No. 20-782

In The
Supreme Court of the United States

RAYMOND HOLLOWAY, JR.,

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 OF MONTANA SHOOTING SPORTS ASS'N, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Montana Shooting Sports Association, Inc. (MSSA) is a Montana non-profit corporation with the mission to "support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms, to provide education to its members concerning shooting, firearms, safety, hunting and the right to keep and bear arms, own and/or manage one or more shooting facilities for the use of its members and/or others, and to conduct such other activities as serves the needs of its members." In protecting the rights of its members, MSSA continuously challenges federal, state and local laws that limit the right to keep and bear arms. The MSSA seeks, in this context, to restore Dual Sovereignty as an effective check and balance in the American Constitutional system, under which state governments retain real and robust powers independent from federal control or interference. MSSA has a strong interest in ensuring federal law does not deprive Montanans of the rights restored to them, including the right to keep and bear arms, upon discharge of their misdemeanor sentences.

Maryland Shall Issue, Inc. (MSI) is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners' rights in Maryland. MSI seeks to educate the community about the

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[1] No counsel for any party authored this brief in whole or in part, nor did any party, person or entity other than *amicus* make a monetary contribution to the preparation/submission of this brief. The parties have given their written consent to undersigned for the filing of this *amicus* brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. In that educational role, MSI frequently advises individuals who have become "disqualified" persons under 28 U.S.C. § 921(a)(20), for minor misdemeanor offenses committed years ago for which they received little or no confinement or a minor fine, including common law offenses. *See*, *e.g.*, *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013) (holding that an honorably discharged Navy Vietnam War veteran who pleaded guilty to common law crime in Annapolis, Maryland in 1968, but who received no jail time and was fined $100, was disqualified for life under federal law). MSI has a strong interest in addressing such miscarriages of justice in Maryland and elsewhere.

Firearm Owners Against Crime (FOAC) is a nonpartisan, non-connected all-volunteer Political Action Committee organized under the laws of the state of Pennsylvania. Its purpose is to empower "all" gun owners, outdoors enthusiasts and supporters of the Second Amendment to the Bill of Rights of the U.S. Constitution and Article 1 Section 21 and 25 of the Pennsylvania Constitution with the tools and information necessary to protect freedom from transgression. FOAC vigorously opposes restrictions on legitimate use of firearms, including personal and property protection as guaranteed by the Constitutions of the United States and the Commonwealth of Pennsylvania.

Arizona Citizens Defense League, Inc. (AzCDL) is a non-profit 501(c)(4), all volunteer, non-partisan

grassroots organization dedicated to the principles contained in Article II, Section 2 of the Arizona Constitution that "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." AzCDL believes the rights of self-defense and bearing arms are the foundation for all other rights.

SUMMARY OF THE ARGUMENT

Lower courts have not treated the Court's Second Amendment direction, as set forth in *Heller* and *McDonald*, with the authority and respect the Court's decisions are typically accorded. The Petition is, therefore, an opportunity for the Court to give needed correction and uniformity to Second Amendment jurisprudence. For example, lower courts have often ignored the substance of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chi.*, 561 U.S. 742 (2010), which require an analysis based on the text of the Second Amendment and the history and tradition of arms bearing. Instead, courts have erroneously devised and implemented various balancing tests rather than, as instructed in *Heller* and *McDonald*, apply the text of the Second Amendment in light of the history and traditions of the American people. The Petition is an opportunity to give needed correction to the lower courts.

In addition, good cause for granting the Petition arises from the novel issue, at least for the Court, which arises in this case. *Heller* and *McDonald* dealt

with what prohibitions can legally be imposed on classes of arms under the Second Amendment in the hands of law-abiding, mentally healthy people. This case involves an issue the Court has never directly addressed: the classes of people that can be prohibited from the possession of otherwise legal firearms. It therefore presents an opportunity to define the proper Second Amendment analysis for firearms dispossession laws. As the petition illustrates, that issue is frequently arising and the lower courts have adopted vastly conflicting approaches.

