No. 16-847

In The
Supreme Court of the United States

DANA J. BOENTE AND THOMAS E. BRANDON,

Petitioners,

v.

DANIEL BINDERUP AND JULIO SUAREZ,

Respondents.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DOUGLAS GOULD
PIZONKA, RIELLEY, BELLO & MCGRORY, P.C.
144 E. DeKalb Pike, Suite 300
King of Prussia, PA 19406
(610) 992-1300

ALAN GURA
Counsel of Record
GURA PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314
alan@gurapllc.com
(703) 835-9085

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Nineteen years ago, Daniel Binderup was convicted of one count of misdemeanor corruption of minors, for having conducted a consensual affair with a seventeen-year-old. Twenty-six years ago, Julio Suarez was convicted of one misdemeanor count of carrying a gun in his car without a license.

Neither individual was sentenced to jail. Neither offense involved violence or the threat of violence, and neither individual has any record of violent conduct. In 2009, Pennsylvania courts restored Binderup and Suarez's right to possess guns under state law. Binderup is a successful entrepreneur. Suarez, a decorated veteran, holds a "secret" clearance in connection with his work for a defense contractor. Both individuals are, today, law-abiding, responsible citizens leading stable family lives.

The question presented is:

Considering their circumstances, are Daniel Binderup and Julio Suarez's Second Amendment rights violated by the application of 18 U.S.C. § 922(g)(1) on account of their nonviolent misdemeanor convictions?

LIST OF PARTIES

Respondents Daniel Binderup and Julio Suarez initiated the proceedings below by each filing a complaint, in the United States District Courts for the Eastern and Middle Districts of Pennsylvania, respectively, against former Attorney General Eric Holder and BATFE Director B. Todd Jones in their official capacities.

Loretta E. Lynch and Thomas E. Brandon substituted for Holder and Jones, respectively, by operation of law, and petitioned for certiorari. Petitioner Dana J. Boente has since substituted for Lynch as Acting Attorney General, while Brandon remains Acting BATFE Director.

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INTRODUCTION

Not every potential application of a facially-valid law is destined to be constitutional. As-applied challenges to facially-valid statutes are a longstanding feature of American constitutional law. The concept does not suddenly become too risky or expensive a proposition just because it is used to uphold Second Amendment rights. Accordingly, the so-called "felon-in-possession"

ban of 18 U.S.C. § 922(g)(1)[1] cannot be immune from as-applied challenges. When it comes to this broad categorical prohibition of a fundamental constitutional right – "[b]y far the most frequently applied [federal firearm] disqualification," Pet. 2 – some exceptions apply. See facts for details.

Perhaps recognizing the venerable nature of as-applied challenges, the Government spends much ink arguing that Section 922(g)(1) is facially valid. But no one below has suggested otherwise. A decision striking down Section 922(g)(1) on its face would present a blockbuster petition for certiorari. Decisions acknowledging that the statute is subject to as-applied challenges are becoming routine.

If the circuits were to treat similar facts differently under the provision, perhaps dividing as to whether and how violent felons might regain their firearms rights, a cert-worthy case might arise. But the Government has overstated the current split. Five of the six courts to have considered the question have acknowledged that as-applied challenges to Section 922(g)(1) are required, as a matter of text and logic, by *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). Any novelty in the decision below reflects only early-stage legal percolation, and the case's particular facts.

Nor does anything decided below threaten the law's typical application in service of its obvious purpose: enhancing public safety by disarming dangerous felons.

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[1] All further statutory references are to Title 18 of the United States Code unless otherwise noted.

A cert-worthy case might well arise had even a single appellate court signaled the prospect of affording as-applied Second Amendment relief to violent criminals. However, the failure of a Section 922(g)(1) fact-pattern to pass as-applied review is not, in and of itself, remarkable.

And of all the possible as-applied challenges to Section 922(g)(1), doubtless the least controversial are challenges such as those presented here: brought by law-abiding, responsible citizens disarmed only on account of long-ago, nonviolent misdemeanors for which they received no jail sentence, and for which they have seen their firearms rights restored under state law. If anything, as recently demonstrated, disarming such individuals hurts public safety. In any event, applying Section 922(g)(1) to long-ago, nonviolent misdemeanants lacks traditional, constitutionally-adequate grounds for disarmament. The judgments here should not have been surprising.

Daniel Binderup and his seventeen-year-old paramour might not have been mistaken for Romeo and Juliet in 1998, and Julio Suarez should have obtained the license required to carry a gun in his car in 1990. But the Government never linked either Respondent to the traditional constitutional justification for disarmament: dangerousness. Armed only with generalized claims that criminals might recidivate (perhaps relevant to the facial challenge no one brought below), the Government could not carry its burden in either district court. Given the complete lack of

relevant evidence rebutting Respondents' proof, the Third Circuit had no choice but to affirm.

Underscoring its lack of actual concern about Respondents' possession of firearms, the Government never bothered to seek stays of the district courts' injunctions commanding that Binderup and Suarez be allowed to possess firearms. Following its loss on appeal, the Government issued each Respondent a PIN number to use in passing a background check when purchasing guns. If disarming Binderup and Suarez is sufficiently imperative to warrant this Court's involvement, the Government should have tried harder to obtain those results in the district courts.

As the lower courts continue developing standards for addressing as-applied Second Amendment challenges, cases may yet arise warranting this Court's attention. This earliest of steps, however, breaks little ground for purposes of qualifying for certiorari. Sup. Ct. R. 10. The petition should be denied.

STATEMENT

A. Statutory Background

"The Founding generation had no laws . . . denying the right [to keep and bear arms] to people convicted of crimes." App. 68a (quoting Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009)). "Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after

the Founding." Winkler, 56 UCLA L. Rev. at 1563 (footnote omitted).

