**No. 19-2694**

# In the United States Court of Appeals for the Third Circuit

EDWARD A. WILLIAMS,

*Plaintiff-Appellant*,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, et al.,

*Defendants–Appellees*.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:17-cv-02641
The Honorable Robert F. Kelly

## APPELLANT'S PRINCIPAL BRIEF

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## JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Appellant's challenge under 28 U.S.C. § 1331. Final judgement was entered by the district court on April 1, 2019, which was a final appealable order disposing of all claims. Appellant timely appealed on July 23, 2019. This Court has jurisdiction under 28 U.S.C. § 1291 in that Appellant is appealing a final judgment of the district court.

## ISSUE PRESENTED

Under 18 U.S.C. § 922(g)(1), any person convicted of a crime punishable by imprisonment exceeding one year is categorically prohibited from possessing firearms and ammunition. This is true even when the underlying crime does not involve violence, physical harm, or a firearm. Here, the underlying crime involves a misdemeanor offense for driving under the influence for which Appellant was placed under house arrest and electronic monitoring for only ninety days—the mandatory minimum sentence permitted by law. The issue presented is whether the district court erred in granting summary judgment in favor of Appellees where Appellant's Second Amendment rights are

perpetually eliminated due to a single misdemeanor conviction that did not involve violence, physical harm, or a firearm.

## STATEMENT OF RELATED CASES

This case has not previously been before this Court. One other appeal pending before this Court raises a similar issue regarding the framework for evaluating as-applied Second Amendment challenges to 18 U.S.C. § 922(g)(1): *United States v. Hunt-Irving*, No. 19-1636.

## STATEMENT OF THE CASE

Edward Williams has worked as a construction manager for the past twenty-five years. App. Vol. 2, P. 9, ¶24. He is responsible for general project management, maintaining project schedules for contractors, field inspections, and cost control. *Id.* He has managed numerous projects requiring substantial responsibility, including the Curran-Fromhold Correctional Facility, the Pennsylvania Convention Center, the SEPTA Railworks Project, the Commodore Barry Bridge, and the Interstate 95 and New Jersey Transportation maintenance facilities. App. Vol. 2, P. 171, ¶12.

In late December 2014, concerned about his and his family's safety, Williams applied for a License to Carry Firearms (LTCF) but was denied. App. Vol. 2, P. 9, ¶25.

The denial, Williams later learned, was based on a single misdemeanor conviction for driving under the influence (DUI) over a decade prior. App. Vol. 2, P. 10, ¶27. On September 7, 2004, Williams was arrested and charged with General Impairment and DUI at the highest rate, due to a .223% blood alcohol content. App. Vol. 3, P. 4, ¶7; App. Vol. 4, P. 222. After a trial in 2005, Williams was convicted of DUI in violation of 75 Pa.C.S. § 3802(c). App. Vol. 2, P. 8, ¶20. Because Williams had a previous DUI non-conviction in 2001 that was later expunged once he completed Pennsylvania's Accelerated Rehabilitative Disposition (ARD), App. Vol. 2, P. 8, ¶19, the 2005 conviction qualified as a first-degree misdemeanor under 75 Pa.C.S. § 3803. App. Vol. 2, P. 8, ¶20. Such a conviction carries a maximum sentence of up to five years' imprisonment. *Id.*; 18 Pa.C.S. § 106(b)(6).

But Williams was never imprisoned. App. Vol. 2, P. 25. Instead, under a mandatory minimum, he was placed under house arrest for 90 days—serving his sentence on passive house arrest until electronic

monitoring was available due to his medical condition—and ordered to pay costs, a fine of $1,500.00, and complete any recommended drug and alcohol treatment. App. Vol. 2, P. 8, ¶22; App. Vol. 2, P. 25.

Williams has no history of violent behavior. Vol. 2, P. 10, ¶29. But he does have a history of safety and competence with firearms. For nearly two decades, Williams worked as a firearms instructor, sales manager, and range safety officer at a firearms store and range. App. Vol. 4, P. 35, ¶22; App. Vol. 1, P. 6–7.

It was not until March 31, 2015, when Williams challenged the denial of the LTCF that he was first informed that he was prohibited from carrying firearms due to his 2005 DUI. App. Vol. 3, P. 6, ¶15. And it was not until or about November 5, 2015, that Williams learned that he was prohibited from possessing firearms and ammunition. *Id.* at ¶16. After learning of this prohibition, Williams refrained from possessing, purchasing, or otherwise using firearms in any capacity for fear of arrest and prosecution. App. Vol. 3, P. 7, ¶19.

