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.,
Respondents.

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

BRIEF FOR PETITIONERS

KIET LAM
Attorney
Counsel of Record for Petitioner

University of California, Berkeley
School of Law
Berkeley, CA 94720

QUESTIONS PRESENTED

1. Are individuals who are convicted of felonies, or their federal equivalent, included within the scope of the Second Amendment?

2. If so, are longstanding felon disarmament statutes, such as 18 U.S.C. § 922(g)(1), a permissible regulation on the Second Amendment rights of those convicts?

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STATEMENT OF THE CASE

I. Proceedings as to Respondent Binderup

In 1996, at the age of 41, Respondent Binderup engaged an illicit fourteen-month sexual relationship with a 17-year-old girl under his employ. R. at 215a–16a. He admitted to detectives that he knew she was under the age of eighteen. R. at 216a. Two years later, he pled guilty to and was convicted of one count of corruption of minors in Pennsylvania. *Id.* Although classified as a "misdemeanor" under state law, his crime was punishable by up to five years imprisonment. *Id; see* 18 Pa. Cons. Stat. §§ 6301(a)(1)(i), 1104. Nonetheless, he received a "colloquial slap on the wrist": three years of probation and $300 fine plus costs. R. at 6a. Since then, he has not been convicted of any subsequent offenses. *Id.*

On November 21, 2013, Binderup filed a declaratory action in the U.S. District Court for the Eastern District of Pennsylvania. R. at 168a. Following cross-motions to dismiss (or for summary judgment), the court issued an opinion and order, in pertinent part, finding him subject to 18 U.S.C. § 922(g)(1) but that application of the statute to him violates the Second Amendment. R. at 241a–42a. In so doing, the district court rejected the government's characterization of Respondent as a "sexual predator" and a "statutory rapist." R. at 221a, 226a. Allowing the as-applied challenge to move forward, the court rejected defendants' empirical evidence, including a 2013 Pennsylvania Department of Corrections Recidivism Report. R. at 228–238a This report demonstrated that recidivism rates for those convicted of sexual offenses within three-years were as high as 50%.

R. at 231. Because the court felt that the data did not extrapolate to Binderup specifically, it upheld his as-applied challenge, from which the Government appealed. R. at 9a.

II. Proceedings as to Respondent Suarez

In 1990, Respondent Suarez was stopped by police "on suspicion of driving while intoxicated." He subsequently failed field sobriety tests and was placed under arrest for driving under the influence. *R.* at 262a, 269a. During the ensuing investigation, the officers caught him carrying weapons without a permit, including a .357 Magnum handgun and two "speed loader" devices allowing for quickly loading ammunition. *Id.* An addition to the intervening D.U.I. conviction, R. at 265a, Suarez was convicted of carrying a handgun without a license under Md. Code Ann., art. 27 § 36(b), a "misdemeanor" punishable by a "term of imprisonment for not less than thirty days nor more than three years." R. at 244a. He was ultimately sentenced to 180 days imprisonment and a $500 fine, though both were suspended pending completion of one year probation. *Id.*

On May 20, 2014, Suarez filed a complaint in the U.S. District Court for the Middle District of Pennsylvania. R. at 244a. Following cross-motions for summary judgment, the court issued an opinion and order similarly finding Suarez subject to 18 U.S.C. § 922(g)(1) but that application of the statute to him violates the Second Amendment. R. at 270a. Again, the court found "[not] particularly useful" the government's empirical evidence demonstrating heightened risk of recidivism, and in particular, violent crime. *Id.* For example, one such empirical analysis

demonstrated that handgun purchasers "'who had prior convictions for nonviolent firearm-related offenses such as carrying concealed firearms in public' . . . were more likely than people with no criminal histories to be charged later with a violent crime." R. at 270a, 30a. The court granted Suarez's as-applied challenge, and the Government appealed. R. at 9a.

III. Consolidated Proceedings *En Banc* at the Third Circuit

Following separate arguments in front of separate panels, the Third Circuit issued a *sua sponte* order to consolidate the cases and rehear arguments en banc. R. at 9a. In a highly fractured opinion, producing separate opinions by Judge Ambro, R. at 1a–42a, Judge Hardiman, R. at 43a–92a (concurring in judgments), and Judge Fuentes, R. at 93a–161a (dissenting from judgments), a majority of the court found that Respondents retained their Second Amendment rights because they are sufficiently distinguishable from those felons historically barred from exercising Second Amendment rights. *See* R. at 35a, 86a. In addition, a majority of the en banc court found that the statute as applied to plaintiffs failed to meet means-end testing. R. at 40a, 92a. Petitioners appeal from this judgment.

SUMMARY OF ARGUMENT

In the not-too-distant past, Respondents made the choice to commit serious crimes. Those actions had consequences: beyond those provided by the respective state legislatures, their crimes (equivalent to federal felonies) resulted in a prohibition on gun ownership under 18 U.S.C. § 922(g)(1). Today, they seek the Court's endorsement that, regardless of what they've done or how serious their local communities take those actions, their Second Amendment rights should be reinstated.