In 1938, Congress prohibited individuals convicted of a "crime of violence" from shipping or receiving firearms in interstate commerce. Federal Firearms Act, Pub. L. No. 75-785, §2(e), (f), 52 Stat. 1250, 1251 (1938) ("FFA").[2] In 1961, Congress broadened this prohibition's scope to include individuals convicted of nonviolent crimes, replacing the "crime of violence" predicate with "crime punishable by imprisonment for a term exceeding one year." See An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

In 1968, Congress prohibited the possession of firearms by individuals convicted of crimes punishable by over a year's imprisonment. Although courts generally refer to this prohibition, codified at Section 922(g)(1), as the "felon in possession" statute, see, *e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015), the statute itself does not use "felony" terminology. Section 922(g)(1) implicates all offenses punishable by over a year's imprisonment, regardless of their link to violence or classification as felonies or misdemeanors, excluding state misdemeanors "punishable by a term of imprisonment of two years or less," Section

[2] "The term 'crime of violence' means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." FFA § 1(6), 52 Stat. at 1250.

921(a)(20)(B). A conditional cross-petition, filed concurrently with this brief, addresses that exclusion's scope.

Section 922(g)(1) was enacted to mitigate the "evils" produced by "especially risky people." *United States* v. *Bass*, 404 U.S. 336, 345 (1971). Recognizing that Section 922(g)(1)'s scope exceeded its purpose, Congress enacted Section 925(c), providing prohibited individuals the opportunity to petition for relief upon showing that

> the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant 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.

Section 925(c) further provides that district courts may review the denial of relief. *Id*. But "that provision has been unfunded for years." App.39a (citation omitted). Congress does, however, continue to fund the federal courts, without limitation as to their ability to adjudicate declaratory judgment actions respecting the Constitution.

B. The Second Amendment

This Court began its interpretation of the Second Amendment "with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Heller*, 554 U.S. at 581. It did not detail the Second Amendment right's full contour,

but held (among other conclusions) that "law-abiding, responsible citizens" enjoyed the right. *Id.* at 635.

In guiding dictum, this Court afforded presumptive validity to "longstanding prohibitions on the possession of firearms by felons," among other restrictions, because such laws might reflect the right's "scope" as would be revealed by "historical analysis." *Id.* at 626-27 & n.26. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Id.* at 634-35.

C. Daniel Binderup and Julio Suarez

1. Daniel Binderup "and his wife of [43] years have raised two children. From 1989 through 2001, he owned and operated a bakery which employed eight people." App. 215a.

In 1996, Binderup made the poor decision to begin an affair with a 17-year-old female employee. *Id.* Alas, what the district court termed a "romantic affair," App. 174a, and what the Third Circuit described as "a consensual sexual relationship," App. 6a, the Government uncharitably labels "repeated acts of sexual intercourse," Pet. 4. This may be correct, if only in a technical sense. It improves upon the Government's earlier efforts, rejected by the district court, to label Respondent a "sexual predator," App. 220a-221a, as well as an appellate brief that employed the term "rape" twenty times. But it still omits a human dimension reflected in the turn of relevant events.

What is not disputed: Binderup's affair, though legally consensual, was nonetheless unlawful and inappropriate. App. 218a. In 1998, he pled guilty to one count of corruption of minors under 18 Pa. C.S. § 6301(a)(1), which bars adults from engaging in "any act [that] corrupts or tends to corrupt the morals of any minor less than 18 years of age." App. 6a, 217a. Binderup was not charged under subsection ii of the statute, which addresses "a course of conduct which would constitute another sexual offense against a person under Pennsylvania law." App. 216a.

"Binderup's sentence was the colloquial slap on the wrist: probation (three years) and a $300 fine plus court costs and restitution." App. 6a, 174a, 217a. He "paid each of those financial obligations and successfully completed his term of probation." App. 217a. "His criminal record shows no subsequent offenses." App. 6a, 174a. The conviction rendered Binderup ineligible to possess firearms under state and, as the Government maintains, federal law. He voluntarily surrendered his firearms. App. 217a.

Binderup's "wife forgave him and they remain married. In 2001, [he] sold his bakery and now owns and operates a plumbing business." *Id.* In 2009, a Pennsylvania court removed Binderup's state law firearms disqualification. App. 7a, 175a.

2. Julio Suarez, married for over 20 years and a father of three children, "enjoys a position of leadership" in his church. App. 263a. "Since 1992, [Suarez] has maintained continuous employment within the

technology field." *Id.* "[A]s a Project Manager for a technology management company," Suarez "provides technology services primarily to Department of Defense clients." *Id.* "And in order to provide those services, he holds a government security clearance of 'Secret.'" *Id.* An honorably discharged veteran, Suarez earned the Army Achievement Medal and the Army Commendation Medal. See M.D. Pa. No. 14-968, Dkt. 18-3.

"In 1990 police stopped Julio Suarez on suspicion of driving while intoxicated." App. 6a. Although not convicted of that offense, Suarez pled guilty to carrying a gun in his car without a permit, "a misdemeanor subject to possible imprisonment for 'not less than 30 days and not [more than] three years or a fine of not less than $250 and not [more than] $2,500 or both.'" App. 6a-7a (quoting Md. Code Ann. art. 27, § 36B(b) (1990)).

"Suarez was ultimately sentenced to 180 days imprisonment and a $500 fine, both suspended, and . . . one year of probation." App. 244a. Apart from a 1998 conviction for driving under the influence, Suarez has no other criminal record. App. 7a. A Pennsylvania state court removed the firearms disability imposed on Suarez by virtue of his 1990 permit violation conviction, App. 7a, 263a, but the Government asserts that this conviction subjects Suarez to Section 922(g)(1).

D. The District Court Proceedings

Binderup and Suarez each brought suit in their local district courts, the Eastern and Middle Districts of Pennsylvania, respectively, challenging Section 922(g)(1)'s application against them on account of their nonviolent misdemeanors. Both courts rejected Respondents' statutory argument that Section 922(g)(1) is inapplicable to their convictions, a matter addressed separately in their conditional cross-petition. But each district court enjoined Section 922(g)(1)'s application on constitutional grounds.