Not realizing he was a prohibited person because his court docket sheet indicated that he was convicted of a non-disqualifying second-degree misdemeanor, Williams did purchase a firearm after his 2005

conviction. App. Vol. 4, P. 36, ¶31. In 2007, he purchased a Glock-23 handgun. *Id.* On the application, Mr. Williams checked the "no" box when asked: "Are you charged with, or have you ever been convicted of a crime punishable by imprisonment for a term exceeding one year? This is the maximum sentence that you 'could have received,' not the actual sentence you did receive." *Id.*; App. Vol. 4, P. 80–85.

The purchase was completed based on Williams' mistaken belief that his 2005 DUI conviction was not a disqualifying crime. App. Vol. 5, P. 107–08, ¶19. Williams believed that he had been convicted of a misdemeanor in the second degree, as was reflected on his court docket sheet, which would *not* have triggered a prohibition under 18 U.S.C. § 922(g)(1). *Id.*; App. Vol. 5, P. 86.

On August 7, 2018, Williams was examined by a psychologist, Dr. Robert M. Gordon, who conducted a variety of tests "to determine if Mr. Williams is fit to be allowed to own, possess, carry, and use a firearm without risk to him or any other person." App. Vol. 3, P. 163. Williams was subjected to a number of tests and procedures including the Minnesota Multiphasic Personality Invetory-2, the Brief Psychiatric Rating Scale, the Montreal Cognitive Assessment Test, the Violence

Risk Appraisal Guide-R, the Hare Revised Psychopathy Checklist, and the Psychodiagnostic Chart. *Id.* The results of these tests and the reports and conclusions of the psychologist indicate that Mr. Williams has a normal personality without violent tendencies or psychopathology. App. Vol. 3, P. 173–74. Dr. Gordon found that "Mr. Williams may possess a firearm without risk to himself or any other person," and "recommend[ed] that Mr. Williams be allowed to own, possess, carry, and use a firearm." App. Vol. 3, P. 174.

Williams challenged his status as a prohibited possessor by filing suit in the United States District Court for the Eastern District of Pennsylvania on June 1, 2017. App. Vol. 2, P. 1. He asserted that the 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him, because it violates his Second Amendment rights to forever deprive him of the right to keep and bear arms based on a nonviolent misdemeanor DUI conviction from 2005. App. Vol. 2, P. 17.

The Government filed a motion to dismiss the complaint for failure to state a claim on September 14, 2017. App. Vol. 2, P. 27. The district court denied the motion after determining that Williams alleged facts

sufficient to maintain a plausible as-applied challenged under the Second Amendment. App. Vol. 2, P. 281.

Mr. Williams then moved for summary judgement, App. Vol. 2, P. 167, which was denied without prejudice as untimely, App. Vol. 2, P. 284.

Following discovery, both parties filed for summary judgment. App. Vol. 3, P. 1; App. Vol. 4, P. 1. The District Court denied Williams' motion and granted the Government's motion. App. Vol. 1, P. 3.

The court first considered whether Section 922(g)(1) burdens Williams' Second Amendment rights. App. Vol. 1, P. 14. The court considered four factors provided by Judge Ambro's opinion in *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336 (3d Cir. 2016) (*en banc*): (1) whether the state legislature enacted the crime as a misdemeanor or felony; (2) whether the offense was violent; (3) the actual punishment the challenger received; and (4) whether there is a cross-jurisdictional consensus regarding the seriousness of the crime. App. Vol. 1, P. 14 (citing *Binderup*, 836 F.3d at 351–53).

The first factor weighed in Williams' favor because his conviction was a misdemeanor rather than a felony, and "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. Vol. 1, P. 15 (quoting *Binderup*, 836 F.3d at 351).

The second factor also weighed in Williams' favor because his DUI offense "contains no element of violence." *Id.*

The third factor "looks to the actual sentence the challenger received for the offense." App. Vol. 1, P. 16. The court determined "[a]lthough Williams was given the minimum sentence under 75 Pa. Cons. Stat. § 3804(c)(2)" of 90-days of house arrest, "the severity of Williams' sentence leans slightly in favor of the Government" because "the sentence still restricted his liberty due to its custodial nature." App. Vol. 1, P. 18–19.