ARGUMENT

I. Lower courts have not treated the Court's Second Amendment direction, as set forth in *Heller* and *McDonald*, with the respect the Court's decisions are typically accorded.

The Second Amendment provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." 554 U.S. at 595. In *McDonald v. City of Chicago*, Justice Alito, writing for a 5-4 majority, added that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." 561 U.S. at 778.

In so ruling, the Court considered the protections ensconced in the Second Amendment on par with other "fundamental rights" identified in its precedent. *Cf., e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to marry person of another race); *Mapp v. Ohio*, 367 U.S. 643, 650, 655-657 (1961) (right to be free from arbitrary intrusion by police). The analysis treats the right to keep and bear arms no differently than the First Amendment right to free speech as "essential to free government" and "to the maintenance of democratic institutions." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Schneider v. State* (*Town of Irvington*), 308 U.S. 147, 161 (1939) (discussing right to distribute printed matter). Like the freedom of political speech, the right to keep and bear arms is implicit in the concept of ordered liberty and ought to be protected from prior restraints. In sum, the decisions in *Heller* and *McDonald* teach that courts must protect Second Amendment rights as carefully and as seriously as they do First Amendment protections of speech, press, assembly and religious expression; Fourth Amendment barriers against unreasonable searches and seizures; Fifth and Sixth Amendment requirements of fair criminal procedure; and Eighth Amendment proscriptions against cruel and unusual punishments.

Despite the Court's clear instruction that courts are duty bound to consider Second Amendment issues with the same special care afforded other individual protections in the Bill of Rights, lower courts have effectively and universally treated the Court's teaching with an untoward level of skepticism bordering on

outright disrespect. *See Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., joined by Kavanaugh, J., dissenting from denial of certiorari); *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring); *id.* at 1544 (Alito, J., joined by Gorsuch, J., dissenting); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari); *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari). Thus, as has been noted before, "many courts have resisted our decisions in *Heller* and *McDonald*." *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (citing *Silvester v. Becerra*, 138 S. Ct. 945 (2018) (dissenting from denial of certiorari)). As Justice Thomas recently noted:

> Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework. See, e.g., *Gould v. Morgan*, 907 F.3d 659, 667 (CA1 2018) (concluding that our decisions "did not provide much clarity as to how Second Amendment claims should be analyzed in future cases"). They then "filled" the self-created "analytical vacuum" with a "two-step inquiry" that incorporates tiers of scrutiny on a sliding scale. *National Rifle Assn. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194 (CA5 2012); *Powell v. Tompkins*, 783 F.3d 332, 347,

> n. 9 (CA1 2015) (compiling Circuit opinions adopting some form of the sliding-scale framework).

Id.

The Second, Third, Ninth, and Tenth Circuits, for example, candidly refuse to accord the Court's Second Amendment authority the same respect shown to decisions involving the First Amendment. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 124 n.28 (3d Cir. 2018); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). Similarly, the Third Circuit considers the Second Amendment inferior to the equal protection clause. *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d at 124 n.28. The Tenth Circuit does not treat the Second Amendment equal with the right to marry. *Bonidy*, 790 F.3d at 1126. The Ninth Circuit's approach "has been described as 'a tripartite binary test with a sliding scale and a reasonable fit.'" *Grewal*, 140 S. Ct. at 1867 (Thomas, J., dissenting from the denial of certiorari), quoting *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017), aff'd, 742 Fed.Appx. 218 (CA9 2018). That court thus treats the Second Amendment as "a second-class right." *Mai v. United States*, 974 F.3d 1082, 1084 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing *en banc*); *see, also, id.* at 1105 (Vandyke, J., dissenting).

