No. 16-983

In the Supreme Court of the United States

DANIEL BINDERUP, ET AL., PETITIONERS,

v.

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

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

BRIEF FOR THE CROSS-RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 922(g)(1) of Title 18 generally prohibits the possession of firearms by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). A separate section, 18 U.S.C. 921(a)(20)(B), excepts from the scope of Section 922(g)(1) persons convicted of state-law misdemeanors "punishable by a term of imprisonment of two years or less." The question presented is whether Section 922(g)(1) applies to cross-petitioners based on their convictions for state-law misdemeanors that carried maximum sentences of more than two years of imprisonment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-161a) is reported at 836 F.3d 336. The opinions of the district courts (Pet. App. 162a-239a, 243a-271a) are not published in the Federal Supplement but are available at 2014 WL 4764424 and 2015 WL 685889.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2016. On November 21, 2016, Justice Alito extended the time within which to file a petition for a writ of certiorari in No. 16-847 to and including January 5, 2017, and the petition was filed on that date. The conditional cross-petition for a writ of certiorari in No. 16-983 was filed on February 6, 2017. The

[1] References to "Pet. App." refer to the appendix to the government's petition for a writ of certiorari in No. 16-847.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The background of this case is described in the government's petition for a writ of certiorari (16-847 Pet. 2-9), which seeks review of the court of appeals' holding that 18 U.S.C. 922(g)(1) violates the Second Amendment as applied to cross-petitioners. This Statement sets forth additional facts relevant to the statutory argument advanced in the conditional cross-petition.

1. Section 922(g)(1) generally prohibits the possession of firearms by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." A separate provision, 18 U.S.C. 921(a)(20)(B), specifies that "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include" a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less."

Cross-petitioners Daniel Binderup and Julio Suarez are Pennsylvania residents who have been convicted of state-law misdemeanors that carried maximum terms of imprisonment longer than two years. In 1998, Binderup pleaded guilty in a Pennsylvania court to corrupting a minor, an offense classified as a first-degree misdemeanor and punishable by up to five years of imprisonment. He was sentenced to three years of probation. In 1990, Suarez was convicted in a Maryland court of unlawfully carrying a handgun without a license, an offense classified as a misdemeanor and punishable by not less than 30 days or more than three years of imprisonment. He was sentenced to 180 days of imprisonment, suspended, and a year of probation. Pet. App. 6a-7a, 173a-174a, 262a-263a.

2. Cross-petitioners filed separate suits in Pennsylvania district courts seeking declaratory and injunctive relief against the enforcement of Section 922(g)(1). Pet. App. 7a-8a. As relevant here, cross-petitioners argued that their convictions do not disqualify them from possessing firearms because their offenses fall within Section 921(a)(20)(B)'s exception for state-law misdemeanors "punishable by a term of imprisonment of two years or less." Cross-petitioners did not deny that their offenses were subject to maximum sentences of more than two years in prison. But they argued that an offense is "punishable by a term of imprisonment of two years or less" within the meaning of Section 921(a)(20)(B) whenever it carries a *minimum* sentence of two years or less.

The district courts rejected that argument. Pet. App. 176a-193a, 246a-252a. Both courts held that "the phrase 'punishable by' in [Section] 921(a)(20)(B) concerns the maximum potential punishment for the state-law misdemeanor offenses," not the minimum. *Id.* at 183a; see *id.* at 249a. The courts therefore held that cross-petitioners are subject to Section 922(g)(1) because their offenses were subject to maximum sentences of three and five years of imprisonment. But the courts accepted cross-petitioners' alternative argument that Section 922(g)(1) violates the Second Amendment as applied to them. *Id.* at 193a-238a, 252a-270a.

3. The court of appeals sua sponte consolidated the cases for en banc consideration and affirmed. Pet. App. 1a-161a.

a. As relevant here, the 15-member en banc court of appeals unanimously rejected cross-petitioners' statutory argument. Pet. App. 9a-12a; see *id.* at 44a (Hardiman, J.); *id.* at 108a n.70 (Fuentes, J.). Like the

district courts, the court of appeals held that Section 921(a)(20)(B)'s "use of 'punishable by' means 'subject to a maximum penalty of.'" *Id.* at 10a. Thus, the exception "covers any crime that *cannot* be punished by more than two years' imprisonment," and "does not cover any crime that *can* be punished by more than two years in prison." *Ibid.* The court noted that it had "at least twice relied on that understanding" in prior decisions applying Section 921(a)(20)(B). *Ibid.* (citing *United States* v. *Essig*, 10 F.3d 968, 969-971 (3d Cir. 1993); *United States* v. *Schoolcraft*, 879 F.2d 64, 69-70 (3d Cir.), cert. denied, 493 U.S. 995 (1989)). The court also observed that this Court has described the statute the same way. *Ibid.* (citing *Logan* v. *United States*, 552 U.S. 23, 34 (2007)).

