No. 16-847

In the Supreme Court of the United States

JEFFERSON B. SESSIONS, III,
ATTORNEY GENERAL, ET AL., PETITIONERS

v.

DANIEL BINDERUP, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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Over a dissent by seven judges, the en banc Third Circuit held that 18 U.S.C. 922(g)(1)'s prohibition on the possession of firearms by felons violates the Second Amendment as applied to respondents. Although respondents oppose certiorari, their brief in opposition and supplemental brief confirm that this Court's review is warranted. Respondents acknowledge (Supp. Br. 2) that the Third Circuit's decision creates a circuit conflict on an important question that "this Court can (and should) resolve." Respondents also do not identify any feature of this case that would make it an unsuitable vehicle for resolving that question. Instead, respondents take issue with the phrasing of the question presented, dispute the precise contours of the circuit split, and disagree with the government's position on the merits. Those arguments are mistaken, and they provide no basis for denying review.

1. The question presented is whether respondents "are entitled to relief from the longstanding federal statute prohibiting felons from possessing firearms, 18 U.S.C. 922(g)(1), based on their as-applied Second Amendment claim that their criminal offenses and other particular circumstances do not warrant a firearms disqualification." Pet. i. Respondents do not deny that this case squarely presents the question whether and under what standard Section 922(g)(1) may be held unconstitutional as applied to specific individuals based on their offenses and other circumstances. Instead, respondents criticize (Br. in Opp. 18-21) two aspects of the phrasing of the question presented. Neither criticism has merit, and neither is relevant to the need for this Court's review.

First, respondents assert (Br. in Opp. 18-19) that the use of the word "felons" in the question presented is wrong because their offenses were state-law misdemeanors. But like all offenses covered by Section 922(g)(1), respondents' crimes are properly described as felonies because they were "punishable by imprisonment for more than one year." *Burgess* v. *United States*, 553 U.S. 124, 130 (2008); see, *e.g.*, *Black's Law Dictionary* 736 (10th ed. 2014). This Court thus routinely describes Section 922(g)(1) as a "felon-in-possession" statute even though it encompasses some offenses that States label "misdemeanor[s]." *Logan* v. *United States*, 552 U.S. 23, 27 (2007); see, *e.g.*, *Voisine* v. *United States*, 136 S. Ct. 2272, 2276 (2016).

Second, respondents assert (Br. in Opp. 20-21) that although Section 922(g)(1) has been on the books for nearly half a century, the question presented incorrectly describes it as "longstanding" because it was not in force when the Second Amendment was adopted

in 1791. That assertion cannot be reconciled with *Heller* and *McDonald*, which emphasized that their Second Amendment holdings did not "cast doubt on longstanding prohibitions on the possession of firearms by felons." *District of Columbia* v. *Heller*, 554 U.S. 570, 626 (2008); see *McDonald* v. *City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion) (same).

2. Respondents' brief in opposition acknowledges (at 29) that the Third Circuit's decision conflicts with decisions of the Tenth Circuit, which they concede has "rejected the availability of as-applied Section 922(g)(1) challenges." See *United States* v. *McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), cert. denied, 559 U.S. 970 (2010). And respondents' supplemental brief correctly recognizes (at 2) that a recent Fourth Circuit decision "deepened [the] circuit split" by rejecting the Third Circuit's approach. But respondents incorrectly seek to minimize the extent of the circuit conflict and the degree to which the Third Circuit is an outlier.

a. Like the Tenth Circuit, the Fifth and Eleventh Circuits have foreclosed as-applied Second Amendment challenges to Section 922(g)(1). Respondents err in arguing otherwise (Br. in Opp. 29-30).

Even before *Heller*, the Fifth Circuit had held that the individual right protected by the Second Amendment "does not preclude the government from prohibiting the possession of firearms by felons." *United States* v. *Darrington*, 351 F.3d 632, 633 (2003), cert. denied, 541 U.S. 1080 (2004). The Fifth Circuit's post-*Heller* decisions reaffirm that "criminal prohibitions on felons (violent or nonviolent) possessing firearms d[o] not violate" the Second Amendment. *United States* v. *Scroggins*, 599 F.3d 433, 451, cert. denied, 562 U.S. 867 (2010). And in a decision issued after the brief in op-

position was filed, the Fifth Circuit confirmed that circuit precedent forecloses a claim that Section 922(g)(1) is unconstitutional "as applied" to a specific defendant, without inquiring into his particular circumstances. *United States* v. *Massey*, 849 F.3d 262, 263 (2017); see *id.* at 265.

