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 EVERYTOWN FOR GUN SAFETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Everytown for Gun Safety ("Everytown") is the nation's largest gun violence prevention organization, with supporters in all fifty states fighting for public safety measures that respect the Second Amendment and help save lives. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, which was formed in the wake of the murders of twenty children and six adults at an elementary school in Newtown, Connecticut.

A critical part of Everytown's mission is advocating for comprehensive, consistent enforcement of existing federal and state laws designed to keep guns out of the hands of dangerous people. It submits this *amicus* brief in support of the United States' Petition for a Writ of Certiorari because of the profound impact that the Court of Appeals for the Third Circuit's decision has on common sense gun safety laws at both the state and federal level. The Third Circuit's interpretation of the Second Amendment as applied to 18 U.S.C. § 922(g)(1) is both novel and dangerous. If permitted to stand, the Third Circuit's approach threatens the efficacy and administrability of pre-purchase background checks, undermines legislative prohibitions on gun possession by certain offenders, and hinders

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[1] Counsel of record for all parties received timely notice of the intent to file this brief. *See* Sup. Ct. R. 37. Counsel for both parties have consented to the filing of this brief, and their consents have been filed with this Court. No counsel for either party authored the brief in whole or in part, and neither party nor their counsel made any monetary contribution intended to fund the brief's preparation or submission.

prosecutions by state and federal authorities for violations of such prohibitions.

SUMMARY OF ARGUMENT

Everytown writes in support of the United States' Petition for a Writ of Certiorari and respectfully requests that this Court grant the Petition in order to correct the Third Circuit's unprecedented and erroneous decision to uphold an as-applied challenge to 18 U.S.C. § 922(g)(1).[2] The Third Circuit is the only Court of Appeals to endorse such a challenge, and its decision complicates an existing circuit split regarding whether as-applied challenges are ever appropriate. In doing so, the Third Circuit established an incoherent and unworkable standard with "no fixed criteria" that relies on several factors that vary widely among jurisdictions. This standard calls into question large swaths of the firearm regulation regime in the Third Circuit and could profoundly undermine public safety. The Court should take this opportunity to reaffirm its promise in *District of Columbia v. Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." 554 U.S. 570, 626-27 (2008). This is an issue of profound national importance requiring the Court's attention.

In addition to the reasons stated by the Acting Solicitor General, this Court should grant review because the Third Circuit's decision will significantly

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[2] 18 U.S.C. § 922(g)(1) prohibits any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," excluding convictions for any state offenses classified as a misdemeanor and "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), from possessing a firearm.

erode gun safety laws at both the state and federal level. The decision will require adjustments to pre-purchase background check procedures in the Third Circuit so that they account for the relative seriousness of prior convictions. Given that there were more than 1.3 million background checks in the Third Circuit alone in 2016 (and 27 million nationally), the decision adds a complicated constitutional review to an already complex and overburdened background check system. In addition, the federal and state courts will be tasked with adjudicating "re-armament" and post-indictment challenges under the Third Circuit's decision, which does not provide clear guidance for such determinations.

Nothing in this Court's precedents or the Constitution compels the result below. Congress and state legislatures have determined that certain offenders present a sufficient risk of harm to themselves and others that they should not possess a gun. Yet, the Third Circuit's decision disregards this policy judgment in favor of an ad hoc and amorphous "seriousness" evaluation that has no basis in law. The decision below fails to provide judicially manageable standards and will therefore result in inconsistencies and errors. As Everytown's supporters are all too aware, the cost of a wrong determination regarding who should possess a firearm can often be measured in lives.

ARGUMENT

I. The Third Circuit's Decision Departs from the Decisions of the Other Courts of Appeals

The Third Circuit's fractured opinion marks the first time that any Court of Appeals has found 18 U.S.C. § 922(g)(1) unconstitutional in any of its applications. In so ruling, a bare majority of the *en banc* Third Circuit has deepened and further complicated an existing circuit conflict regarding when—and whether—anyone can mount a successful as-applied challenge to § 922(g)(1). If permitted to stand, this decision will hamstring the effectiveness and administrability of the nation's most vital gun safety laws.