The court of appeals further explained that it would have rejected cross-petitioners' statutory argument even if it "were writing on a blank slate." Pet. App. 11a. "When considering a crime's potential punishment," the court noted, "we ordinarily refer only to the maximum punishment a court may impose." *Ibid.* For example, a "misdemeanor carrying a ceiling of 18 months' imprisonment would properly be described * * * as a crime 'punishable by a term of imprisonment of two years or less.'" *Ibid.* But, the court observed, "we would not describe a crime carrying a specified term of imprisonment of up to three years as one 'punishable by a term of imprisonment of two years or less.'" *Ibid.*

The court of appeals also rejected cross-petitioners' invocation of the rule of lenity and the canon of constitutional avoidance. The court explained that those principles "require ambiguity in the statute" and that "there isn't any here." Pet. App. 12a.

b. After unanimously holding that cross-petitioners are subject to Section 922(g)(1)'s firearms disability, the court of appeals sustained their as-applied Second Amendment challenges by an 8-7 vote, with no opinion garnering a majority on that question. Pet. App. 12a-42a (Ambro, J.); *id.* at 44a-92a (Hardiman, J.); *id.* at 93a-161a (Fuentes, J.). The government has filed a petition for a writ of certiorari seeking review of that aspect of the court's decision (No. 16-847).

ARGUMENT

Cross-petitioners renew their contention (Cross-Pet. 9-20) that even though their offenses carried maximum terms of three and five years of imprisonment, those offenses were "punishable by a term of imprisonment of two years or less" within the meaning of 18 U.S.C. 921(a)(20)(B). The en banc court of appeals unanimously and correctly rejected that argument. That aspect of the court's decision does not conflict with any decision of this Court or another court of appeals. And because Section 921(a)(20)(B) is unambiguous, cross-petitioners' 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. The conditional cross-petition should therefore be denied.

1. Section 922(g)(1) prohibits the possession of firearms by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." Congress specified, however, that the term "crime punishable by imprisonment for a term exceeding one year" does not include a state-law misdemeanor "punishable by a term of imprisonment of two years or less." 18 U.S.C. 921(a)(20)(B). The court of appeals correctly held that Congress

thereby exempted only state-law misdemeanors subject to maximum terms of imprisonment of two years or less. State-law misdemeanors subject to longer maximum sentences, including respondents' crimes, trigger Section 922(g)(1)'s firearms disability.

a. "When a word is not defined by statute," this Court "normally construe[s] it in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). As the court of appeals explained, a reference to an offense "punishable by" a specified term of imprisonment naturally and ordinarily refers to the maximum available sentence, not the minimum. Pet. App. 11a; cf. *Black's Law Dictionary* 1428 (10th ed. 2014) (defining "punishable" as "giving rise to a specified punishment <a felony punishable by imprisonment for up to 20 years>"). One would not, for example, say that an offense that carries a maximum sentence of ten years in prison is "punishable by a term of imprisonment of two years or less." And that is true even though a particular defendant convicted of the offense might be sentenced to only a year in prison.

Consistent with that understanding, this Court has often used the phrase "punishable by [a specified term] of imprisonment or less" to refer to an offense's maximum punishment. For example, the Court recently explained that the Sixth Amendment right to trial by jury depends on the "severity of the maximum authorized penalty" and that there is a presumption that "offenses punishable by six months' imprisonment or less" do not require a jury. *Southern Union Co.* v. *United States*, 567 U.S. 343, 351 (2012) (citation omitted). That presumption applies only to petty offenses with maximum sentences of six months or less—not to the vastly larger universe of offenses with minimum

sentences of six months or less. *Ibid.* Numerous other opinions likewise use the phrase "punishable by [a specified term of imprisonment] or less" to refer to offenses with maximum sentences shorter than the specified term.[2]

Similarly, a number of statutory and regulatory provisions use the phrase "punishable by imprisonment for one year or less" to describe offenses with maximum sentences of one year or less. For example, 18 U.S.C. 4083 provides that a person convicted of an offense "punishable by imprisonment for more than one year" may be confined in a penitentiary but that a person convicted of "an offense punishable by imprisonment for one year or less" generally may not. The United States Sentencing Guidelines likewise distinguish between conduct constituting an offense "punishable by a term of imprisonment exceeding one year"

