No. 16-983

In The
Supreme Court of the United States

DANIEL BINDERUP, et al.,

Cross-Petitioners,

v.

JEFFERSON B. SESSIONS, III, et al.,

Cross-Respondents.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR THE CROSS-PETITIONERS

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SUMMARY OF ARGUMENT

From its presumption that the lower court's statutory interpretation is correct, the Government jumps to the conclusion that the matter requires no further examination.

This approach fails to address one simple fact that all three lower courts correctly understood: the constitutional merits which the Government would like to contest cannot be reached without first addressing Respondents' statutory argument. If the

statutory problem is as cut-and-dry as the Government claims, then it should not require much effort to resolve, assuming the Court wishes to grant the underlying petition. But this Court's recent history demonstrates that parties should rely on neither their perception of "obvious" statutory interpretations, nor on this Court's desire to resolve Second Amendment questions.

And as the Government otherwise demonstrates by what it conspicuously fails to address, and by its re-imagination of Respondents' claims, the cross-petition would have substantial merit independent of the Government's underlying effort.

ARGUMENT

1. "[B]ecause Section 921(a)(20)(B) is unambiguous, [Respondents'] statutory argument would not provide a viable basis for avoiding the important constitutional question decided by the court of appeals and presented in the government's petition." Br. in Opp. 5.[1]

Momentarily setting aside the question of *which* of its two common definitions might render the term "punishable" unambiguous in this particular context, see *infra*, the three lower courts reached this case's constitutional merits only after writing seventeen, six,

[1] All statutory references are to Title 18 of the United States Code.

and three pages of the petition's appendix, respectively. Pet. App. 176a-193a, 246a-252a, 9a-12a. The Government's opposition might have some force if those opinions ended at those places, and Respondents were the original petitioners in the matter.

But that is not the case's posture. Respondents are *cross*-petitioners. The conditional cross-petition merely seeks to afford each Justice of this Court the same opportunity enjoyed by the judges below, to consider whether there is some way to avoid what the Solicitor General considers to be a pressing constitutional issue.[2] But the Court might not learn just how much it might wish to avoid the constitutional question until it has granted the underlying petition and considered the case on its merits. *Cf. King* v. *Burwell*, 135 S. Ct. 2480, 2492 (2015) ("We'll just have to pass it to find out what it means") (internal quotation marks omitted).

Recent history suggests that this Court should avail itself of the option presented by this conditional cross-petition. For example, few predicted that the Affordable Care Act's individual mandate to purchase health insurance would be upheld as a tax – a position not generally adopted in the expansive litigation below. But the incident served as a useful reminder that this Court looks to "every reasonable construction" of a statute, even one that is only "fairly possible" rather than the "most natural interpretation," to avoid a

[2] As Respondents have explained, the Government's petition overreaches as to the question it presents, though the issue of as-applied Second Amendment challenges to felon disarmament provisions would be cert-worthy in a proper vehicle.

constitutional decision. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2594 (2012) (Roberts, C.J.) (internal quotation marks omitted). Compared to construing the individual mandate as a tax, reading "punishable" in Section 921(a)(20)(B) as "capable of being punished by" is more than "fairly possible" – it *is* the most natural and common interpretation of the term, and indeed, it is precisely the meaning often afforded the term as it appears in Section 922(g)(1). See, *e.g.*, *Schrader* v. *Holder*, 704 F.3d 980, 986 (D.C. Cir. 2013); *United States* v. *Leuschen*, 395 F.3d 155, 158 (3d Cir. 2005).[3]

The other side of the *NFIB* coin's example likewise compels consideration of the present statutory problem. This Court has of late been as likely to strike down laws for violating the Second Amendment as for exceeding Congress's Interstate Commerce Clause

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[3] Section 4083, Sentencing Guidelines § 7B1.1(a)(1) and (2), and Fed. R. Crim. P. 7(a), which the Government cites for the proposition that "punishable by" refers to a maximum penalty, Br. in Opp. 7-8, actually make Respondents' point that context normally calls for consistently defining statutory terms in a given text. See Cross-Pet. 12-13. In each of the Government's examples, "punishable" must refer to the defined term of punishment in both instances for the provision to be coherent, because "one year or less" is used as the opposite of "more than one year" or "exceeding one year." Together, both usages complete the universe of possible crimes.

Sections 921(a)(20)(B) and 922(g)(1) are structured differently; "two years or less" is a *subset* of "more than one year," supplying an exclusion. Utilizing potentiality in both those instances of "punishable" is more logical, and in any event, does not render the scheme incoherent.

authority. See, *e.g.*, *Caetano* v. *Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring) (noting "grudging *per curiam*"); *Friedman* v. *City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari) ("[t]he Court's refusal to review a decision that flouts two of our Second Amendment precedents"); *Jackson* v. *City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from denial of certiorari).

Five years ago, this Court's reluctance to engage the Second Amendment in the face of dubious lower court decisions signaled to some that the controlling opinion in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) is Justice Breyer's dissent. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703 (2012). Today, it is credibly argued that *Heller* has been successfully resisted into oblivion, that in the absence of intervening correction, "the passage of time has seen *Heller*'s legacy shrink to the point that it may soon be regarded as mostly symbolic." Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L. J. 921, 962-63 (2016). If this Court cannot easily agree to maintain *Heller*'s viability, it should avail itself of alternative modes of addressing this case. Of course, the outcome of *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), this Court's last significant exploration of the Second Amendment, demonstrates the value of ensuring that all viable grounds for decision be presented. See David S. Cohen, *The Paradox of McDonald v. City of Chicago*, 79 Geo. Wash. L. Rev. 823 (2011).