1. In Binderup's case, the district court rejected a two step, interest-balancing approach to resolving the constitutional challenge. Although that approach "could conceivably be applied to an as-applied Second-Amendment claim," the court noted that doing so would require applying a standard of review assigning the burden of proof to the Government. App. 213a-214a. The court preferred following more recent and relevant circuit precedent governing as-applied claims, dispensing with interest-balancing and assigning the burden of proof to the challenger. App. 214a-215a.

The court understood that the question presented was "not simply whether plaintiff's underlying criminal offense was morally reprehensible," but "whether the traditional justifications underlying the [disarmament] statute support a finding of permanent disability." App. 218a (internal quotation marks omitted). "[T]he core concern [is] whether an individual [is] likely

to commit a violent offenses [sic]." *Id.* (internal quotation marks omitted).

"There is simply nothing in the record here which would support a reasonable inference that [Binderup] used any violence, force, or threat of force to initiate or maintain" the relationship, *id.*, or "that he even engaged in any violent or threatening conduct." App. 219a. "[T]here is no record evidence which supports a reasonable inference that [Binderup] has a propensity to commit violent acts, sexual or otherwise. [Had] the record instead demonstrated a history of or propensity for violence," Binderup's constitutional claim "would be a non-starter." App. 221a.

The district court also rejected, at some length, the Government's efforts to analogize Binderup to various types of sex offenders. App. 219a-227a. And it pored over the Government's statistical studies tending to show that various classes of offenders recidivate, finding them all inapposite. App. 229a-238a.

Binderup "carried his burden on his as-applied challenge . . . and defendants have not shown otherwise." App. 238a. Binderup "has demonstrated that, despite his prior criminal conviction which brings him within scope of § 922(g)(1)'s firearm prohibition, he poses no greater risk of future violent conduct than the average law-abiding citizen." App. 239a.

2. In contrast to the district court in Binderup's case, the Suarez district court held that an as-applied challenge to Section 922(g)(1) would be analyzed under a two step interest-balancing framework.

> If the challenger can demonstrate that his circumstances are different from those historically barred from Second Amendment protections, he establishes that his possession of a [sic] firearms is conduct within the Second Amendment's protections and satisfies the first prong. Said differently in the context of § 922(g)(1), if a challenger can show that his circumstances place him outside the intended scope of § 922(g)(1), he establishes . . . that he is the "law-abiding citizen" identified in *Heller*.

App. 256a.

"[I]n theory . . . some sort of means-ends scrutiny" would then apply – strict scrutiny, considering that Section 922(g)(1) would effect "a straight prohibition of a fundamental right." App. 257a & n.9.

> However, in the context of an as-applied challenge to § 922(g)(1), if a challenger [demonstrates] that he is outside the scope of § 922(g)(1), and thereby shows he is a law-abiding citizen who falls within the core of the Second Amendment's protection, any means-end scrutiny would be fatal in fact.

App. 257a (footnote omitted). "As a practical matter, therefore, an analysis of the second prong . . . is futile." App. 258a. In "an as-applied Second Amendment challenge to § 922(g)(1), the analysis begins and ends" with the first step. *Id.*

The court held that Suarez "falls outside the intended scope of § 922(g)(1) and is distinguishable from

those historically barred from Second Amendment protections." App. 266a. His "predicate conviction was minor and non-violent, and the conviction is now decades-old." App. 264a. Alternatively, Suarez "established that he is no more dangerous than a typical law-abiding citizen and poses no continuing threat to society." App. 266a.

Rejecting attempts to analogize Suarez to prohibited felons, the district court did "agree with [Petitioners] that the circumstances of [Suarez's] arrest were dangerous. But the inquiry is whether the challenger, today, not at the time of arrest, is more dangerous than a typical law-abiding citizen or poses a continuing threat." App. 269a.

Suarez's acts were not "so violent that even after twenty-five years of nonviolent behavior he would continue to be dangerous and to pose a threat to society." *Id.* Nor did "the facts and circumstances since the conviction show that [Suarez] remains dangerous." *Id.* Suarez's "background and circumstance establish that, today, he is not dangerous and does not pose a risk to society." App. 270a.

The Government's statistical evidence was held irrelevant. "[G]eneralized results of an empirical study are useful to refute a facial challenge and demonstrate that a statute survives some sort of means-end scrutiny," but they "are [not] particularly useful in as-applied challenges to demonstrate whether Plaintiff, himself, is dangerous or poses a continuing threat." *Id*.

3. The Government appealed its losses. In neither case did it seek to stay the judgments. Respondents cross-appealed on their statutory claim.

E. The Appeals

Third Circuit panels heard each case separately. But neither panel issued an opinion before the court sua sponte consolidated the cases for rehearing en banc. The court of appeals affirmed both judgments, unanimously as to the statutory arguments, but dividing as to the proper methodology on the constitutional arguments.

1. Judge Ambro, joined by six others, found the two step interest-balancing approach applicable. App. 21a. First, "a challenger must prove . . . that a presumptively lawful regulation burdens his Second Amendment rights," by

> (1) identify[ing] the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present[ing] facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class.

Id. (citations omitted). Doing so requires a "strong" "showing." *Id.* "That's no small task." *Id.*

Judge Ambro determined that Section 922(g)(1) is presumptively lawful per *Heller*. App. 23a. He then tied the historical justification for disarming felons to

the concept of a "virtuous citizenry." *Id.* (internal quotation marks omitted). Violent criminals "undoubtedly qualify as 'unvirtuous citizens' who lack Second Amendment rights." App. 25a (citations omitted). But even serious nonviolent crimes may demonstrate lack of virtue. *Id.* And the passage of time or rehabilitation would not "restore the Second Amendment rights of people who committed serious crimes." App. 27a.

