative risk ratios over a 15-year period for misdemeanants *not* barred from firearm possession by Section 922(g)(1)).

the influence, are also four times more likely to be arrested for a violent crime in the future.[12]

To take just one example, in 2007, 17-year-old Carlos Bernardez was convicted of illegally possessing a firearm as a juvenile. After performing community service, Bernardez had his right to purchase firearms restored by Washington state courts.[13] Two years later, Bernardez knocked on the side door of a music club in Seattle; when performers inside opened the door, Bernardez opened fire, shooting three and killing one.[14] Thousands of other felons and misdemeanants nationwide successfully restore their gun-buying privileges each year – with little or no meaningful review.[15]

Dispossession laws have also proven to be effective. Bans on convicted criminals' ability to possess firearms reduce their likelihood of committing future violent crime by 20-30%, in line with the benefits of other measures designed to limit gun violence,

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[12] *See* Garen J. Wintemute et al., *Firearms, Alcohol and Crime: Convictions for Driving Under the Influence (DUI) and Other Alcohol-Related Crimes and Risk for Future Criminal Activity Among Authorised Purchasers of Handguns*, Injury Prevention (forthcoming 2017), *available for purchase at* http://injuryprevention.bmj.com/content/early/2017/01/27/injuryprev-2016-042181.full.pdf+html.

[13] *See* Christine Clarridge & Sara Jean Green, *In Court, Nightclub Shooting Suspect Regained Right to Gun*, Seattle Times, Jan 6, 2009, http://www.seattletimes.com/seattle-news/in-court-nightclub-shooting-suspect-regained-right-to-gun/.

[14] *See* Sara Jean Green, *Man Sentenced to 30 Years in Prison for Fatal Shooting at Nightclub*, Seattle Times, Aug. 13, 2010, http://www.seattletimes.com/seattle-news/man-sentenced-to-30-years-in-prison-for-fatal-shooting-at-nightclub/.

[15] *See* Michael Luo, *Felons Finding It Easy To Regain Gun Rights*, N.Y. Times, Nov. 14, 2011, at A1.

such as gun-free zone laws.[16] More generally, gun-purchasing laws are associated with measurable reductions in gun-related homicides.[17]

Background checks – made possible primarily by Section 922's categorical nature – have likewise proven to reduce gun violence. For example, Missouri's repeal of its permit-to-purchase law, which required background checks for purchases even from unlicensed sellers, was associated with a 23% increase in the State's firearm homicide, with no effect on the non-firearm homicide rate.[18] And, as noted, evidence suggests that denial of a handgun purchase because of a failed background check is associated with a 20-30% decrease in the risk of later criminal activity, even after controlling for the number of prior convictions.[19]

B. Congress Has Determined That Individualized Adjudication of Second Amendment Rights Is Subjective and Unworkable

Congress has legislated in this area repeatedly, including by renewing its ban on discretionary relief

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[16] *See* Mona A. Wright et al., *Effectiveness of Denial of Handgun Purchase to Persons Believed to Be at High Risk for Firearm Violence*, 89 Am. J. Pub. Health 88, 89 (1999), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1508506/pdf/amjph00001-0090.pdf.

[17] *See* Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615, 1619-20 (1991) (concluding that gun-licensing laws are effective because they reduce the availability of lethal weapons to those who lack deadly intent), http://www.nejm.org/doi/pdf/10.1056/NEJM199112053252305.

[18] *See* Daniel Webster et al., *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 J. Urban Health 293, 297 (2014).

[19] *See* Wright et al., 89 Am. J. Pub. Health at 89.

under Section 925(c) every year since 1992. In doing so, Congress has made a clear choice to adopt a categorical approach to felon-in-possession laws. That choice was born of experience.

Under the now-defunded federal law permitting relief from Section 922(g)(1)'s ban, there were numerous examples of criminals permitted to obtain firearms who later committed crimes.[20] A House Report concluded that "too many . . . felons whose gun ownership rights were restored went on to commit violent crimes with firearms." H.R. Rep. No. 104-183, at 15 (1995).

Such instances of recidivism by individuals included within Section 922(g)(1)'s prohibition led in large part to Congress's decision to suspend Section 925(c)'s discretionary relief program in 1992. *See* Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, tit. I, 106 Stat. 1729, 1732 (defunding discretionary review). Congress determined not only that the fact-specific determination was costly to make, but also that the costs of error were dire. *See* S. Rep. No. 102-353, at 19-20 (1992) (warning that an incorrect determination under Section 925(c) "could have devastating consequences for innocent citizens if the wrong decision is made").

