No. 20-812

In the
Supreme Court of the United States

LISA M. FOLAJTAR,

Petitioner,

v.

JEFFREY A. ROSEN,
ACTING ATTORNEY GENERAL,
ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF AMERICAN CONSTITUTONAL RIGHTS UNION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1), which permanently prohibits nearly all felons—even those convicted of nonviolent crimes—from possessing firearms for self-defense, violates the Second Amendment, as applied to an individual convicted of willfully making a materially false statement on her tax returns.

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STATEMENT OF AMICUS CURIAE[1]

The American Constitutional Rights Union (ACRU) is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel; former Federal Election Commissioner Hans von Spakovsky; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the Second Amendment rights of the American people. It is committed to insuring that the individual right of Americans to own guns which the Court recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008) , is not undermined by the federal, state, or local governments. To protect this fundamental right,

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[1] The parties were notified of the filing of this brief more than 10 days before its filing and consented to it. *See* Sup. R. 37.2(a). Pursuant to Rule 37.6, *amicus curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

ACRU has filed amicus briefs in *New York State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. ___ (2020), and in support of the Petitioners in *Lane v. Holder*, 703 F. 3d 668 (4th Cir. 2012), cert. denied, 134 S. Ct. 1273 (2014), and *Woolard v. Gallagher*, No. 12-1437, in the United States Court of Appeals for the Fourth Circuit (Mar. 13, 2013), cert. denied, 134 S. Ct. 422 (2013).

SUMMARY OF ARGUMENT

In *Heller*, this Court understandably declined to "clarify the entire field" governing the right to keep and bear arms. 554 U.S. at 635. This case presents the Court with an opportunity to clarify one part of that field: the standards applicable to efforts by disarmed non-violent felons and those convicted of qualifying misdemeanors to regain their right to keep and bear arms.

As Petitioner notes, the courts are split on whether as applied challenges to the lifetime ban on firearms possession imposed through 18 U.S.C. § 922(g)(1) can be made. This Court should use this case to make it clear that such as-applied challenges are allowed, if only to limit the overbreadth inherent in § 922(g)(1).

This Court should also take this case to clarify the standard of review applicable to such as-applied challenges. The Second Amendment right is a fundamental one, and heightened scrutiny is warranted that right is permanently deprived.

Finally, this Court should conclusively reject the virtue theory, which suggests that there is an historical basis for disarming felons, as ungrounded historically, inconsistent with *Heller*, and too malleable for consistent application. Instead, only those who pose a danger to the public, as with those convicted of crimes of violence, should be eligible for permanent disarmament.

ARGUMENT

I. The right to keep and bear arms guaranteed by the Second Amendment is an individual right grounded in the inherent right of self-defense.

In *District of Columbia v. Heller*, the Court explained that the "operative clause of the Second Amendment, "which protects the "right of the people to keep and bear arms" from infringement, creates an individual right, not a "collective" one that "may be exercised only through participation in some corporate body." 584 U.S. 570, 579 (2008). The individual nature of the right "contrasts markedly" with the prefatory clause, which speaks of forming a "well regulated militia," because "the 'militia' in colonial America consisted of a subset of 'the people'—those who were male, able bodied, and within a certain age range." *Id.* at 580. "The Second Amendment 'elevates above *all* other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home'—a right that is at the 'core' of the Second Amendment." *Binderup v. Attorney General*, 836 F. 3d 336, 358 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and

concurring in the judgments) (quoting *Heller*, 554 U.S. at 635, and adding emphasis). *Heller* further "ma[de] it clear" that the right of self-defense, which the Second Amendment protects, is both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald v. Chicago*, 130 S. Ct. 3020, 3036-42 (2010).

The *Heller* Court further found that the creation of a militia and an individual right to keep and bear arms "fit[] perfectly, once one knows the history that the founding generation knew." *Heller*, 554 U.S. at 598. It noted, "That history showed that the way tyrants had eliminated a militia consisting of all able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." *Id*.

II. This Court should take the opportunity to clarify the law surrounding as-applied challenges to the permanent disarmament of nonviolent felons and those convicted of qualifying misdemeanors.

The Second Amendment's historical grounding as an individual and fundamental right should guide the Court as it determines whether as-applied challenges to the application of § 922 (g)(1) are permitted, what standard of review should be applied, and whether the virtue test should be rejected.