At this point, four judges departed from Judge Ambro's opinion. Writing for himself and two others, Judge Ambro continued that "there are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights." App. 30a. Factors to weigh in determining whether a crime is "serious" include: (1) its classification as a felony or misdemeanor; (2) whether the crime was violent; (3) the sentence actually received; and (4) any cross-jurisdictional consensus regarding the crime's seriousness. App. 31a-34a. Having satisfied all these criteria, Judge Ambro determined that Respondents "distinguished their circumstances from those of persons historically excluded from the right to arms." App. 35a.

At step two, per Judge Ambro, "the Government falls well short of satisfying its burden – even under intermediate scrutiny." *Id.* The record "contains no evidence explaining why banning people like them (*i.e.*, people who decades ago committed similar misdemeanors) from possessing firearms promotes public safety." App. 35a-36a. "[N]either the evidence in the record nor common sense supports those assertions." App. 36a.

Judge Ambro accepted that "reliable statistical evidence that people with the Challengers' backgrounds were more likely to misuse firearms or were otherwise irresponsible or dangerous" would be relevant, but agreed with the district courts that "[t]he Government simply presented no such evidence." App. 38a. The various generalized recidivism studies were "obviously distinguishable," App. 36a, and "off-point," App. 36a, 39a.

2. Judge Hardiman, joined by four other judges, agreed that "some degree of individualized assessment is part and parcel of all as-applied challenges." App. 51a n.6. They would have held that as-applied Second Amendment challenges to categorical disarmament present *Heller*-style one-step, rather than two-step, cases. Such cases ask courts "to decide who count among 'the people' entitled to keep and bear arms." App. 43a.

Judge Hardiman did not consider whether the passage of time, in and of itself, could effect a restoration of a felon's right to bear arms. App. 62a-63a n.12. But he did reiterate, as did Judge Ambro, the Third Circuit's previous holding that "a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen." App. 54a. Propensity for dangerousness – "the time-honored principle that the right to keep and bear arms does not extend to those likely to commit violent offenses," App. 64a – not "virtue," is the touchstone inquiry, and Judge Hardiman expounded in detail on the historical basis confirming that view.

> Binderup and Suarez have presented unrebutted evidence that their offenses were nonviolent and now decades old, and that they present no threat to society, which places them within the class [sic] persons who have a right to keep and bear arms. Accordingly, 18 U.S.C. §922(g)(1) is unconstitutional as applied to them.

App. 92a.

3. Judge Fuentes, joined by six other judges, dissented from the judgment, albeit for different reasons. Judge Fuentes and three others agreed with Judge Ambro that people with non-serious crimes could obtain as-applied relief from firearm dispossession laws utilizing means-ends scrutiny, but asserted that any crime subject to Section 922(g)(1) is "serious" for step one purposes. App. 109a-110a.

Alternatively, Judge Fuentes and his colleagues would have rejected Respondents' as-applied challenges under intermediate scrutiny – although not on the basis of their particular circumstances. For these judges, it would have sufficed that Section 922(g)(1) is properly tailored. App. 138a, 150a ("as applied to these plaintiffs and as applied to future plaintiffs who might bring similar challenges"). Three of the dissenters rejected the as-applied framework entirely. App. 5a-6a n.1, 109a n.72.

4. Following the court of appeals' judgment, stays of the district court judgments never having been requested nor issued, the Government assigned

Binderup and Suarez PIN numbers with which they could successfully navigate the National Instant Criminal Background Check System. BIO Appendix 1a-5a. They have done so.

REASONS FOR DENYING THE PETITION

I. The Question Petitioners Present Does Not Accurately Reflect The Case Heard Below.

A petitioner's failure to present essential material "with accuracy . . . and clarity . . . is sufficient reason for the Court to deny a petition." Sup. Ct. R. 14.4 . Unfortunately, the question presented is not "expressed concisely in relation to the circumstances of the case"; misstates federal law; and contains a debatable legal conclusion, rendering it highly "argumentative." Sup. Ct. R. 14.1(a).

Readers of the Government's presented question, otherwise unfamiliar with the case, might understandably form the misimpression that Respondents are felons whom the Third Circuit excused from compliance with a traditional, long-accepted criminal prohibition. That is not exactly correct.

The question carefully dances around the crucial distinction between felony and misdemeanor offenses, in the process misrepresenting the law as well as the facts of the case. It starts doing so by incompletely describing Section 922(g)(1) as a measure "prohibiting felons from possessing firearms," Pet. I, although the

statute extends broadly to countless misdemeanants, including Respondents.

The question then notes, as it must, that Respondents' challenges were "as-applied" to "their criminal offenses and other particular circumstances." *Id.* The briefest description of "their criminal offenses" would reveal that Respondents are not "felons," while the undefined term "their circumstances" covers much ground, hiding the case's nature.

The felon-misdemeanant distinction is crucially important. "Misdemeanors are, and traditionally have been, considered less serious than felonies." App. 31a (citation omitted). While some misdemeanors are serious, it "may readily be admitted – that a felony conviction is more serious than a misdemeanor conviction." *Baldwin* v. *New York*, 399 U.S. 66, 70 (1970). Felonies often carry more severe collateral consequences, assign individuals to state rather than local prisons, and require prosecution by grand jury indictment rather than by information or complaint. *Id.* "[A] 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." App. 31a.

Courts are understandably reluctant to extend *Heller*'s presumption respecting "felons" to misdemeanants. See *United States* v. *Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) ("Section 922(g)(9) is not mentioned in *Heller*"); *United States* v. *Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (declining to find Section 922(g)(9) "constitutional by analogy" to presumptively

lawful felon prohibition); *Gowder* v. *City of Chicago*, 923 F. Supp. 2d 1110, 1122 (N.D. Ill. 2012); but see *United States* v. *White*, 593 F.3d 1199 (11th Cir. 2010).

A successful as-applied challenge to Section 922(g)(1) brought by an actual felon, *e.g.*, someone convicted of a *felony* offense, would plainly have greater certiorari resonance under *Heller* – and even more so were the predicate felony violent, and yet more so again were the felony one traditionally proscribed in our legal tradition. Perhaps this is why the question presented hides the ball as to Respondents' "offenses" in the context of what is described as a ban targeting "felons." But were this Court inclined to review the case, it should address the situation at hand, and might leave questions about *felon* dispossession for another day.

