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 Third Circuit Court of Appeals

BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, AND INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1), which permanently prohibits almost all felons—even nonviolent ones—violates the Second Amendment.

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INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles. Reason advances its mission by publishing *Reason* magazine, website commentary, and policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus* in cases raising significant constitutional issues.

The **Individual Rights Foundation** was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF opposes attempts from anywhere along the political spectrum to undermine fundamental rights, and it participates as *amicus curiae* in cases to combat overreaching governmental activity.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

The **Independence Institute** is a nonpartisan public policy research organization based in Denver. The Institute's *amicus* briefs in *Heller* and *McDonald* (under the name of lead amicus International Law Enforcement Educators & Trainers Association) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*). The Institute's briefs and scholarship by Research Director David Kopel were cited last term in *New York State Rifle & Pistol Association v. City of New York* (Alito, J., dissenting), and *Rogers v. Grewel* (Thomas, J., dissenting from denial of cert.).

This case interests *amici* because it addresses the Second Amendment's scope, particularly as it applies to nonviolent offenders who have their fundamental right to bear arms denied by federal or state law. This is an area of growing concern given the thousands of regulations that carry criminal penalties.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether a citizen convicted of a nonviolent felony can be completely barred for life from exercising her fundamental Second Amendment right to keep and bear arms. The federal government argues that under 18 U.S.C. § 922(g)(1), felons lose their Second Amendment rights.

The government justifies this position by arguing that the right to bear arms was limited to "virtuous" citizens. In *District of Columbia v. Heller*, this Court found that the core right protected by the provision is individually held rather than collectively. 554 U.S. 570, 582 (2008). While virtue-based exclusions have

been applied to civic rights such as voting and jury duty, there is no historical justification for applying the test to individual rights. The proposed virtue test would relegate the Second Amendment to second-class status. Just as a nonviolent conviction does not suspend an individual's First or Fourth Amendment rights, it should not suspend their Second Amendment rights.

The virtue test becomes more worrisome as it is tethered to the felony label—a mushy standard that legislatures can manipulate. A legislature seeking to prevent possession of firearms could make almost any crime a disqualifying felony under § 922(g)(1) by setting the maximum penalty so that the offense is "serious." *Folajtar v. Att'y Gen.*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *7 (3d Cir. Nov. 24, 2020) (citing *Binderup v. Att'y Gen.*, 836 F.3d 336, 349 (3d Cir. 2016) (en banc)). By allowing state legislatures to determine the scope of the Second Amendment, the fundamental nature of the right is diluted. This blanket rule is far from narrowly tailored, labeling almost all felons as dangerous because some are.

ARGUMENT

I. THE VIRTUE TEST IS INAPPROPRIATE FOR INDIVIDUAL RIGHTS

Since *Heller*, lower courts have been deeply divided on Second Amendment questions. This is true for § 922(g)(1) as to whether as-applied challenges are permitted, the proper standard of review, and whether a "virtue" test should be applied.

Section 922(g)(1) makes it unlawful for any person convicted of "a crime punishable by

imprisonment for a term over one year" to possess a firearm. Four circuit courts employ a virtue-based test to limit the right to keep and bear arms to those who have not committed a felony. Although a virtue test can be appropriate to certain communal rights, it is inappropriate for individual rights like the one protected by the Second Amendment. There is "no evidence that virtue exclusions ever applied to individual, as opposed to civic, rights." *Kanter v. Barr*, 919 F.3d 437, 463 (7th Cir. 2019) (Barrett, J., dissenting). Any permanent deprivation of an individual right needs to only be as broad as necessary for the government to achieve its interest.

A. The Virtue Test Has Only Been Used for Collective Rights

In denying petitioner relief, the Third Circuit employed the virtue test which allows for the disarmament of "any person who has committed a serious criminal offense, violent or nonviolent." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *7 (quoting *Binderup*, 836 F.3d at 348). While previous Third Circuit decisions used a multifactor test to determine seriousness, the majority here reduced the test to a single factor: whether the legislature labeled the crime a felony. *Id.* at *26 ("[F]elony status is generally conclusive evidence that the offense is serious.").[2]

[2] The other approach taken by judges is to look at the dangerousness of the offense. Under this approach, the legislature may disarm only those who have "demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).

