

No. 17-69

In the Supreme Court of the United States

MARVIN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In 2002, petitioner was convicted of a felony in federal district court. In 2016, he filed a motion in his original criminal case seeking expungement of his conviction and a declaration that he is entitled to possess a firearm because the federal statute prohibiting felons from possessing firearms, 18 U.S.C. 922(g)(1), violates the Second Amendment as applied to him. The question presented is:

Whether the court of appeals erred in summarily affirming the denial of petitioner's motion for an order allowing him to possess and use a firearm.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement.....	1
Argument.....	3
Conclusion.....	9

TABLE OF AUTHORITIES

Cases:

<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997)	5
<i>Binderup v. Attorney Gen.</i> , 836 F.3d 336 (3d Cir. 2016), cert. denied, 137 S. Ct. 2323 (2017).....	5, 8
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	8
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	6, 7
<i>Kokkonen v. Guardian Life Ins. Co. of Am.</i> , 511 U.S. 375 (1994)	4, 5
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010)	7
<i>Sessions v. Binderup</i> , 137 S. Ct. 2323 (2017).....	6
<i>United States v. Crowell</i> , 374 F.3d 790 (9th Cir. 2004), cert. denied, 543 U.S. 1070 (2005)	4
<i>United States v. Meyer</i> , 439 F.3d 855 (8th Cir. 2006)	3, 4, 5
<i>United States v. Moore</i> , 666 F.3d 313 (4th Cir. 2012)	7
<i>United States v. Rowlands</i> , 451 F.3d 173 (3d Cir.), cert. denied, 549 U.S. 1032 (2006).....	4
<i>United States v. Wahi</i> , 850 F.3d 296 (7th Cir. 2017)	4

Constitution and statutes:

U.S. Const. Amend. II	2, 3, 5, 6, 7, 8
All Writs Act, 28 U.S.C. 1651.....	2

IV

Statutes—Continued:	Page
Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. IV, §§ 901(a)(2), 902, 82 Stat. 225, 226	6
18 U.S.C. 922(g)(1).....	2, 3, 5, 6, 8
18 U.S.C. 1343 (2000)	2, 8
18 U.S.C. 1343	1
18 U.S.C. 3231	3
18 U.S.C. 3559(a)(4).....	8
Miscellaneous:	
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968).....	6

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1) and the district court (Pet. App. 2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2017. The petition for a writ of certiorari was filed on July 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Missouri, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343. D. Ct. Doc. 18, at 2 (Nov. 9, 2016). He was sentenced to five years of probation. *Ibid.* Fourteen years later, petitioner filed a motion in his criminal case asking the district court to expunge his conviction and issue an order allowing him to possess and use a firearm. The

court denied the motion. Pet. App. 2. The court of appeals summarily affirmed. *Id.* at 1.

1. In 2002, petitioner pleaded guilty to one count of wire fraud, an offense that was then punishable by up to five years of imprisonment. D. Ct. Doc. 18, at 2; see 18 U.S.C. 1343 (2000). The district court sentenced him to five years of probation. D. Ct. Doc. 18, at 2. In 2007, the court entered an order discharging petitioner from supervision and directing “that the proceedings in the case be terminated.” D. Ct. Doc. 14, at 1 (Mar. 22, 2007).

2. In 2016, petitioner filed a motion in his closed criminal case seeking expungement of his conviction and an order “permitting him to possess and use a firearm.” D. Ct. Doc. 15, at 1 (Sept. 28, 2016). Petitioner principally argued that his conviction should be expunged on equitable grounds and that the district court could grant that relief either under its ancillary jurisdiction or under the All Writs Act, 28 U.S.C. 1651. D. Ct. Doc. 15, at 13-31. Petitioner also asserted that the federal statute prohibiting felons from possessing firearms, 18 U.S.C. 922(g)(1), violates the Second Amendment as applied to him because he was convicted of a nonviolent felony. D. Ct. Doc. 15, at 32-37. Petitioner asked the court to issue an order “permitting him to possess and use a firearm.” *Id.* at 1, 37. He did not identify any source of authority that would allow the court to grant that relief.

The government opposed the motion. Among other things, it argued that the district court lacked jurisdiction to expunge petitioner’s conviction and that his as-applied Second Amendment challenge to Section 922(g)(1) lacked merit. D. Ct. Doc. 18, at 2-7.

The district court denied the motion “for all the reasons stated by the Government, including that the

Court is without jurisdiction to grant the relief requested.” Pet. App. 2 (citing *United States v. Meyer*, 439 F.3d 855, 862 (8th Cir. 2006)).

