No. 19-287

In the Supreme Court of the United States

JORGE L. MEDINA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's as-applied challenge to 18 U.S.C. 922(g)(1), the longstanding federal statute that bars convicted felons from possessing firearms.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 913 F.3d 152. The opinion of the district court (Pet. App. 19a-42a) is reported at 279 F. Supp. 3d 281.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2019. A petition for rehearing was denied on April 2, 2019 (Pet. App. 45a-46a). On June 8, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 30, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, petitioner made false statements on loan applications in order to obtain loans for which he was

not qualified. C.A. App. 9-10. Although petitioner had an annual income of approximately $60,000, he claimed an annual income of approximately $340,000. *Ibid.* Petitioner pleaded guilty to one count of making a false statement to a lending institution, in violation of 18 U.S.C. 1014. Pet. App. 2a. That offense was a felony carrying a maximum punishment of 30 years in prison. *Ibid.* Petitioner was sentenced to three years of probation, 60 days of home detention, and a fine. *Ibid.*

In 1994 and 1995, petitioner again violated the law by making false statements on applications for hunting licenses in Wyoming. Pet. App. 2a-3a. Petitioner pleaded guilty to three counts of making a false statement on a game license application, in violation of Wyo. Stat. Ann. § 23-3-403 (Supp. 1989). Pet. App. 3a. The offense, a misdemeanor, was punishable by up to six months in prison, but petitioner was sentenced to a fine. *Ibid.*

2. Under 18 U.S.C. 922(g)(1), the longstanding federal statute that disarms convicted felons, petitioner's felony conviction precludes him from possessing a firearm. Pet. App. 3a. In 2016, petitioner filed this lawsuit, claiming that Section 922(g)(1) violates the Second Amendment as applied to him. C.A. App. 6-21.

The district court dismissed petitioner's lawsuit, holding that petitioner had "failed to state a claim for relief under the Second Amendment." Pet. App. 41a; see *id.* at 19a-44a. The court explained that, in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court made "clear that it had no intention of 'cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons.'" Pet. App. 27a (quoting *Heller*, 554 U.S. at 626) (brackets in original). The court also cited "[h]istorical scholarship" showing that the government has

traditionally been understood to have the power to disarm "convicted criminals," a "class of citizens deemed not to be law-abiding and responsible." *Id.* at 32a-33a. The court also noted that "no single decision by a Court of Appeals has upheld an as-applied challenge to section 922(g)(1) brought by a convicted felon." *Id.* at 41a.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court first rejected petitioner's broad contention that, because "the government cannot show that he is particularly dangerous," his conviction for a felony was "insufficient to disarm him." *Id.* at 11a. Starting with an examination of "tradition and history," the court recounted that, at the time of the Founding, felonies—"includ[ing] non-violent offenses * * * such as counterfeiting currency, embezzlement, and desertion from the army"—were punishable by death and forfeiture of goods. *Id.* at 11a-12a. The court found it "difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms." *Id.* at 12a. Turning to precedent, the court observed that, in *Heller*, this Court described felon-disarmament laws as "longstanding" and "presumptively lawful." *Id.* at 15a. (quoting *Heller*, 554 U.S. at 626, 627 n.26). The court noted that "[f]elonies encompass a wide variety of non-violent offenses," and it saw "no reason to think that th[is] Court meant 'dangerous individuals' when it used the word felon." *Ibid.* The court also concluded that, as "a practical matter," "[u]sing an amorphous 'dangerousness' standard to delineate the scope of the Second Amendment would require the government to make case-by-case predictive judgments before barring the possession of weapons by convicted criminals, illegal aliens, or perhaps even children." *Ibid.* The court "d[id]

not think the public, in ratifying the Second Amendment, would have understood the right to be so expansive and limitless." *Ibid.*

The court of appeals also rejected petitioner's contention that Section 922(g)(1) was unconstitutional as applied to him because his crime was minor and because he had rehabilitated himself after committing it. Pet. App. 16a-18a. The court stated that it "need not decide * * * if it is ever possible for a convicted felon to show that he may still count as a 'law-abiding, responsible citizen'" entitled to keep and bear arms. Pet. App. 16a. It instead held that, "[t]o the extent that it may be possible for a felon to show that his crime was so minor or regulatory that he did not forfeit his right to bear arms by committing it, [petitioner] has not done so," because he had been "convicted of felony fraud—a serious crime, *malum in se*, that is punishable in every state." *Id.* at 16a-17a. The court added that, "just a few years after the end of his probation for his first crime, [petitioner] was convicted of three more counts of misdemeanor fraud." *Id.* at 16a. The court concluded that, because "nothing about [petitioner's] crime distinguishes him from other felons," his as-applied challenge to Section 922(g)(1) must fail. *Id.* at 18a.

