No. 16-1517

In The Supreme Court of the United States

JAMES HAMILTON,

Petitioner,

v.

WILLIAM L. PALLOZZI AND BRIAN E. FROSH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 2017

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QUESTION PRESENTED

Is Maryland's prohibition on the possession of firearms by felons consistent with the Second Amendment to the United States Constitution as applied to an individual who was convicted of three separate felony theft counts less than a decade before filing his challenge?

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STATEMENT

1. Petitioner James Hamilton pleaded guilty to three separate felonies in Virginia on November 6, 2006: (1) credit card fraud, in violation of Va. Code § 18.2-195; (2) credit card theft, in violation of Va. Code § 18.2-192; and (3) credit card forgery, in violation of Va. Code § 18.2-193(a)(1). Pet. App. 3a. He received a suspended sentence of four years' imprisonment, and was ordered to pay $1,227.90 in restitution and $1,090 in court costs. Pet. App. 3a-4a. He has not been pardoned for these felony convictions.

The Circuit Court for Spotsylvania County, Virginia, restored Mr. Hamilton's firearms rights within the Commonwealth of Virginia on April 22, 2014, upon finding that he met certain statutory criteria. Pet. App. 4a, 28a. Subsequently, Mr. Hamilton inquired whether he would be permitted to possess firearms in Maryland, and was informed that he could not because Maryland law prohibits possession of a firearm by an individual who has been convicted of a "disqualifying crime." Pet. App. 6a; Md. Code Ann., Pub. Safety §§ 5-133(b)(1), 5-205(b)(1). Under Maryland law, a disqualifying crime means any crime – including any crime committed in another State – that is classified as a felony in Maryland or that is punishable by more than two years' imprisonment. *Id.* § 5-101(g). Two of the crimes to which Mr. Hamilton pleaded guilty in

Virginia were equivalent to felonies, and thus were disqualifying crimes, under Maryland law.[1] Pet. App. 5a-6a.

2. In this action, Mr. Hamilton contends that Maryland's law disqualifying him from firearms possession is unconstitutional as applied to him because – notwithstanding his three felony theft convictions – he is a "law-abiding, responsible citizen" protected by the Second Amendment. Pet. 2.

The defendants moved to dismiss the complaint for failure to state a claim. The district court, after reviewing applicable precedent from this Court and the Fourth Circuit, and case law from other courts of appeals, Pet. App. 35a-47a, granted the motion to dismiss. In rejecting Mr. Hamilton's portrayal of himself as a law-abiding, responsible citizen, the district court observed that Mr. Hamilton "is *not* an average, law-abiding, responsible citizen: he is a felon who was convicted not ten years ago of three serious crimes." Pet. App. 49a (emphasis in original). Moreover, the court

[1] The Maryland equivalent of the Virginia charge of credit card forgery is credit card counterfeiting, and is a felony under § 8-205 of the Criminal Law Article of the Maryland Code. The Maryland equivalent of the Virginia crime of credit card fraud is receiving property by stolen, counterfeit, or misrepresented credit card under § 8-209 of the Criminal Law Article. At all relevant times, that crime was a felony under Maryland law under the facts of Mr. Hamilton's conviction. Md. Code Ann., Crim. Law § 8-209 (2016 Supp.). As of October 1, 2017, receipt of such property with a value between $100 and $1,500 will be a misdemeanor. 2016 Md. Laws ch. 515, § 2 (amending Md. Code Ann., Crim. Law § 8-209).

explained, Mr. Hamilton's crimes "are not technical or regulatory offenses: they are black-letter *mala in se* felonies reflecting grave misjudgment and maladjustment," which "the law has proscribed from time immemorial." Pet. App. 49a-50a. Observing that other courts had repeatedly and universally rejected Second Amendment challenges brought by both violent and nonviolent felons, the district court held that Mr. Hamilton's as-applied challenge could not succeed. Pet. App. 51a-53a.