Lower court reluctance to treat the Court's Second Amendment jurisprudence with the same weight as

other decisions enforcing the Bill of Rights has led to a confusing and inconsistent array of disparate modes of analysis. The hodgepodge is amply demonstrated by the array of approaches described in the Petition. "The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court." *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1527 (Kavanaugh, J., concurring). The troubling circumstance could be corrected if the Court chooses to grant the Petition.

II. The Petition is an opportunity to give needed correction and uniformity to Second Amendment jurisprudence.

The Petition raises important questions that are not clearly answered by the Court's past decisions, and that have deeply divided federal and state courts. The federal gun dispossession statute at issue is 18 U.S.C. § 921(a)(20), which allows the states to strip Second Amendment rights from misdemeanants for truly minor offenses, including decades-old and youthful mistakes, from which the offender has long been truly and fully rehabilitated. This unacceptable circumstance results from a lack of guidance by this Court on the proper mode of firearm prohibition analysis for nonviolent misdemeanants. The Court should grant the petition for certiorari in order to answer the question, resolve the conflict and set to rights what, for Petitioner Holloway, amounts to a grave injustice.

A. Eschewing *Heller* and *McDonald*, lower courts have erroneously devised and implemented various balancing tests rather than, as instructed, apply the text of the Second Amendment in light of the history and traditions of the American people.

In *Heller*, the Court noted that nothing in the decision should "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 626. But it recognized that there would be time later to "expound upon the historical justifications for the exceptions . . . ***if and when those exceptions come before***" the Court. *Id*. at 635 (emphasis added). That time is now.

Heller supplies the proper analysis for Second Amendment claims. The Court looked to the Amendment's words, Founding-era thinkers, and early court decisions to examine the scope of the Second Amendment right, demonstrating that courts should look to text, history, and tradition in resolving Second Amendment issues. *Id.* at 605, 625, 635. *See*, *e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). The *Heller* decision warned that the Second Amendment was not subject to a "freestanding 'interest-balancing' approach." *Id.* at 634. The Court observed that the "very enumeration of the right takes 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.*

Heller thus rejected any idea that "the scope of the Second Amendment right should be determined by judicial interest balancing." *McDonald*, 561 U.S. at 785. In *Heller*, rather, the Court relied on "historical tradition" and "longstanding" and "historical justifications." *Heller*, at 626-27, 635; *see* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1463 (2009) ("Absent [from *Heller*] is any inquiry into whether the law is necessary to serve a compelling government interest in preventing death and crime, though handgun ban proponents did indeed argue that such bans are necessary to serve those interests and that no less restrictive alternative would do the job."); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 380 (2009) ("Rather than adopting one of the First Amendment's many Frankfurter-inspired balancing approaches, the majority endorsed a categorical test under which some types of 'Arms' and arms-usage are protected absolutely from bans and some types of 'Arms' and people are excluded entirely from constitutional coverage."); *id.* at 405 (*Heller* "neither requires nor permits any balancing beyond that accomplished by the Framers themselves.").

Yet the methods of judicial interest balancing, rejected in *Heller*, is exactly what many Courts of Appeal now employ to adjudicate Second Amendment claims. The Ninth Circuit, for example, has adopted a two-step balancing test. First, it asks whether the statute at issue "burdens conduct protected by the Second

Amendment[.]" *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). Under *Chovan*, courts in the Ninth Circuit answer this question "based on a 'historical understanding of the scope of the [Second Amendment] right[.]'" *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (quoting *Heller*, 554 U.S. at 625). Second, having determined that the law burdens protected Second Amendment activity, the Ninth Circuit selects the appropriate level of scrutiny based on a balance of (1) how close the law comes to the "core" of the Second Amendment right and (2) the severity of the law's burden on the right. *See Chovan*, 735 F.3d at 1138.