Congress found case-by-case determination even by expert administrators at ATF of whether to permit those convicted of crimes to possess firearms is difficult, costly, and inherently subjective. *See id.* Congress has repeatedly determined that such case-

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[20] *See* Violence Policy Ctr., *Putting Guns Back into Criminals' Hands: 100 Case Studies of Felons Granted Relief From Disability Under Federal Firearms Laws* (1992), http://www.vpc.org/publications/putting-guns-back-into-criminals-hands/ (last visited Feb. 3, 2017).

by-case review is not the best use of taxpayer funds. *See Logan v. United States*, 552 U.S. 23, 28 n.1 (2007) (describing Congress's annual defunding of the review mechanism described in Section 925(c)). That legislative determination should not be displaced lightly.

But that is just what the court of appeals has done. Due to the nature of as-applied challenges, lower courts are forced to consider the challengers' "backgrounds, including the time that has passed since they last broke the law," statistical evidence of recidivism specific to the type and severity of the offense in question, and any available alternative avenues for relief. Pet. App. 35a-39a & n.7.

The court of appeals thus asks district courts to perform an administrative task that Congress decided not even ATF – the administrative agency with significant subject-matter expertise – could or should do. Under Judge Ambro's approach, step two of the Second Amendment inquiry requires courts to determine "the likelihood that the Challengers will commit crimes in the future." *Id.* at 37a n.7. That is precisely the kind of inquiry called for by the now-inoperative Section 925(c), which authorized the Attorney General to determine whether "the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." ATF dedicated 40 person-years annually to the task set out by Section 925(c), only for Congress to conclude that the task was "very difficult and subjective." S. Rep. No. 102-353, at 19-20.

That congressional judgment should be granted significant deference. "In the context of firearm regulation, the legislature is 'far better equipped than the

judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality)). In this case, the legislature has decided repeatedly that case-by-case determination is costly and risky.

C. The Second Amendment Does Not Provide Any Basis To Reject Congress's Judgment That Certain Classes of Criminals Should Not Possess Firearms

Nor is there any basis in the text or history of the Second Amendment to displace Congress's sound policy judgment. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court made clear that its ruling did not "cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 626. Nor was the Court's list of presumptively lawful gun-control measures exhaustive. *Id.* at 626 n.26. And a plurality "repeat[ed] those assurances" in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality). And in *Lewis v. United States*, 445 U.S. 55 (1980), this Court described felon-in-possession laws as "legislative restrictions" that "are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Id.* at 65 n.8.

As noted, the ban on felons possessing firearms has been on the books for nearly 50 years, and it accords with the experience of the common law. "Felons simply did not fall within the benefits of the common law right to possess arms." Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983);

see also Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 (1986).

"Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them." Kates, 82 Mich. L. Rev. at 266. The most detailed ratifying convention proposals also excluded criminals and the violent. *See id.* For example, the dissent at the Pennsylvania ratifying convention proposed a right to bear arms that prohibited "disarming the people or any of them *unless for crimes committed*." 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971) (emphasis added). In *Heller*, this Court called that Pennsylvania minority proposal "highly influential." 554 U.S. at 604.

II. The Third Circuit's Two Balancing Tests Doom District Courts to a Flood of As-Applied Challenges with Little Guidance on How To Resolve Them

The court of appeals leaves district courts with an extremely difficult task. When they are asked to rule on one of the many as-applied challenges to Section 922(g)(1) that will follow in the wake of the decision below, district courts must undertake two separate multifactor balancing tests to determine *first* whether the challenger's prior crimes were sufficiently "serious" to strip him of his Second Amendment rights, and *second* whether Section 922(g)(1) as applied to his individual circumstances, life history, and behavior render him likely to commit violent crimes in the future. Neither of those balancing tests is workable, and both invite subjectivity and inconsistent judgments.

A. The Court of Appeals' First Balancing Test Invites a Subjective, Rudderless Inquiry That Second-Guesses Both Legislatures and Sentencing Judges

Rather than evaluate the constitutionality of Section 922(g)(1)'s *categorical* rule, the first step of Judge Ambro's opinion asks whether the circumstances of *a particular plaintiff's* prior crimes are sufficiently unserious as to render their Second Amendment rights intact.