ARGUMENT

Petitioner renews his contention (Pet. 14-27) that 18 U.S.C. 922(g)(1) violates the Second Amendment as applied to him. The court of appeals correctly rejected that contention, and its conclusion that Section 922(g)(1) may constitutionally be applied to petitioner does not conflict with any decision of this Court or of any other court of appeals. In particular, this case does not implicate the circuit conflict created by *Binderup* v. *Attorney Gen. U.S.*, 836 F.3d 336 (2016) (en banc), cert. denied,

137 S. Ct. 2323 (2017), in which the Third Circuit held that Section 922(g)(1) violated the Second Amendment as applied to two individuals based on different offenses and circumstances than those presented here. Petitioner's circumstances—including his conviction of a federal felony punishable by up to 30 years in prison—mean that he could not prevail even under the standard applied by the Third Circuit in *Binderup*. In any event, this Court denied the government's petition for a writ of certiorari in that case, see *Sessions* v. *Binderup*, 137 S. Ct. 2323 (No. 16-847) (2017), and has since denied numerous other petitions raising similar questions, see, *e.g.*, *Michaels* v. *Whitaker*, 139 S. Ct. 936 (2019) (No. 18-496); *Rogers v. United States*, 138 S. Ct. 502 (2018) (No. 17-69); *Hamilton* v. *Pallozzi*, 138 S. Ct. 500 (2017) (No. 16-1517); *Massey* v. *United States*, 138 S. Ct. 500 (2017) (No. 16-9376); *Phillips* v. *United States*, 138 S. Ct. 56 (2017) (No. 16-7541). The same result is warranted here.

1. The court of appeals correctly determined that Section 922(g)(1) does not violate the Second Amendment as applied to petitioner. Federal law has long restricted the possession of firearms by certain categories of individuals. A frequently applied disqualification is 18 U.S.C. 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." 18 U.S.C. 922(g)(1). Congress enacted that disqualification because 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 possess a handgun "[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) (Alito, J., plurality opinion) (quoting *Heller*, 554 U.S. at 626).

The historical record supports this Court's repeated suggestion that convicted felons are outside the scope of the Second Amendment. "*Heller* identified * * * as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting *Heller*, 554 U.S. at 604), cert. denied, 562 U.S. 1303 (2011). That report

expressly recognized the permissibility of imposing a firearms disability on convicted criminals, stating that "citizens have a personal right to bear arms '*unless for crimes committed*, or real danger of public injury.'" *Ibid.* (quoting *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents* (1787), *reprinted in* 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 662, 665 (1971)) (emphasis added).

"[M]ost 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.'" *United States* v. *Yancey*, 621 F.3d 681, 684-685 (7th Cir. 2010) (per curiam) (quoting *United States* v. *Vongxay*, 594 F.3d 1111, 1118 (9th Cir.), cert. denied, 562 U.S. 921 (2010)); see *United States* v. *Carpio-Leon*, 701 F.3d 974, 979 (4th Cir. 2012) (same), cert. denied, 571 U.S. 831 (2013). The Second Amendment thus incorporates "a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible" and it "'does not preclude laws disarming the unvirtuous (*i.e.* criminals).'" *United States* v. *Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) (citation omitted); see *NRA* v. *BATFE*, 700 F.3d 185, 201 (5th Cir. 2012) (same), cert. denied, 571 U.S. 1196 (2014); *United States* v. *Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) ("Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as * * * limited to those members of the polity who were deemed capable of exercising it in a virtuous manner.") (citation omitted), cert. denied, 558 U.S. 1133 (2010).

In this respect, the right to bear arms is a fundamental right analogous to civic rights that have historically

been subject to forfeiture by individuals convicted of crimes, including the right to vote, see *Richardson* v. *Ramirez*, 418 U.S. 24, 56 (1974), the right to serve on a jury, 28 U.S.C. 1865(b)(5), and the right to hold public office, *Spencer* v. *Kemna*, 523 U.S. 1, 8-9 (1998). Cf. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480-481 (1995) ("[T]he franchise and the right to arms were 'intimately linked' in the minds of the Framers.").

Section 922(g)(1) comports with the historical understanding of the Second Amendment because it applies only to offenses that satisfy the traditional definition of a felony: "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1); see 18 U.S.C. 3559(a); 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.6(a), at 48 (2d ed. 2003) (LaFave). Just as Congress and the States have required persons convicted of such crimes to forfeit civic rights, Section 922(g)(1) permissibly imposes a firearms disability "as a legitimate consequence of a felony conviction." *Tyler* v. *Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring in most of the judgment).