At first glance, the issues presented pose no more than quotidian questions of constitutional interpretation. However, the practical consequence of Respondent's position would be a Byzantine web of gun regulation: one that disrupts our system of checks and balances, as between the Separate but Coequal Branches of Government, as well as between the federal and state governments. Affirming the Third Circuit would allow federal courts to overrule legislative directives across the nation that certain conduct is so reprehensible to local communities so as to warrant serious consequences.

On appeal, this Court has the opportunity to realign the Third Circuit with each its sister circuits that have reached the issue presented and found that 18 U.S.C. § 922(g)(1) is a permissible limitation on the right to keep firearms. In so doing, the Court should conclude that as-applied challenges are proscribed by the Court's precedent in *Heller*. Failing that, the Court should take a deferential approach to analysis of the law, finding that the compelling interest of curbing our nation's epidemic of gun violence is well met by a policy of disarming convicted felons.

Ultimately, the question the Court must decide is whether disarming felons is consistent with "the security of a free State," the very goal articulated within the

Second Amendment. It must decide which parties are best situated to make these judgments: whether that be federal judges, the convicted criminals themselves, or a duly elected Congress acting through the articulated will of the Several States. The only possible conclusion is that the framework set up by § 922(g)(1)—a framework that honors the time-tested principals of federalism and separation of powers—poses no discernible Second Amendment violation, even as applied to Respondent.

STANDARD OF REVIEW

As a "rule of federal constitutional law," this Court should conduct an "independent examination of the record as a whole, without deference to the trial court." *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). A grant of summary judgment can only stand if this Court agrees that there exists "no genuine dispute as to any material fact" and that "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing the district court's grants of summary judgment, the Court is "required to view all facts and draw all reasonable inferences in favor of the nonmoving party." *Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 274 n.1 (2009).

ARGUMENT

The Second Amendment protects a right "to keep and bear Arms" from infringement by the government. U.S. Const. amend. II. As the Court recently held in *District of Columbia v. Heller*, this right is held by individuals and need not be exercised within the context of organized militias. 554 U.S. 570, 599 (2008) (explaining that the prefatory clause merely "announces the purpose for which the right was codified"). The Second Amendment is fully applicable to states, having been incorporated into the Fourteenth Amendment in *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010). While its exact contours have not yet been elaborated by the Court, at its core, the Second Amendment "elevates above all other interests" the right for "law-abiding, responsible citizens" to wield arms "in defense of hearth and home." *Heller*, 554 U.S. at 635.

But rather than conferring this right to the people, the amendment merely "recognizes the *pre-existence* of the right." *Id.* at 592 (emphasis in original). The Court has long held that "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *Id.* at 592 (quoting *United States v. Cruikshank*, 92 U. S. 542, 553 (1876)). Thus, by codifying it within the Constitution, the framers also codified limitations that were prevalent and widely recognized by the public at the time of ratification. And as the Court recognized in *Heller*, despite the seemingly broad language of the Second Amendment, these limitations are numerous. They exclude from protection certain types of weapons, *see, e.g.*, *United States v. Miller*, 307 U.S. 174 (1939) (unregistered short-barreled shotgun), in certain contexts, *see, e.g.*, *Louisiana v. Chandler*, 5 La. Ann. 489 (1850) (concealed in public), and by certain groups, *see, e.g.*, *Presser v. Illinois*, 116 U.S. 252 (1886) (parades of men). Thus, courts have routinely held that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Similarly, the Court explicitly cautioned that its opinion "should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* It "repeat[ed] those assurances" in *McDonald*, 561 U.S. at 786.

The time-honored federal "felon-in-possession" law, 18 U.S.C. § 922(g)(1), is exactly the type of statute the Court had in mind. In pertinent part, this section makes it unlawful for anyone "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess "any firearm

or ammunition." R. at 275a–76a. The definitions at § 921(a)(20)(B) provides an exception for individuals convicted of state offenses labeled "misdemeanors" and "punishable by a term of imprisonment of two years or less." R. at 274a. It further excepts those convictions "expunged," "set aside," or "pardoned." *Id.*

Respondents are indisputably subject to § 922(g)(1). As an initial matter, that their respective crimes were *technically* called "misdemeanors" instead of "felonies" is unavailing, given the seriousness of their crimes as indicated by the punishment set by the state legislatures. By including misdemeanors punishable by a term of imprisonment of two years or more, § 922(g)(1) targets conduct generally agreed to be the equivalent of a felony and eschews overemphasis on a demarcation that the Court has called "minor and often arbitrary." *See* R. at 118a (Fuentes, J., dissenting) (citing *Tennessee v. Garner*, 471 U.S. 1, 14 (1985)). Moreover, by the time of this appeal, it is well settled that no (strained) reading of the word "punishable" in the statute would render it inapplicable to them simply because they somehow escaped the more serious punishments authorized by the legislatures. Both district courts rejected this argument, as did the unanimous Third Circuit sitting *en banc*. *See* R. at 193a (E.D. Pa.), 249a (M.D. Pa.), 12a (3d Cir.).