Considering the fourth factor, the court found that "Williams has easily met his burden regarding the cross-jurisdictional analysis." App. Vol. 1, P. 19. "Although all states criminalize DUI, there is no clear consensus among the states regarding the seriousness of Williams' offense" because "Williams' conduct would meet the traditional definition of a felony in only eleven other states." App. Vol. 1, P. 19–20.

Because Williams "distinguished himself from those persons historically excluded from the right to bear arms," he "carried his high burden of showing that his misdemeanor was not serious." App. Vol. 1, P. 21.

The court then proceeded to apply heightened scrutiny, App. Vol. 1, P. 22, settling on intermediate scrutiny as the appropriate standard for as-applied challenges, *id.* at n.12. The court determined that 18 U.S.C. § 922(g)(1) satisfies intermediate scrutiny as-applied to Williams "individuals like Williams, who have been convicted of an alcohol-related offense within the past fourteen years, have a four to five-fold increase of being arrested for a subsequent crime of violence or one involving a firearm." App. Vol. 1, P. 29.

## SUMMARY OF THE ARGUMENT

In holding U.S.C. § 922(g)(1) unconstitutional as applied to two nonviolent misdemeanants in *Binderup*, the *en banc* majority issued a fractured decision in which three judges endorsed a multifactor test based on virtue and five judges endorsed a test based on dangerousness.

In the past, this Court has looked to the Supreme Court's analysis in *Marks v. United States*, 430 U.S. 188 (1977) to identify the controlling

test in split decisions. Some judges have indicated that *Marks* should be used to identify the controlling test in *Binderup*, but this Court has not yet applied such an analysis. Under *Marks*, the dangerousness test controls.

Under the dangerousness test, Section 922(g)(1) is unconstitutional as applied to Williams. His conviction had nothing to do with firearms or violence, and he has been a peaceable citizen his entire life. In fact, Williams provided an expert psychological opinion concluding that his possession of a firearm would not pose a risk to himself or others.

Section 922(g)(1) is also unconstitutional under the multifactor virtue test. Every factor of that test as it was applied in *Binderup* favors Williams: he was convicted of a misdemeanor, the offense was nonviolent, he received the mandatory minimum sentence, and there is no cross-jurisdictional consensus that a DUI is a serious crime.

Moreover, disarming Williams is poorly tailored to the government's interest in preventing armed mayhem. Section 922(g)(1) is both overinclusive and underinclusive. Indeed, Williams' DUI meets the traditional definition of a felony in only eleven states, and only one in

five individuals across the country would have been disarmed under Section 922(g)(1) for behaving exactly as Williams did.

## STANDARD OF REVIEW

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The district court's decision resolving cross-motions for summary judgment is reviewed de novo. *See Binderup*, 836 F.3d at 341 ("Our review is plenary.").

## ARGUMENT

### I. The dangerousness test applies to Williams' as-applied challenge.

*Binderup* established the test applicable to this case. *Binderup* was a split opinion by a 15-judge *en banc* panel of this Court that held 18 U.S.C. § 922(g)(1) unconstitutional as applied to two nonviolent misdemeanants, like Williams.

Ten judges in *Binderup* agreed that the two-step framework from *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) governed the case. *Binderup*, 836 F.3d at 346–47 (citing *United States* v. *Barton*, 633 F.3d 168, 173–74 (3d Cir. 2011)); *id.* at 339 n.1; *id.* at 387 n.72 (Fuentes,

J., dissenting). In step one, a challenger "must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." *Id.* at 347 (citing *Barton*, 633 F.3d at 174). "[I]f the challenger succeeds at step one, the burden shifts to the Government to demonstrate that the regulation satisfies some form of heightened scrutiny." *Id.*

This Court was split, however, over who the historically barred class was. Judges Ambro, Greenaway, Jr., and Smith, determined that the historically barred class was "unvirtuous citizens" who commit "a serious criminal offense, violent or nonviolent." *Id.* at 348–49 (Ambro, J., opinion)). While explaining that "there are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights," *id.* at 351, this contingent applied the multifactor test used by the district court here, questioning: (1) whether the crime is a misdemeanor or felony; (2) whether the offense was violent; (3) the actual punishment issued; and (4) whether there is a cross-

jurisdictional consensus regarding the seriousness of the crime. App. Vol. 1, P. 14 (citing *Binderup*, 836 F.3d at 351–53).

