No. 16-847

In the Supreme Court of the United States

DANA J. BOENTE, ACTING ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

DANIEL BINDERUP, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae the Law Center to Prevent Gun Violence ("Law Center") is a national, non-profit organization dedicated to reducing gun violence. Founded after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides comprehensive legal expertise in support of common sense gun laws. The Law Center tracks and analyzes federal, state, and local firearms legislation, monitors Second Amendment litigation nationwide, and provides support to jurisdictions facing legal challenges to their gun laws. The Law Center has provided informed analysis as an amicus in a wide variety of important firearm-related cases nationwide, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

SUMMARY OF ARGUMENT

The Third Circuit's fractured opinion substantially weakens an Act of Congress, creating an unwarranted risk to public safety. The decision also exacerbates a circuit conflict regarding the permissibility of as-applied challenges to Section 922(g)(1), rendering this Court's intervention necessary.

Congress made a reasoned determination that categorical treatment of felons is needed in this context for both safety and administrative purposes. The ad hoc test created by Judge Ambro undermines

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[1] Counsel for all parties received notice at least 10 days prior to the due date of the Law Center's intent to file this brief; all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

that judgment, opening the floodgates to thousands of new as-applied challenges to Section 922(g)(1). Courts and prosecutors are ill-equipped to administer such an individualized test, which will lead to an increasing number of felons with guns, some of whom undoubtedly will pose a threat to public safety.

The Third Circuit's decision flatly contradicts this Court's affirmation of the constitutionality of the categorical approach in *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008): "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."

Finally, the division and confusion within the circuits regarding both the permissibility of as-applied challenges and the method to evaluate an as-applied challenge, warrants this Court's review to avoid the unequal treatment of similarly situated individuals. Not only does this case add to the circuit split regarding the permissibility of as-applied challenges, but the divisive nature of the separate opinions below make this case the ideal vehicle to resolve the courts' inconsistent understanding of how as-applied challenges may be evaluated.

ARGUMENT

I. THE THIRD CIRCUIT'S RULING INVALIDATES 18 U.S.C. § 922(g)(1) IN MANY OF ITS HISTORICAL APPLICATIONS

The Third Circuit's plurality decision permitting individuals to bring as-applied challenges to Section 922(g)(1) undermines Congress's carefully considered categorical prohibition, threatens public safety, and creates myriad administrability issues. In effect, it renders the statute inapplicable in many cases where

the terms of the statute are met, contravening Congress's intent.

A. The Third Circuit's opinion contravenes Congress's reasoned application of a categorical approach

The Third Circuit's opinion disregards Congress's reasoned judgment that a categorical prohibition is necessary in this instance. In the past, Congress permitted individuals to obtain relief from Section 922(g)(1)'s firearms disability by demonstrating that "the circumstances regarding the disability, and [his] record and reputation, are such that [he] will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). In 1992, however, Congress suspended funding for the relief procedure, concluding that the investigation required was "a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made" and that "approximately 40 man-years [were] spent annually to investigate and act upon these investigations." S. Rep. No. 102-353, at 19, 20 (1992) ("1992 Senate Report"). Congress has repeatedly suspended funding for the relief procedure, noting that "those who commit serious crimes forfeit many rights and those who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms." H.R. Rep. No. 104-183, at 15 (1995). By reinstating a relief procedure via the courts, the Third Circuit effectively invalidates Congress's reasoned conclusion that

individualized determinations are both unworkable and dangerous in this context.

B. The Third Circuit's decision will allow dangerous felons to acquire firearms, notwithstanding the language of the statute

The Third Circuit's ruling will likely lead to firearms in the hands of many people who Congress intended to bar from obtaining such weapons. Judge Ambro's opinion relied on a number of factors to determine that the Challengers' crimes were not "serious," including whether the crimes were classified as misdemeanors under state law, whether they contained violent elements, whether there was a cross-jurisdictional consensus regarding the seriousness of the crimes, and whether the Challengers received light sentences. *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 351-353 (3rd Cir. 2016) (plurality opinion). In doing so, he failed to provide guidance as to how to weigh each factor. *Id.* As a result, the range of potentially viable as-applied challenges to Section 922(g)(1) is broad, which will encourage large numbers of constitutional claims. Given the ad hoc nature of the test, courts will invariably make disparate determinations of whether a particular prior offense was "serious" based on their own subjective opinions, rather than grounded in any objective basis. The result is that dangerous felons will almost certainly be allowed to acquire firearms.[2]

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[2] Section 922(g)(1) prohibits gun possession by some misdemeanants as well as felons (*see* 18 U.S.C. §§ 922(g)(1); 921(a)(20)), but it includes only those crimes that meet the traditional definition of a felony. *See Thorm v. United States*, 59 F.2d 419 (1932) (recognizing that Congress identifies felonies as crimes punishable by sentences exceeding one year).

