No. 19-1687

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LISA FOLAJTAR,

Plaintiff-Appellant,

v.

WILLIAM P. BARR, Attorney General of the United States, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR APPELLEES

JOSEPH H. HUNT
Assistant Attorney General

WILLIAM M. MCSWAIN
United States Attorney

MARK B. STERN
PATRICK G. NEMEROFF
Attorneys, Appellate Staff
Civil Division, Room 7217
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8727

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Rule:

Legislative Authorities:

Other Authorities:

STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiff's challenge under 28 U.S.C. § 1331. On February 22, 2019, the district court entered an order granting the government's motion to dismiss. App. vol. I, p. 3. Plaintiff filed a timely notice of appeal on March 27, 2019. App. vol. I, p. 1. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Federal law prohibits the possession of firearms by felons. 18 U.S.C. § 922(g)(1). Plaintiff Lisa Folajtar is subject to that prohibition because she was convicted of violating 26 U.S.C. § 7206(1), a federal felony. The issue presented is whether the district court correctly dismissed plaintiff's Second Amendment challenge to section 922(g)(1) for failure to state a claim.

STATEMENT OF RELATED CASES

This case has not previously been before any court other than the district court, and there are no currently pending related cases.

STATEMENT OF THE CASE

A. Statutory Background

Federal law has long restricted the possession of firearms by certain categories of individuals. One such disqualification, 18 U.S.C. § 922(g)(1), generally prohibits the possession of firearms by any person "who has been convicted in any court of[] a

crime punishable by imprisonment for a term exceeding one year," the traditional definition of a felony.

For the purposes of section 922(g)(1), "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include" a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20)(B). Individuals convicted of state misdemeanors punishable by more than two years, however, remain barred from possessing firearms. *See id.* §§ 921(a)(20)(B), 922(g)(1).

Section 922(g)(1) further excludes "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored." 18 U.S.C. § 921(a)(20).[1] Congress previously allowed an individual to obtain relief from section 922(g)(1)'s firearms disability by demonstrating to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that "the circumstances regarding the disability, and [his] record and reputation, are such that [he] will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Id.* § 925(c). Since 1992, however, Congress has suspended that program by enacting annual provisions barring the use of appropriated funds to process applications for relief. *Logan v. United States*, 552 U.S.

[1] Congress also excluded any "Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A).

23, 28 n.1 (2007). The Senate Appropriations Committee explained that determining whether applicants were "a danger to public safety" was "a very difficult and subjective task" that required "approximately 40 man-years . . . annually" and that "could have devastating consequences for innocent citizens if the wrong decision is made." S. Rep. No. 102-353, at 19-20 (1992). A later House Report added that "too many . . . felons whose gun ownership rights were restored went on to commit violent crimes with firearms." H.R. Rep. No. 104-183, at 15 (1995).

B. Factual Background and Prior Proceedings

1. Plaintiff Lisa Folajtar pled guilty in 2011 to willfully making a material false statement in a tax return, in violation of 26 U.S.C. § 7206(1), a federal felony punishable by imprisonment of up to three years and a fine of up to $100,000. Folajtar was sentenced to three years' probation, including three months of home confinement with an electric monitoring device, and was ordered to pay a $100 assessment and a $10,000 fine. App. vol. II, pp. 20-25. Folajtar also paid over $250,000 to the Internal Revenue Service in back taxes, interest, and penalties. App. vol. II, p. 42. As a result of her federal felony conviction, Folajtar is subject to 18 U.S.C. § 922(g)(1)'s prohibition on the possession of firearms.

2. Folajtar filed this lawsuit, asserting that application of 18 U.S.C. § 922(g)(1) to her violates the Second Amendment, and seeking declaratory and injunctive relief barring enforcement of the statute against her. App. vol. II, pp. 1-17.

The district court applied a two-step framework for evaluating as-applied challenges to section 922(g)(1). *See Binderup v. Attorney General*, 836 F.3d 336, 339 (3d Cir. 2016) (en banc) (Ambro, J.) (citing *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)). Under that framework, a court first determines whether an individual has forfeited Second Amendment protections by committing a "serious" crime. *Id.* at 347, 349 (Ambro, J.). If not, the court considers whether the regulation survives intermediate scrutiny. *Id.* at 347.