The circuit split is ripe for resolution by this Court. Three Courts of Appeals have categorically rejected the availability of as-applied challenges to § 922(g)(1), holding that the statute, as currently drafted, is constitutional in all of its applications. *See United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir.), cert. denied, 562 U.S. 867 (2010); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir.), cert. denied, 560 U.S. 958 (2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), cert. denied, 559 U.S. 970 (2010).[3] Other Courts of Appeals have recognized the possibility of a successful as-applied challenge, but none has ever upheld such a challenge, nor articulated

[3] The Ninth Circuit has arguably foreclosed the possibility of as-applied challenges as well. *See United States v. Vongxay*, 594 F.3d 1111, 1114-15 (9th Cir.) (holding that § 922(g)(1) is constitutional even as applied to non-violent felons), cert. denied, 562 U.S. 921 (2010); *see also United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016) (noting reasons to be skeptical of categorical lifetime bans on firearm possession by all felons, but reaffirming *Vongxay*).

any standard for adjudicating those challenges. *See, e.g.*, *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *Schrader v. Holder*, 704 F.3d 980, 991-92 (D.C. Cir.), cert. denied, 134 S. Ct. 512 (2013); *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012); *United States v. Williams*, 616 F.3d 685, 692-93 (7th Cir.), cert. denied, 562 U.S. 1092 (2010).

The Third Circuit, therefore, stands alone, and its erroneous *en banc* decision can only be corrected by this Court. The Court of Appeals expanded the scope of Second Amendment protections to encompass certain convicted criminals, yet failed to clearly define the set of persons to whom such protections apply. By creating a new set of constitutional protections for an undefined subset of offenders, the Third Circuit has sown a seed of confusion. And it will reap a whirlwind of challenges to state and federal statutes designed to keep firearms out of the hands of people convicted of serious crimes.

II. The Third Circuit's Framework for Adjudicating As-Applied Challenges Is an Imprecise and Incoherent Means of Assessing a Crime's Seriousness

Under the holding below, offenders may now mount successful as-applied challenges to § 922(g)(1) by "rebutting the presumption that they lack Second Amendment rights by distinguishing their crimes of conviction from those that historically led to exclusion from Second Amendment protections." *Binderup v. Att'y Gen.*, 836 F.3d 336, 356 (3d Cir. 2016) (noting that Judge Ambro's plurality decision is now "the law of our Circuit").[4] To make this showing, the offender

[4] As no opinion garnered a majority of the *en banc* court, the holding of the court "may be viewed as that position taken by

can point to a variety of factors regarding the predicate crime's seriousness, including, among other things: (i) whether the crime is a misdemeanor or a felony, (ii) whether force or attempted use of force is an element of the offense, (iii) the sentence imposed, and (iv) whether there is a "cross-jurisdictional consensus regarding the seriousness" of the crime giving rise to the federal firearm prohibition. *Id.* at 351-53. This confused framework has no basis in the constitutional precedents of this Court or any of the other Courts of Appeals, and provides little guidance to the district courts that will be burdened with evaluating future as-applied challenges to § 922(g)(1) prohibitions. This Court's review can correct the Court of Appeals' failure to provide meaningful guidance and resolve confusion on this issue of national importance.

A. A Review of State Laws Reveals the Infirmities of Relying on an Offense's Felony or Misdemeanor Classification

As other offenders follow in Binderup and Suarez's footsteps and raise civil challenges to the constitutionality of firearm possession prohibitions under § 922(g)(1) and its state law analogues, the Court of Appeals' error in focusing on the state law taxonomy of the offense at issue will become increasingly apparent. That is because the first factor identified in the ruling—a binary distinction between felony crimes and misdemeanors—is far from universal. Even within the Circuit itself, only Delaware uses the standard felony/misdemeanor distinction.

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those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977).

New Jersey's Criminal Code provides for three offense categories: (i) "petty disorderly persons offenses," (ii) "disorderly persons offenses," and (iii) "crimes," which carry varying lengths of punishment.[5] Yet, the state's criminal law also classifies some offenses as "high misdemeanors" and "misdemeanors," which are then translated to the offense categories described above for sentencing purposes. *See* N.J. Stat. Ann. § 2C:43-1(b). High misdemeanors are translated to third-degree crimes, punishable by up to five years in prison and triggering the 18 U.S.C. § 922(g)(1) prohibition. Pennsylvania's criminal code is equally unsuited to the Third Circuit's binary analysis. The Commonwealth divides offenses into three categories: (i) murder, (ii) felonies, and (iii) misdemeanors, and further subdivides misdemeanors into three degrees based on the maximum term of imprisonment. *See* 18 Pa. Cons. Stat. § 106(a).[6] First-degree misdemeanors, including Respondent Binderup's crime, are punishable by five years' incarceration and therefore qualify for dispossession under § 922(g)(1).