3. The court of appeals summarily affirmed. Pet. App. 1.

ARGUMENT

1. Petitioner contends (Pet. 5-9) that this Court should grant review to decide whether a felon may bring an as-applied Second Amendment challenge to 18 U.S.C. 922(g)(1). The Court could not reach that question in this case because the district court lacked authority to grant the relief petitioner sought.

a. The district court had jurisdiction over petitioner’s criminal prosecution under 18 U.S.C. 3231, which grants federal district courts jurisdiction “of all offenses against the laws of the United States.” But that criminal prosecution ended at the very latest in 2007, when the court discharged petitioner from supervision and “terminated” the case. D. Ct. Doc. 14, at 1.

Petitioner filed the present motion nine years later. In the district court, he asserted that the court had ancillary jurisdiction to expunge his conviction or, in the alternative, that it could do so under the All Writs Act. D. Ct. Doc. 15, at 13-31. The court correctly rejected those arguments, relying on *United States v. Meyer*, 439 F.3d 855 (8th Cir. 2006).

In *Meyer*, the Eighth Circuit explained that where a person convicted of a crime in federal court “does not seek expungement pursuant to any statutory authority, the district court’s jurisdiction to expunge [the] conviction could arise only from the exercise of ancillary jurisdiction incidental to the court’s original jurisdiction over the underlying criminal prosecution.” 459 F.3d at

859 (footnote omitted). The court then held that “a district court does not have ancillary jurisdiction to expunge a criminal record based solely on equitable grounds.” *Id.* at 860. The court noted that its conclusion followed from *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), which clarified that ancillary jurisdiction is available only “to permit disposition by a single court of claims that are * * * factually interdependent” or “to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.” *Id.* at 379-380. As the Eighth Circuit observed, expungement of a criminal conviction does not fit into either category. *Meyer*, 439 F.3d at 859-860.

The Eighth Circuit’s holding in *Meyer* accords with the decisions of “[e]very circuit that has specifically addressed this question in light of *Kokkonen*.” *United States v. Wahi*, 850 F.3d 296, 298 (7th Cir. 2017). Those courts have uniformly recognized that “[a] district court lacks ancillary jurisdiction to hear requests for equitable expungement.” *Ibid.* (citing decisions from the First, Second, Third, Sixth, and Ninth Circuits). Courts of appeals have likewise rejected the contention that district courts may “grant petitions for expungement pursuant to the All Writs Act.” *United States v. Rowlands*, 451 F.3d 173, 178 (3d Cir.), cert. denied, 549 U.S. 1032 (2006); see, e.g., *United States v. Crowell*, 374 F.3d 790, 794 n.4 (9th Cir. 2004), cert. denied, 543 U.S. 1070 (2005).

b. Petitioner expressly disclaims (Pet. 5) any challenge to the district court’s conclusion that it lacked jurisdiction to expunge his conviction. But just as the court lacked ancillary jurisdiction, or any other basis, to expunge his conviction, it also lacked authority to

adjudicate his Second Amendment challenge to Section 922(g)(1) or to issue an order “permitting him to possess and use a firearm.” D. Ct. Doc. 15, at 1, 37. If anything, the limits of a district court’s ancillary jurisdiction apply with even greater force to petitioner’s Second Amendment challenge, which is even more attenuated from his original criminal case. See *Meyer*, 439 F.3d at 860; see also *Kokkonen*, 511 U.S. at 379-381. And the district court’s holding that it was “without jurisdiction to grant the relief requested,” Pet. App. 2, encompassed both petitioner’s request for expungement and his request for an order allowing him to possess a firearm.

Petitioner does not challenge that jurisdictional holding, and he has never identified any legal basis for the district court to adjudicate his Second Amendment claim in this criminal case. Because the district court lacked authority to consider petitioner’s motion, this Court could not reach the Second Amendment question presented in the petition. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (“Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts.”) (brackets, citation, and internal quotation marks omitted). If petitioner wishes to challenge the constitutionality of Section 922(g)(1), he may file a civil action seeking a declaratory judgment. See, e.g., *Bindrup v. Attorney Gen.*, 836 F.3d 336, 340 (3d Cir. 2016) (en banc) (considering such a challenge), cert. denied, 137 S. Ct. 2323 (2017). He may not, however, assert such a challenge through an unauthorized post-judgment motion filed years after the termination of his criminal case.