The district court concluded that Folajtar's claim fails at the first step, because she "does not satisfy her high burden of distinguishing herself from other felons historically excluded from the right to bear arms." App. vol I, p. 15. The court explained that, in *Binderup*, this Court stated that it "presumes 'the judgment of the legislature is correct and treat[s] any crime subject to § 922(g)(1) as disqualifying unless there is a strong reason to do otherwise.'" *Id.* at 14 (quoting *Binderup*, 836 F.3d at 351 (Ambro, J.)). Moreover, because Folajtar was convicted of a crime classified as a felony under federal law, "[t]he burden on Folajtar at this point in the analysis is 'extraordinarily high.'" *Id.* at 13 (quoting *Binderup*, 836 F.3d at 353 n.6). Relying on the fact that "Congress labeled [Folajtar's] crime a felony," the crime's "statutory maximum penalty," and the penalty imposed on Folajtar, the district court concluded that "Folatjar's felony conviction" is "a serious crime" that resulted in the forfeiture of her Second Amendment rights. *Id.* at 15. The court therefore dismissed Folajtar's

challenge for failure to state a claim, without proceeding to means-end scrutiny. *Id.* at 15 & n.11.

SUMMARY OF ARGUMENT

Congress has restricted the possession of firearms by persons "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(g)(1), the traditional definition of a felony. Folajtar is subject to that prohibition because she was convicted of violating 26 U.S.C. § 7206(1), a federal felony punishable by imprisonment of up to three years and a fine of up to $100,000.

Application of section 922(g)(1) to Folajtar does not implicate the Second Amendment's protection of "the right of law-abiding, responsible citizens to use arms." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). This Court held in *Binderup v. Attorney General* that, because "[m]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry," those who commit a "serious criminal offense" and thereby qualify as "unvirtuous citizens" necessarily "lack Second Amendment rights." 836 F.3d 336, 348 (3d Cir. 2016) (en banc) (Ambro, J.). The Court in that case evaluated the seriousness of the state-law misdemeanors before it based on various "objective indications of seriousness," *id.* at 353 n.5. That multifactor analysis is unnecessary here, because Congress has classified Folajtar's offense as a felony punishable by imprisonment of up to three years. The Court in *Binderup* explained that "when a legislature chooses to call a crime a misdemeanor, we have an indication of non-seriousness that is lacking when it opts

instead to use the felony label." *Id.* at 353 n.6. Because Congress itself has classified plaintiff's crime as a felony with a commensurate punishment, it is unnecessary to inquire further to determine the seriousness of the offense. *See Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017) (holding that "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment").

Were the Court to consider the factors examined in *Binderup,* that analysis would confirm that Folajtar was convicted of a serious crime for purposes of the Court's Second Amendment analysis. *See Binderup,* 836 F.3d at 350-53 (Ambro, J.). The Court in *Binderup* observed that even if *Heller* left "open the possibility, however remote, of a successful as-applied challenge by someone convicted" of a crime labeled a felony, "the individual's burden would be extraordinarily high—and perhaps even insurmountable." *Id.* at 353 n.6. Folajtar cannot satisfy that "extraordinarily high" burden. Her offense has long been a federal felony, and her conduct thus would have been criminal no matter where she lived. Moreover, there is a cross-jurisdictional consensus that Folajtar's actions were criminal, and no real disagreement as to the seriousness of her offense. Finally, Folajtar's sentence meaningfully exceeded the sentences imposed on the *Binderup* plaintiffs. Because Folajtar was convicted of a serious offense, she cannot "distinguish[] [her] circumstances from those of persons historically excluded from the right to arms." *Id.* at 353.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *See Trzaska v. L'Oreal USA, Inc.*, 865 F.3d 155, 159 (3d Cir. 2017).

ARGUMENT

FOLAJTAR'S CONSTITUTIONAL CHALLENGE TO SECTION 922(g)(1) LACKS MERIT.

A. Folajtar Forfeited Her Second Amendment Rights Upon Being Convicted Of A Felony.

1. The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," but "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 592, 626 (2008). The Supreme Court in *Heller* identified the right as belonging to "law-abiding, responsible citizens," *id.* at 635, and, consistent with that understanding, it stated that "nothing in [its] opinion should be taken to cast doubt" on "longstanding prohibitions on the possession of firearms by felons," *id.* at 626. The Court described this "permissible" measure as falling within "exceptions" to the right to bear arms. *Id.* at 635. Two years later, a plurality of the Court "repeat[ed]" its "assurances" that *Heller*'s holding "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626).