Applying the Third Circuit's analysis to such a framework is challenging—especially absent clear guidance from the *Binderup* opinion—and is likely to

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[5] *See* N.J. Stat. Ann. § 2C:43-8 (petty disorderly offenses punishable for up to 30 days' imprisonment); *id.* § 2C:43-8 (disorderly persons offenses punishable for up to six months' imprisonment); *id.* § 2C:1-4(a) (crimes are offenses punishable by more than six months' imprisonment). Each crime is further subdivided into "degrees," with corresponding levels of sentence severity.

[6] *See* 18 Pa. Cons. Stat. § 106(b)(6) (first-degree misdemeanor punishable by up to five years' imprisonment); *id.* § 106(b)(7) (second-degree misdemeanor punishable by up to two years' imprisonment); *id.* § 106(b)(8) (third-degree misdemeanor punishable by up to one year imprisonment).

create results that exempt serious offenders from § 922(g)(1)'s prohibition based on the term used by the legislature when criminalizing the offense decades ago. For example, Pennsylvania law classifies repeated instances of driving while under the influence, making terroristic threats, and simple assault as misdemeanors, despite the fact that these crimes are undoubtedly serious and carry a penalty of up to five years' imprisonment. *See* 75 Pa. Cons. Stat. § 3803 (driving while intoxicated on multiple occasions); 18 Pa. Cons. Stat. § 2706 (making terroristic threats); *id.* § 2701 (simple assault).

B. Courts Lack Clear Standards to Determine Whether an Offense Includes the Use or Attempted Use of Force as an Element

Determining whether certain crimes have "the use or attempted use of force as an element," *Binderup*, 836 F.3d at 352, is a question that continues to bedevil courts. First, the distinction between an element of the offense and the means by which the offense is carried out is often far from clear. *See Mathis v. United States*, 136 S. Ct. 2243, 2264 (2016) (Breyer, J., dissenting) (discussing the difficulty of isolating the elements of an offense, and noting that "there are very few States where one can find authoritative judicial opinions that decide the means/elements question" with respect to particular crimes, such as burglary); *Omargharib v. Holder*, 775 F.3d 192, 200 (4th Cir. 2014) (Niemeyer, J., concurring) (noting the difficulty of deciding "whether disjunctive phrases in a criminal law define alternative *elements* of a crime or alternative *means* of committing it"). Moreover, even the court below—despite disclaiming any reliance on the particular manner in which plaintiffs' crimes were

carried out—looked beyond the mere elements of the crime to the specific conduct at issue. *See Binderup*, 836 F.3d at 352 n.4 (noting, "as an aside," that both district courts described plaintiffs' actual behavior as non-violent). This implicit invitation to delve into the facts behind a previous conviction makes the court's standard even more amorphous and burdensome.

C. The Length of a Sentence Imposed Is a Poor Proxy for the Seriousness of an Offense

The Third Circuit's decision to rely on the sentence imposed, rather than the statutorily mandated possible sentence, is a flawed measure of a crime's seriousness. Sentencing determinations reflect a variety of factors, including the defendant's cooperation with authorities, prior criminal history, sentences handed down to co-conspirators or accomplices, the jurisdiction in which the offense was committed, or even the defendant's race.[7] And while the Third Circuit