Relatedly, and at least equally problematic, is the question's description of Section 922(g)(1) as "longstanding." This much would be debatable to say the least, both as a general matter and especially in the context of a misdemeanor. If "longstanding" laws are "presumptively lawful" because they implicate the right's "scope," *Heller*, 554 U.S. at 626-27 & n.26, a law enacted in 1968 cannot be "longstanding." *Heller* was careful to confirm that "future legislatures" could not override "the scope [rights] were understood to have when the people adopted them," *Heller*, 554 U.S. at 634. Thus, "1791, the year the Second Amendment was ratified – [is] the critical year for determining the amendment's historical meaning." *Moore* v. *Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (citation omitted).

No evidence exists that anyone in 1791 would have understood the disarmament of peaceable, non-violent misdemeanants as consistent with the right to keep and bear arms. "Throughout history, felons have been subject to forfeiture and disqualification, but misdemeanants, in direct contrast to felons, have not." *Chovan*, 735 F.3d at 1144 (Bea, J., concurring). The very fact that as-applied challenges to Section 922(g)(1) are recognized refutes the claim that the statute is "longstanding" in all of its applications, for the challenges succeed precisely when the statute's application is inconsistent with traditional grounds for disarmament.

II. Section 922(g)(1) Is Subject To As-Applied Challenges.

1. The Petition rests largely on blurring the lines between facial and as-applied challenges. Because no one seriously questions Section 922(g)(1)'s facial validity – Mr. Heller himself, the Court is reminded, agreed "that felon-in-possession laws are constitutional," Pet. 11 – "Section 922(g)(1) is thus valid in all of its applications." Pet. 12.

That is not how constitutional law works. "In upholding [a statute] against a facial challenge, we [do] not purport to resolve future as-applied challenges." *Wis. Right to Life, Inc.* v. *FEC*, 546 U.S. 410, 411-12 (2006) (per curiam).

> A facial attack tests a law's constitutionality based on its text alone and does not consider

> the facts or circumstances of a particular case. An as-applied attack, in contrast, does not contend that a law is unconstitutional as written but that its application to a *particular person* under *particular circumstances* deprived *that person* of a constitutional right.

United States v. *Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (citations omitted) (emphases added). As-applied challenges do not threaten facial validity, which requires only a "plainly legitimate sweep." *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotation marks omitted).

Assuming, as do the Government and the courts below, that Section 922(g)(1) can properly be described as a felon dispossession law, this Court's description of felon dispossession laws as "presumptively lawful," *Heller*, 554 U.S. at 627 n.26, confirms the availability of as-applied challenges to the statute. As Judge Hardiman noted, "[a] presumption of constitutionality 'is a presumption . . . [about] the existence of factual conditions supporting the legislation. As such it is a *rebuttable* presumption.'" App. 52a n.6 (quoting *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 209 (1934)).

"Put simply, we take the Supreme Court at its word that felon dispossession is *presumptively* lawful." App. 53a n.6 (internal quotation marks omitted). As discussed *infra*, that view of Section 922(g)(1) prevails among the lower courts.

2. Nonetheless, the Government argues that "Section 922(g)(1) is valid in all of its applications" for two reasons: first, "because convicted felons have forfeited Second Amendment rights"; second, "because it is reasonably tailored to serve the government's compelling interest in public safety." Pet. 12, 17.

The second argument merits no discussion. Merely shorthand for "no as-applied challenges exist because the law is facially valid," it presents a non-sequitor that is doubly irrelevant in a case lacking a facial challenge.

The first argument has surface appeal, a simple sort of "do the crime, do the time" logic holding people accountable for their actions, until one considers that the Government can choose to hold people accountable for almost any action, in almost any fashion – a level of discretion that requires judicial review when fundamental rights are at stake. The fact that a legislature has imposed a firearms disability says nothing about whether that disability is justified by traditional, constitutional standards.

Judges Ambro and Hardiman may have disagreed as to the historically-appropriate criteria for disarmament, but they both called out the categorical argument as one that "puts the rabbit in the hat." App. 29a, 61a n.11. "[T]he Government could make an end-run around the Second Amendment and undermine the right to keep and bear arms in contravention of *Heller*." App. 29a. Because "[a] crime's maximum possible punishment is 'purely a matter of legislative prerogative,' "

App. 29a (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 274 (1980)), the prohibiting classification would be subject only to the rational basis test that *Heller* rejects as a Second Amendment standard.

On the opposite coast, Judge Bea once extended the Government's argument to the limit of its logic:

> Why not all misdemeanors? Why not minor infractions? Could Congress find someone once cited for disorderly conduct to be "not law-abiding" and therefore to have forfeited his core Second Amendment right? . . . Why should we not accept every congressional determination for who is or is not "law-abiding" and "responsible" for Second Amendment purposes? Why not?

Chovan, 735 F.3d at 1148 (Bea, J., concurring).

"Because *Heller* was a constitutional decision. It recognized the scope of a passage of the Constitution. The boundaries of this right are defined by the Constitution. They are not defined by Congress." *Id.* (citation omitted).

By its petition, the Government seeks nothing less than the power to legislatively define the Second Amendment's scope. That this power would be used piecemeal, opportunistically disarming anyone who transgresses in some fashion that happens to be theoretically punishable by a year and a day's sentence, does not make it any more acceptable.

3. Naturally, the Government criticizes any approach that might allow judges to review its behavior

for constitutional compliance. Respondents believe that Judge Hardiman's as-applied framework is more historically correct in grounding disarmament on dangerousness rather than lack of virtue. Yet they are constrained to defend Judge Ambro's approach against the criticism that his test for "serious" offenses is inconsistent with how "serious" offenses may be viewed in other constitutional contexts. Pet. 14-15. In the Second Amendment context, Judge Ambro plainly utilizes "seriousness" as a proxy for "virtue." Neither Judge Ambro, nor the Government, contend that the Sixth Amendment jury trial right or Fifth Amendment right to grand jury indictment apply only to "virtuous" citizens.