Such a determination is, by Judge Ambro's admission, guided by "no fixed criteria" because "the category of serious crimes changes over time as legislative judgments regarding virtue evolve." Pet. App. 30a. Under Judge's Ambro's approach, courts should "presume the judgment of the legislature is correct and treat any crime subject to § 922(g)(1) as disqualifying unless there is a strong reason to do otherwise." *Id.*

What constitute strong reasons for courts to second-guess the judgment of the legislature in this regard? Judge Ambro identifies four features of plaintiffs' convictions that render them "not serious enough," *id.* at 31a:

- They are styled by the enacting legislatures as misdemeanors rather than felonies, *id.*;
- Neither attempted nor actual violence was an element of either of the offenses, *id.* at 32a;
- They received minor sentences, *id.* at 32a-33a;
- There is no "cross-jurisdictional consensus regarding the[ir] seriousness," *id.* at 33a.

Not only are these factors not necessarily indicative of a person's danger when possessing a gun, but also

each of those four factors will be difficult to apply in individual cases.

As this Court has noted, "numerous misdemeanors involve conduct more dangerous than many felonies." *Tennessee v. Garner*, 471 U.S. 1, 14 (1985). In any event, legislatures express judgments about the severity of a crime in part by setting maximum punishments. As this Court has held, "the maximum penalty attached to the offense . . . is considered the most relevant [criterion] with which to assess the character of an offense, because it reveals the legislature's judgment about the offense's severity." *Lewis v. United States*, 518 U.S. 322, 326 (1996).

Whether a prior crime involves violence can also be a subjective inquiry. As this Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), asking courts to determine whether the "ordinary case" of a particular crime "involves conduct that presents a serious potential risk of physical injury to another" invites deep divisions among the lower courts even about the applicable standard of inquiry. *Id.* at 2557, 2559-60 (noting that lower courts have struggled to determine whether statutory rape qualifies as a violent crime). Judge Ambro's solution to this problem is to define "violence" narrowly to include only those crimes in which attempted or actual violence is an element of the crime, Pet. App. 32a, but he offers no principled reason why that definition of violence should control and no method for determining when an element of a crime is violent.

Judge Ambro's third factor – whether the sentence imposed was "minor" – is even more fraught. Sentencing is a complicated and difficult task, taking into account as it does not only the crime committed but also the defendant's criminal history, role in the

broader criminal scheme, character, personal circumstances, remorse, likelihood of recidivism, harm to the victim(s), and the interest of deterrence. Judge Ambro's answer – "severe punishments are typically reserved for serious crimes," *id.* – may be true as a general matter, but hardly resolves the individual case. Courts tasked with balancing the court of appeals' four-factor test will be forced to second-guess the sentencing judge's balancing of all of those factors in order to determine whether the sentence was "minor" because the crime itself was minor or because of other extenuating circumstances.

Judge Ambro's final factor, whether there is a "cross-jurisdictional consensus regarding the seriousness" of the crimes in question, *id.* at 33a, is perhaps the most difficult of the factors to apply. Indeed, it is almost paradoxical to suggest that lack of consensus about the seriousness of a crime provides evidence that a crime is not serious.

And, of course, the court of appeals offered no guidance on how to reconcile the factors when they point in different directions. Here, Judge Ambro concluded that all four factors weighed in favor of respondents' continuing Second Amendment rights, but gave no guidance about what to do if one or more of the factors cut the other way.

B. The Court of Appeals' Second Balancing Test Requires Fact-Bound Review of an As-Applied Challengers' Entire Background

But the beleaguered district court's work is not yet done. After balancing four poorly defined factors at step one to determine whether a challenger's crime is sufficiently unserious, a district court must then proceed to apply heightened scrutiny. Under Judge Ambro's approach, however, the question is

whether "banning people like" the challengers "from possessing firearms promotes public safety." Pet. App. 35a-36a.

District courts will be left to figure out how to define the category of "people like" the challengers in each case. Judge Ambro put the burden on the government to adduce evidence regarding the future dangerousness of individuals who committed (a) non-violent (b) misdemeanors (c) decades ago, (d) for which they received no jail time. But district courts will be on their own in determining which of a challenger's personal characteristics are relevant to the narrowness of the government's tailoring of Section 922(g)(1).

Indeed, Judge Ambro appeared to recognize that his analysis is essentially personal to the challenger, noting that the analysis turns on whether the challenger "will commit crimes in the future." *Id.* at 36a-37a & n.7. Making such an individualized judgment will require detailed fact-finding by district courts of a challenger's personal circumstances and history. By making the analysis so radically individualized, the court of appeals rendered the constitutionality of Section 922(g)(1) perpetually contested.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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