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[7] A defendant's cooperation with the government can result in relief from applicable mandatory minimum sentences under both federal and various state laws. *See, e.g.*, 18 U.S.C. § 3553(e) (waiver of mandatory minimum for "substantial cooperation"); N.J. Stat. Ann. § 2C:35-12 (waiver of mandatory minimum at the government's discretion where the defendant pleads guilty). Criminal history often influences sentence lengths irrespective of the nature of the underlying crime. *See, e.g.*, U.S. Sentencing Guidelines Manual § 4 (U.S. Sentencing Comm'n 2015). Sentencing judges often consider sentences previously imposed on co-conspirators or accomplices as a relevant baseline for analysis, potentially constraining the ultimate sentence. *See, e.g.*, *United States v. Parker*, 462 F.3d 273, 278 (3d Cir.) (noting that "a sentencing court may reasonably consider sentencing disparity of co-defendants"), cert. denied, 594 U.S. 987 (2006). Judges in some jurisdictions impose systematically higher sentences than others. For example, in the federal system, where the relevant

presumes that "punishments are selected by judges who have first-hand knowledge of the facts and circumstances of the cases," and that therefore sentences "reflect the sentencing judges' assessment of how minor the violations were," *Binderup*, 836 F.3d at 352, that presumption simply ignores the other factors that may influence judges' sentencing determinations.

Moreover, judicial discretion over sentences is limited by a series of predicate determinations made by prosecutors, including whether to bring charges in the first instance, what charges to bring, and whether to forgo more serious charges in exchange for a guilty plea on a lesser charge. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Calif. L. Rev. 1471, 1505 (1993) ("Attaching specific sentences to criminal statutes so amorphous that any one of several can apply to a given course of criminal conduct yields a system in which the prosecutor, through his ability to control the charge, controls the sentence."). Prosecutorial discretion, in turn, is often based on factors unrelated to the seriousness of the

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criminal law is identical across all jurisdictions, the national median sentence for firearms offenses in fiscal year 2015 was 60 months; but that figure ranged from 46 months in the Ninth Circuit to 78 months in the Third Circuit. U.S. Sentencing Comm'n, *Statistical Information Packet, Fiscal Year 2015 First Circuit* 10 (Apr. 2016); U.S. Sentencing Comm'n, *Statistical Information Packet, Fiscal Year 2015 Ninth Circuit* 10 (Apr. 2016). Finally, numerous studies have identified racial disparities in criminal sentences, further complicating the Third Circuit's reliance on actual sentences as a measure of seriousness. *See, e.g.*, William Rhodes et al., Bureau of Justice Statistics, *Federal Sentencing Disparity: 2005-2012* (2015) (concluding that "black males receive harsher sentences than white males after accounting for the facts of the surrounding case," and noting that the disparity has grown since 2005).

crime—for example, avoiding the burden and risk of going to trial on a more serious charge. *See* John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 Hofstra L. Rev. 639, 640 (2008) (discussing prosecutors' reasons for negotiating sentences with defendants).

D. Determining the "Cross-Jurisdictional Consensus" on the Seriousness of an Offense Is Time-Intensive and Subjective

Consideration of whether there is a "cross-jurisdictional consensus" regarding the predicate crime is similarly unhelpful. Such an analysis would require a time-intensive inquiry, particularly when other authorities have not recently catalogued the relevant laws of all fifty states, and undermines our federal system, which allows state legislatures to determine, for themselves, whether a given crime is serious. But the criterion is also elusive because the state legislatures could decide to revise their criminal codes at any time, creating cross-jurisdictional consensus where there was none, and destroying it where it already existed.

* * *

Thus, none of the four factors outlined by the Third Circuit is an objective indicium of seriousness. Even if the factors the Court of Appeals articulated were independently objective and workable, the decision below offers no guidance as to the weight to be accorded to each factor. For instance, the Third Circuit leaves open the possibility that even convicted felons could potentially mount as-applied challenges. *Binderup*, 836 F.3d at 353 n.6. Similarly, while the

maximum possible punishment is a relevant consideration, the Court of Appeals provided no guidance beyond the caveat that courts should not "defer blindly to it." *Id.* at 351. Thus, neither prosecutors, defendants, nor judges will have any idea whether any particular § 922(g)(1) prohibition comports with the Constitution. Such indeterminacy has no place in criminal law. *See Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) ("[T]he Government violates the [Fifth Amendment] by taking away someone's life, liberty, or property under a criminal law so . . . standardless that it invites arbitrary enforcement.").[8]

III. The Third Circuit's Framework Will Be Unworkable in at Least Three Contexts

The factors discussed by the court are inherently problematic, and as a consequence, would complicate and confuse critical decision-making in at least three contexts: (1) when prospective gun owners seek approval to purchase a firearm and are subject to a background check; (2) when plaintiffs bring legal challenges seeking declaratory judgments regarding the constitutionality of a variety of other dispossession