History shows that the virtue test can be appropriate in dealing with the rights to vote, serve on juries, and serve in public office. *See*, *e.g.*, *Binderup*, 836 F.3d at 369 n.14 (3d Cir. 2016) (Hardiman, J., concurring) (noting the history of felon disenfranchisement and that jury service and eligibility for public office are not fundamental rights); Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 29 (1st ed. 1868) (arguing that disenfranchising certain classes of people on the basis of "want of capacity or of moral fitness" was well-documented). The virtue theory of the Second Amendment conceives of the right to keep and bear arms as one that "was exercised for the benefit of the community (like voting and jury service), rather than for the benefit of the individual (like free speech or free exercise)" and thus "belonged only to virtuous citizens." *Kanter*, 919 F.3d at 462–63 (Barrett, J., dissenting). Four circuits have imported the virtue-based test and applied it to the Second Amendment.

But *Heller* expressly rejected the notion that the right to keep and bear arms was a collective right, holding instead that "the Second Amendment confer[s] an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. The scholarship that the four virtue-test-applying circuits came pre-*Heller*. *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *42–50 (Bibas, J., dissenting). As other *amici* argue, there is no evidence to support the idea that virtue exclusions ever applied to individual rights. Given the importance of history to the Court's Second Amendment jurisprudence, it is inappropriate to use an ahistorical test to strip people of an individual right.

B. Categorically Stripping Individual Rights from Felons Would Be Unacceptable in Other Contexts

Courts "treat no other constitutional right so cavalierly" as they do the Second Amendment. *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting). The Tenth Circuit does not treat the Second Amendment equal with the right to marry. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) ("The risk inherent in firearms . . . distinguishes the Second Amendment right from other fundamental rights . . . such as the right to marry and the right to be free from viewpoint discrimination."). Other circuits refuse to import substantive First Amendment principles into Second Amendment jurisprudence. *See, e.g.*, *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 124 n.28 (3d Cir. 2018). This is despite the Court's direction in *Heller* and *McDonald* to consider Second Amendment issues with the same care afforded other individual rights. *Rogers v. Grewal*, 140 S. Ct. 1865 (2020) (Thomas, J., dissental) ("Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework.").

This does not mean that all restrictions on Second Amendment rights are unconstitutional. History shows that the right to keep and bear arms "was not unlimited, just as the First Amendment's right of free speech was not." *Heller*, 554 U.S. at 595. We can and should continue restrictions on firearms to those who pose a genuine danger to the public, but any deprivation must be narrowly tailored. The Constitution would not allow a permanent

deprivation of every felon's First or Fourth Amendment right simply because the offense was "serious." The Second Amendment should receive the same respect, to protect against attempts to infringe on fundamental constitutional rights.

1. Felons maintain their First Amendment rights.

No court would strip a felon's First Amendment rights solely because of their lack of virtuousness. This past May, the U.S. Bureau of Prisons released Michael Cohen, President Trump's former attorney, as authorities tried to slow the spread of COVID-19 in federal prisons. Matt Zapotosky, "Michael Cohen Released from Federal Prison Over Coronavirus Concerns," Wash. Post, May 21, 2020, https://wapo.st/3hNv57O. He was ordered back to prison, however, after tweeting that he was finishing up his book about his experience with President Trump. In a hearing on his reimprisonment, Judge Alvin Hellerstein released Cohen, saying that the government retaliated against Cohen solely "because of his desire to exercise his First Amendment rights." Benjamin Weiser & Alan Feuer, "Judge Orders Cohen Released, Citing 'Retaliation' Over Tell All Book," N.Y. Times July 23, 2020, https://nyti.ms/3rVF9jy. If the circumstances were different and the court applied the virtue test to Cohen, they would only look at his felony conviction to determine whether he still had his First Amendment rights. Courts do not apply such a standard though.