The notion that Judge Hardiman's dangerousness-based test "is unfounded as [sic: a] matter of principle," Pet. 17 n.8, is off-base. As the Government offers, Section 922(g)(1) "reflects Congress's concern with keeping firearms out of the hands of categories of potentially irresponsible persons." Pet. 18 (internal quotation marks and punctuation omitted). Disarming a non-dangerous person does not advance the statute's interest.

Moreover, dangerousness – not lack of virtue – has traditionally been the basis for disarmament. The debates at the constitutional ratifying conventions, and a variety of Framing Era laws disarming particular classes of people perceived as dangerous, prove as much. App. 65a-69a. "[T]he public understanding of the scope of the Second Amendment was tethered to the principle that the Constitution permitted the dispossession

of persons who demonstrated that they would present a danger to the public if armed." App. 69a (footnote omitted).

4. While the Government *here* argues directly that Section 922(g)(1) does not tolerate as-applied challenges, at times it took a different tack below, conceding that "the Supreme Court might find some felonies so tame and technical as to be insufficient to justify the ban." App. 81a (quoting Gov't Binderup Br. 15; Gov't Suarez Br. 15); *United States* v. *Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011); see also Gov't Suarez Br. 16. "[B]ut it insist[ed] that Binderup's and Suarez's misdemeanors do not qualify." App. 81a.

Peeling away the unlikely suggestion that Section 922(g)(1) is somehow immune from as-applied challenge, the Court may be left with a purely factbound dispute as to whether all three lower courts got it wrong in weighing the evidence (they did not). But this Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951).[3]

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[3] On the as-applied merits, the case isn't close. "[T]he Government falls well short of satisfying its burden – even under intermediate scrutiny." App. 35a. "[N]either the evidence in the record nor common sense supports [Petitioners'] assertions." App. 36a. "The study cited by the Government would predict that [Respondents] pose a negligible chance of being arrested for a violent crime and a zero percent chance of being arrested for a violent

III. Five Of The Six Circuits That Have Decided The Matter Agree That Section 922(g)(1) Is Subject To As-Applied Challenges.

1. The Third Circuit hardly "stands entirely alone" in this matter. Pet. 10, 21 (internal quotation marks and brackets omitted). All but one of the circuits that have considered the question are in agreement that as-applied challenges against Section 922(g)(1) are available to assure that law-abiding responsible citizens are not disarmed.

The Third Circuit just happens to be the first circuit where the balance of the circumstances weighed in a challenger's favor. This case's uniqueness reflects only the (temporary) paucity of decisions in this percolating field, and the fact that other as-applied challenges to Section 922(g)(1) determined thus far have arisen in a very different context.[4]

2. The Fourth, Seventh, Eighth, and D.C. Circuits agree with the Third Circuit that individuals may ask whether Section 922(g)(1)'s application against them comports with constitutional values.

The Fourth Circuit's as-applied framework is essentially that offered below by Judge Hardiman,

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felony." App. 90a. The dissenters argued that the risk is unknowable, not that Binderup or Suarez is actually dangerous. App. 140a.

[4] The nonviolent felons denied as-applied relief in earlier cases were most certainly *not* "like respondents." Pet. 22. That they lost does not diminish the fact that courts adjudicated their as-applied challenges.

"streamlin[ing]" the usual two-step process into an examination of whether the challenger is a "law abiding, responsible citizen" who retains Second Amendment rights. *United States* v. *Pruess*, 703 F.3d 242, 245 (4th Cir. 2012); *United States* v. *Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012); *United States* v. *Moore*, 666 F.3d 313, 318-19 (4th Cir. 2012).

The Seventh Circuit held that "*Heller* referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *United States* v. *Williams*, 616 F.3d 685, 692 (7th Cir. 2010). The Eighth Circuit rejected an as-applied challenge to Section 922(g)(1) where the felon "has not shown that he is 'no more dangerous than a typical law-abiding citizen.'" *United States* v. *Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (internal quotation marks omitted). Added the D.C. Circuit,

> Without the relief authorized by section 925(c), the federal firearms ban will remain vulnerable to a properly raised as-applied constitutional challenge brought by an individual who, despite a prior conviction, has become a law-abiding, responsible citizen entitled to use arms in defense of hearth and home.

Schrader v. *Holder*, 704 F.3d 980, 992 (D.C. Cir. 2013) (internal quotation marks and brackets omitted).

The First Circuit *has* "left open the theoretical possibility" of as-applied Section 922(g)(1) challenges, Pet.

22 (quotation marks and brackets omitted), see *Torres-Rosario*, 658 F.3d at 113, but that is not how district courts read the Seventh and D.C. Circuit precedents. See *Baginski* v. *Lynch*, No. 15-1225, 2017 U.S. Dist. LEXIS 8603, at *20 (D.D.C. Jan. 23, 2017); *Hatfield* v. *Lynch*, No. 16-383, 2016 U.S. Dist. LEXIS 175832 (S.D. Ill. Dec. 30, 2016).[5]

3. The Government correctly notes that the Tenth Circuit has rejected the availability of as-applied Section 922(g)(1) challenges, but it overreads Fifth and Eleventh circuit precedent. In *United States* v. *Scroggins*, 599 F.3d 433 (5th Cir. 2010), the felon did not raise a constitutional argument at trial. On plain error review, the Fifth Circuit rejected his claim that Section 922(g)(1) could only be constitutional if he had a violent intent in possessing the gun. *Id.* at 451. In *United States* v. *Darrington*, 351 F.3d 632 (5th Cir. 2003), the court perfunctorily turned away a facial challenge. In *United States* v. *Rozier*, 598 F.3d 768 (11th Cir. 2010) (per curiam), the only "as-applied" claim rejected was based on the felon's motive to possess a gun (home defense). His personal circumstances were not at issue.