Judicial balancing, moreover, appears to have been indulged in by every circuit to have addressed the question since *Heller*. First Circuit: *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (requiring "a substantial relationship between the restriction and an important governmental objective"); Third Circuit: *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny); Fourth Circuit: *United States v. Masciandaro*, 638 F.3d 458, 471 (2011) (same); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (same); Seventh Circuit: *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019); *United States v. Skoien*, 614 F.3d 638, 641-42 (2010) (en banc) (upholding law upon assumption intermediate scrutiny applies); Ninth Circuit: *Chovan*, supra; Tenth Circuit: *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny); D.C. Circuit: *Heller*, 670 F.3d at 1252 (same).

This judicial balancing test is impossible to square with *Heller's* ruling that courts should apply text, history, and tradition in evaluating the scope of the Second Amendment. *See*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1544 (2020) (Alito, J., dissenting) ("We are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern."); *United States v. McGinnis*, 956 F.3d 747, 762 (5th Cir. 2020) (Duncan, J., concurring) (urging use of *Heller's* text and history mandate); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 127 (3d Cir. 2018) (Bibas, J., dissenting) (arguing *Heller* does not indicate tiers of scrutiny); *Mance v. Sessions*, 896 F.3d 390, 398 (5th Cir. 2018) (Ho, J., dissenting) (arguing fundamental constitutional rights should be given scope they were understood by the Framers); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring) (pointing out *Heller* and *McDonald* look to history and tradition rather than balancing tests); *id.* at 710 (Sutton, J., concurring); *Gowder v. Chicago*, 923 F. Supp. 2d 1110, 1123 (N.D. Ill. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701-02 (7th Cir. 2011) (Sykes, J.) (Second Amendment issues require historical inquiry rather than interest-balancing); *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."); *Chovan*, 735 F.3d at 1143

(Bea, J., concurring) ("[U]nitary tests such as strict scrutiny, intermediate scrutiny, undue burden, and the like don't make sense . . . in the Second Amendment context because the language of *Heller* seems to foreclose scrutiny analysis.").

The doubters stand on solid ground. The Court's legal reasoning in *Heller* utilizes text, history and tradition. It does not contemplate that a core constitutional protection should be subjected to a "freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* After all, "[t]he People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail." *Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring). " 'The very enumeration of the right takes 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.' " *McDonald*, 561 U.S. at 791, quoting *Heller*, 554 U.S. at 634 (emphasis in *Heller*).

With due respect, judges should refrain from resting on their own public policy preferences in a constitutional analysis of the right to keep and bear arms. They should instead defer to the view of the people who ratified the Second Amendment, which is itself the "very product of an interest balancing by the people." *Heller*, 554 U.S. at 635. "By ignoring the balance already struck by the people, and instead subjecting enumerated rights, like the Second Amendment, to our

own judicial balancing, 'we do violence to the [constitutional] design.'" *Mai*, 974 F.3d at 1087 (Bumatay, J., dissenting from denial of en banc review, quoting *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004)). The Constitution, after all, "does not prescribe tiers of scrutiny." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting).[2] If the people decide the Second Amendment, as originally adopted, should be subject to revision, the Constitution includes means for the people's elected representatives to amend it. U.S. Const. Art. V.

The Court should take this opportunity to correct lower court reluctance to adhere to *Heller* and *McDonald*. In these seminal cases, the Court was, in the view of this *amicus curiae*, quite correct in its recognition that the historical, pre-existing right of self-defense is embodied in the Second Amendment. And since it appears to have been serious about these principles, the need for a reckoning is now apparent as well. Under *Heller* and *McDonald*, a law may constitutionally prohibit the core right of self-defense only if the prohibition is understood to be outside of the Second Amendment's scope at the Founding. The many and varied standards applied by the lower courts in

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[2] *Cf.*, Tr. of Oral Arg. at 44, *Heller*, 554 U.S. 570 (No. 07-290) (Chief Justice Roberts: "Well, these various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution. . . . I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up.").

purporting to apply *Heller* and *McDonald* calls for correction. The Court should take the opportunity to do so.