2. Suspending Fourth Amendment rights for felons would also be unconstitutional.

Likewise, courts do not treat the Fourth Amendment so cavalierly. The search-and-seizure

provisions of the Fourth Amendment protect against "unreasonable" searches. This protection applies both to those with and without a criminal record. No court would allow legislatures to deprive all felons their Fourth Amendment rights even though it would arguably improve public safety.

To justify the near-blanket ban on nonviolent felons, proponents point to recidivism rates, especially among nonviolent offenders. *See Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *25; *Kanter*, 919 F.3d at 449 (highlighting several studies showing a connection between nonviolent offenders and risk of future violent crime); *Kaemmerling v. Lappin*, 553 F.3d 669, 683 (D.C. Cir. 2008) ("[C]ertain groups—such as property offenders—have an even higher recidivism rate than violent offenders, and a large percentage of the crimes nonviolent recidivists later commit are violent.").

There are two principal problems with the use of recidivism rates to support firearm bans. First, as Judge Bibas wrote below, the statistics lump all nonviolent felons together with burglars and drug dealers without taking account individual characteristics that make some riskier than others. *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *59 (Bibas, J., dissenting). Second, recidivism rates would also support stripping Fourth Amendment rights, because the government has a significant interest in curbing crime. Given that many felons are likely to reoffend, allowing police to regularly search felons' homes would deter future crimes. But if a state legislature abridged felons' Fourth Amendment rights en masse under the belief that it would improve public safety, would courts blindly defer to that

judgment? Yet courts around the country do blindly defer to similar legislative judgments on Second Amendment rights. And just as it would be unconstitutional to indiscriminately abridge Fourth Amendment rights, so too for the Second Amendment.

3. Any restriction on individual rights needs to be narrowly tailored.

The "right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. This is also true for other individual rights. "No fundamental right—not even the First Amendment—is absolute." *McDonald*, 561 U.S. at 802 (Scalia, J., concurring). While prisoners are incarcerated, the government can curb their First Amendment rights if the restriction is reasonably related to a valid penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). Likewise, prisoners and parolees lack a reasonable expectation to privacy. *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (prisoners can be searched as a routine matter); *Samson v. California*, 547 U.S. 843, 850 (2006) (allowing warrantless searches at any time).

Historical evidence shows that the government can exclude some individuals from possessing guns. Violent and other dangerous persons have historically been banned from keeping arms in several contexts—specifically, persons guilty of committing violent crimes. *See, e.g.*, *Binderup*, 836 F.3d at 367–74 (Hardiman, J., concurring). If the Second Amendment were subject to the virtue test, the government would not need to show evidence that a felon is dangerous. *Kanter*, 919 F.3d at 463 (Barrett, J., dissenting). But a lifetime prohibition should be upheld only if the government can demonstrate that a nonviolent felon

poses a danger to commit gun violence. *Binderup*, 836 F.3d at 354 ("[The government] must present some meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments.").

II. THE VIRTUE TEST ILLEGITIMATELY ALLOWS LEGISLATURES TO DETERMINE THE SECOND AMENDMENT'S SCOPE

The court below justifies its application of the virtue test by claiming that it "accords proper deference to the legislature," as legislatures are "'far better equipped than the judiciary' to make sensitive public policy judgments." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *15–16 (quoting *Kachalsky*, 701 F.3d at 97). The court also cites administrative concerns, arguing that the dangerousness test endorsed by the dissent would give districts courts the "unenviable task of weighing the relative dangerousness of hundreds of offenses already deemed sufficiently serious to be classified as felonies." *Id.* at *18. But courts can use objective factors, such has having a clean record since the offense, to mitigate administrative concerns. As a fundamental right, the Second Amendment requires "narrow[] tailor[ing]" rather than a near-blanket rule. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

With § 922(g)(1) tied to the maximum punishment of an offense, legislatures' have been given the power to define the scope of the Second Amendment. Legislators wanting to limit possession of firearms can do that by designating almost any offense a felony. The statute does not account for the nature of the offense, the length of time elapsed since the offense, or the punishment actually given to the felon.