3. The Fourth Circuit affirmed. Pet. App. 1a-29a. After determining that Mr. Hamilton's challenge is justiciable, Pet. App. 9a-14a, the court reviewed applicable precedent from this Court and its own prior decisions, and applied the two-step approach that most courts of appeals employ in addressing Second Amendment challenges. Pet. App. 15a-20a. Using that analysis, the Fourth Circuit previously had upheld the constitutionality of the federal felon-dispossession statute, 18 U.S.C. § 922(g)(1), against facial challenges, *see, e.g.*, *United States v. Moore*, 666 F.3d 313, 318-19 (4th Cir. 2012).

Under the two-step approach, courts first ask whether the challenged conduct falls within the protection of the Second Amendment. At that stage, a challenger must demonstrate "that his factual circumstances remove his challenge from the realm of ordinary challenges" to the statute. Pet. App. 18a (quoting *Moore*, 666 F.3d at 319). If not, the challenge fails and the inquiry ends. If the challenger succeeds at the first step, courts next determine whether the regulation at

issue satisfies the applicable level of scrutiny. Pet. App. 15a-16a.

Consistent with the case law, the Fourth Circuit first examined whether Mr. Hamilton is among those "law-abiding, responsible citizens," who are entitled to Second Amendment protection. Pet. App. 18a (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)). In answering that question, the Fourth Circuit held that Mr. Hamilton cannot demonstrate that he is a "law-abiding, responsible citizen[]" whose factual circumstances are removed from the realm of ordinary challenges to the constitutionality of felon-dispossession statutes because he was convicted of felonies, crimes that do not involve mere "errors in filling out a form or some regulatory misdemeanor offense," but rather are "significant offenses reflecting disrespect for the law." Pet. App. 25a-26a. The Fourth Circuit thus agreed with the district court that Mr. Hamilton's conviction of these state-law felonies was "dispositive of his challenge." Pet. App. 25a-26a.

4. In rejecting Mr. Hamilton's contention that the restoration of his firearms rights in Virginia and his ability to carry a firearm in connection with his job in Washington, D.C. would "work absurd results" unless he is also permitted to possess a firearm in Maryland, the Fourth Circuit explained that this result was instead a product of federalism. Pet. App. 27a. Different sovereigns have the right to make different decisions for different reasons. Pet. App. 28a. Virginia's decision to allow Mr. Hamilton to possess firearms within the borders of the Commonwealth cannot dictate what

Maryland does within Maryland's own borders, the court observed, as long as Maryland's law does "not run afoul of the Constitution, federal laws, and treaties . . . , specifically as relevant here, the Second Amendment." Pet. App. 27a.[2]

REASONS FOR DENYING THE PETITION

I. There Is No Circuit Split on Whether State-Law Felons May Successfully Challenge Felon-Dispossession Laws.

The Fourth Circuit's decision in this case is consistent with the decisions of all other circuit courts of appeals resolving as-applied challenges to felon-dispossession laws. Indeed, Mr. Hamilton fails to identify even a single decision upholding an as-applied challenge by any individual convicted of a state-law felony. And his claim that four circuits have "expressly approved" of such challenges, Pet. 14, is wrong. Instead, the opinions he cites from those four circuits range from being deeply skeptical that a felon's challenge could ever succeed to simply acknowledging that the issue had not yet been decided.

[2] The Fourth Circuit observed that Virginia's restoration of Mr. Hamilton's firearms rights did not involve any finding that he was a law-abiding, responsible citizen. Pet. App. 28a. Instead, it was a "rather pro forma matter" of satisfying certain statutory conditions. *Id.* The court also noted that, while possessing firearms in connection with his employment, Mr. Hamilton was "acting under supervision and ultimately under some form of accountability to another person." *Id.*

The primary case on which Mr. Hamilton relies did not even involve a disqualified felon, but decided challenges brought by two non-violent state-law misdemeanants.[3] *Binderup v. Attorney Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2323 (2017). In upholding the misdemeanants' as-applied challenges to 18 U.S.C. § 922(g)(1), the Third Circuit determined that the misdemeanors involved were not "serious" enough to merit treatment as disqualifying felonies. Using the same two-step approach employed by the Fourth Circuit here, the Third Circuit first considered whether each individual challenger had presented "facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." 836 F.3d at 347-49. The court concluded that the question that defined the scope of that historically barred class was whether the offense at issue was "serious." *Id.* at 349.