Having failed in their statutory argument, Respondents resort to a constitutional challenge to the statute, rather than going through the usual channels suggested by § 921(a)(20): seeking to have their conviction expunged, set aside, or pardoned. *See* R. at 274a. However, this Court should reject their

challenges and reverse the Third Circuit's conclusion that, despite their criminal histories, the Second Amendment protects their right to wield guns. First, the language and reasoning of *Heller* demonstrate that they have disqualified themselves from the protections of the Second Amendment. Second, even if they retain their Second Amendment rights, the regulation of guns from individuals with a demonstrated risk of breaking the law is a permissible exercise of Congress's power.

I. Both court precedent and historical analysis preclude Respondents from mounting an as-applied constitutional challenge to § 922(g)(1).

Respondents do not raise a facial challenge to § 922(g)(1). Nor could they. As "the most difficult challenge" to raise, a facial challenge would require proof that "no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). *Heller* thus completely foreclosed facial challenges to felon disarmament statutes by holding that they were "presumptively legal" and insinuating that most—if not all—applications of those laws were valid.[1] *Heller*, 554 U.S. at 627 n.26; *see United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011). It would be impossible for a challenger to meet this burden for a regulation presumed legal by the Court.

[1] While some courts treat this language as dicta, the majority of Circuits rightfully view it as binding precedent because it narrows the scope of the Court's holding in *Heller*. *See, e.g., United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) ("Courts often limit the scope of their holdings, as such limitations are integral to those holdings.").

By this logic, Respondents are also barred from raising any as-applied challenges to § 922(g)(1). The most logical reading of *Heller* dictates that felon disarmament laws are always valid because they contemplate a longstanding historical exception that must be read into the Second Amendment. In addition, even if as-applied challenges are allowed, Respondents cannot properly raise them because they are within a group of individuals falling outside of the protections of the Second Amendment.

A. The most natural reading of *Heller* precludes *all* challenges to felon disarmament laws.

A true-to-form reading of *Heller* would preclude even as-applied challenges to felon disarmament. In no uncertain terms, the Court thoroughly disclaimed any reading of *Heller* that would "cast any doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626. The best reading of this broad language is that challenging longstanding felon disarmament rules based on *Heller* would be the exact "doubt" that *Heller* repudiated.

A number of Circuits have followed this exact approach. Having recognized an individual right to bear arms years before *Heller*, the Fifth Circuit declined to revisit its conclusion that felon-in-possession laws were constitutional, finding *Heller* to provide no new justification to hold otherwise. *United States v. Scroggins*, 599 F.3d 433 (5th Cir. 2010). Likewise, the Ninth Circuit has repeatedly upheld the constitutionality of § 922(g)(1) against as-applied challenges. *See, e.g.*, *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *Van Der Hule v. Holder*, 759 F.3d 1043 (9th Cir. 2014); *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016). The Tenth

Circuit has similarly "rejected the notion that *Heller* mandates an individualized inquiry concerning felons pursuant to § 922(g)(1)." *In re United States*, 478 F.3d 1195, 1200 (10th Cir. 2009) (citing *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009)). And the Eleventh Circuit interpreted *Heller* to mean that felons were categorically excluded from Second Amendment rights altogether, meaning that felon disarmament laws were "under any and all circumstances" immune from Second Amendment challenges. *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010). These Circuits have all adopted the most reasonable interpretation of *Heller*, avoiding contradictory readings that would "cast doubt" on America's longstanding tradition of banning felons from possessing firearms.

Admittedly, the remaining circuits have demonstrated varying levels of acceptance to as-applied challenges, ranging from the First Circuit's skepticism, *United States v. Torres-Rosario*, 658 F.3d 110, 1113 (1st Cir. 2011)), to the Fourth Circuit's full acceptance, *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012). But even as those courts have gone through the motions of analyzing those challenges, their deferential reviews of 922(g)(1) have not resulted in any successful challenges. *See, e.g.*, *Pruess*, 703 F.3d at 246 (rejecting defendant's as-applied challenge because he was neither "law-abiding" nor "responsible"). The Third Circuit's opinion below, in substance ignoring the strong presumptions of *Heller* and "taking the further step of upholding such a challenge . . . stand[s] entirely alone." R. at 108a (Fuentes, J., dissenting).

B. Even if *Heller* does not foreclose as-applied challenges altogether, this Court should adopt the Third Circuit's test to find that these

Respondents have forfeited their Second Amendment rights.