[8] The concurring opinion below also presents the same problem. Requiring district courts to determine whether a defendant is "likely to commit violent offenses" or whether he would be "dangerous, violent, or irresponsible with firearms," *Binderup*, 836 F.3d at 367, 377 (Hardiman, J., concurring), would introduce a risk of grave error and would necessitate a time- and fact-intensive analysis. The burden on trial courts to make such determinations would be substantial in light of the nearly 5,000 convictions in fiscal year 2015 under § 922(g), "most commonly because of a prior conviction for a felony offense." U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm* (July 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY15.pdf.

statutes; and (3) when defendants indicted under § 922(g)(1) bring constitutional claims at the outset of any proceeding, requiring courts to engage in complicated and fact-sensitive "*Binderup* hearings."

A. The Third Circuit's Standard Could Hamstring the Effectiveness of Firearm Background Check Systems

1. The Third Circuit's Opinion Adds a Layer of Constitutional Confusion to States' Firearm Background Check Procedures

State and federal laws require licensed dealers to obtain criminal background checks on most potential purchasers prior to the sale of a firearm.[9] In a typical process, a licensed firearms dealer contacts the FBI's National Instant Criminal Background Check System ("NICS"), or an equivalent state system, where records examiners determine whether "receipt of a firearm . . . would violate subsection (g) or (n) [of § 922] or State law."[10] If the purchaser is disqualified under § 922(g) or state law, the records examiner directs the dealer to deny the firearm sale.[11]

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[9] *See, e.g.*, 18 U.S.C. § 922(t); 27 C.F.R. § 478.102; 11 Del. Code Ann. §§ 1448A(a)-(b), 1448B(a); N.J. Admin. Code §§ 13:54-3.12, 13:54-3.13; 18 Pa. Cons. Stat. § 6111(b)(3)-(4).

[10] 18 U.S.C. § 922(t)(4); *see also* 11 Del. Code Ann. §§ 1448A(a)-(b), 1448B(a); N.J. Admin. Code §§ 13:54-1.3(a)-(b), 13:54-1.5(a); 18 Pa. Cons. Stat. § 6111.1(b)(1)(i).

[11] *See, e.g.*, 27 C.F.R. § 478.102(a)(2)(i) (allowing a firearms transfer to proceed if "NICS informs the [dealer] that it has no information that receipt of the firearm . . . would be in violation of Federal or State law"); 11 Del. Code Ann. §§ 1448A(a)-(b), 1448B(a); N.J. Admin. Code § 13:54-1.5(a) (prohibiting firearms purchaser identification cards from being issued to persons convicted of specified crimes); 18 Pa. Cons. Stat. § 6111.1(b)(1)(iii).

As this Court has held, such mandatory state and federal background checks, i.e., "laws imposing conditions and qualifications on the commercial sale of arms," are among the list of "presumptively lawful regulatory measures" validated in *Heller*. 554 U.S. at 626-27 & n.26. The Third Circuit's new rule of constitutional law excludes persons convicted of misdemeanors punishable by more than two years in prison from the scope of the statute, yet fails to clearly define this group. *Binderup*, 836 F.3d at 351-53 (setting forth criteria for adjudicating the "seriousness" of a prior conviction). To comply with this constitutional rule, states in the Third Circuit must now apply the decision to their pre-purchase background check systems.[12] However, the analysis required by the Third Circuit's decision would add further complexity to background check systems that are already overwhelmed by record numbers of gun sales and understaffing.[13] This strain would harm public

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[12] The requirement to initiate a background check—like all requirements that dealers must observe before selling firearms—must comply with constitutional standards. *See, e.g.*, *Silvester v. Harris*, 843 F.3d 816, 818-19, 827-29 (9th Cir. 2016) (reviewing the constitutionality of a requirement that firearms dealers observe a waiting period while a background check is conducted); *United States v. Hosford*, 843 F.3d 161, 164-70 (4th Cir. 2016) (reviewing pre-purchase licensing requirements for firearms dealers under the Second Amendment); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 189-90, 211-12 (5th Cir. 2012) (reviewing prohibitions on dealers selling firearms to minors under the Second and Fifth Amendments).