Applying *Heller*, this Court held in *Binderup v. Attorney General* that section 922(g)(1)'s exclusion of "felons and felon-equivalents" generally "comport[s] with the Second Amendment because [it] affect[s] individuals . . . unprotected by the right to keep and bear arms." 836 F.3d 336, 343, 348 (3d Cir. 2016) (en banc) (Ambro, J.).[2] The Court explained that "most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry." *Id.* at 348 (collecting academic literature). The Second Amendment thus incorporates a common-law tradition that permits restrictions directed at citizens who are not "law-abiding" and "responsible," *Heller*, 554 U.S. at 635, and it "does not preclude laws disarming unvirtuous citizens (*i.e.* criminals)," *Binderup*, 836 F.3d at 348 (Ambro, J.) (alteration in original) (quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (quoting in turn Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49:1 Law & Contemp. Probs. 143, 146 (Winter 1986))).

Although the Court held in *Binderup* that individuals convicted of serious crimes forfeit their Second Amendment rights, it concluded that some state-law crimes labeled misdemeanors are insufficiently serious to justify disarmament despite triggering section 922(g)(1). *See Binderup*, 836 F.3d at 350-53 (Ambro, J.). In finding

[2] Although no single opinion in *Binderup* garnered a majority, this Court has treated as controlling Judge Ambro's opinion announcing the judgment of the Court. *See Beers v. Attorney General*, 927 F.3d 150, 155-56 (3d Cir. 2019); *see also Binderup*, 836 F.3d at 356-57 (Ambro, J.) (announcing "the law of our Circuit" based on an analysis under *Marks v. United States*, 430 U.S. 188, 193 (1977)).

that the state-law misdemeanors in *Binderup* were insufficiently serious, the Court relied on several factors, including the state legislature's classification of the crimes as misdemeanors, the fact that the offenses did not involve violence, the sentences imposed on the plaintiffs, and the absence of a cross-jurisdictional consensus about the seriousness of the crimes. *Id.* Because the Court had no occasion to address whether an offense labeled a felony could ever be insufficiently serious to result in the loss of Second Amendment protection, the Court limited its analysis "to the cases before [it], which involve[d] state-law misdemeanants." *Id.* at 353 n.6.

2. Congress permissibly disqualified Folajtar from keeping and bearing arms as a consequence of her felony conviction. The Court's reasoning in *Binderup*, the historical record, and decisions of other courts of appeals confirm that the government may disarm a person convicted of a felony, and there is no need for the same crime-by-crime analysis of felonies that the Court applied to the state-law misdemeanors at issue in *Binderup*.

The Court suggested in *Binderup* that there is no constitutional obstacle to applying the prohibition "where the purportedly disqualifying offense is considered a felony by the authority that created the crime." *See Binderup*, 836 F.3d at 353 n.6 (Ambro, J.); *id.* at 396 (Fuentes, J.) (concurring in part, dissenting in part, and dissenting from the judgment) ("Th[e] categorical rule" that "felonies . . . *are* serious enough to support disarmament . . . is consonant with history and tradition."). In holding that some state-law misdemeanors subject to section 922(g)(1) are

insufficiently serious to result in disarmament, the Court reasoned that "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." *Binderup*, 836 F.3d at 351 (Ambro, J.). The Court explained that "when a legislature chooses to call a crime a misdemeanor, we have an indication of non-seriousness that is lacking when it opts instead to use the felony label." *Id.* at 353 n.6.

Consistent with that reasoning, the Court should defer to Congress's decision to "label[] the crime a felony, [which] represents the sovereign's determination that the crime reflects 'grave misjudgment and maladjustment.'" *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017); *see, e.g.*, *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-42 (1989) (in context of Sixth Amendment right to trial by jury, explaining that "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task"). As the D.C. Circuit explained in *Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019), "[w]hen the legislature designates a crime as a felony, it signals to the world the highest degree of societal condemnation for the act, a condemnation that a misdemeanor does not convey." The commission of any felony thus removes one from the class of "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635, and results in the forfeiture of Second Amendment rights.