Assuming, *arguendo*, that, contrary to the Supreme Court's repeated, clear admonitions, the decision nonetheless opens up as-applied challenges to felon disarmament laws, these particular Respondents are not appropriate for such a challenge. As individuals convicted of serious crimes with serious potential punishments, they have no claim to *Heller*'s "right of *law-abiding*, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635 (emphasis added). *Heller*'s articulation of the exact right protected by the Second Amendment was neither ambiguous nor accidental; the Court clearly meant to cabin claims by individuals who have failed to abide by the law. And courts applying this language have characterized it as a "law-abiding responsible citizen *requirement*," deeming those who "flunk[]" to have no claim to an as-applied challenge. *See United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012) (emphasis added). Put simply: no Second Amendment right, no as-applied challenge.

While this abbreviated analysis—one that is faithful to the Court's language and reasoning in *Heller*—would be ample to demonstrate that Respondents are in a class outside of Second Amendment protection, even a more rigorous analysis would reach the same result. To that end, this Court should follow the Third Circuit's approach articulated in the proceedings below to determine whether a challenged law even burdens any Second Amendment rights of the individuals at hand R. at 21a. To do so, a court should first "identify the traditional justifications for excluding" that class. *Id.* Next, a court should determine if the challenger has "distinguish[ed] his circumstances from those of persons in the historically barred

class." *Id.* In so doing, the court should ignore the plaintiff's "mere[] . . . say-so," but instead require a "strong" showing of actual facts. *Id.* The burden is on the challenger, and as the Third Circuit has acknowledged, "That's no small task." *Id.*

Under this framework, Respondents again fail to demonstrate that the Second Amendment extends protections to them. An objective examination of history demonstrates that individuals who, like Respondents, have willingly violated the law have been considered "unvirtuous" and were deemed to have forfeited their rights to gun ownership. And on the facts given, this Court cannot safely conclude that Respondents are somehow different from the many generations of felons before them who have had no claim to gun ownership given their checkered track records with the law.

1. The right to keep and bear Arms has always excluded "unvirtuous" individuals who commit crimes.

As *Heller* explained, the posture of the Second Amendment against the backdrop of a historical right to bear arms necessarily imports historical limitations into its protections. *Heller*, 556 U.S. at 595. Thus, it is irrelevant to the Amendment's meaning whether "future legislatures or (yes) even future judges think that scope" is too narrow. *See id.* at 635. Rather, to determine if Respondents are even included under the Second Amendment's protections, the Court should first determine the "historical justifications" underpinning exclusion of that class. *See* R. at 21a. In one example from *Heller*, the Court looked to a "majority of 19th-century courts" as confirmation that the Second Amendment excluded carrying concealed weapons. *Heller*, 554 U.S. at 626. Courts have looked to any appropriate

sources to ascertain "the scope [the rights] were understood to have when the public adopted them." *Id.* at 634–35; *see, e.g.*, R. at 24a.

Even while it would be impossible to reduce the cacophony of historical voices into one all-encompassing understanding of the right to bear arms, it is clear that "[f]elons simply did not fall within the benefits of the common law right to possess arms." R. at 26a (internal quotations and citations omitted). More specifically, at the time the Second Amendment was adopted, "the right to bear arms was tied to the concept of a virtuous citizenry." R. at 23a. As the court below acknowledged, those considered "unvirtuous citizens" are more than just violent criminals; "[the category] covers any person who has committed a serious criminal offense, violent or non-violent." *Id.* at 25a. Drawing upon *Heller*'s approbation of state debates on ratification of the Constitution, the court below cited the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, which explained that "citizens have a personal right to bear arms 'unless for *crimes committed*, or real danger of public injury." R. at 25a–26a (emphasis in original) (quoting *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc)). As the court below aptly noted, this rationale is distinct from notions of public safety and danger; rather, it rests upon a theory of forfeiture or disqualification of rights when one tears at the social compact. *See* R. at 26a.

The Court's own articulation of the right in *Heller* is in accord. Throughout the opinion, the Court articulated the "core" right as one held by "law-abiding citizens." *Heller*, 554 U.S. at 635. Its examination of the historical record

acknowledges that "[f]or most of our history . . . the Federal Government did not significantly regulate the possession of firearms by *law-abiding* citizens." *Id.* at 625 (emphasis added). The Court further implies that denial of a license for being a felon would be permissible. *Id.* at 631, 635. And the dissent, too, characterized the limitation as "forfeiture by *criminals* of the Second Amendment right." *Id.* at 688 (Breyer, J., dissenting). While *Heller* did not present the Court with the opportunity to further delve into this particular issue at that time, the historical context of the right permeates throughout the Court's opinion, both majority and dissent.

Contrary to the concurrence's position below, which rejected this notion of virtue as controlling, this understanding stems from ancient historic roots and indeed predates the United States. *See* R. at 73a–74a (Hardiman, J., concurring in judgments). As one Second Amendment scholar noted: "As in England, the requirement of keeping arms was as much directed toward prevention of crime and apprehension of criminals as the repelling of foreign enemies." Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 216, n.47 (1983). Appointed militiamen would "raise the hue and cry" in cases of felony. *Id.* It would be senseless for the right to bear arms, historically linked in part to the apprehension of criminals, to be extended to those same criminals. Indeed, as the court below notes: "[M]ost scholars of the Second Amendment agree" with this well-explored notion. R. at 23a.