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[5] The Ninth Circuit has also left the matter open. In *United States* v. *Vongxay*, 594 F.3d 1111 (9th Cir. 2010), it upheld Section 922(g)(1) on its face, the "as-applied" criteria being, without more, a felony conviction. No personal criteria were at issue in *United States* v. *Phillips*, 827 F.3d 1171 (9th Cir. 2016), which rejected a categorical challenge to basing Section 922(g)(1)'s disability upon a traditional, if nonviolent felony, but otherwise left open the as-applied question, *id.* at 1176 n.5.

Future "[d]isagreement in the lower courts" may yet "facilitate[] percolation – the independent evaluation of a legal issue by different courts" that is more conducive to certiorari. *California* v. *Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting).

But claims of a meaningful circuit split, at present, are overstated.

IV. Abolishing As-Applied Challenges To Categorical Disarmament Laws Would Lead To Unjust And Absurd Results, And Endanger Public Safety.

"Can a conviction for stealing a lollipop . . . serve as a basis under § 922(g)(1) to ban a person for the rest of his life from ever possessing a firearm, consistent with the Second Amendment?" *Phillips*, 827 F.3d at 1176 n.5.

According to the Government, the answer to that question is "yes." "[P]roperty offenders – have an even higher recidivism rate than violent offenders, and a *large percentage of the crimes nonviolent recidivists later commit are violent*." Gov't Binderup Br. 29 (internal quotation marks omitted, emphasis added in brief). Better safe than sorry – the Ninth Circuit's hypothetical lollipop thief might someday murder.

As Judge Hardiman noted, the day where the Government might permanently deprive individuals of all Second Amendment rights on account of relatively trivial offenses has arrived. The preceding three

Presidents would have been permanently disarmed had they possessed their marijuana in Arizona. Anyone redeeming out-of-state bottle deposits in Michigan, such as *Seinfeld*'s Newman and Kramer, or stealing $150 from a Pennsylvania library, faces federal disarmament. App. 77a n.20 (citations omitted).

Prosecutorial overreach further poses serious concerns. For example, while Florida punishes the release of balloons as a noncriminal infraction subject to a $250 fine, Fla. Stat. § 379.233, one Florida man found himself facing a third-degree felony charge, punishable by five years imprisonment, for releasing a dozen heart-shaped balloons as a gesture to his girlfriend.[6] Should that transgression have cost him his fundamental Second Amendment rights forever?

The Government also forgets that the Second Amendment reflects the People's belief – even if some disagree – that private firearms possession confers valuable benefits. Disarming law-abiding, responsible citizens thus imposes social costs. In 2003, Thomas Yoxall

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[6] See Erika Pesantes, *Love hurts: Man arrested for releasing helium balloon with his girlfriend*, Sun Sentinel, Feb. 22, 2013, available at http://articles.sun-sentinel.com/2013-02-22/news/fl-helium-balloon-environmental-crime-20130222_1_helium-balloon-fhp-trooper-wood-storks (last visited Feb. 2, 2017).

Court records confirm the charge under the general felony pollution statute, Fla. Stat. § 403.161(1)(a), albeit coded as "Haul Waste Tire w/out a Permit." See *State of Florida* v. *Anthony Cade Brasfield*, Broward County (Fl.) Case No. 13002444CF10A (filed Feb. 18, 2013). While such a ring might have been less romantic than heart-shaped balloons, hauling it without a permit would hardly warrant the permanent loss of Second Amendment rights.

successfully asked that his 2000 felony theft conviction be reduced to a misdemeanor so that he might regain his firearm rights. Last month, Yoxall used his gun to save an Arizona trooper who had been shot and was being beaten to death on the side of a highway.[7] The harm posed by some individuals on account of 17-year-old nonviolent crimes is theoretical. Trooper Andersson being alive today is a matter of reality.

V. The Constitution Is A Feature, Not A Defect.

The Government's bottom line in seeking review is extra-constitutional: as-applied challenges "pose serious problems of public safety and judicial administration." Pet. 10, 24. Nevermind securing this (second-class) fundamental right, it costs money to hear constitutional claims, and courts might err.

The argument that Section 922(g)(1) ought never be questioned because "many States" apply firearms prohibitions along the same lines, Pet. 24, the "everyone else does it" defense, is no answer to the fact that applying such a prohibition will generate more as-applied challenges than utilizing better criteria. Indeed, Congress might learn something from the States that base firearm dispossession on convictions for enumerated offenses, rather than on the potential for over

[7] See Megan Cassidy, *A visceral reaction with no time to spare: Arizona man gives emotional account of saving DPS trooper*, Arizona Republic, Jan. 24, 2017, available at http://www.azcentral.com/story/news/local/southwest-valley/2017/01/24/phoenix-man-gives-emotional-recount-taking-life-save-trooper/97005886/ (last visited Feb. 2, 2017).

a year's imprisonment. See Ala. Code § 13A-11-72(a); Idaho Code Ann. § 18-310(2); La. Rev. Stat. Ann. § 14:95.1; Minn. Stat. § 609.165 Subd. 1a; Mont. Code Ann. § 45-8-313(1); N.D. Cent. Code § 62.1-02-01; N.H. Rev. Stat. Ann. § 159:3(I); N.J. Stat. Ann. § 2C:39-7; Ohio Rev. Code § 2923.13(A)(2); Or. Rev. Stat. § 166.270(4)(a); 18 Pa. C.S. § 6105(b); R.I. Gen. Laws § 11-47-5; S.C. Code Ann. § 16-23-30; S.D. Codified Laws § 22-14-15; Tenn. Code Ann. § 39-17-1307(b); Wyo. Stat. Ann. § 6-8-102.

And if the Government has the time and resources to operate a breathtakingly broad law like Section 922(g)(1), it should find a way to ensure that individuals posing no threat to public safety do not have their fundamental rights swept away. As the D.C. Circuit warned Congress, this type of litigation should be expected so long as Section 925(c) remains unfunded. *Schrader*, 704 F.3d at 992.