There are currently thousands of potentially dangerous individuals subject to Section 922(g)(1) who may now attempt to argue that Section 922(g)(1) is unconstitutional as applied to them because their prior convictions were non-violent or because they did not receive a significant sentence.[3]

As-applied challenges by such persons are not merely hypothetical. There are already a number of pending as-applied challenges that, if successful, present threats to public safety. For example, Alonzo Adams is currently appealing his conviction for violation of Section 922(g)(1). Brief for Petitioner, *United States v. Adams*, No. 15-00153-01-CR-W-GAF,

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[3] Between 2014 and 2015, there were over ten thousand convictions under Section 922(g). U.S. Sentencing Commission, Quick Facts, Felon in Possession of a Firearm (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY15.pdf ("Quick Facts 2015"); U.S. Sentencing Commission, Quick Facts, Felon in Possession of a Firearm (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY14.pdf ("Quick Facts 2014"). Of those ten thousand convictions, roughly 20 percent of the offenders were assigned to the two lowest criminal history categories. Quick Facts 2014; Quick Facts 2015. Criminal history categories are assigned based on, among other things, prior sentences of imprisonment and whether the prior convictions resulted from a crime of violence. U.S. Sentencing Commission, Criminal History Primer (2015), http://www.ussc.gov/sites/default/files/pdf/ training/primers/2015_Primer_Criminal_History.pdf.

In addition, there are currently over six hundred thousand offenders serving sentences for non-violent crimes in state prisons, suggesting that there are many thousands of individuals subject to Section 922(g)(1) who may bring as-applied challenges based on the non-violent nature of their prior convictions. Prison Policy Initiative, Mass Incarceration: The Whole Pie 2016 (Mar. 14, 2016), https://www.prisonpolicy.org/reports/pie2016.html.

2015 U.S. Dist. LEXIS 139749 (W.D. Mo. Oct. 13, 2015), *appeal docketed*, No. 16-2529 (8th Cir. June 2, 2016). He argues that the statute is unconstitutional as applied to him because his prior felony conviction for unlawful use of a weapon by carrying a concealed firearm, based on conduct involving throwing a loaded firearm on the ground as police officers were pursuing him, was non-violent. *Id.* at 10; *see also* Brief for Petitioner at 23, *United States v. Hughley*, No. 14-00224-01-CR-W-DW, 2015 U.S. Dist. LEXIS 137544 (W.D. Mo. Oct. 7, 2015), *appeal docketed*, No. 16-1936 (8th Cir. Apr. 20, 2016) (arguing that the statute is unconstitutional as applied to Petitioner because his two prior felony convictions, for crack cocaine possession and for unlawful use of a weapon, were non-violent).

The Third Circuit's opinion also lends credence to arguments by plaintiffs like Christopher Clark. Clark has filed a complaint seeking a ruling that Section 922(g)(1) is unconstitutional as applied to him based on a prior conviction for carrying an unlicensed firearm during a verbal altercation with his girlfriend. Complaint, *Clark v. Lynch et al.*, No. 2:16-cv-1804-JFC (W.D. Pa., filed Dec. 2, 2016); *see also* Complaint, *Benedetto v. Lynch et al.*, No. 1:17-cv-00058-CCB (D. Md., filed Jan. 9, 2017) (seeking a ruling that § 922(g)(1) is unconstitutional as applied to plaintiff based upon his prior conviction for misdemeanor battery); Complaint, *Holloway v. Lynch et al.*, No. 1:17-cv-00081-CCC (M.D. Pa., filed Jan. 13, 2017) (seeking a ruling that § 922(g)(1) is unconstitutional as applied to plaintiff who was convicted of driving under the influence, his second such offense).[4]

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[4] Moreover, the logic of the Third Circuit's opinion, if allowed to stand, might further threaten public safety by raising doubts about similar gun prohibitions based on criminal convictions

To the extent such challenges succeed, they pose a threat to public safety. One study of felons who had their gun rights restored in Washington State found that hundreds of criminals – nearly 15 percent of those who regained their gun rights – subsequently committed new crimes, including murder, assault in the first and second degree, child rape and drive-by shooting. Michael Luo, *Felons Finding It Easy to Regain Gun Rights*, N.Y. Times, Nov. 13, 2011, at A1. Another study found that authorized handgun purchasers with prior nonviolent misdemeanor convictions are more likely than those with no criminal history to be charged with new crimes, particularly crimes involving firearms or violence. Garen J. Wintemute, *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 J. Am. Med. 2083, 2085 (1998).