This principle is not merely a (well-settled) academic concept. In practice, a substantial number of other circuits join the Third Circuit to articulate the same

idea. The Seventh Circuit, sitting en banc, did so in *Skoien*, 614 F.3d at 640, pointing to a number of state constitutions, which similarly "did not extend this right to persons convicted of crime." The Ninth Circuit made explicit the connection between crime and virtue: "[T]he right to bear arms does not preclude laws disarming . . . unvirtuous citizens (i.e., criminals)." *Vongxay*, 594 F.3d at 1118. The Eighth Circuit also recognized a "common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens." *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011). The Fourth Circuit followed suit. *United States v. Carpio-Leon*, 701 F.3d 974, 980 (4th Cir. 2012) ("The average citizen whom the Founders wished to see armed was a man of republican virtue.") (quoting David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 626 (2000)).

In sum, the "unvirtuous"—that is, criminals—have long been deemed to forfeit certain civil rights, "including fundamental constitutional rights." R. at 26a. An in-depth examination of the historical record supports excluding criminals from enjoying the rights of the Second Amendment. And as the court below recognized, once those rights are forfeited, there is "no historical support" that mere "passage of time" or "evidence of rehabilitation" can restore rights once forfeited. R. at 27a.

2. Respondents fall squarely within the group of individuals historically and categorically excluded from enjoying the privileges of the Second Amendment.

Next, the Court should determine whether the challengers have met their heavy factual burden to "distinguish their circumstances" from those justifications above. R. at 26a. Under the "virtuousness" justification above, the antecedent

crimes—of which Respondents are unquestionably guilty—would seem to definitively place them into the class of unvirtuous citizens who forfeited their claims under the Second Amendment to gun ownership. Nonetheless, the opinion below posits instead an analysis of "whether crimes are serious enough to destroy Second Amendment rights." R. at 30a. Under this view, the Court should examine whether an antecedent offense may be "so tame and technical as to be insufficient to justify the ban." *Id.* at 29a (quoting *Torres-Rosario*, 658 F.3d at 1113).

In so doing, courts must eschew overdependence on the specific crimes were punishable centuries ago. *Heller* squarely rejected rigid interpretations using a "historically fact-bound" approach. *United States v. Marzzarella*, 614 F.3d 85, 93 (3d Cir. 2010). Indeed, "exclusions need not mirror limits that were on the books in 1791." R. at 30a (quoting *Skoien*, 614 F.3d at 641). For instance, the *Heller* court rejected a Second Amendment framework that would depend on the types of guns available in the eighteenth century, declaring, "We do not interpret constitutional rights that way." *Heller*, 554 U.S. at 582. The logic applies equally to state crimes. Courts should give deference to legislative judgments to match the "category of serious crimes . . . over time" as "virtue evolve[s]." R. at 30a.

To that end, the best indicator that courts can discern about a crime's seriousness is the punishment assigned by the local legislature. Even if not given conclusive effect, the legislature here speaks as the representative of its constituents at its own "prerogative," capturing the evolving virtues of its community. *See Rummel v. Estelle*, 445 U.S. 263, 274 (1980). Labels like "felony"

and "misdemeanor" are unhelpful to the inquiry because they are arbitrary and idiosyncratic; as the concurrence below notes, misdemeanors frequently involve conduct that is more grievous than felonies. R. at 81a (Hardiman, J., concurring in judgments). Nor should courts violate powerful separation-of-powers principles in overriding local legislatures in their judgments as to the seriousness of criminalized conduct. *See* R. at 127a (Fuentes, J., dissenting) ("Congress has made a reasoned judgment that crimes currently covered by § 922(g)(1) . . . *are* serious enough to support disarmament.") (emphasis in original).

With this in mind, application to Respondents clearly demonstrates that they fall squarely into the category of "unvirtuous" citizens deprived of Second Amendment rights. As above, "Heller requires [the Court] to consider the maximum possible punishment." R. at 30a. Respondent Suarez's conviction for unlawfully carrying a gun without a license was punishable by *up to three years of imprisonment*. R. at 6a. Respondent Binderup's conviction for corruption of minors was punishable by *up to five years of imprisonment*. R. at 6a. These were not threshold cases. *Heller* recognized the seriousness when a legislature "threatens citizens with a year in prison." *See Heller*, 554 U.S. at 634 (contrasting threats of prison to "a 5-shilling fine"). Surely, crimes allowing for punishments of up to three to five years in prison must carry substantial weight in signaling to the court how local legislatures—and by extension, local communities—feel about certain conduct.