A. The Court should allow as-applied challenges to the lifetime ban on firearms possession by non-violent individual with felony or qualifying-misdemeanor convictions.

As Petitioner notes, some courts allow as-applied challenges to the scope of § 922(g)(1), while others do not. Pet. at 13-20. The courts should consider as-applied challenges for three reasons.

First, in *Heller*, the Court stated, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," characterizing that prohibition and others as "presumptively lawful." 554 U.S. at 626-27 and n. 26. The presumption of lawfulness can be protected by denying facial challenges to the constitutionality of § 922 (g)(1), as the courts generally do, see *Folajtar v. Attorney General*, No. 19-1687, in the United States Court of Appeals for the Third Circuit, __ F. 3d __ (Nov. 24, 2020), Pet. Appx. at 7, while also permitting as-applied challenges. Those as-applied challenges weed out potentially overbroad applications of the lifetime bar on the possession of firearms that § 922(g)(1) imposes. In addition, given that the firearms ban is only "presumptively lawful," as-applied challenges reflect the fact that "[u]nless flagged as irrebuttable, presumptions are rebuttable." *Binderup v. Attorney General*, 836 F. 3d 336, 350 (3d Cir. 2016) (Opinion of Ambro, J.).

Section 922(g)(1) can be overbroad in its application. This Court pointed to that possibility in *Old Chief v. United States*, when it noted that "an

extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession." 519 U.S. 172, 185 n.8 (1997). In such a case, "the Government would have to bear the risk of jury nullification." *Id*.

That overbreadth stems from the statutory history. As first codified, in 1938, § 922(g)(1) prohibited persons convicted of a "crime of violence" from shipping or receiving firearms in interstate commerce. Federal Firearms Act, Pub. L. No. 75-785, § 2(e), (f), 52 Stat. 1250, 1251 (1938). At that time, a crime of violence was "murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking; assault with intent to kill, rape, or rob; assault with a deadly weapon, or assault with intent to commit any offense punishable by imprisonment for more than a year." Federal Firearms Act, § 1(6), 52 Stat. at 1250. In 1961, Congress expanded the prohibition on shipping or receiving firearms in interstate commerce by replacing the "crime of violence' predicate with "crime punishable by imprisonment for a term exceeding one year." An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961). Then, in 1968, Congress prohibited the possession of firearms by persons convicted of crimes punishable by imprisonment for more than one year, a provision codified at 18 U.S.C. § 922(g)(1).

The range of felonies shows how broadly § 922(g)(1) reaches. As then-Judge Barret observed, the number of nonviolent felonies and qualifying state-law misdemeanors is "an immense and diverse

category." *Kanter v. Barr*, 919 F. 3d 437, 466-67 (7 th Cir. 2019) (Barrett, J., dissenting); see also *Folajtar* at 50-51 (Bibas, J., dissenting).

Petitioner's case is an example of the effect of § 922(g)(1) on nonviolent criminals because it is a felony punishable by up to three years' imprisonment. See 26 U.S.C. § 7206(1). She pleaded guilty to a single count of willfully making a materially false statement on her tax returns. Even so, Petitioner received only a sentence of three-years' probation, including three months of home confinement, a $10,000 fine, and a $100 assessment. See Pet. at 7. She also paid the IRS some $250,000 in back taxes, penalties, and interest. *Id*. Almost 10 years after her conviction, with a law-abiding record, Petitioner deserves the chance to regain her right to keep and bear arms. Cf. *Kanter*, 919 F. 3d at 541 (Barrett, J., dissenting) ("Absent evidence that he either belongs to a dangerous category or bears individual markers of risk, permanently disqualifying Kanter [who was convicted of nonviolent mail fraud] from possessing a gun violates the Second Amendment.").

B. As-applied challenges to the application of § 922(g)(1) call for the application of heightened scrutiny.

The application of heightened scrutiny to as-applied challenges to the application of §922 (g)(1) is appropriate for two reasons.

First, the right to keep and bear arms is a fundamental right. As this Court held in *McDonald*, that right is both "fundamental to our scheme of

ordered liberty," and "deeply rooted in this Nation's history and traditions." 130 S. Ct. at 3036. Before any such fundamental right is infringed or taken away, the Government should be required to show that its action is narrowly tailored to the pursuit of a significant state interest. Any less rigor would make the Second Amendment would make it " a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," a step this Court declined to take in *McDonald*. 130 S. Ct. at 3044.