C. The Third Circuit's decision will create administrative burdens that will undermine the efficacy of the statute

The Third Circuit's ruling also makes the judicial branch responsible for individualized assessments of seriousness or dangerousness it lacks the institutional tools to perform. Courts are not

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that a judge, in a subsequent review, deems not sufficiently "serious." These might include the federal prohibition on gun possession by those convicted of domestic violence (*see, e.g., Stimmel v. Lynch*, No. 5:14CV2081, 2015 U.S. Dist. LEXIS 130312 (N.D. Ohio Sept. 28, 2015), *appeal docketed*, No. 15-4196 (6th Cir. Nov. 3, 2015)), and state prohibitions on gun possession by those convicted of felonies (*see, e.g., Hamilton v. Pallozzi*, No. JKB-15-2142, 2016 U.S. Dist. LEXIS 19428 (D. Md. Feb. 18, 2016), *appeal docketed*, No. 16-1222 (4th Cir. Mar. 2, 2016)).

equipped to assess whether a person's background makes it likely they will pose a danger to the public if given access to a firearm. "Whether an applicant is 'likely to act in a manner dangerous to public safety' presupposes an inquiry into that applicant's background – a function best performed by the Executive, which, unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation." *United States v. Bean*, 537 U.S. 71, 77 (2002).

In addition to recognizing that the judiciary is ill-equipped to investigate individuals' backgrounds in this manner, the Court has acknowledged in other constitutional contexts that it would be improper to require courts to resolve an as-applied challenge by reference only to the personal circumstances of the challenger. For example, in the context of the First Amendment, the Court has held that the government may properly enforce a "prophylactic" rule designed to prevent harm, even if actual harm cannot be linked to the challenging individual. *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 462-67 (1978). In other words, a "restriction's validity is judged by the relation it bears to the general problem . . . not by the extent to which it furthers the Government's interest in an individual case." *United States v. Edge Broad. Co.*, 509 U.S. 418, 430-31 (1983) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989)).[5]

The Third Circuit plurality, in contrast, has ruled that convicted felons may challenge Section 922(g)(1) – a prophylactic rule designed to prevent convicted

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[5] The Court has identified the same principle in a case involving Equal Protection challenges, as well. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70 (2001) ("None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.").

criminals from harming more people – based on individualized allegations about their personal background and circumstances. And the plurality has said that such felons will prevail if their allegations are sufficient to persuade judges that their crimes were not serious. In adopting this rule, the plurality assigned to the judiciary precisely the difficult predictive task it is instructed to avoid with respect to prophylactic rules in the context of other constitutional rights.

The Third Circuit's test will not only require courts to conduct high-stakes investigations for which they are not "institutionally equipped," *Bean*, 537 U.S. at 77, and which are not required in the context of other constitutional rights, it will also substantially increase courts' caseloads. The "40 man-years" that were spent each year to investigate claims under the administrative relief procedure that existed prior to 1996 will instead be shifted to the already burdened lower courts. 1992 Senate Report. Moreover, because the Third Circuit's opinion suggests that the passage of time and evidence of rehabilitation could be relevant to an as-applied challenge, the same person may be able to pursue multiple successive challenges before the same court.

Courts will face particular challenges in cases in which significant time has passed or the defendant pled guilty to the original felony offense. This will be especially problematic in cases where the defendant was convicted of a facially nonviolent offense, but the surrounding circumstances leading to his prosecution revealed a predisposition for violent behavior. The risk, of course, is that the record for purposes of an as-applied challenge may not reflect that context. A recently filed as-applied challenge illustrates the type of issues that may arise. In the complaint filed in *Benedetto v. Lynch et al.*, No. 1:17-cv-00058-CCB (D.

Md., filed Jan. 9, 2017), plaintiff Jeffery Benedetto contends that Section 922(g)(1) is unconstitutional as applied to him based upon his prior conviction for misdemeanor battery. He argues that at the time of his conviction, battery required offensive touching, but did not require ill intent. Benedetto pled guilty to the offense years ago, and the complaint does not disclose any of the conduct that led to the charge. As a result, it may be very difficult for a court to evaluate whether the crime was "serious" under the rubric proposed by Judge Ambro's opinion.