The Third Circuit is mistaken by looking at the actual punishments that were meted out to Respondents. *See* R. at 32a. Sentencing decisions reflect any

number of factors, not all of which will present themselves in the context of a declaratory judgment to reinstate gun rights. The Third Circuit's tautology that "severe punishments are typically reserved for serious crimes," R. at 32a, conflates the crime with the criminal; that serious actions may be punished differently between different individuals is not relevant to the inquiry at hand, which looks at the seriousness of the *crime*. *See id.* at 28a ("[O]nly the seriousness of the purportedly disqualifying offense determines the constitutional sweep of statutes.").

Nor can the substance of their unlawful conduct allow Respondents to claim that their violations were "so tame and technical" as to necessitate a contrary conclusion. At the district court, Respondent Binderup conceded that his actions were "wrong" and "criminal." R. at 218a. And despite the district court's quizzical insistence that an employer targeting an employee (or put differently, a middle-aged adult male targeting a teenage female) is not "predatory sexual behavior," its analysis was comically formalistic, resorting to a dictionary definition of "predator". *See id.* at 220a. Moreover, the court placed far too much weight on the fact that the conduct did not involve violence, erroneously overemphasizing violence as the sole historical justification for disarming felons. *See id.* at 218a–219a. Instead, when viewed properly from the lens of the state legislature, no doubt Binderup's egregious conduct, repeated time and again over the course of fourteen months, would be sufficient to render him "unvirtuous." *See id.* at 216a.

Similarly, Respondent Suarez's crime was far from "tame" or "technical." As an initial matter, the district court pays short shrift to the regulation of violent

weapons, an interest the Third Circuit in *Marzzarella* elevated to the status of compelling. See R. at 265a; *Marzzarella*, 614 F.3d at 99. Surely the Maryland legislature is able to decide for itself that Suarez's willing violations of its efforts to contain gun violence and aid law enforcement are serious. Moreover, at the time he was arrested, Suarez was "carrying a .357 Magnum handgun and two loaded speed-loaders while intoxicated to the point that he was placed under arrest for driving under the influence." R. at 269a. The district court "agree[d] with [Petitioners] that the circumstances of Plaintiff's arrest were dangerous." *Id.* Even though its subsequent reasoning—essentially placing a burden on the Government to demonstrate that he *continues* to pose a danger—was clearly flawed, this Court should honor its initial conclusion: that the circumstances of his arrest demonstrate a disregard for the law and squarely renders him "unvirtuous" for Second Amendment purposes. *See id.* at 269a–70a.

In sum, the courts below uniformly applied incorrect standards and reached incorrect conclusions regarding the seriousness of Respondents' crimes. When viewed properly, in context and through the lens of the local state legislatures, their criminal conduct amply places them into the "unvirtuous" category long disqualified from Second Amendment rights.

II. Even if Respondents retain Second Amendment rights despite their convictions, 18 U.S.C. § 922(g)(1) is a permissible regulation as applied to them because it meets all possible means-end tests.

If Respondents meet the heavy burden of demonstrating that the historical limitations of the Second Amendment do not apply to them, the Court must then determine whether those rights have been impermissibly infringed. The Government concedes that, if the Court finds that Respondents somehow still retain the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," then the challenged statute does clearly pose *some* burden on it. *See Heller*, 554 U.S. at 635.

Once a court establishes that the Second Amendment right has indeed been burdened, *Heller* would apply some sort of means-end testing to determine whether the restriction violates the Second Amendment. *See id.* at 628 (finding a handgun ban to fail under "any of the standards of scrutiny"). Nonetheless, the *Heller* court declined to elucidate any particular level of scrutiny or framework for evaluating Second Amendment claims, explaining that the Court's "first in-depth examination of the Second Amendment" need not "clarify the entire field." *Id.* at 634–35. Still, the Court closed a number of avenues proposed by the dissent. It rejected the use of rational-basis scrutiny, noting that such a deferential standard of review would render the Second Amendment "redundant . . . [with] no effect." *Id.* at 628 n.27. It also declined use of a "judge-empowering 'interest-balancing' inquiry" suggested by the dissent, explaining that it should not be for courts to "decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634 (emphasis in original).

A. For "longstanding prohibitions," intermediate scrutiny is the only appropriate standard that courts can apply.

The Court in *Heller* was incredibly wary of judicial second-guessing of the Second Amendment. *Id.* Still, the opinion's differential treatment of regulations (some presumptively lawful, others not) tells us that courts require flexibility to properly analyze challenges. Even so, blanketly applying one type of scrutiny to all types of regulations (be it strict scrutiny or intermediate scrutiny) would clearly be insufficient to handle this distinction.

Yet letting courts decide *ad hoc* which level of scrutiny is appropriate in a given challenge is the exact kind of judicial aggrandizement that *Heller* disclaimed. *See id.* at 634. This "judge-empowering" system is of particular concern when the choice is almost always dispositive. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring) ("This most exacting standard [of strict scrutiny] 'has proven automatically fatal' in almost every case."). Additionally, while the Court analogized to First Amendment jurisprudence, rote translation of that complex analytical framework onto the Second Amendment is unhelpful. *See Heller*, 554 U.S. at 635; *Marzzarella,* 614 F.3d at 96 (providing a long overview of the standards of review for First Amendment claims). At the margin, whether to apply intermediate or strict scrutiny based on the extent of the burden would be too difficult of an exercise for courts to engage fairly, encouraging the court to impermissibly decide "whether the right is *really worth* insisting upon." *See Heller*, 554 U.S. at 634; *Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny

because it felt "[t]he burden imposed by the [challenged] law does not *severely* limit the possession of firearms") (emphasis added).