Second, in *Heller,* this Court rejected the suggestion that Second Amendment claims be reviewed under an "'interest-balancing inquiry.' 554 U.S. at 634. It noted, "The very enumeration of the right takes it out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id*. (emphasis in original). Indeed, "[a] constitutional guarantee subject to future judges' assessment of its usefulness is no constitutional guarantee at all." *Id*.

More to the point, the First Amendment is not subject to an interest-balancing analysis. It "contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed ideas." 554 U.S. at 635. "The Second Amendment is no different." *Id*. It, too, "is the very product of an interest balancing by the people," one that "elevates above all other interests the right of law-abiding,

responsible citizens to use arms in defense of hearth and home. *Id*.

The Second Amendment should receive the same respect as the First by being protected by heightened scrutiny of attempts to infringe on the rights guaranteed.[2]

C. The virtue test is not an appropriate method of deciding whether a disarmed individual may regain his or her Second Amendment rights.

The virtue test, which some courts employ in considering as-applied challenges to the application of § 922(g)(1) is flawed in its reading of history, inconsistent with *Heller*, and incapable of consistent, principled application.

1. The virtue test lacks historical support.

The opinion of Judge Hardiman in *Binderup* and the dissenting opinions of then-Judge Barrett in *Kanter v. Barr*, and Judge Bibas in *Folajtar v. Attorney General*, show that the power of the legislature to disarm citizens is limited to "those likely to commit violent offenses." *Binderup*, 836 F. 3d at 367 (Hardiman, J., concurring in part and concurring in the judgments); see also *Kanter v. Barr*,

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[2] In *Binderup*, Judge Hardiman noted that the Third Circuit employed intermediate scrutiny in evaluating the application of § 922 (g)(1) to a statutory ban on the possession of firearms with obliterated serial numbers. *Binderup*, 836 F. 3d at 360 (Hardiman, J., concurring in part and concurring in the judgments) (discussing *United States v. Barton*, 633 F. 3d 168 (3d Cir. 2011)).

919 F. 3d at 451-469 (Barrett, J., dissenting); *Folajtar*, at Pet. Appx. at 30-58 (Bibas, J., dissenting).

More specifically, those opinions show:

(1) Reliance on the state ratifying conventions in New Hampshire, Massachusetts, and Pennsylvania that proposed protecting the right to keep and bear arms subject to limitations show that "the right to keep and bear arms was understood to exclude those who presented a danger to the public." *Binderup*, 836 F. 3d at 368 (Hardiman, J., concurring in part and concurring in the judgments). Significantly, "none of the relevant limiting language made its way in to the Second Amendment." *Kanter*, 919 F. 3d at 455 (Barrett, J., dissenting). More specifically, the New Hampshire proposal, which would disarm those who "are or have been in actual rebellion," speaks of "rebellion," not criminality. *Id*. at 454-55. The Massachusetts proposal would disarm those not "peaceable citizens", but would not "encompass[] all criminals, or even all felons." *Id*. The Pennsylvania proposal, which guaranteed the right of arms "unless for crimes committed, or real danger of public injury from individuals", "was suggested by a minority of the Pennsylvania ratifying convention that failed to persuade its own state let alone others." *Folajtar*, Pet. Appx. at 38 (Bibas, J., dissenting); see also *Kanter*, 919 F. 3d at 456 (Barrett, J., dissenting) ("If 'crimes committed' refers only to a subset of crimes, that subset must be defined; using 'real danger of public injury' to draw the line is both internally coherent and consistent with founding-era practice.").

(2) In the same way, English and early American authorities disarmed those who posed a danger to the public peace. Such disarmed groups included Catholics in England, those loyal to the English Crown during the Revolution, and slaves and Native Americans in the United States. As Judge Bibas explains, the loyalists were not disarmed because they were not virtuous but because they were "potential rebels who were dangerous before they erupted into violence." *Folajtar*, Pet. Appx. at 37.

"In sum, founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety. But neither the convention proposals nor historical practice supports a legislative practice to categorically disarm felons because of their status as felons." *Kanter*, 919 F. 3d at 458 (Barrett, J., dissenting).