[13] Of the almost 27 million background checks conducted in 2016, 1.3 million of those were in the Third Circuit. *See* Fed. Bureau of Investigation, *NICS Firearm Checks: Month/Year by State*, https://www.fbi.gov/file-repository/nics_firearm_checks_-

safety and burden law-abiding gun purchasers whose acquisition of firearms would likely be delayed in the overwhelmed system.

2. Criminal Records Databases Lack Data Necessary for the Analysis the Third Circuit Requires

In investigating a purchaser's criminal history, a records examiner searches a set of federal databases including the Interstate Identification Index (the "III"), which contains "identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, and release." *See* 28 C.F.R. §§ 20.3(d), 25.6(c)(1)(iii). Some states' examiners also search proprietary state criminal records databases. For example, Pennsylvania and New Jersey operate their own databases, which use datasets comparable to the III.[14]

_month_year_by_state.pdf/view (collecting state-by-state background check statistics); Doug Cameron, *FBI Forecasts Gun Checks to Climb 6.5% in 2016*, Wall St. J., Jan. 20, 2016, http://www.wsj.com/articles/fbi-forecasts-gun-checks-to-climb-6-5-in-2016-1453331602 (noting the need to add 100 new employees to the NICS section in 2016).

[14] *See* 18 Pa. Cons. Stat. § 9102 (defining "criminal history record information" as "identifiable descriptions, dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom"); N.J. Admin. Code § 13:59-1.1 (defining "criminal history record information" as "identifiable descriptions and notations of arrests, indictments, or other formal criminal charges, and any dispositions arising therefrom, including convictions, pending court actions, dismissals, acquittals, sentencing, correctional supervision and release").

Regardless of which dataset is used, the examiner lacks the information necessary to assess the seriousness of a predicate offense under the Third Circuit's framework. The federal dataset lacks information on the particular elements of prior convictions, as it "is intended to include the basic offender-based transaction statistics/III System (OBTS/III) data elements," such as "notations of an arrest, disposition, or other formal criminal justice transaction." 28 C.F.R. pt. 20 App., Subpart A. Similarly, Pennsylvania's criminal records do not include "documents, records or indices prepared or maintained by or filed in any court of this Commonwealth," 18 Pa. Cons. Stat. § 9104(a)(2), or "caution indicator information, . . . personal history information, [or] presentence investigation information," *id.* § 9105. Nor do these datasets help determine "cross-jurisdictional consensus regarding the seriousness" of an offense, as required in *Binderup*, 836 F.3d at 352, because they only contain the individual's offenses in the jurisdictions where she was convicted.[15] The records do not provide information on comparable offenses in other jurisdictions.

All of these limitations would have to be corrected in order to make background check systems within the Third Circuit compliant with that court's constitutional interpretation. The financial costs to bring such systems into compliance would be extraordinary. Costs aside, even Congress itself does not have the power to directly commandeer the States to engage in such an undertaking. *See Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that a firearm background check regime "compel[led] the States to

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[15] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Use and Management of Criminal History Record Information* 76-77 (2001), https://www.bjs.gov/content/pub/pdf/umchri01.pdf.

enact or enforce a federal regulatory program" and thus violated the Tenth Amendment).[16] Yet, the Third Circuit's decision would have that same effect, requiring a wholesale rethinking of how law enforcement officials conduct background checks at the point of purchase.

3. Firearm Background Checks Are Too Frequent and Time-Sensitive to Function Effectively Without Clear Standards for Evaluating Applications

Because it is unlikely that databases on which background check systems rely could be brought into compliance with the Third Circuit's ruling, records examiners would necessarily have to look beyond the databases in order to conduct the analysis that the decision now requires. Under federal law, a pre-purchase records check must be completed within three business days, or the transaction is allowed to proceed, despite uncertainty about whether a § 922(g) prohibition applies (i.e., a "default proceed"). *See* 18 U.S.C. § 922(t)(1)(B)(ii); 28 C.F.R. § 25.6(c)(1)(iv)(B).[17] Federal statistics indicate that potentially prohibiting criminal records that lack sufficient information to make a final determination are the most common reason for default proceeds.[18] In such cases, records

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[16] The states currently submit their criminal records to the federal government on a voluntary basis, in order to gain access to the III and other federal databases. *See* Nat'l Crime Prevention & Privacy Compact, 42 U.S.C. § 14616.