Fortunately, in this context, the court's language in *Heller* provides clear guidance that intermediate scrutiny is appropriate in the context of felon disarmament. By identifying certain "longstanding prohibitions" as "presumptively lawful regulatory measures," *Heller* tells us that application of strict scrutiny—the most rigorous form of constitutional skepticism—would be inappropriate. *See id.* at 626, n.26. Courts applying this test "presume the law invalid," placing the burden on the government to rebut that presumption. *Marzzarella*, 614 F.3d at 99 (citing *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 817 (2000)). The Court cannot at once presume the law to be "lawful" yet "invalid." Having ruled out rational basis and strict scrutiny, intermediate scrutiny is the only safe alternative not rejected by the *Heller* court.

B. Because Section 922(g)(1) serves a compelling governmental interest and is narrowly tailored, it would survive even strict scrutiny.

Notwithstanding the impropriety of strict scrutiny analysis to presumptively lawful measures, 18 U.S.C. § 922(g)(1) would survive even under this meticulous review. Under strict scrutiny, a law must "serve[] a compelling interest and [be] narrowly tailored to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). Here, national security and public safety provide an interest that has been repeatedly recognized to be compelling. In addition, the statute, which targets subjects who have *already* demonstrated in ability to comply with the law, is narrowly tailored to meet those ends.

1. Congress has a compelling interest in curbing gun violence and advancing national security.

As the Third Circuit recognized in *Marzzarella*, the relative paucity of Supreme Court analysis of the Second Amendment provides little guidance on what can and cannot serve as a compelling interest. 614 F.3d at 99. In passing § 922(g), Congress sought to "keep guns out of the hands of presumptively risky people." *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010). Related legislative history confirms this purpose: "The ready availability, that is, the ease with which any person can anonymously acquire firearms (including criminals . . . and others whose possession of firearms is similarly contrary to the public interest) is a matter of serious national concern." S. Rep. No. 90-1501, at 22 (1968).

This type of interest has been consistently upheld by the Court as compelling since this analytical framework first emerged. *Korematsu* first articulated public safety and national security as a compelling governmental interest. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). And while the validity of its ultimate outcome has been called into serious question, *Korematsu*'s holding that "national security constitutes a 'pressing public necessity'" remains good law. *See Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting *Korematsu*, 323 U.S. at 216). And, even more specifically, in *United States v. Salerno*, the Court noted that a "general concern with crime prevention" is "both legitimate and compelling." 481 U.S. at 749. And the opinion below concedes that "preventing armed mayhem" is both "important and

compelling." R. at 35a. In sum, there is no serious doubt that the government's legislative purpose here is amply sufficient to demonstrate a compelling interest.

2. Section 922(g)(1) is narrowly tailored to reach those who have already demonstrated their riskiness and inability to comply with the law.

Under strict scrutiny analysis, once the court agrees that a compelling interest exists, the Government must also demonstrate that its chosen policy response is narrowly tailored. Specifically, "the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Grutter*, 539 U.S. at 333.

Here, to support its policy response, the Government provided "numerous studies that explore the link between past criminal conduct and future crime, including gun violence." R. at 135a–36a. For example, one such empirical analysis demonstrated that handgun purchasers "'who had prior convictions for nonviolent firearm-related offenses such as carrying concealed firearms in public' . . . were more likely than people with no criminal histories to be charged later with a violent crime." R. at 38a (quoting Garen J. Wintemute et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 Am. Med. Ass'n 2083, 2086 (1998)). The court then rejects this study as having looked at recidivism rates within only fifteen years of conviction, not twenty-six years like Respondent Suarez's conviction. R. at 38a. Similarly, the Third Circuit rejected the government's empirical evidence of recidivism rates for individuals convicted of sexual offenses, whereas, for whatever reason, Respondent Binderup managed to

elude serving actual jailtime. *Id.* Seemingly, in the context of an as-applied challenge, the Third Circuit would require a study individually tailored for each challenger, an absurd proposition and a misapplication of tailoring analysis.

In fact, any cursory analysis of the Government's empirical evidence would be adequate to show that Respondents like individual pose a *greater* risk than the average citizen. To prevail in demonstrating that its laws are narrowly tailored, the Government need simply show that this overwhelming empirical evidence meets the policy objective: to "keep guns out of the hands of presumptively risky people." *Yancey*, 621 F.3d at 683. All studies necessarily rely on some degree of inference. As Judge Fuentes's opinion below aptly notes: "The question is not whether someone *exactly like the plaintiffs* poses a threat to public safety." R. at 136a (Fuentes, J., dissenting from judgments). And it would be "practically impossible to make this kind of individualized prediction with any degree of confidence." *Id.* at 140a. By dismissing these studies as "off-point," the court below misses the forest for the trees. *See* R. at 36a.