The conclusion that felony convictions are disqualifying rests on sound "historical justifications," *Heller*, 554 U.S. at 635, because "[f]elons simply did not fall

within the benefits of the common law right to possess arms," *Binderup*, 836 F.3d at 349 (Ambro, J.) (quoting Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983)). That common-law tradition is reflected in the background of the Second Amendment itself. "*Heller* identified as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (citation omitted) (quoting *Heller*, 554 U.S. at 604). That report expressly recognized the permissibility of disarming convicted criminals, stating that "citizens have a personal right to bear arms '*unless for crimes committed*, or real danger of public injury.'" *Skoien*, 641 F.3d at 640 (emphasis added) (quoting 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 662, 665 (1971)).

In this respect, the right to keep and bear arms is analogous to other civic rights that have historically been subject to forfeiture by individuals convicted of crimes, including the right to vote, *see Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), the right to serve on a jury, 28 U.S.C. § 1865(b)(5), and the right to hold public office, *Spencer v. Kemna*, 523 U.S. 1, 8-9 (1998). Just as Congress and the States have required persons convicted of felonies to forfeit civic rights, section 922(g)(1) permissibly imposes a firearms disability "as a legitimate consequence of a felony conviction." *Tyler v. Hillsdale Cty. Sherriff's Dep't*, 837 F.3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring in judgment).

Relying on that historical record, no court of appeals has sustained an as-applied challenge to section 922(g)(1) brought by an individual convicted of a crime labeled and punishable as a felony, and a number of courts have rejected such challenges. Several of these courts of appeals have "suggested that § 922(g)(1) is always constitutional as applied to felons as a class, regardless of their individual circumstances or the nature of their offenses." *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019) (collecting cases). And a number of courts have recognized that "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment." *Hamilton*, 848 F.3d at 626; *see also Medina*, 913 F.3d at 160 ("hold[ing] that those convicted of felonies are not among those entitled to possess arms"); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) ("reaffirm[ing]" the Fifth Circuit's pre-*Heller* jurisprudence holding "that criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate" the Second Amendment); *Vongxay*, 594 F.3d at 1114-15 (holding that "[n]othing in *Heller* can be read legitimately to cast doubt on the constitutionality of § 922(g)(1)" because "felons are categorically different from the individuals who have a fundamental right to bear arms"); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *id.* at 1049-50 (Tymkovich, J, concurring); *see also Kanter*, 919 F.3d at 442 (rejecting as-applied challenge to section 922(g)(1) brought by federal felony after applying means-end scrutiny); *Hatfield v. Barr*, 925 F.3d 950, 951-52 (7th Cir. 2019) (same).

3. Folajtar claims that her offense's classification as "a felony does not automatically foreclose the possibility of a successful challenge" to section 922(g)(1), Appellant's Br. 16, but she identifies no support for that assertion. Instead, she cites the very language in *Binderup* that expressly limits that decision to the plaintiffs' state-law misdemeanors and suggests that all felony offenses may be disqualifying. *See* Appellant's Br. 16 n.52 (citing *Binderup*, 836 F.3d at 353 n.6 (Ambro, J.)).

Folajtar's assertion that section 922(g)(1) can apply only upon a "show[ing] that [her crime] qualifies as a 'violent offense," Appellant's Br.12-13, is flatly at odds with this Court's precedents and those of every other circuit to have opined on the question. In *Binderup*, the Court held that "[t]he category of 'unvirtuous citizens'" disqualified from Second Amendment protection "is . . . broader than violent criminals; it covers any person who has committed a serious criminal offense, violent or nonviolent." *Binderup*, 836 F.3d at 348 (Ambro, J.). The Court explained that "crimes committed—violent or not—were thus an independent ground for exclusion from the right to keep and bear arms" at the founding, "[a]nd there is reason to believe that felon disarmament has roots that are even more ancient." *Id.* at 249; *see also Medina*, 913 F.3d at 159 (concluding that "the historical evidence and the Supreme Court's discussion of felon disarmament laws leads us to reject the argument that non-dangerous felons have a right to bear arms"); *Scroggins*, 599 F.3d at 451 (reaffirming pre-*Heller* precedent establishing "that criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate" right to bear arms); *United*

States v. Phillips, 827 F.3d 1171, 1175 (9th Cir. 2016) (acknowledging that misprision of felony "is not a violent crime," but finding "there is little question that" it "can constitutionally serve as the basis for a felon ban").