The Eleventh Circuit, too, has held that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *United States* v. *Rozier*, 598 F.3d 768, 771, cert. denied, 560 U.S. 958 (2010). The court's subsequent decisions addressing the issue, though themselves unpublished, treat that precedent as "foreclose-[ing]" both facial and as-applied challenges. *United States* v. *Dowis*, 644 Fed. Appx. 882, 883 (2016); see, *e.g.*, *United States* v. *Reverio*, 551 Fed. Appx. 552, 553 (same), cert. denied, 134 S. Ct. 2158 (2014).

b. Respondents' brief in opposition asserts (at 27-29) that the Third Circuit's decision is consistent with decisions of the Fourth, Seventh, Eighth, and D.C. Circuits. But those decisions merely "left open the possibility that a person could bring a successful as-applied challenge to [Section] 922(g)(1)." *United States* v. *Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014).[1]

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[1] See *United States* v. *Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) ("[T]here in theory might be 'an as-applied Second Amendment challenge to [Section] 922(g)(1)' that 'could succeed.'") (citation omitted); *United States* v. *Williams*, 616 F.3d 685, 693 (7th Cir.) ("[Section] 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent."), cert. denied, 562 U.S. 1092 (2010); *Schrader* v. *Holder*, 704 F.3d 980, 991 (D.C. Cir.) (stating that the plaintiff may have had a valid as-applied claim, but deferring consideration of that question "to a case where the issues are properly raised and fully briefed"), cert. denied, 134 S. Ct. 512 (2013).

No court of appeals other than the Third Circuit has actually held that Section 922(g)(1) is unconstitutional in any of its applications. In taking that step, the Third Circuit "stand[s] entirely alone." Pet. App. 108a (Fuentes, J.).

Moreover, as respondents' supplemental brief acknowledges (at 4), the Fourth Circuit has now expressly "decline[d] to adopt" the Third Circuit's approach in a case involving a Second Amendment challenge to a state felon-in-possession statute. *Hamilton* v. *Pallozzi*, 848 F.3d 614, 626 & n.10 (4th Cir. 2017). Rather than endorsing "the 'seriousness' test elucidated in *Binderup*," the Fourth Circuit "simply h[e]ld," subject to one possible caveat, "that conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for purposes of the Second Amendment" and forecloses the possibility of a successful as-applied challenge. *Id.* at 626.

Hamilton did "leave open the possibility" of as-applied challenges by individuals who, like respondents, were convicted of state-law misdemeanors. 848 F.3d at 626 n.11. But, as respondents acknowledge (Supp. Br. 2), the Fourth Circuit's rejection of the legal rule adopted by the decision below "deepened [the] circuit split to which the Government's certiorari petition alluded."

3. Notwithstanding the circuit conflict, respondents urged further "percolation" in their brief in opposition (at 30), contending that the question presented did not yet warrant this Court's review. But respondents gave no reason to think that the conflict will resolve itself absent this Court's intervention or that the relevant legal issues have not been sufficiently developed. And in any event, respondents have now reversed course,

acknowledging (Supp. Br. 2) that "this Court can (and should) resolve th[e] circuit split" over the viability of as-applied Second Amendment challenges to Section 922(g)(1).

Respondents' opposition to certiorari now rests exclusively on their assertion (Supp. Br. 2) that even though the court of appeals' decision in this case created a circuit conflict and held an Act of Congress unconstitutional as applied, *Hamilton* would be a better vehicle for resolving the question presented. But respondents do not deny that this case squarely presents the question that has divided the circuits. Instead, respondents simply contend (Br. in Opp. 19-20; Supp. Br. 2) that their as-applied challenges have greater force because their offenses—though punishable by up to three or five years of imprisonment, Pet. App. 6a—were labeled misdemeanors by state law.