As applied challenges will also hinder prosecutors' ability to prosecute illegal gun possession. Federal prosecutors would need to develop individualized, detailed evidence on the criminal history of each potential defendant. This could be difficult and resource-intensive, particularly in cases where the defendants' predicate convictions are old or involve guilty pleas. Furthermore, because the test endorsed by Judge Ambro requires a fact-specific, individualized assessment, an elaborate case law will develop, and federal judges will be forced to wade through it in order to determine where a particular defendant fits within the developing taxonomy of criminal histories that do or do not permit application of Section 922(g)(1).

Individualized determinations of the validity of Section 922(g)(1) may also interfere with the National Instant Criminal Background Check System (NICS). The NICS is a computerized system designed to streamline the background check inquiry process for Federal Firearms Licensees. FBI, About NICS, https://www.fbi.gov/services/cjis/nics/about-nics. Applying a categorical approach to firearm disability is important to permit NICS operators to quickly determine whether a firearm transfer would violate state or federal law. The legal uncertainty injected

by the Third Circuit's opinion may hamper the operation of the system and thus increase the likelihood that dangerous felons will slip through and acquire guns.

The substantial burdens placed on lower courts and prosecutors by virtue of the Third Circuit's opinion will do more than cause an unnecessary administrative headache. These burdens will inevitably lead to more felons obtaining guns, chipping away at Section 922(g)(1), and undermining Congress's judgment that public safety is best protected with a uniform, national rule.

II. THE THIRD CIRCUIT'S OPINION CONFLICTS WITH SUPREME COURT PRECEDENT

The Third Circuit's opinion squarely conflicts with the Court's statement in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Court explicitly stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." 554 U.S. at 626.

As the plurality below detailed, the exclusion of certain individuals from the scope of the Second Amendment is consistent with the Framers' understanding of the right to bear arms. *See e.g.*, *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) ("Scholarship suggests historical support for common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible."); *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) ("most scholars of the Second Amendment agree that the right to bear arms was 'inextricably . . . tied to' the concept of a 'virtuous citizen[ry]'") (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs.

143, 146 (1986)); *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) ("most 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.'"); *see also* Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Commentary 221, 228-29 (1999) (suggesting that at the time the Second Amendment was ratified a substantial number of Americans believed that a large number of individuals could be excluded from gun ownership); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (relying on a "highly influential" precursor to the Second Amendment that "asserted that citizens have a personal right to bear arms 'unless for crimes committed, or real danger of public injury'") (citing *Heller*, 554 U.S. at 604).

The idea that a felony conviction strips felons of certain rights is not a novel proposition. *United States v. Barton,* 633 F.3d 168, 175 (3rd Cir. 2011) ("[F]elons forfeit other civil liberties, including fundamental constitutional rights such as the right to vote or serve on a jury.") Section two of the Fourteenth Amendment contemplates that revocation of constitutional rights (in that case the right to vote) is a permissible consequence of a criminal conviction. This implicit understanding that criminals forfeit certain rights by virtue of their conviction provides a relevant backdrop for interpretation of the Second Amendment.

Further, to the extent there is a limit to Congress's ability to impose a firearm disability following a conviction, Section 922(g)(1) does not come close to that limit. Section 922(g)(1) covers only those crimes that fall within the traditional definition of a felony,

crimes that are by definition "serious." *See Thorm*, 59 F.2d at 419 (recognizing that Congress identifies felonies as crimes punishable by sentences exceeding one year). As the government persuasively argues in its petition, this categorical approach is consistent with the Court's approach to identifying "serious" offenses in other constitutional contexts. Pet. at 15-16 (citing *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 542 (1989) (a crime is "serious" for purposes of determining the right to a jury trial "whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months"); *Branzburg v. Hayes*, 408 U.S. 665, 687 n. 24 (1972) (a crime triggers the Fifth Amendment right to a jury when it is punishable for more than 1 year)). It would be incongruous for courts to use a categorical approach to determine whether a crime is serious enough for an *accused* criminal to be granted important fundamental rights, while at the same time requiring an individualized determination of whether a crime is serious enough to deprive a *convicted* criminal of his rights. "The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task." *Lewis v. United States*, 518 U.S. 322, 326 (1996) (quoting *Blanton*, 489 U.S. at 541).