This Court's precedent also forecloses Folajtar's argument that "the passage of time . . . can be considered to determine that an old conviction poses no continuing threat to society and thus entitles one to relief," even though a challenger "cannot present facts about herself and her background that distinguish her circumstances from those in the historically barred class." Appellant's Br. 35-36. In *Binderup*, the Court "reject[ed] [the] claim that the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes," 836 F.3d at 349 (Ambro, J.), reasoning that it has "no historical support," *id.* at 850. More recently, in rejecting an as-applied challenge to section 922(g)(4), the Court repeated its holding "that neither passage of time nor evidence of rehabilitation 'can restore Second Amendment rights that were forfeited.'" *Beers v. Attorney General*, 927 F.3d 150, 159 (3d Cir. 2019) (quoting *Binderup*, 836 F.3d at 350); *see also Medina*, 913 F.3d at 160-61 ("A prohibition on firearm ownership . . . is a reasonable consequence of a felony conviction that the legislature is entitled to impose without undertaking the painstaking case-by-case assessment of a felon's potential rehabilitation."); *Hamilton*, 848 F.3d at 626 (holding "that evidence of rehabilitation, , likelihood of recidivism, and passage of time are not bases for which a challenger might remain in the protected class of 'law-abiding, responsible' citizen").

Contrary to Folajtar's contention (Br. 20-29), it is thus irrelevant how ATF exercised its prior authority to restore firearms rights to felons. As this Court explained in *Binderup*, "[t]o the extent Congress affords such a remedy . . . that is a matter of legislative grace; the Second Amendment does not require that those who commit serious crimes be given an opportunity to regain their right to keep and bear arms in that fashion." 836 F.3d at 350 (Ambro, J.). As noted, prior to 1992, Congress permitted individuals to obtain relief from section 922(g)(1) by demonstrating to the ATF that, among other things, they would "not be likely to act in a manner dangerous to public safety," 18 U.S.C. § 925(c). In 1992, however, Congress concluded that such determinations involved "a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made," S. Rep. No. 102-353, at 19. And in declining to allow individuals to seek section 925(c) relief directly in the courts, the Supreme Court explained that the judiciary is not "institutionally equipped for conducting a neutral, wide-ranging investigation" into an individual's dangerousness, which would necessarily call for an "inherently policy-based decision." *United States v. Bean*, 537 U.S. 71, 77 (2002).

This Court has already recognized that the Second Amendment does not require courts to engage in an ad hoc and standardless inquiry into individual dangerousness as a prerequisite for section 922(g)(1)'s application. Folajtar's felony conviction disqualifies her from Second Amendment protection, and her as-applied challenge therefore fails.

B. Folajtar's Offense Was Sufficiently Serious To Result In Disarmament.

1. Because Folajtar was convicted of a crime labeled and punishable as a felony, no further analysis is necessary to dispose of her challenge. In any event, the factors cited by this Court in *Binderup* confirm that Folajtar committed a serious offense and thus forfeited her Second Amendment rights.

The Court in *Binderup* explained that there must be "strong reason" to treat "any crime subject to § 922(g)(1)" as not disqualifying, because it "will presume the judgment of the legislature is correct." *Binderup*, 836 F.3d at 351 (Ambro, J.). While the Court did not identify "fixed criteria for determining whether crimes are serious," it relied on a confluence of factors in concluding that the state-law misdemeanors before it "were not serious enough to strip [the plaintiffs] of their Second Amendment rights." *Id.* at 351. The Court relied on the legislatures' designation of the crimes as misdemeanors, the maximum punishments prescribed for the offenses, the lack of a violence element in the crimes, the minor sentences imposed on the plaintiffs as a result of their convictions, and the lack of a cross-jurisdictional consensus regarding the crimes' severity. *Id.* at 351-52.

The Court suggested that each of the factors was necessary to its analysis and that, absent even one of those indications that the crimes were not serious, the plaintiffs in *Binderup* could not "have distinguished their circumstances from those of persons historically excluded from the right to arms." *Binderup*, 836 F.3d at 353

(Ambro, J.). Addressing the cross-jurisdictional consensus, for example, the Court noted that, "[w]ere [the plaintiffs] unable to show that so many states consider their crimes to be non-serious, it would be difficult for them to carry their burden." *Id.* And in limiting its decision to the state-law misdemeanants before it, the Court observed that even if *Heller* left "open the possibility, however remove, of a successful as-applied challenge by someone convicted" of a crime labeled a felony, "the individual's burden would be extraordinarily high—and perhaps even insurmountable." *Id.* at 353 n.6.