In analyzing the seriousness of the challengers' misdemeanor offenses, the Third Circuit placed greatest weight on the state's own characterization of the offenses, explaining that the "state legislature's classification of an offense as a misdemeanor is a powerful expression of its belief that the offense is not serious enough to be disqualifying." 836 F.3d at 351-52. Other

[3] Mr. Binderup had pleaded guilty to the misdemeanor offense of corrupting a minor based on his consensual sexual relationship with a 17-year-old. 836 F.3d at 340. Mr. Suarez had pleaded guilty to the misdemeanor offense of carrying a handgun without a license in Maryland. *Id.*

relevant, but not dispositive, factors, were that the offenses were not violent, *id.* at 352; the punishments were not severe, *id.* at 352; and the vast majority of other States treated the conduct at issue as either not serious or not even criminal, *id.* at 352-53. By contrast, all three of Mr. Hamilton's Virginia convictions were felonies in Virginia, and two were also felonies in Maryland; and such theft crimes have been recognized as serious crimes by all civilized societies "from time immemorial," Pet. App. 49a-50a & n.24.

Notably, the *Binderup* opinion itself directly refutes Mr. Hamilton's contention that the decision supports his as-applied challenge to the disqualifying effect of his state-law felony convictions. The Third Circuit emphasized that its holding was limited to state-law misdemeanants, and it expressly reserved judgment as to "whether an as-applied Second Amendment challenge can succeed where the purportedly disqualifying offense is considered a felony by the authority that created the crime." 836 F.3d at 353 n.6. Even if such a challenge could be made, the court observed, the "burden would be extraordinarily high – and perhaps even insurmountable." *Id.*[4]

[4] Mr. Hamilton's claim that the Fourth Circuit "specifically rejected the Third Circuit's approach" in *Binderup*, Pet. 15, is misleading. Although the Fourth Circuit declined to adopt the *Binderup* decision "in its entirety," the Fourth Circuit largely agreed with that court's analysis, which it considered "well-reasoned and thoughtful." Pet. App. 23a. Of course, given that the *Binderup* court so carefully limited its holding to challenges by state-law misdemeanants, and the Fourth Circuit's analysis

Thus, Mr. Hamilton's best case for demonstrating a circuit split as to whether state-law felons can successfully bring as-applied challenges to felon-dispossession laws is a case in which the court (1) is openly skeptical of whether such a claim "could be made" at all, and (2) posits that even if it can, the burden on the challenger may still be "insurmountable." *Binderup*, 836 F.3d at 353 n.6.

The other three cases that Mr. Hamilton claims directly establish a circuit split, Pet. 15-16, are no more helpful to him. Contrary to Mr. Hamilton's contention, none of those cases holds that an individual convicted of a state-law felony can successfully bring an as-applied challenge to a felon-dispossession statute. In two of those cases, the courts did not need to address – and thus did not address – whether any state-law felon could successfully bring an as-applied challenge to the statute, because they determined that the violent felons before them could not do so. *United States v. Williams*, 616 F.3d 685, 694 (7th Cir. 2010) ("Because Williams was convicted of a violent felony, his claim that § 922(g)(1) unconstitutionally infringes on his right to possess a firearm is without merit."); *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (individual with three prior convictions for violent felonies could not bring successful as-applied challenge). The third case did not even involve a state-law felon, but an individual who had been convicted four decades earlier of misdemeanor assault and battery. *Schrader v.*

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here was concerned exclusively with a challenge from a state-law felon, the analysis of each was different.

Holder, 704 F.3d 980, 982 (D.C. Cir. 2013). After rejecting that plaintiff's facial challenge to including such misdemeanors within the scope of disqualifying offenses under § 922(g)(1), *id.* at 989-91, the court declined to address as-applied arguments raised for the first time on appeal, *id.* at 991.