All that matters is the maximum possible punishment. While the government should be able to balance interests and define crimes and sentences, restrictions on Second Amendment rights should not turn entirely on the label applied to an offense.

More problematic is that, in blessing the virtue test, lower courts have paid mere lip service to concerns about legislatures' unfettered power. A near-blanket rule that strips fundamental rights based on any felony is overinclusive.

A. The Felony Label Is Manipulable and Leads to Disparate Outcomes for the Same Offense

1. Modern felonies are far removed from common-law felonies.

Section 922(g)(1) prohibits firearm possession by persons convicted of a "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Its application is not limited to violent crimes and applies to almost all felons and some misdemeanants, making it "wildly overinclusive." Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 721 (2007).

The court below justified its application of the virtue test arguing "[w]hen the legislature," in this case Congress, "designates a crime as a felony, it signals to the world the highest degree of societal condemnation for the act." *Medina*, 913 F.3d at 160. If only this were true. In dissent, Judge Bibas described the definition of a felony as "elastic, unbounded, and manipulable by legislatures and prosecutors." *Folajtar*, No. 19-1687,

2020 U.S. App. Lexis 37006, at *56 (Bibas, J., dissenting). Judge Bibas recognized what this Court recognized almost 80 years ago: the term "[f]elony . . . is a verbal survival which has been emptied of its historic content." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272 n.2 (1942).

At common law, the term "applied to only a few select categories of serious crimes." Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. Rev. 163, 195 (2013). "Felony" was a category "used to designate such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender." *Bannon v. United States*, 156 U.S. 464, 468 (1895) (citing *Ex parte Wilson*, 114 U.S. 417, 423 (1885)). For a crime to be designated as a felony today, it only needs to be punishable by imprisonment for a term exceeding one year.

To see how far-removed today's felonies are from the common law, consider a few examples. In *United States v. Yates*, the Supreme Court reversed a conviction for impeding a federal investigation, a violation of 18 U.S.C. § 1519, for a fisherman's disposal of three undersized grouper that were 1.25 inches under the required 20-inch size. 574 U.S. 528, 531–35 (2015). Transporting lottery tickets across state lines when one state forbids lottery tickets carries a maximum penalty of two years in prison. 18 U.S.C. § 1301. Finally, in Pennsylvania, reading another person's email without permission is a third-degree felony, punishable by up to seven years. Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. Crim. L. & Criminology 709, 719 n.44, 46 (2010). There are

currently thousands of criminal statutes and regulations that would allow Congress to disarm people for statutory felonies that were not contemplated by the common law.

2. The court below defers to the felony label even though the government uses that label arbitrarily.

In justifying the felony-misdemeanor dichotomy, the court below opined that "when a legislature chooses to call a crime a misdemeanor, we have an indication of non-seriousness that is lacking when it opts instead to use the felony label." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *9 (quoting *Binderup*, 836 F.3d at 353 n.6 (en banc)). The lower court's deference to the felony label is illegitimate given that the government has admitted that the "felony-misdemeanor distinction is 'minor and often arbitrary.'" *See, e.g.*, *Binderup*, 836 F.3d at 374 (en banc) (Hardiman, J., concurring) (quoting Gov't Binderup Br. 19). Because a state can define crimes, an individual who commits a crime in one state might lose her gun rights, whereas someone who committed the same crime in another state would retain her rights. This is seen with DUI laws, as many states treat a second DUI as an offense that does not implicate § 922(g)(1). *Holloway v. Att'y Gen.*, 948 F.3d 164, 192 (3d Cir. 2020) (Fisher, J., dissenting). But there are eight jurisdictions where a second DUI does trigger § 922(g)(1). *Id.* As a result, the statute's dependence on how a state classifies and punishes a crime "results in an underinclusive application that raises constitutional concerns." *Id.*

The lower court's deference to the felony label is even more concerning considering that Congress has already determined that some serious, nonviolent felonies do not warrant a lifetime firearm ban. The definition of the term "felony" used in 18 U.S.C. § 922 excludes "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A). There is no principled basis as to why Folajtar's nonviolent felony of tax fraud is worthy of a lifetime firearm ban and an antitrust violation is not. At the very least, the government must justify disparate treatment with evidence. Otherwise, the distinction is entirely arbitrary.