2. Folajtar was convicted of a federal offense for conduct that has long been understood to be criminal, and her punishment exceeded the sentences imposed on the plaintiffs in *Binderup*. Thus, even if Congress's treatment of Folajtar's offense as a felony were not by itself an "insurmountable" barrier to her claim, she could not meet her "extraordinarily high" burden of distinguishing herself from the class of felons historically disqualified from the right to possess firearms.

Folajtar urges that her crime "is hardly in the same league" as the *Binderup* plaintiff's crimes, Appellant's Br. 16, but she cannot explain why her conviction was insufficiently serious to preclude Congress from disarming her. The Court in *Binderup* relied on "objective indications of seriousness," *Binderup*, 836 F.3d at 353 n.5 (Ambro, J.), and Folajtar's subjective evaluation of her own crime is irrelevant. Unlike the offenses at issue in *Binderup*, Folajtar's crime of willfully making false statements in a tax return has been a federal felony since at least 1954. *See* Internal Revenue Code of

1954, § 7206, 68A Stat. 1, 852-53 (providing whoever is convicted of filing a false tax return "shall be guilty of a felony and . . . shall be fined not more than $5,000, or imprisoned not more than 3 years, or both"). Lying to the government more generally has long been a felony, *see* Act of June 25, 1948, § 1001, 62 Stat. 683, 749, and it is broadly understood that "[t]heft, fraud, and forgery are not merely errors in filling out a form or some regulatory misdemeanor offense; these are significant offenses reflecting disrespect for the law." *Hamilton*, 848 F.3d at 627. That "disregard for the basic laws and norms of our society is precisely what differentiates a criminal from someone who is 'law-abiding.'" *Medina*, 913 F.3d at 160.

Moreover, because Folajtar's offense was a federal felony, her conduct would have been criminal no matter where she lived. That fact readily distinguishes this case from *Binderup*, in which at least one of the plaintiff's conduct "would have been legal in many states." *Binderup*, 836 F.3d at 352 (Ambro, J.). Thus, while Folajtar asserts that her crime's seriousness should be judged based on laws regarding evasion of state taxes, the district court properly concluded that those state crimes have no bearing on the seriousness of Folajtar's federal felony. App. vol. I, p. 15. Moreover, even accepting Folajtar's analysis of state laws on its face, her own survey indicates that evasion of state taxes is unlawful everywhere, and that a sizable majority of states would have deemed her crime a felony. *See* App. vol. II, pp. 75-76 (plaintiff's survey identifying at least thirty-four states that treat her crime as a felony). In *Binderup*, by contrast, "the vast majority of states d[id] not" treat one of the plaintiff's crime as

serious, and "more than half prescribe[d] a maximum sentence" for the other plaintiff's crime "that does not meet the threshold of a traditional felony (more than one year in prison)." 836 F.3d at 352 (Ambro, J.).

In any event, Folajtar's analysis of state crimes underrepresents the seriousness with which states would have treated her conduct. She asserts, for example, that a conviction in Alabama for evasion of state taxes would not qualify under section 922(g)(1). Appellant's Br. 18. But Alabama law makes her conduct a felony punishable by a fine up to $100,000 and imprisonment up to three years. *See* Ala. Code § 40-29-115(a)(1), (4). She claims her crime would have been a misdemeanor under California law, citing a provision that applies whether or not the defendant had "intent to evade any requirement." Cal. Rev. & Tax Code § 19701(a). But she fails to note a separate California statute that makes tax evasion a felony, using language identical to the federal statute under which she was convicted. *Compare* Cal. Rev. & Tax Code § 19705(a)(1), *with* 26 U.S.C. § 7206(1). And she cites a provision of Iowa law imposing civil penalties for false tax returns, *see* Iowa Code Ann. § 421.27, but ignores a separate Iowa statute providing that anyone "who willfully makes a false or fraudulent deposit form or [tax] return . . . is guilty of a fraudulent practice," *id.* § 422.25, which is a felony, *see id.* § 714.9 (class C felony where amount involved exceeds $10,000); *id.* § 714.10 (class D felony where amount involved exceeds $1500).[3]