The decisions Mr. Hamilton cites from the First and Ninth Circuits similarly do not evidence a circuit split. Although the First Circuit held open the theoretical possibility "*arguendo* that the Supreme Court might find some felonies to be so tame and technical as to be insufficient to justify the [§ 922(g)(1)] ban," the drug-related felonies of which the defendant before it was convicted were "not likely to be among them." *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011). And the Ninth Circuit, in upholding the application of § 922(g)(1)'s ban to the longstanding felony crime of misprision of a felony, simply speculated that if Congress began to re-classify as felonies crimes that have long been considered minor misdemeanors, they might be treated differently. *United States v. Phillips*, 827 F.3d 1171, 1176 n.5 (9th Cir. 2016). In fact, the Ninth Circuit has long held that § 922(g)(1) is constitutional as applied to individuals convicted of longstanding felonies, including non-violent felonies. *See United States v. Vongxay*, 594 F.3d 1111, 1114, 1118 (9th Cir. 2010) ("In sum, we hold that § 922(g)(1) does not violate the Second Amendment as it applies to Vongxay, a convicted [non-violent] felon.").

If there is to be a circuit split, it has yet to develop. No federal court of appeals has ever decided that state-law felons generally may successfully bring as-applied challenges to § 922(g)(1), much less felons convicted of crimes similar to Mr. Hamilton's.

II. The Fourth Circuit's Decision Follows Directly from This Court's Decisions in *Heller* and *McDonald*.

In *Heller*, this Court held that the right codified in the Second Amendment is an "individual right to keep and bear arms," not connected to militia service. 554 U.S. at 595. But the Second Amendment right, like most others, "is not unlimited." *Id.* at 626. Among other limitations expressly recognized by this Court are "longstanding prohibitions on the possession of firearms by felons," which this Court identified as "presumptively lawful regulatory measures." *Id.* at 626-27 & n.26; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (repeating this same assurance).

Mr. Hamilton argues that this Court's use of the term "presumptively" means that he and every other individual convicted of a state-law felony must have the right to plead their individual factual circumstances before a federal district court whenever they believe they have sufficiently rehabilitated themselves. Pet. 21-24. But Mr. Hamilton misunderstands the role of "presumptively" in the sentence at issue. This Court was identifying types of firearms regulations that it presumed would withstand constitutional

challenge,[5] not deciding – without briefing or argument – that such regulations would forever be subject to as-applied challenges based on the individual factual circumstances of state-law felons. *See Heller*, 554 U.S. at 635 (acknowledging that the Court's listing of exceptions was not an attempt "to clarify the entire field" of Second Amendment law).

Finally, Mr. Hamilton also claims, erroneously yet repetitively, that the Fourth Circuit itself lamented that its ruling in this case was "apparently absurd." Pet. 2, 13, 17, 21, 23. To the contrary, the Fourth Circuit rejected Mr. Hamilton's argument that it would work "absurd results" if he were permitted to carry a firearm in Virginia and the District of Columbia, but not in Maryland. The court explained that (1) this result is, in fact, a product of federalism; (2) Maryland's firearms policy, although circumscribed by the Second Amendment, is not circumscribed by Virginia's firearms policy decisions; and (3) the assumptions underlying Mr.

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[5] Following *Heller* and *McDonald*, each circuit court of appeals has confirmed that presumption, and upheld the constitutionality of felon-dispossession laws, including § 922(g)(1). *Torres-Rosario*, 658 F.3d at 113 & n.1; *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013) (mem.); *United States v. Barton*, 633 F.3d 168, 170-72 (3d Cir. 2011), *overruled on other grounds by Binderup*, 836 F.3d at 349, 350; *Moore*, 666 F.3d at 318; *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010); *Williams*, 616 F.3d at 693; *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *Vongxay*, 594 F.3d at 1118; *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010); *Schrader*, 704 F.3d at 990.

Hamilton's claims of absurdity are not well founded. Pet. App. 27a-28a.

As the district court recognized in this case, theft crimes have been recognized as serious crimes since at least the time of Hammurabi's Code. Pet. App. at 49a-50a & n.24. Like every other federal appellate court to hear a challenge to a felon-dispossession law by an individual who has been convicted of a state-law felony, the Fourth Circuit rejected that challenge. There is no circuit split and the decision below is consistent with this Court's precedents. No compelling reason exists that requires review of the decision of the Fourth Circuit in this straightforward case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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