2a. The Government correctly notes that "'[w]hen a word is not defined by statute,' this Court 'normally construe[s] it in accord with its ordinary or natural meaning.'" Br. in Opp. 6 (quoting *Smith* v. *United States*, 508 U.S. 223, 228 (1993)).

Very well. "The word 'punishable' in ordinary English simply means 'capable of being punished.'" *United States* v. *Nieves-Rivera*, 961 F.2d 15, 17 (1st Cir. 1992) (citations omitted). This much "is so self-evident that it hardly admits of argument." *United States* v. *Denson*, 588 F.2d 1112, 1117 (5th Cir.), *aff'd in part and modified in part*, 603 F.2d 1143 (5th Cir. 1979) (en banc). It is one thing for the Government to claim that in Section 921(a)(20)(B)'s context, "punishable" refers to a defined rather than a potential term. Respondents never denied the existence of this alternative definition. But it is quite another matter to deny that a statutory term carries its most plain English meaning, one adopted elsewhere in the same statutory scheme, and deny this with such conviction as to argue that the Court ought not even consider the possibility.

The Government reaches this conclusion by subtly replacing the potentiality/defined term dichotomy with one focused on whether the subject of "punishable" references a "minimum" or "maximum" term. See Br. in Opp. 3 (alleging that Respondents "argued that an offense is 'punishable by a term of imprisonment of two years or less' . . . whenever it carries a *minimum* sentence of two years or less") (no citation supplied); *id.* at 6 ("maximum available sentence") (citations omitted).

Of course Respondents "do not cite any statute or judicial decision using the phrase 'punishable by' a specified term of imprisonment to refer to an offense's minimum penalty rather than its maximum." Br. in Opp. 8. That is because Respondents do not argue that "punishable" ordinarily refers to either a minimum *or* maximum term. The touchstone of the inquiry is potentiality. In some usages, as the Government has discovered, the potential maximum is determinative. Section 922(g)(1) is such a text.

But "punishable" merely refers to potentiality. *Nieves-Rivera*, *Denson*, and *In re Mills*, 135 U.S. 263 (1890) explain that much. That these cases happened to relate to "maximum available penalt[ies]," Br. in Opp. 9, does not mean that they established a rule of maximums. Rather, quite plainly, they discussed the concept of availability. Other statutory words indicate whether the "punishable" inquiry focuses on a potential maximum or potential minimum. In Section 921(a)(20)(B), the fact that the potential *minimum* sentence is dispositive has nothing to do with the word "punishable," but is rather primarily a function of the words "or less." The first condition required to trigger Section 921(a)(20)(B)'s exclusion – that the crime be a "State offense classified by the laws of the State as a misdemeanor" – further indicates that the inquiry may be directed toward factors that would make a crime less serious.

2b. A statute's "ordinary or natural meaning," Br. in Opp. 6 (internal quotation marks omitted), cannot include the judicial insertion of the word "only" at critical junctures. Cross-Pet. 18-19. The Government ignores this argument, perhaps because there is no answer to the fact that it asks this Court to amend Section 921(a)(20)(B) in a manner that would have the state misdemeanor exclusion cover offenses "punishable *only* by a term of imprisonment of two years or less." Whatever Congress *thought* it was enacting, or *really wanted* to enact, or *should* have enacted, Br. in Opp. 9-10, is irrelevant. The statute, as it is written, lacks the word "only" in the spot where the Government would have this Court insert it. But this Court inserts words in the U.S. Reports, not the U.S. Code.

The Government might well be correct in claiming that an amended Section 921(a)(20)(B) would have the salutary effect of disarming some indeterminate number of violent misdemeanants. Surely it presents no evidence substantiating its claim that Respondents' plain meaning reading of the statute would "*severely* undermine[] Section 922(g)(1)'s purpose by allowing persons convicted of serious violent crimes to possess firearms." Br. in Opp. 10 (emphasis added).[4]

Yet it takes very little to show that the Government's broad view leads to countless absurd results –

[4] Respondents appreciate that the Government does not readily describe Section 922(g)(1)'s purpose as the disarmament of "unvirtuous" people.

starting with Respondents' cases, where the Government did not seriously argue that either Daniel Binderup or Julio Suarez were in any way dangerous, let alone with firearms. In Massachusetts, shoplifting goods valued at $100 or more is a misdemeanor punishable by two-and-a-half years. Mass. Gen. Law c. 266, § 30A. So is a second offense of selling pigs without a license. Mass. Gen. Law c. 129, § 43. Must any ambiguity in the federal Gun Control Act be read to permanently and completely deprive such violators of their Second Amendment rights?

No. When faced with two potential statutory interpretations, the rule of lenity requires greater caution before choosing a path that would explode the scope of criminal liability in this fashion. And the constitutional avoidance doctrine calls for caution before inviting the sort of difficulties that prompted the Government's petition. This Court should be open to these alternatives.

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CONCLUSION

Should the petition be granted, the conditional cross-petition should be granted as well.

Respectfully submitted,

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