III. THERE IS A SIGNIFICANT DIVISION OF AUTHORITY REGARDING THE PERMISSIBILITY OF AS-APPLIED CHALLENGES TO SECTION 922(g)(1) RENDERING THE COURT'S INTERVENTION NECESSARY

A. Courts are divided on whether as-applied challenges are appropriate in the first instance

The conflict between the circuit courts on the question of whether as-applied challenges to Section 922(g)(1) are permissible warrants this Court's review. The Fifth, Tenth, and Eleventh Circuits have foreclosed the possibility of bringing as-applied challenges to Section 922(g)(1). *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010). In doing so, each court relied on Heller's assertion that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626.

By contrast, the First, Fourth, Seventh, Eighth, and D.C. Circuits have kept open the possibility of successful as-applied challenges. *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) (stating that the Supreme Court might be open to highly fact-specific objections to § 922(g)(1)); *United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012) (suggesting that Heller left open the question of possibility of as-applied challenges); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (stating that "the government does not get a free pass simply because Congress has established a 'categorical ban'"); *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (stating that the Eighth Circuit "has left open the possibility that a person could bring a successful as-applied challenge"); *Schrader v. Holder*, 704 F.3d 980, 991 (D.C. Cir. 2013) (suggesting an as-applied challenge could be successful in the right circumstances).

B. There is confusion and hesitation even among the courts that do appear open to as-applied challenges

Even those courts that have suggested as-applied challenges are permissible have nevertheless failed to embrace a uniform or coherent standard, and have expressed hesitation and conflicting views regarding how as-applied challenges may be evaluated.

The First Circuit, for instance, has suggested that as-applied challenges to Section 922(g)(1) are permissible, but it has also warned that "such an approach, applied to countless variations in individual circumstances, would obviously present serious problems of administration, consistency, and fair warning." *Torres-Rosario*, 658 F.3d at 113.

The Seventh and Eighth Circuits have suggested that a challenger whose prior convictions were for non-violent felonies may be able to launch a successful as-applied challenge to the statute based purely on the non-violent nature of the prior conviction. In rejecting an as-applied challenge to Section 922(g)(1), the Seventh Circuit relied on the fact that the defendant was convicted of a violent felony. *Williams*, 616 F.3d at 693. The court suggested that the statute "may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent." *Id.* The Eighth Circuit has also seemed to draw a distinction between prior convictions for violent and non-violent crimes for purposes of evaluating an as-applied challenge to the statute. In *Woolsey*, the court suggested that to succeed on an as-applied challenge, the challenger must demonstrate that he is "no more dangerous than a typical law-abiding citizen." 759 F.3d at 909.

By contrast, the First and Fourth Circuits have suggested that Section 922(g)(1) is valid as applied to felons who have committed non-violent felonies. The Fourth Circuit outright rejected the proposition that Section 922(g)(1) is unconstitutional as applied to non-violent felons. *United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012). Instead of placing significance on the violent nature of the prior conviction, the court has suggested that a challenger must rebut the presumption of lawfulness of the felon-in-possession prohibition by showing that he is a "law-abiding" and "responsible" citizen. *Moore*, 666 F.3d at 319. Similarly, although the First Circuit stated that "the Supreme Court might find some felonies so tame and technical as to be insufficient to justify the ban," it has rejected the proposition that the challenger must have prior convictions for violent felonies. *Torres-Rosario*, 658 F.3d at 113.

The division among the courts regarding the relevance of whether the predicate conviction was violent or not mirrors the split in the Third Circuit. That is, just as Judge Ambro and Judge Hardiman were divided over whether the test should be one of "seriousness" or "violence," other circuits that are open to as-applied challenges are conflicted over the same question. This multi-tiered confusion among the courts renders this Court's intervention necessary. Otherwise, as-applied challenges to Section 922(g)(1) based on the same prior convictions, and similar background facts, will lead to vastly different outcomes based solely on the location of the challenge. For example, a challenger with a prior conviction for carrying a firearm without a license, like plaintiff Christopher Clark, may fare very differently depending on where he decides to bring his challenge. It is possible that one court may determine that he enjoys the protections of the Second Amendment because his prior conviction was

"non-violent." Another court, by contrast, may emphasize that he was not "law-abiding" or a "responsible" citizen, thus placing him outside the scope of the Second Amendment. Further, even a court that deems the violent/nonviolent distinction to be significant, may view the prior conviction as "violent" based on circumstances individual to the challenger that would be ignored by a different court. The practical result will be that, in contrast to the Congressional intent to create a uniform, national rule about gun possession by persons convicted of serious crimes, the law's reach will be a patchwork dependent on the particularities of a given state, circuit or judge. In sum, the confusion among the circuits renders the rights of any individual subject to Section 922(g)(1) unclear, and risks creating inequality among similarly situated challengers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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