2. Even setting aside that threshold obstacle, this Court’s review is not warranted. Petitioner correctly notes that the Third Circuit’s recent decision in *Binderup* created a circuit conflict by holding, in a very different case, that Section 922(g)(1) violated the Second Amendment as applied to two individuals based on their particular offenses and other circumstances. But this Court denied the government’s petition for a writ of certiorari in *Binderup*, see *Sessions v. Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847), and has since denied another petition raising the same issue, see *Phillips v. United States*, No. 16-7541 (Oct. 2, 2017). There is no sound reason for a different result here.

a. Federal law has long restricted the possession of firearms by certain categories of individuals. The most frequently applied disqualification is Section 922(g)(1), which 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.” Congress enacted that disqualification based on its determination that the “ease with which” firearms could be acquired by “criminals * * * and others whose possession of firearms is similarly contrary to the public interest” was “a matter of serious national concern.” S. Rep. No. 1097, 90th Cong., 2d Sess. 28 (1968); see Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. IV, §§ 901(a)(2), 902, 82 Stat. 225, 226.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment protects “the right of law-abiding, responsible citizens” to possess handguns for self-defense. *Id.* at 635. Consistent with that understanding, the Court stated that “nothing in [its] opinion should be taken to cast doubt”

on certain well-established firearms regulations, including “longstanding prohibitions on the possession of firearms by felons and the mentally ill.” *Id.* at 626. The Court described those “permissible” measures as falling within “exceptions” to the protected right to keep and bear arms. *Id.* at 635. And the Court incorporated those exceptions into its holding, stating that the plaintiff in *Heller* was entitled to keep a handgun in his home “[a]ssuming that [he] is not disqualified from the exercise of Second Amendment rights,” *ibid.*—that is, assuming “he is not a felon and is not insane,” *id.* at 631. Two years later, a plurality of the Court “repeat[ed]” *Heller*’s “assurances” that its holding “did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons.’” *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (opinion of Alito, J.) (quoting *Heller*, 554 U.S. at 626).

b. Until *Binderup*, the courts of appeals were “unanimous” in holding “that [Section] 922(g)(1) is constitutional, both on its face and as applied.” *United States v. Moore*, 666 F.3d 313, 316 (4th Cir. 2012). Petitioner thus correctly observes (Pet. 7-8) that the Third Circuit’s decision created a circuit conflict. But this unusual case would not be an appropriate vehicle in which to resolve that conflict.

First, it appears that the court of appeals did not pass on petitioner’s Second Amendment challenge. It summarily affirmed an order in which the district court had determined that it was “without jurisdiction to grant the relief requested.” Pet. App. 2; see *id.* at 1. That summary affirmance is most naturally understood to reflect the court of appeals’ agreement with the district court’s conclusion that it lacked jurisdiction rather than a decision on the merits of petitioner’s claim. This

Court is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). That principle counsels decisively against granting review here, where both courts below issued one-paragraph orders that did not include any explicit discussion of the Second Amendment issue.

Second, this case would not in any event implicate the disagreement created by *Binderup* because petitioner could not prevail under the controlling test in the Third Circuit. Judge Ambro’s plurality opinion, which appears to constitute “the law of [the Third] Circuit,” concluded that the *Binderup* plaintiffs had meritorious as-applied challenges in part because they had demonstrated that their predicate offenses were not sufficiently “serious” to justify a firearms disability. 836 F.3d at 351, 356. Petitioner could not make the same showing. Most obviously, Congress classified his wire fraud offense as a felony. 18 U.S.C. 1343 (2000); see 18 U.S.C. 3559(a)(4). The *Binderup* plaintiffs’ predicate offenses, though punishable by more than a year of imprisonment, were classified as “misdemeanors” under state law. 836 F.3d at 351 (opinion of Ambro, J.). Judge Ambro placed great weight on that classification, explaining that where, as here, the relevant predicate offense “is considered a felony by the authority that created the crime,” an individual seeking to bring an as-applied challenge to Section 922(g)(1) faces an “extraordinarily high” burden that is “perhaps even insurmountable.” *Id.* at 353 n.6. Judge Ambro also specifically rejected the argument that only “violent” offenses can qualify as “serious.” *Id.* at 348. Petitioner does not argue that his felony conviction for wire fraud would not qualify as “serious” under the standard Judge Ambro

articulated in *Binderup*. Accordingly, his untested assertions (Pet. 3-4) about this conduct aside from his conviction—which, he acknowledges, includes a 2014 arrest for other offenses—would not establish any entitlement to relief under Judge Ambro’s approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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