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[2] See, *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 742 n.7 (1994) ("punishable by six months' imprisonment or less"); *Scott* v. *Illinois*, 440 U.S. 367, 371 (1979) ("punishable by less than six months in jail"); *Argersinger* v. *Hamlin*, 407 U.S. 25, 30-31 (1972) ("punishable by imprisonment for less than six months"); see also, *e.g.*, *Alabama* v. *Shelton*, 535 U.S. 654, 679 n.4 (2002) (Scalia, J., dissenting) ("punishable by less than six months' imprisonment"); *Riggs* v. *California*, 525 U.S. 1114, 1114 (1999) (Stevens, J., respecting the denial of the petition for a writ of certiorari) ("punishable by a fine or a jail sentence of six months or less"); *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 36 (1981) (Blackmun, J., dissenting) ("punishable by imprisonment for less than six months"); *Scott*, 440 U.S. at 379 (Brennan, J., dissenting) ("punishable by six months of incarceration or less"); *Argersinger*, 407 U.S. at 47 (Powell, J., concurring in result) ("punishable by six months or less"); *Alexander* v. *Louisiana*, 405 U.S. 625, 635 (1972) (Douglas, J., concurring) ("punishable by less than six months' imprisonment"); *Frank* v. *United States*, 395 U.S. 147, 155 (1969) (Warren, C.J., dissenting) ("punishable by less than two years").

and conduct constituting an "offense punishable by a term of imprisonment of one year or less." Sentencing Guidelines § 7B1.1(a)(1) and (2); see Pet. App. 11a-12a. And Federal Rule of Criminal Procedure 7(a) draws the same distinction, stating that "[a]n offense punishable by imprisonment for one year or less" may be prosecuted without an indictment, while an offense punishable by "imprisonment for more than one year" may not. In each of those provisions, the phrase "offense punishable by imprisonment for one year or less" refers to an offense with a *maximum* sentence of one year or less.

Cross-petitioners 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. Instead, they rely (Cross-Pet. 11-12) on decisions interpreting a now-repealed statute that authorized district courts to "suspend the imposition * * * of sentence and place the defendant on probation" when entering "a judgment of conviction of any offense not punishable by death or life imprisonment." 18 U.S.C. 3651 (1982). As cross-petitioners observe (Cross-Pet. 11-12), courts of appeals held that the "ordinary plain meaning" of that statute was that sentencing courts could not grant probation to defendants "convicted of offenses for which death or life imprisonment may be imposed as a sentence." *United States* v. *Denson*, 588 F.2d 1112, 1116 (5th Cir. 1979); see *United States* v. *Nieves-Rivera*, 961 F.2d 15, 16 (1st Cir. 1992) (Breyer, J.) (collecting cases). Those decisions interpreted "punishable" to mean "capable of being punished." *Nieves-Rivera*, 961 F.2d at 17 (citation omitted). But those decisions are entirely consistent with the ordinary

meaning of "punishable" because they focused on the maximum available penalty, not the minimum. For the same reason, cross-petitioners err in invoking (Cross-Pet. 15) *In re Mills*, 135 U.S. 263 (1890). In that case, this Court held that "the words 'punishable . . . by imprisonment at hard labor' * * * embrace offences which, although not imperatively required by statute to be so punished, may, in the discretion of the court" be punished by hard labor. *Id.* at 268. There, too, the Court construed the phrase "punishable by" to refer to the maximum authorized punishment for an offense.

The natural reading of Section 921(a)(20)(B)'s exception for state-law misdemeanors "punishable by a term of imprisonment of two years or less" is thus that it exempts from Section 922(g)(1)'s firearms disability persons convicted of state-law misdemeanors subject to maximum sentences of two years or less.

b. That natural reading is confirmed by Section 921(a)(20)(B)'s context. Congress tied the firearms disability imposed by Section 922(g)(1) to offenses that satisfy the traditional definition of a felony, "a crime punishable by imprisonment for more than one year." *Burgess* v. *United States*, 553 U.S. 124, 130 (2008). Congress recognized that some States classify offenses fitting that definition as misdemeanors, and it enacted Section 921(a)(20)(B) to provide that a conviction for a state-law misdemeanor punishable by imprisonment for more than one year would not trigger Section 922(g)(1)'s firearms disability unless the offense carried a maximum sentence of more than two years of imprisonment—twice the usual threshold for a felony. The legislative history confirms that Congress's purpose was to exclude from Section 922(g)(1) only state-law misdemeanors "punishable by a term of imprison-

ment of not more than 2 years"—that is, offenses with maximum sentences of two years or less. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 29 (1968).

Cross-petitioners, in contrast, assert (Cross-Pet. 11) that Congress exempted from Section 922(g)(1) *all* misdemeanors except those carrying mandatory minimum sentences longer than two years. But cross-petitioners have not identified any misdemeanor carrying such a lengthy mandatory-minimum sentence—much less any reason to think that Congress was aware of such offenses when it enacted the statute in 1968. And even if Congress had wanted to achieve the result cross-petitioners posit, it is implausible to think that it would have chosen such a roundabout way to exclude all (or nearly all) state-law misdemeanors from Section 922(g)(1)'s scope.