[17] State laws may extend such periods. *See* 11 Del. Code Ann. §§ 1448A(b), 1448B(a) (extending to 25 days); N.J. Stat. Ann. § 2C:58-4(c) (extending to 60 days). Pennsylvania has not extended the default proceed period.

[18] Fed. Bureau of Investigation, U.S. Dep't of Justice, *National Instant Criminal Background Check System (NICS) Operations*

examiners must collect this information from local, state, tribal, and/or federal agencies, which takes time and frequently results in a default proceed.[19] *See id.* Allowing firearms sales to proceed when a background check cannot be completed within three days can have tragic results: it was because NICS agents could not resolve his background check within a three-day window that Dylann Roof was permitted to purchase the .45-caliber handgun he used to murder nine people at an evening Bible study in downtown Charleston, South Carolina in June 2015.[20]

Thus, the absence of a fixed standard in the Third Circuit's "multi-factor test" will require time-consuming outreach for nearly every purchaser with prior misdemeanors punishable by a term of imprisonment of more than two years. *See* 18 U.S.C. § 921(a)(20)(B). And there is little chance that the standard will become clear over time: as more as-applied challenges are litigated, there will be a "morass of as-applied precedent" that attempts to draw increasingly fine-

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Report 2 (2015), https://www.fbi.gov/file-repository/2015-nics-ops-report.pdf/view.

[19] For example, when one NICS background check revealed a conviction for misdemeanor assault, the records examiner needed to contact a county court to determine whether the crime was "a misdemeanor crime of domestic violence," a prohibitor under § 922(g)(9). U.S. Gen'l Accounting Office, *Implementation of the National Instant Criminal Background Check System* 50 (Feb. 2000), http://www.gao.gov/new.items/g100064.pdf. The examiner then learned that the purchaser was subject to an outstanding arrest warrant, requiring further research as to whether he was "a fugitive from justice," a prohibitor under § 922(g)(2). *Id.* The investigation took longer than three days, and the transaction proceeded by default. *Id.*

[20] Michael S. Schmidt, *Background Check Flaw Let Dylann Roof Buy Gun, F.B.I. Says*, N.Y. Times, July 11, 2015, at A1.

grained distinctions about the seriousness of prior convictions. *Binderup*, 836 F.3d at 409 (Fuentes, J., dissenting). Indeed, experience with a similar statutory provision shows that consistent application is chimerical. The FBI and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") have disagreed for 15 years over the meaning of § 922(g)(2)'s prohibition on firearm possession by "fugitives from justice."[21] As a result, ATF has refused to recover nearly 50,000 firearms, the purchase of which the FBI initially attempted to deny. *See* Office of the Inspector General, *supra* note 21, at 26.

B. The Third Circuit's Standard Will Cause a Flood of Civil Challenges to Dispossession Statutes

The onslaught of challenges mirroring *Binderup* has already begun. *See, e.g.*, Notice of Supplemental Authority, *Baginski v. Lynch*, No. 1:15-CV-1225-RC, 2017 WL 318624 (D.D.C. Jan. 23, 2017). However,

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[21] *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* 26-27 (Sept. 2016). A "fugitive from justice" is defined as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding." 18 U.S.C. § 921(a)(15). ATF considers a person a "fugitive from justice" if she attempts to purchase a firearm in a state outside the one where her outstanding warrant was issued. *See* Office of the Inspector General, *supra*, at 26-27. However, the FBI applies the term to individuals who attempt to purchase a firearm outside the *county* where their warrants were issued. *See id.* at 27. After ten years of disagreement, the Department of Justice's Office of Legal Counsel ("OLC") issued an opinion on the matter. *See id.* The FBI requested reconsideration of the opinion in 2010, but no new decision has been rendered, and the dispute continues. *Id.*

even as it currently stands, the Third Circuit's decision threatens to deprive Congress of its ability to enact prophylactic gun legislation at the federal level that respects historical variations in state criminal law while simultaneously creating a uniform standard for firearm prohibition nationwide. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) (recognizing and giving weight to Congress's ability to create "broad prophylactic" gun legislation).