Finally, the Court should credit Congress for its "escape hatch." By allowing state governments to rescind their stamps of dangerousness through expungement, setting aside the conviction, or pardon, *see* 18 U.S.C. § 921(a)(20), R. at 274a, the Government provides an even tighter fit with its purpose by deferring to the judgments of the local communities where convicts live. Rather than taking challengers at their word that they no longer pose a threat, Congress reasonably

requires that they seek such affirmation from the very legislatures that deemed their conduct to be a serious criminal act.

III. Respondents' position would impermissibly shift vast powers to federal courts without any corresponding resources or capacity to resolve each individual inquiry.

For the aforementioned reasons, the Government contends that the lower courts' opinions rest on constitutionally infirm ground, and that all reasonable readings of *Heller* point to one conclusion: that § 922(g)(1) is a perfectly legitimate (and even advisable) regulation of Respondents' ownership of dangerous firearms. But notwithstanding the erroneous reasoning, there are broader concerns that militate against this Court's endorsement of Respondents' position. The statutory framework created by Congress envisions a delicate balance: as between the federal government and the states, as well as between legislatures and judges. The Third Circuit's opinion has created an obvious crack in this foundation, and an affirmation by this Court could send the whole structure crumbling down into an unworkable mess.

For starters, even where courts have not completely foreclosed as-applied challenges, they recognize the administrative difficulties that they would raise. For example, the First Circuit noted that such "highly fact-specific objections" would "obviously present serious problems of administration, consistency, and fair warning." *Torres-Rosario*, 658 F.3d at 112. Quite apart from the extensive, five-plus-year litigation presented by the cases at hand, endorsing as-applied challenges to § 922(g)(1) would open the floodgates to countless similar challenges, which by their very nature will require fact-intensive analyses. And as the dissenting opinion

below noted, if as-applied challenges for *presumptively* lawful regulation are permitted, courts will clearly be required to revisit laws not specifically enumerated in *Heller* (e.g., other provisions under § 922(g), like prohibitions targeting drug addicts under § 922(g)(3)). *See* R. at 116a, n. 99 (Fuentes, J., dissenting from judgments).

In light of an all-but-certain influx of Second Amendment challenges, the relative incapacity of courts to adequately tackle these tough issues should give this Court pause. The Supreme Court (and even the Third Circuit opinion below) acknowledged that the courts are not "'institutionally equipped' to conduct 'a neutral, wide-ranging investigation" . . . to predict whether particular offenders are likely to commit violent crimes in the future." R. at 28a (quoting *United States v. Bean*, 537 U.S. 71, 77 (2002)). And unlike with other contexts, like sentencing or bail hearings, courts would lack access to specialized resources like "presentence and pretrial services reports, [or] input from trained probation and pretrial services professionals." *Id.* at 138a n.168 (Fuentes, J., dissenting from judgments). But mandating heightened-scrutiny inquiries would require exactly that investigation every time: courts (rather than elected bodies) determining whether facts and empirical evidence demonstrate that the laws, as applied to each challenger, are sufficiently tailored to the government's compelling interest in curbing gun violence. Instead, this "function [is] best performed by the Executive." *Bean*, 537 U.S. at 77.

But even Congress itself gave up on its system of case-by-case inquiries by the Executive Branch. Under 18 U.S.C. § 925(c), Congress had authorized the

Attorney General to review applications for relief from § 922(g)'s disarmament provisions. Upon defunding such a program, Congress noted that review of such applications was "a very difficult and subjective task." R. at 95a (Fuentes, J., dissenting) (quoting S. Rep. No. 102-353, at 19 (1992)). More importantly, Congress soon realized the potential for "devastating consequences for innocent citizens if the wrong decision is made," warning that "too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms." *Id.* Without funding, the program is essentially defunct—and the Court should not volunteer itself for such a herculean task without any new resources or expertise.

Apart from the question of institutional competency, the system subjects the reasoned judgments of local legislatures to second-guessing by federal courts. The structure of § 922(g)(1) is "predicated on principles of federalism," creating restrictions based on the decisions of state legislatures. R. at 145a–46a (Fuentes, J., dissenting). In that same vein, the federal regime honors state decisions that would reinstate civil rights: § 921(a)(20), R. at 274a, allows a state to expunge, pardon, or set aside those convictions should they wish to reinstate gun ownership rights to individuals previously ineligible by way of conviction. R. at 274a. This Court should decline invitations to second-guess those state legislatures.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Third Circuit,

holding instead that longstanding prohibitions on felon disarmament pose no Second Amendment issue for Respondents.

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Respectfully Submitted,

KIET T. LAM
Counsel for Petitioner