Such a result would, moreover, have severely undermined Section 922(g)(1)'s purpose by allowing persons convicted of serious violent crimes to possess firearms. In 1968, "many common-law crimes" classified as misdemeanors "involved quite violent behavior." *Schrader* v. *Holder*, 704 F.3d 980, 985 (D.C. Cir.), cert. denied, 134 S. Ct. 512 (2013). "In Maryland, for example, attempted rape and attempted murder were common-law misdemeanors." *Ibid.* So was "assault and battery," an offense that encompassed "serious, violent conduct" and that sometimes yielded "sentences of ten or twenty years' imprisonment." *Ibid.* Because those offenses were common-law crimes, none of them carried mandatory minimum penalties—and all of them would thus have been excluded from Section 922(g)(1) by cross-petitioners' interpretation.

2. The court of appeals' decision does not conflict with any decision of this Court or another court of

appeals. To the contrary, courts have uniformly understood Section 921(a)(20)(B) to exempt only state-law misdemeanors subject to maximum terms of imprisonment of two years or less.

As cross-petitioners acknowledge (Cross-Pet. 14-15), this Court has twice described Section 921(a)(20)(B) in exactly that way, explaining that the exception does not apply to "state misdemeanor convictions punishable by more than two years' imprisonment," *Logan* v. *United States*, 552 U.S. 23, 34 (2007), and instead excludes only misdemeanors "punishable by a term of imprisonment of up to two years." *Small* v. *United States*, 544 U.S. 385, 392 (2005).

The courts of appeals, too, have concluded that state-law misdemeanors "capable of being punished by more than two years' imprisonment * * * are ineligible for [S]ection 921(a)(20)(B)'s misdemeanor exception." *Schrader*, 704 F.3d at 986; see, *e.g.*, *United States* v. *Matthews*, 498 F.3d 25, 37 n.15 (1st Cir. 2007) (explaining that the defendant's prior offense "d[id] not fall within the [Section 921(a)(20(B)] exclusion because [it] is punishable * * * by imprisonment for up to two and one-half years"), cert. denied, 552 U.S. 1238 (2008); *United States* v. *Coleman*, 158 F.3d 199, 203-204 (4th Cir. 1998) (en banc) ("[T]he statutory language of [Section] 921(a)(20)(B) unambiguously indicates that the critical inquiry in determining whether a state offense fits within the misdemeanor exception is whether the offense is 'punishable' by a term of imprisonment greater than two years."); *United States* v. *Sumlin*, 147 F.3d 763, 765 (8th Cir. 1998) (holding that misdemeanor convictions fall outside the Section 921(a)(20)(B) exclusion "if they were punishable by more than two years imprisonment regardless of the pun-

ishment actually imposed by the state court"). Cross-petitioners do not cite any decision, by any court, adopting a contrary interpretation.

3. The government's petition for a writ of certiorari seeks this Court's review of the court of appeals' unprecedented holding that the firearms disability imposed by Section 922(g)(1) violates the Second Amendment as applied to cross-petitioners. Cross-petitioners contend (Cross-Pet. 15-17) that if the Court grants that petition, it should also grant their cross-petition because their proposed interpretation of Section 921(a)(20)(B) would allow the Court to avoid the Second Amendment question resolved by the court of appeals by invoking the canon of constitutional avoidance. That contention lacks merit.

The canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a provision," and it therefore "'has no application' in the interpretation of an unambiguous statute." *McFadden* v. *United States*, 135 S. Ct. 2298, 2307 (2015) (quoting *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014)). Instead, the canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005).

The canon of constitutional avoidance does not assist cross-petitioners because—as each of the 17 judges to consider their argument has concluded—the statute "is *unambiguous* as to whom it covers and what it criminalizes." Pet. App. 44a n.1 (Hardiman, J.) (emphasizing "the Court's universal agreement" on this point); see *id.* at 12a (Ambro, J.) (explaining that the avoidance canon "require[s] ambiguity in the statute"

and that "there isn't any here"); *id.* at 108a n.70 (Fuentes, J.) ("The two statutory provisions here are straightforward."); *id.* at 190a (finding "no doubt" about the correct interpretation); *id.* at 251a ("[W]e do not find 'punishable' to be an ambiguous term."). Cross-petitioners' statutory argument thus would not provide a viable basis for this Court to avoid the important Second Amendment question resolved by the court of appeals and squarely presented in government's petition.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2017