2. Petitioner does not contend that the court of appeals' rejection of an as-applied challenge to Section 922(g)(1) by an individual with petitioner's criminal history conflicts with any decision of another court of appeals. Rather, he contends that the courts of appeals are conflicted on "whether individuals may challenge felon disarmament laws on an as-applied basis." Pet. 14 (capitalization altered; emphasis omitted). But this case does not implicate that conflict, because, whatever doors other courts of appeals may have left open, only the

Third Circuit has actually accepted an as-applied challenge to Section 922(g)(1), and petitioner could not prevail under the standard adopted by the Third Circuit.

a. 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).

The Fifth, Tenth, and Eleventh Circuits have held that Section 922(g)(1) is not subject to individualized as-applied Second Amendment challenges. Before *Heller*, the Fifth Circuit had held that the individual right its precedent had recognized under 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). After *Heller*, the court reaffirmed its view 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 (5th Cir.), cert. denied, 562 U.S. 867 (2010); see, *e.g.*, *United States* v. *Massey*, 849 F.3d 262, 265, cert. denied, 138 S. Ct. 500 (2017). Similarly, the Tenth and Eleventh Circuits have interpreted *Heller* to mean 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 (11th Cir.) (per curiam), cert. denied, 560 U.S 958 (2010); see *United States* v. *McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), cert. denied, 559 U.S. 970 (2010); *id.* at 1049-1050 (Tymkovich, J., concurring).

As petitioner observes (Pet. 14-20), other courts of appeals, including the court below, have "le[ft] open the possibility of a successful felon as-applied challenge." Pet. App. 6a; see *id.* at 16a; *United States* v. *Williams*,

616 F.3d 685, 693 (7th Cir.), cert. denied, 562 U.S. 1092 (2010); *Hamilton* v. *Pallozzi*, 848 F.3d 614, 626 & n.11 (4th Cir.), cert. denied, 138 S. Ct. 500 (2017). But before *Binderup*, no circuit had held Section 922(g)(1) unconstitutional in any of its applications, and the courts of appeals had "consistently upheld applications of [Section] 922(g)(1) even to non-violent felons." *United States* v. *Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (emphasis omitted) (collecting cases).

b. In *Binderup*, two individuals sought a declaratory judgment that Section 922(g)(1) could not constitutionally be applied to them, where the crimes of which they had been convicted were nonviolent offenses denominated by the state as misdemeanors, where they served no prison time, and where their subsequent conduct showed that they could possess firearms without endangering themselves or others. 836 F.3d at 340. The en banc Third Circuit agreed by a fractured 8-7 vote, with no single opinion garnering a majority on the Second Amendment issue.

Ten of the 15 judges on the en banc court recognized that individuals convicted of "serious" crimes forfeit their Second Amendment rights. *Binderup*, 836 F.3d at 349 (Ambro, J., plurality opinion); *id.* at 396 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). Seven of those judges would have concluded that, consistent with "history," "tradition," and this Court's decision in *Heller*, all of the offenses covered by Section 922(g)(1) are sufficiently "serious" to warrant a firearms disability because those offenses are punishable by more than a year of imprisonment—the traditional definition of a felony. *Id.* at 396 (Fuentes, J., concurring in part, dissenting in part, and

dissenting from the judgments); see 1 LaFave § 1.6(a), at 48.

Judge Ambro and two of his colleagues took a different view. Judge Ambro stated that courts should presumptively "treat any crime subject to [Section] 922(g)(1) as disqualifying" under the Second Amendment "unless there is a strong reason to do otherwise." *Binderup*, 836 F.3d at 351 (Ambro, J., plurality opinion). But he concluded that the particular offenses committed by the *Binderup* plaintiffs "were not serious enough to strip them of their Second Amendment rights." *Ibid.* And he further concluded that Section 922(g)(1) did not survive Second Amendment scrutiny as applied to those plaintiffs because the government had not shown that the plaintiffs' backgrounds and post-conviction conduct made them "more likely to misuse firearms" or that they were "otherwise irresponsible or dangerous." *Id.* at 355; see *id.* at 354 n.7, 355-356 & n.8. Although it was joined by only two other judges, that portion of Judge Ambro's opinion appears to reflect the narrowest ground for the en banc court's judgment and therefore to constitute "the law of [the Third] Circuit." *Id.* at 356.