Even if that argument were correct, it would be relevant only to the merits of respondents' Second Amendment challenges, not to whether this Court's review is warranted. And in any event, respondents provide no sound reason to afford constitutional significance to the "minor and often arbitrary" state-law distinction between felonies and misdemeanors. *Tennessee* v. *Garner*, 471 U.S. 1, 14 (1985). Respondents briefly suggest (Br. in Opp. 19) that a misdemeanor classification reflects the legislature's view about the seriousness of the offense. But they do not attempt to square that argument with this Court's admonition that a crime's "maximum penalty," not its label, is the best measure of "the legislature's judgment about the offense's severity." *Lewis* v. *United States*, 518 U.S. 322, 326 (1996); see Pet. 15-16. Furthermore, the state-law felony-misdemeanor distinction could not

form the basis for a viable constitutional rule because "some States * * * do not label offenses as felonies or misdemeanors." *Burgess*, 553 U.S. at 132; see, *e.g.*, *State* v. *Doyle*, 200 A.2d 606, 613 (N.J. 1964) ("Criminal codes in New Jersey have not utilized the felony-misdemeanor nomenclature.").[2]

Ultimately, even respondents themselves do not appear to contend that the state-law felony-misdemeanor distinction has constitutional significance because they do not incorporate that distinction into their proposed Second Amendment rule. They endorse (Br. in Opp. 25) "Judge Hardiman's as-applied framework." But Judge Hardiman declined to rely on "the felony-misdemeanor distinction" because he "agree[d] with the Government" that it is "minor and often arbitrary." Pet. App. 81a (citation omitted).

4. On the merits, respondents defend (Br. in Opp. 21-26, 30-34) the Third Circuit's ultimate conclusion that Section 922(g)(1) violates the Second Amendment as applied to them. But they confirm the need for this Court's review by expressly declining to endorse the legal rule adopted in Judge Ambro's opinion, which now appears to be "the law of [the Third] Circuit." Pet. App. 41a.

a. Just as Congress and the States permissibly require persons convicted of felonies to forfeit other

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[2] Respondents assert (Br. in Opp. 19) that courts of appeals have treated misdemeanors differently than other offenses covered by Section 922(g)(1). But the decisions on which they rely addressed 18 U.S.C. 922(g)(9), which—unlike Section 922(g)(1)—reaches true misdemeanors punishable by less than a year of imprisonment. See *United States* v. *Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013), cert. denied, 135 S. Ct. 187 (2014); *United States* v. *Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

important rights, including the rights to vote, to serve on a jury, and to hold public office, Section 922(g)(1) imposes a firearms disability "as a legitimate consequence of a felony conviction." *Tyler* v. *Hillsdale Cnty. Sherriff's Dep't*, 837 F.3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring in most of the judgment); see, *e.g.*, *Alleyne* v. *United States*, 133 S. Ct. 2151, 2172 (2013) (Roberts, C.J., dissenting) ("[T]he rights to vote and to bear arms are typically denied to felons—that is, those convicted of a crime with a maximum sentence of more than one year in prison.").

Judge Ambro's opinion acknowledged that persons who commit "serious" offenses forfeit their Second Amendment rights, Pet. App. 23a-28a, but he concluded that some offenses covered by Section 922(g)(1) are not "serious." Instead, he held that courts must evaluate "seriousness" on a case-by-case basis by examining whether the offense was classified as a misdemeanor; whether it involved the use of force; whether it resulted in a lengthy sentence; and whether there is a "cross-jurisdictional consensus" on its seriousness. *Id.* at 30a-34a.

The certiorari petition explained (at 14-17) that this novel multi-factor inquiry has no foundation in this Court's decisions or in the Second Amendment's history, and that it would be impossible for district courts to apply in a principled manner. Respondents offer virtually no response to those points, and they specifically decline (Br. in Opp. 25) to endorse Judge Ambro's approach because they regard "Judge Hardiman's as-applied framework" as "more historically correct."