B. There Are Few Limits on What a Legislature Can Make a Felony and That Has Dire Consequences for Second Amendment Rights

1. Legislatures control the scope of punishment.

Usually, what a state decides to punish as a crime is "purely a matter of legislative prerogative." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *56 (Bibas, J., dissenting) (citing *Rummel v. Estelle*, 445 U.S. 263, 274 (1980); *Heller*, 554 U.S. at 628 n.27). However, it is different when a fundamental right is at stake. With § 922(g)(1), the power to determine a felony also provides the legislature the power to determine the Second Amendment's scope. If a legislature wanted to curb firearm possession, it could designate any minor offense—say, jaywalking—as punishable by more than one year's imprisonment

and vigorously enforce it. Some may argue that courts would find the offense of "felony jaywalking" to be a bridge too far, possibly under the Eighth Amendment. But if a legislative committee made findings that purportedly showed jaywalking to be a serious threat to the community, is it seriously likely our deferential courts would gainsay the determination? Thus, legislatures effectively have the power to narrow the Second Amendment. But "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 834–35.

The court's deference to the felony label to determine the seriousness of an offense is also misguided because sentencing reflects a culmination of factors. While a maximum possible punishment is "certainly probative" of the offense's potential seriousness, the wide range of punishments for an offense makes the maximum punishment a poor indicator of the actual seriousness of the defendant's personal conduct. *Holloway v. Sessions*, 349 F. Supp. 3d 451, 457 (M.D. Pa. 2018). As the court in *Binderup* recognized, judges must not "defer blindly" to maximum possible punishments because "some offenses may be 'so tame and technical as to be insufficient to justify the ban.'" 836 F.3d at 350–51 (quoting *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011)).

When determining a sentence, courts may consider the history and characteristics of the defendant, and a judge's sentence may reflect a compromise resulting from plea bargaining. Under the court's test, it does not matter if the convicted

person served time in prison for over a year. The only thing that matters is the maximum punishment. In fact, three in ten felony convictions do not result in a prison sentence. Bureau of Justice Statistics, *Felony Sentences in State Courts*, 2006 – Statistical Tables (Dec. 2009). The judicial decision to impose no incarceration at all indicates that the offense was not relatively serious. Here, Lisa Folajtar was sentenced to three years' probation for her actions. Despite her offense not being serious enough to be incarcerated, she will forever be barred from exercising her Second Amendment rights.

2. The government's data on recidivism rates conflate one-time offenders with repeat violators.

To justify the blanket ban, the court below said, "there is good reason not to trust felons, even non-violent ones, with firearms." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *24. The majority in *Kanter* also approvingly cited studies linking nonviolent convictions to later offenses involving violence. *Kanter*, 919 F.3d at 449.

But the cited data do not distinguish between first-time offenders like Lisa Folajtar and those with repeat records. *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *59 (Bibas, J., dissenting). Moreover, stripping a person's fundamental rights based on projected crimes unrelated to past criminal acts is a dangerous proposition. *Id.* All the evidence shows—and the government does not dispute—that Lisa Folajtar is now a responsible, law-abiding citizen.

3. There are relatively few constitutional limits to punishments legislatures can impose when dealing with felony sentences of a few years.

A legislature could punish a crime so severely it would violate the Eighth Amendment's protection against cruel and unusual punishments. But this is a high bar to reach. *See, e.g.*, *Ewing v. California*, 538 U.S. 11 (2003) (upholding 25-year sentence for stealing golf clubs under California's three-strikes law). And when a sentence involves "only" several years, Eighth Amendment jurisprudence provides very little judicial review.

Legislatures have nearly limitless power over whether to classify legal violations as felonies. Recognizing the possibility of abuse, the majority below did "not foreclose the possibility that a legislature could be overly punitive and classify as a felony an offense beyond the limits of the historical understanding." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *10. However, it also stated that "a felony is generally conclusive in our analysis of seriousness." *Id.* at *9–10. Indeed, the challenger's burden for restoration of Second Amendment rights is "extraordinarily high." *Id.*; *see also Binderup*, 836 F.3d at 353.