B. The Court should grant the Petition in order to define the proper Second Amendment analysis for firearms dispossession laws.

In *Heller*, before the Court was whether regulation can be placed upon classes of firearms for otherwise law-abiding, mentally healthy people. Thus, *Heller* did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment" for the other side of the coin: classes of people who may lawfully be prohibited from possessing otherwise legal firearms. In that respect, the *Heller* decision did confirm that such laws are not necessarily inconsistent with the Second Amendment. As far as resolving these issues, however, it offered nothing more than the dicta that "longstanding prohibitions on the possession of firearms by felons and the mentally ill" are "presumptively lawful." *See Heller*, 554 U.S. at 626-27 & n.26. Since the issue was not then before the Court, *Heller* did not address the issue of prohibited persons in a comprehensive or binding fashion. Similarly, in *McDonald*, restrictions on "prohibited persons" were not at issue. Thus, the Court has not evaluated whether and to what extent the Second Amendment permits particular classes of people to be prohibited from possessing otherwise legal firearms. This case offers an excellent vehicle for doing so.

And this case also illustrates why the question calls out to be clarified. Here, the Court of Appeals cast the net of prohibition as wide as can be imagined. It treated Holloway, a fully rehabilitated misdemeanant, with a history of neither violence nor mental illness, as a prohibited person because his long-ago misdemeanor could have been (but was not) punished by more than two years of imprisonment. *See* 18 U.S.C. § 921(a)(20)(B) and § 922(g). Even though Holloway is not and never has been (a) violent; (b) a felon; or (c) mentally ill, the Court of Appeals, with little pause, completely stripped him of a "fundamental" constitutional right. *McDonald*, 561 U.S. at 778. Holloway is currently—and has been for years—a model citizen and yet he is left with no greater Second Amendment rights now than those possessed by the most heinously violent of serial killers or domestic terrorists. If the Court is serious about treating individual rights under the Second Amendment as "fundamental," then it should give more specific guidance on when, how and to what extent entire classes of people can be legally dispossessed of the fundamental right to keep and bear arms. The Court should take this case to draw a line, somewhere, rather than allow lower courts to continue to invent disparate and legally confusing balancing tests.

The case is also an opportunity to resolve a split among lower courts on the proper mode of analysis for assessing the constitutionality of gun dispossession laws. *See Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). Some say misdemeanants like Holloway fall entirely outside the Second

Amendment's scope. *See, e.g.*, *Binderup v. AG of United States*, 836 F.3d 336, 357 (3d Cir. 2016) (*en banc*) (Hardiman, J., concurring in part and concurring in the judgment) ("These appeals require us to decide who count among 'the people entitled to keep and bear arms.'"). Others maintain that all people have the right to keep and bear arms but that history and tradition support legislative power to strip certain groups of that right. *See, also*, Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1497-98 (2009) (describing these competing views). *See Kanter*, 919 F.3d at 452 (Barrett, J., dissenting).

As then-Judge Barrett pointed out in her dissent in *Kanter*, 919 F.3d at 451, the latter is more consistent with the holding of *Heller*. There, the Court interpreted the word "people" as "all Americans." 554 U.S. at 580-81; *see, also, id.* at 580 (asserting that "the people" refers "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community" (citation omitted)). Misdemeanants are not categorically excluded from the national community. In our view, "[t]he most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment." *Binderup*, 836 F.3d at 357 (Hardiman, J., concurring). The majority below thus erred in holding that "the Founders

sought to permit only the virtuous citizen to possess a firearm." (App.16 n.11). As this case illustrates, the court's boundless standard permits State legislatures to strip away Second Amendment rights for malum prohibitum crimes having nothing to do with the use of firearms for "illicit purposes." The Court should resolve, one way or the other, the present conflict over the proper standard.

CONCLUSION

Accordingly, the petition for certiorari should be granted and the case set for a hearing on the merits.

Respectfully submitted,

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