[3] Folajtar does not explain her claim (Br. 18 n.56) that her conduct would not

Finally, the sentence Folajtar received also distinguishes her offense from the ones at issue in *Binderup*. The Court concluded that the *Binderup* plaintiffs "received a minor sentence by any measure," because neither plaintiff received "a single day of jail time," one "was sentenced to three years' probation . . . and a $300 fine," and the other "received a suspended sentence of 180 days' imprisonment and a $500 fine." *Binderup*, 836 F.3d at 352 (Ambro, J.). By contrast, as a condition of her three years' probation, Folajtar was required to serve three months of home confinement with an electric monitoring device. App. vol. II, pp. 20-25. And while the *Binderup* plaintiffs paid fines of $300 and $500 each, Folajtar was ordered to pay a $10,000 fine, App. vol. II, pp. 20-25, and she separately paid over $250,000 to the Internal Revenue Service in back taxes, interest, and penalties, *id.* at 42.

Those penalties do not suggest Folajtar was convicted merely of "minor . . . violations," *Binderup*, 836 F.3d at 352 (Ambro, J.), even if it were somehow possible for that description to be applied to a federal felony. Folajtar seeks to minimize the seriousness of her crime by observing that her $10,000 fine was "one tenth of the possible amount she could have been responsible for." Appellant's Br. 39. But the

---

have violated Georgia's statute making it a felony to "willfully evade[] or defeat[] . . . in any manner . . . any income tax, penalty, interest, or other amount in excess of $3,000.00," Ga. Code Ann. § 48-7-5, and none is evident in the record. Folajtar similarly does not explain why her conduct would not have been punishable by imprisonment of up to three years under Vermont law. *See* Vt. Stat. Ann. tit. 32 § 5894(e). In any event, in evaluating the seriousness of an offense, this Court "look[s] only to a crime's elements rather than to the way it actually was committed." *Binderup*, 836 F.3d at 352 n.4 (Ambro, J.).

fact that her crime was punishable by a $100,000 fine merely underscores the seriousness of her offense. *See Binderup*, 836 F.3d at 352 (Ambro, J.) (considering the maximum punishable ascribed by the legislature for an offense).

3. As a person disqualified from possessing a firearm because of her felony conviction, Folajtar falls outside the scope of Second Amendment protection. *See Heller*, 554 U.S. at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home."); *Hamilton*, 848 F.3d at 628 ("Hamilton is a state law felon" and therefore "cannot state a claim for an as-applied Second Amendment" challenge.). There is therefore no need to proceed to means-end scrutiny to uphold application of section 922(g)(1) to Folajtar. *See Beers*, 927 F.3d at 159 & n.53 (declining to "proceed to step two" of the analysis because application of the prohibition "does not burden conduct falling within the scope of the Second Amendment"). And the district court appropriately declined to apply such scrutiny in dismissing Folajtar's challenge for failure to state a claim. *See* App. vol I, p. 15 n.11.

While Folajtar's felony conviction makes means-end scrutiny unnecessary in this case, she is mistaken in claiming such scrutiny would be inappropriate under this Court's precedent if she could somehow demonstrate that she had retained her Second Amendment rights. *See* Appellant's Br. at 19-20. This Court rejected that position in *Binderup*, explaining that any challenger who "rebut[s] the presumption" that he or she "lack[s] Second Amendment rights" must then "test[] the law or

regulation under heightened scrutiny." *Binderup*, 836 F.3d at 347 (Ambro, J.). Thus, even if this Court were to conclude that Folajtar is entitled to some Second Amendment protection despite her felony conviction, the proper course under this Court's decisions would be to remand the case to the district court to apply means-end scrutiny in the first instance. There is no need for such a remand here, however, because Folajtar's felony conviction disqualifies her from the right to possess firearms.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
WILLIAM M. MCSWAIN
United States Attorney
MARK B. STERN
PATRICK G. NEMEROFF
Attorneys, Appellate Staff
Civil Division, Room 7217
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8727

August 2019

COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,604 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

3. On August 21, 2019 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

4. The text of the electronic version of this document is identical to the text of the hard copies that will be provided.

5. This document was scanned for viruses using Microsoft Forefront Client Security, and no virus was detected.

s/ Patrick G. Nemeroff
Patrick G. Nemeroff