Respondents do echo (Br. in Opp. 23-24, 30-31) Judge Ambro's conclusion that some offenses punishable by more than one year of imprisonment are too

minor to justify a firearms disability. But respondents offer only examples of offenses that they regard as insufficiently serious—they do not articulate any principled standard for distinguishing such offenses from those that justify a firearms disability. This Court previously abandoned a similar ad hoc effort to identify offenses that are sufficiently "serious" to trigger the Sixth Amendment right to trial by jury. *Lewis*, 518 U.S. at 325. In making that determination, "courts at one time looked to the nature of the offense and whether it was triable by a jury at common law." *Ibid.* But that approach proved impracticable, and the Court rejected it in favor of a test based on "the maximum penalty" authorized by the legislature. *Id.* at 326. The Court explained that the maximum penalty "reveals the legislature's judgment about the offense's severity," *ibid.*, and it emphasized that "[t]he judiciary should not substitute its judgment as to seriousness for that of the legislature, which is far better equipped to perform the task," *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 541 (1989) (citation and internal quotation marks omitted).

As respondents observe (Br. in Opp. 25), the Second and Sixth Amendment inquiries serve different purposes. But this Court's conclusion that it is impracticable and inappropriate to substitute ad hoc judicial assessments of "seriousness" for the legislative judgment reflected in an offense's maximum penalty applies equally here—and counsels decisively against the rule adopted in Judge Ambro's opinion.

b. Rather than defending Judge Ambro's approach, respondents endorse (Br. in Opp. 25) the broader rule reflected in Judge Hardiman's concurring opinion. In Judge Hardiman's view, Section 922(g)(1) may not be

applied to any "non-dangerous persons convicted of offenses unassociated with violence." Pet. App. 45a. That rule is inconsistent with the history of the Second Amendment and with this Court's decision in *Heller*.

Judge Hardiman correctly recognized that "the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses." Pet. App. 66a (citation omitted). But he erred in inferring that *only* those with a demonstrated propensity for violence may be barred from possessing firearms. In fact, "most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *Id.* at 23a (Ambro, J.) (brackets and citation omitted). That category is "broader than violent criminals; it covers any person who has committed a serious criminal offense." *Id.* at 25a. For example, one of the Second Amendment precursors on which Judge Hardiman relied provided that citizens could be disarmed not only for "real danger of public injury," but also "for crimes committed." *Id.* at 65a (quoting 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971)) (emphasis omitted). And *Heller* likewise indicates that Second Amendment rights may be forfeited through conduct inconsistent with being a "law-abiding, responsible citizen[]," 554 U.S. at 635—not exclusively through violence.

Judge Hardiman's approach would, moreover, be even more difficult to apply than Judge Ambro's. Judge Hardiman's opinion offered several inconsistent definitions of "offenses []associated with violence," including offenses "ordinarily committed with the aid of firearms," Pet. App. 45a, 82a; offenses involving

"actual violent behavior," *id.* at 82a; and offenses "'closely related to violent crime,'" a category that includes "drug trafficking," *id.* at 84a (citation omitted). And Judge Hardiman appeared to conclude that if an individual's offense qualifies as "unassociated with violence," a court must conduct a wide-ranging inquiry into the individual's background, character, post-conviction conduct, and other circumstances to determine whether he qualifies as "non-dangerous." *Id.* at 45a; see *id.* at 81a-86a. Respondents do not explain how district courts could apply that framework consistently to the many felons whose offenses might arguably qualify as "unassociated with violence" under one of Judge Hardiman's formulations.

5. Congress previously adopted an administrative process that allowed felons to regain the right to possess firearms by demonstrating to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) that they "w[ould] not be likely to act in a manner dangerous to public safety." 18 U.S.C. 925(c). Since 1992, however, Congress has declined to fund that program because the task of identifying felons who can safely possess firearms is "very difficult and subjective" and because it "could have devastating consequences for innocent citizens if the wrong decision is made." S. Rep. No. 353, 102d Cong., 2d Sess. 19 (1992).

The Third Circuit's decision re-imposes a version of the same regime—except one administered by district courts rather than the ATF, and one that requires courts to make case-by-case judgments about both the severity of an individual's underlying crime and the individual's present-day dangerousness. If allowed to stand, that regime of as-applied challenges will "place[] an extraordinary administrative burden on

district courts handling prosecutions under [Section] 922(g)(1)." Pet. App. 154a-155a (Fuentes, J.). The Third Circuit's conclusion that the Constitution mandates that untenable result warrants further review.

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For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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