2. The virtue test cannot be reconciled with *Heller*.

As noted above, *Heller* recognized that the right to keep and bear arms is an individual right. The virtue test is grounded on an entirely different view of the Second Amendment and should be rejected for that reason.

Then-Judge Barrett observes that "virtue exclusions are associated with civic rights—individual rights 'that require[] citizens to act in a collective manner for distinctly public purposes.'" *Kanter*, 919 F. 3d at 462 (quoting Saul Cornell, *A New Paradigm for the Second Amendment*, 22 Law & Hist. Rev. 161,165 (2004)). Civic rights include the right to

vote and the right to serve on juries. *Id*. But, "*Heller* . . . expressly rejects the argument that the Second Amendment protects a purely civic right", plainly holding that "the Second Amendment confer[s] an *individual right* to keep and bear arms." *Id*. at 463 (quoting *Heller*, 554 U.S. at 595, and adding emphasis).

There are two other problems with the virtue test. First, Cornell's article, and much of the other scholarship classifying Second Amendment rights as civic rights, are pre-*Heller*. *Id*. (citing *Binderup*, 836 F. 3d at 371 (Hardiman, J., concurring in part and concurring in the judgments).[3]

Second, the virtue-based exclusions of convicted felons from voting or jury service "were explicit." *Id*. "By 1820, ten states' constitutions included provisions excluding or authorizing the exclusion of those who 'had committed crimes, particularly felonies or so-called infamous crimes' from the franchise.'" *Id*. (quoting Alexander Keyssar,

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[3] The same holds true for articles such as Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143 (1986); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588 (2000); Saul Cornell, *Don't Know Much About History: The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657 (2002); and Saul Cornell & Nathan DiDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004). Such pre-*Heller* scholarship is nothing more than wishful thinking. See also *Folajtar*, Pet Appx. at 39-44 (Bibas, J., dissenting).

The Right to Vote, 62-63 & tbl. A.7.). The number of such states increased to twenty-four by 1857, and "[t]he same crimes 'often made a person ineligible to serve as a witness in a legal proceeding' and to serve on a jury. *Id*. (quoting Keyssar at 60); see also *id*. at 463, n. 11; see also U.S. Const. amend. XIV, § 2 (allowing for the right to vote to be abridged for "participation in rebellion, or other crime").

"State constitutions protecting the right to bear arms do not follow a similar pattern" of disarming felons. *Id*. at 464. In sum, as Judge Hardiman explains, "We have found no historical evidence on the public meaning of the right to keep and bear arms indicating that 'virtuousness" was a limitation on one's qualification for the right—contemporary insistence to the contrary falls somewhere between guesswork and *ipse dixit*." *Binderup*, 836 F. 3d at 372 (Hardiman, J., concurring in part and concurring in the judgments).

Neither guesswork nor *ipse dixit* provides a sound basis for adopting a test.

3. The virtue test is too malleable for consistent, principled application.

Section 922(g)(1) sweeps with a broad brush, not simply because of its inherent overbreadth. It further empowers the legislative branch to infringe on Second Amendment rights by defining crimes and penalties.

In *Binderup*, Judge Hardiman criticized the majority for "misapprehending the traditional

justifications underlying felon dispossession, substituting a vague 'virtue' requirement that is belied by the historical record." 836 F. 3d at 358 (Hardiman, J., concurring in part and concurring in the judgment). The effect of that substitution is to empower judges to "pick and choose whom the government may permanently disarm if the judges approve of the legislature's interest balancing." *Id*.

Judge Bibas explains, "[T]oday, a felony is whatever the legislature says it is." Folajtar, at 51 (Bibas, J., dissenting). "The category is elastic, unbounded and manipulable by legislatures and prosecutors." *Id*.

Granted, legislatures are there to balance interests and to define crimes and sentences. But, the government's ability to infringe on the Second Amendment rights should not turn entirely on the label applied to the offense.

The remedy is to go back to the historical roots of "disarming dangerous—not merely unvirtuous—persons." Joseph G. S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 285 (2020).

CONCLUSION

"Felons [and those convicted of qualifying misdemeanors] are people too." *Folajtar*, at 54 (Bibas, J., dissenting). Those who have paid their debt to society should have the chance to regain their rights.

For the reasons stated in the Petition and this amicus brief, this Court should grant the writ of certiorari and, on review, reverse the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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