Any defects in the (defunded) Section 925(c) process are beside the point. As Judge Hardiman pointed out,

> a constitutional inquiry into a presumptively lawful statute is distinct from the one-sided, fact-intensive inquiry that would have been called for were courts required to assess § 925(c) petitions in the first instance. Reviewing an as-applied constitutional challenge based on facts alleged by a challenger and weighing those facts against competing evidence proffered by the Government is not

> only something courts are equipped to do, it is our constitutional duty.

App. 63a-64a n.13 (citing U.S. Const. arts. III and VI, cl. 2; *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)). Moreover, as Pennsylvania demonstrated here, states often afford some practical means of relief from the firearms disabilities they impose – relief that, like here, is often meaningless absent relief from Section 922(g)(1).

In the end, enforcing the Constitution is not optional. This Court long ago addressed the fear of constitutional adjudication offered by the petition:

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us . . . All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

CONCLUSION

The petition should be denied.

Respectfully submitted,

DOUGLAS GOULD
PIZONKA, RIELLEY, BELLO
& MCGRORY, P.C.
144 E. DeKalb Pike, Suite 300
King of Prussia, PA 19406
(610) 992-1300

ALAN GURA
Counsel of Record
GURA PLLC
916 Prince Street,
Suite 107
Alexandria, VA 22314
alan@gurapllc.com
(703) 835-9085

Counsel for Respondents

February 6, 2017

APPENDIX A

[SEAL] **U.S. Department of Justice**

Federal Bureau of Investigation

Clarksburg, WV 26306
November 2, 2016

Mr. Julio Suarez
[redacted]

SUBJECT: National Instant Criminal Background Check System (NICS)
Voluntary Appeal File (VAF)
Unique Personal Identification Number (UPIN)-[redacted]

Dear Mr. Suarez:

The Appeal Services Team of the FBI Criminal Justice Information Services (CJIS) Division's NICS Section has processed your VAF application, and you have been entered into the VAF. **Your UPIN is listed above.**

Keep this original letter in a secure location. In order to avail yourself to the benefits of the VAF, you will need to provide your assigned UPIN to the Federal Firearms Licensee (FFL) for each subsequent firearm transaction.

You are advised that entry into the VAF will not automatically result in a proceed response on subsequent firearm transfers. A complete NICS check will be required on each transaction and may result in a

denied status if new disqualifying information is discovered. Pursuant to the NICS Final Rule, Title 28, Code of Federal Regulations, Part 25.10(g), if the NICS Section discovers disqualifying information, your information may be deleted from the VAF. You will be notified by mail if this situation ever occurs.

In the future, if you decide that you no longer wish to have your information retained in the VAF, you may submit a written request to the NICS Section to be removed from the VAF. Upon receipt of your written request, your information will be destroyed, and you will receive written confirmation.

For subsequent NICS checks, the FFL must initiate a firearm background check as normal. However, the NICS Contracted Call Center Representative or state point-of-contact representative should be advised the background check is being initiated with a UPIN.

NICS Section
CJIS Division

APPENDIX B

[SEAL] **U.S. Department of Justice**

Federal Bureau of Investigation

Clarksburg, WV 26306
November 3, 2016

Mr. Daniel Richard Binderup
[redacted]

SUBJECT: National Instant Criminal Background Check System (NICS)
Voluntary Appeal File (VAF)
Unique Personal Identification Number (UPIN)-[redacted]

Dear Mr. Binderup:

The Appeal Services Team of the FBI Criminal Justice Information Services (CJIS) Division's NICS Section has processed your VAF application, and you have been entered into the VAF. **Your UPIN is listed above.**

Keep this original letter in a secure location. In order to avail yourself to the benefits of the VAF, you will need to provide your assigned UPIN to the Federal Firearms Licensee (FFL) for each subsequent firearm transaction.

You are advised that entry into the VAF will not automatically result in a proceed response on subsequent firearm transfers. A complete NICS check will be required on each transaction and may result in a

denied status if new disqualifying information is discovered. Pursuant to the NICS Final Rule, Title 28, Code of Federal Regulations, Part 25.10(g), if the NICS Section discovers disqualifying information, your information may be deleted from the VAF. You will be notified by mail if this situation ever occurs.

Please be advised there is an Identification for Firearm Sales (IFFS) flag maintained by the state of Pennsylvania on your criminal history record. The state informs us that it has been unable to modify the IFFS flag due to technical issues involving its database. However, NICS is keeping documentation with your UPIN information stating the IFFS flag is no longer prohibiting and the Pennsylvania Instant Check System (PICS) has taken similar action. Therefore, subsequent firearm transfers within Pennsylvania or processed by the NICS should not be denied on the IFFS flag. However, due to this flag you may experience a slight delay during review of subsequent transfers. In addition, should you attempt to purchase a firearm in another state that conducts its own firearms background checks (known as Point of Contact or POC state) rather than running those checks through NICS, Pennsylvania's placement of the IFFS flag may result in a denial. While we have worked with Pennsylvania to identify a solution to this problem, we have so far been unsuccessful. We are informed that Pennsylvania continues to investigate ways to permanently modify the IFFS flag in its system. Should you have further questions regarding Pennsylvania's IFFS flag,

please contact the Pennsylvania system administrators via the Pennsylvania State Police.

Pennsylvania State Police
1800 Elmerton Avenue
Harrisburg, PA 17110

In the future, if you decide that you no longer wish to have your information retained in the VAF, you may submit a written request to the NICS Section to be removed from the VAF. Upon receipt of your written request, your information will be destroyed, and you will receive written confirmation.

For subsequent NICS checks, the FFL must initiate a firearm background check as normal. However, the NICS Contracted Call Center Representative or state point-of-contact representative should be advised the background check is being initiated with a UPIN.

NICS Section
CJIS Division