The Third Circuit's decision expressly leaves open the possibility of as-applied challenges to § 922(g)(1) for felony convictions. Like the misdemeanors in this case, many state felonies are punishable by terms of imprisonment between one and five years. Thus, applying the Third Circuit's rule nationally would call into question wide swaths of state felonies that currently fall under the federal firearms prohibitions. The mere possibility of such challenges would open new avenues of constitutional attacks on gun safety laws, because nothing in this Court's prior decisions has ever called into question the ability of Congress or state legislatures to attach collateral consequences—including the forfeiture of certain civil rights—to felony convictions. *See, e.g.*, *Richardson v. Ramirez*, 418 U.S. 24 (1974) (holding that felon disenfranchisement laws are not per se unconstitutional); *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 332 (1970) ("The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character.").

Furthermore, the logic of the Third Circuit's endorsement of as-applied challenges to § 922(g)(1) applies equally to other federal gun safety laws,

including other provisions of § 922(g), as well as state-level analogues. If the Court of Appeals' analysis were to apply nationally, it would lead to a torrent of constitutional challenges to the 18 state-level misdemeanor prohibitors that sweep more broadly than § 922(g)(1), reaching repeat drug offenders, stalkers, misdemeanor sex offenders, and domestic abusers.[22] Nothing in this Court's precedents requires such a result.

C. The Third Circuit's Standard Opens the Door to As-Applied Constitutional Challenges at the Outset of Many § 922(g)(1) Criminal Proceedings

In addition to civil challenges to offender dispossession laws, the Third Circuit's decision creates the possibility for a new type of post-indictment challenge in prosecutions for violations of § 922(g)(1) or state law dispossession statutes. Such "*Binderup* hearings" would be necessary to assess the constitutional validity of the indictment and would turn on the "seriousness" of the underlying predicate offense. Even if the Third Circuit had provided clear guidance for district courts to make such fact-intensive individualized assessments, such hearings would present administrability problems. However, in light of the Court of Appeals' fractured decision, which provides little

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[22] *See* Ala. Code § 13A-11-72; Cal. Penal Code § 29800(a)(2); Conn. Gen. Stat. Ann. § 53a-217(a)(1); 11 Del. Code §§ 1448(a), (d); Haw. Rev. Stat. Ann. § 134-7(b); 430 Ill. Comp. Stat. Ann. 65/8; K.S.A. 21-6304(a)(1); 15 Me. Stat. § 393; Md. Public Safety Code Ann. §§ 5-133(b), 5-101; ALM GL c. 140 § 129B(1)(i); Minn. Stat. § 624.713 (subd. 1) (11); N.J. Stat. § 2C:39-7; N.Y. CLS Penal §§ 400.00(1)(c), 265.00(17); N.D. Cent. Code § 62.1-02-01; 18 Pa. Cons. Stat. § 6105(b); 13 V.S.A. § 4017; Va. Code Ann. § 18.2-308.1:5 (purchase); D.C. Code § 22-4503(a).

concrete guidance on how to apply the framework in future cases, it is completely unworkable. A host of run-of-the-mill firearm possession challenges would be rendered vulnerable to constitutional attack with a method for evaluating such challenges that is murky at best.

As discussed above, the Third Circuit's non-exhaustive list of four considerations in evaluating whether the seriousness of a crime permits a § 922(g)(1) prohibition is inherently amorphous. *Binderup*, 836 F.3d at 351-53 ("[T]here are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights."). Yet, none of the factors the Third Circuit articulated is an "easily administrable . . . objective indication[] of seriousness," *id.* at 33 n.5, particularly when one takes into account the variety of factors influencing how crimes are prosecuted, offenders plead guilty, and sentences are determined.

This system of case-by-case determination of firearms eligibility is completely unworkable. Indeed, Congress itself has so concluded by its persistent refusal to fund the relief provision of the statute. Congress previously allowed an individual to obtain relief from § 922(g)(1)'s firearm disability by demonstrating to ATF that "the circumstances regarding the disability, and [his] record and reputation, are such that [he] 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." 18 U.S.C. § 925(c). Since 1992, however, Congress has suspended the program by enacting annual provisions barring the use of appropriated funds to process applications for relief. *See Logan v. United States*, 552 U.S. 23, 28 n.1 (2007). The plurality should not

be permitted to impose a blunt reproduction of that program on the Third Circuit by judicial fiat, without any basis in law.

CONCLUSION

For the reasons set forth herein, this Court should grant the United States' Petition for a Writ of Certiorari.

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