In practice, "extraordinarily high" is a euphemism for "impossible." "[N]o circuit has held the law unconstitutional as applied to a convicted felon." *Medina v. Whitaker*, 913 F.3d 152, 155 (D.C. Cir. 2019) (Sentelle, J.).

The reason for the extraordinary/impossible standard is that legislative classification of a crime as

a felony puts people on notice that they are "committing a serious offense" and will "forfeit their rights under the Second Amendment." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *18.

As a practical matter, even the most learned lawyers today cannot know the full scope of offenses that are denominated as felonies. *See* Mike Chase, *How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender* (2019). Even if a mere mortal could know all the federal and state felonies, "extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *33 (Bibas, J., dissenting).

This Court has long upheld the rule that when legislatures attach a label that will constrict constitutional rights, the labeling is subject to careful scrutiny. *See*, *e.g.*, *Jenkins v. Georgia*, 418 U.S. 153 (1974) (while "obscene material" may be prohibited, Georgia statute that encompassed an R-rated film went too far). The Court has usually not needed to police the meaning of "felony." But whatever the word "felony" means, it is not a synonym for the permanent loss of constitutional rights. The person convicted of felony criminal libel still enjoys the freedom of speech. The person who has served her full sentence, including parole, for felony burglary, still enjoys Fourth Amendment rights in her own home. A police officer who is convicted of a felony for violating due process rights still enjoys his own due process rights.

Only one right in the Bill of Rights may be taken away forever by the whim of what the legislature does

or does not label a "felony." The petitioner here is not challenging the lifetime loss of constitutional rights for convicted felons who have proven themselves to be violently dangerous. The question instead is whether there are some limits to stripping the practical right of self-defense from persons who, while once having poor virtue, have never behaved dangerously.

C. Restrictions of Fundamental Rights Need to Be Grounded in Constitutional Text and History

The ability of the legislature to define the scope of the Second Amendment appears even more absurd when compared to the First Amendment. In *R. A. V. v. St. Paul,* this Court held that obscenity and fighting words are unprotected by the First Amendment. 505 U.S. 377, 383 (1992). While Congress can restrict speech that amounts to obscenity or fighting words, "it may not substantially redefine what counts as obscenity or fighting words." *Binderup*, 836 F.3d at 372 n.20 (en banc) (Hardiman, J., concurring). Yet in the Second Amendment context, the government argues that Congress and state legislatures have the right to define the types of criminals excluded from the right to keep and bear arms.

This is not a small problem. There are 15 million "ex-felons" who have had their Second Amendment rights stripped. *See* Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010*, 6–7 (2011)). In the most recent year that BJS published figures for state felony convictions, 18.2 percent of all state felony convictions were for violent offenses. Bureau of Justice Statistics, *supra*. Even though most convicted felons committed a nonviolent

offense, only a select few can exercise their Second Amendment right due to an ahistorical virtue test.

The historical evidence supports a different proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. As then-Judge Barrett noted, "[t]his is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting). The danger test also justified the disarming of those who refused to pledge loyalty to the colonies. "Loyalists were potential rebels who were dangerous before they erupted into violence." *Folajtar*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *39 (Bibas, J., dissenting). Similarly, "[r]ebels posed a risk of insurrection and so were dangerous." *Id.*

The case for keeping firearms away from those who have demonstrated violent behavior is strong. Even so, some tailoring is essential. Under the decision below, there is no tailoring. Instead, it is a near-blanket ban that defers to how the legislature labels a crime. But the Second Amendment demands more than kowtowing to the whims of legislatures. The proper test is to look to history which supports that all citizens enjoyed the Second Amendment unless they posed a danger. Because Lisa Folajtar is not dangerous, her Second Amendment rights must be restored to her.

CONCLUSION

The Court should grant the petition and use this case to provide clarity about how to evaluate restrictions of fundamental rights. Neither the text nor history of the Second Amendment supports the permanent disarmament of nonviolent felons.

Respectfully submitted,

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