The remaining votes for the judgment were supplied by Judge Hardiman and four judges who joined his concurring opinion. Judge Hardiman disagreed with the plurality's conclusion that all individuals who commit "serious" crimes forfeit their Second Amendment rights. Instead, he stated that the Second Amendment excludes only those who "have demonstrated that they are likely to commit violent crimes." *Binderup*, 836 F.3d at 370 (Hardiman, J., concurring in part and concurring in the judgments). And he concluded that Section 922(g)(1) could not be applied to the *Binderup* plaintiffs because their offenses did not involve "any violence or threat of

violence" and because "their subsequent behavior confirms their membership among the class of responsible, law-abiding citizens." *Id.* at 376.

c. The Third Circuit's conclusion that Section 922(g)(1) violates the Second Amendment as applied to the *Binderup* plaintiffs created a circuit conflict, as the Third Circuit was the first and only court of appeals to sustain an as-applied challenge to Section 922(g)(1). This case, however, does not implicate that conflict.

As an initial matter, there is no conflict between the decision below and *Binderup* on the general question whether felons may bring as-applied challenges to Section 922(g)(1), because the court of appeals found it unnecessary to resolve that question. The court stated that it "need not decide today if it is ever possible for a convicted felon to show that he may still count as a 'law-abiding, responsible citizen.'" Pet. App. 16a. The court instead held that, "[t]o the extent it may be possible for a felon to show that his crime was so minor or regulatory that he did not forfeit his right to bear arms by committing it, [petitioner] has not done so." *Id.* at 17a.

There is also no conflict between the decision below and *Binderup* on the more specific question whether Section 922(g)(1) is unconstitutional as applied in the circumstances presented here, because petitioner could not prevail even under the legal standard articulated in Judge Ambro's opinion in *Binderup*. The *Binderup* plaintiffs had been convicted in state courts of corrupting a minor and carrying a handgun without a license. *Binderup*, 836 F.3d at 340. In concluding that those offenses were not sufficiently serious to support the constitutionality of Section 922(g)(1) as applied, Judge Ambro emphasized four factors: (i) the relevant state legislatures had classified the offenses as misdemeanors

rather than felonies;[*] (ii) the offenses were nonviolent; (iii) the *Binderup* plaintiffs received sentences that were "minor * * * by any measure"; and (iv) there was no "cross-jurisdictional consensus" regarding the seriousness of the *Binderup* plaintiffs' crimes because their conduct would have been legal or punishable by less than a year of imprisonment in many States. *Id.* at 352 (Ambro, J., plurality opinion); see *id.* at 351-352. Judge Ambro also suggested that a felon's post-conviction conduct may in some circumstances "be a relevant consideration." *Id.* at 354 n.7.

Although petitioner's offense was not violent, all of the other factors identified by Judge Ambro weigh against petitioner's as-applied challenge. First, and most importantly, Congress classified petitioner's offense as a felony and prescribed a possible prison sentence of up to thirty years. 18 U.S.C. 1014. Judge Ambro stated that where, as here, the 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." *Binderup*, 836 F.3d at 353 n.6 (Ambro, J., plurality opinion). Second, while the *Binderup* plaintiffs received "not a single day of jail time," *id.* at 352, petitioner was sentenced to sixty days of home detention (in addition to a fine and probation). C.A. App. 10. Third, because

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[*] A few States depart from the traditional felony/misdemeanor distinction and classify some crimes punishable by more than one year of imprisonment as "misdemeanors," as was the case in *Binderup*. See 836 F.3d at 340. Section 922(g)(1) prohibits an individual convicted of such a crime from possessing firearms if his state-law misdemeanor carried a maximum sentence of more than two years. 18 U.S.C. 921(a)(20)(B).

petitioner was convicted of a federal felony, rather than a state offense, his conduct was punishable as a felony throughout the Nation and thus raises no concern about the absence of a "cross-jurisdictional consensus" on the seriousness of his offense. *Binderup*, 836 F.3d at 352 (Ambro, J., plurality opinion). Indeed, as the court below observed, "felony fraud" is "a serious crime, *malum in se*, that is punishable in every state." Pet. App. 16a. And it has long been understood that "[t]heft, fraud, and forgery are not merely errors in filling out a form or some regulatory misdemeanor offense; these are significant offenses reflecting disrespect for the law." *Hamilton*, 848 F.3d at 627. Finally, whereas the *Binderup* plaintiffs' post-conviction conduct did not suggest that they were "otherwise irresponsible," 836 F.3d at 355 (Ambro, J., plurality opinion), petitioner here "was convicted of three more counts of misdemeanor fraud" "just a few years after the end of his probation for his first crime," Pet. App. 16a.

Petitioner therefore could not prevail on his as-applied Second Amendment challenge under the Third Circuit's standard. And because he could not prevail under that standard, this case neither implicates the circuit conflict created by the *Binderup* decision nor would be an appropriate vehicle in which to resolve it. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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