Judge Hardiman's concurrence, joined by Judges Fisher, Chagares, Jordan, and Nygaard, applied a dangerousness test that considered whether the individual is "likely to use firearms for illicit purposes." *Id.* at 357 (Hardiman, J., concurring).

Although Judge Ambro declared in *Binderup* that his multifactor virtue test was "the law of our Circuit" based on the rule for interpreting split opinions set forth for in *Marks v. United States*, 430 U.S. 188 (1977), *Binderup*, 836 F.3d at 356 (Ambro, J., opinion) (quoting *Marks*, 430 U.S. at 193), *Marks* actually counsels that Judge Hardiman's dangerousness test controls.

### A. *Marks* is used to determine the controlling test from a split decision.

Although "[t]here are no specific rules for how to identify the holdings and legal standards from split circuit opinions" in this Court, *Holloway v. Att'y Gen. United States*, 948 F.3d 164, 170 (3d Cir. 2020), this Court previously has looked to the Supreme Court's test in *Marks*. Indeed, this Court has indicated that *Marks* should be applied to determine the controlling test from *Binderup*. As mentioned, Judge

Ambro pointed to *Marks* to identify the controlling test in *Binderup* itself. *See Binderup*, 836 F.3d at 356 (Ambro, J., opinion) ("when no single rationale explaining the result enjoys the support of a majority of the Court, its holding 'may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'") (quoting *Marks*, 430 U.S. at 193).

The majority in *Holloway* applied the multifactor virtue test to a similar as-applied challenge to Section 922(g)(1) brought by a challenger convicted of a DUI misdemeanor. The *Holloway* Court "look[ed] to the rules we use to identify such standards in fractured Supreme Court opinions, as set forth in *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), and its progeny." 948 F.3d at 170.

But neither *Binderup* nor *Holloway* conducted a *Marks* analysis. The *Holloway* Court explained that it "need not conduct an explicit *Marks* analysis of the *Binderup* opinions here because we already recited its holdings, as expressed by Judge Ambro's controlling opinion, in *Beers* [*v. Att'y Gen. United States*, 927 F.3d 150, 155–56 (3d Cir. 2019)]." *Holloway*, 948 F.3d at 170. But, as the Court later conceded, "*Beers* did

not explicitly conduct a *Marks* analysis" either. *Id.* at 171 n.5; *see also Folajtar v. Att'y Gen. United States*, 980 F.3d 897, 913 (3d Cir. 2020) (Bibas, J., dissenting) ("*Beers* was vacated, so it is not precedent. And *Holloway* dropped a footnote, relying on the now-vacated decision in *Beers* to 'set forth the *Binderup* majority holdings.' 948 F.3d at 170-71 & n.5. So that footnote was built on sand that has since washed away. Plus, neither panel decision did a *Marks* analysis of the fractured opinions in *Binderup*.").

Thus, while many Judges on this Court have acknowledged that a *Marks* analysis is the appropriate approach to deciding the applicable test from *Binderup*, this Court has not yet applied a *Marks* analysis. A closer look reveals that *Marks* compels the application of the dangerousness test.

Dissenting in *Holloway*, Judge Fisher reached a similar conclusion: "I do not think *Marks* requires us to treat the multifactor test as controlling authority." 948 F.3d at 180 (Fisher, J., dissenting). Judge Fisher explained that the *Marks* test has four different applications, and determined that "the multifactor test would be Circuit precedent

under only one of these versions." *Id.* And this "Court has not adopted this interpretation of the *Marks* rule above the others." *Id.*

Under *Marks*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." 430 U.S. at 193. But "[c]ourts and legal scholars disagree as to the nature of the *Marks* rule and how it is to be applied." *Holloway*, 948 F.3d at 180 (Fisher, J., dissenting). There are four common applications of the *Marks* rule. *See* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1976–93 (2019) (detailing the four common applications of *Marks*: the "median opinion," "logical subset," "shared agreement," and "all opinions" applications). Three of the four compel the application of the dangerousness test, the fourth is unclear.

**1. Shared Agreement Approach.**

The first interpretation of *Marks* is the "shared agreement" approach. Under the shared agreement approach, "by looking to the majority's partially overlapping and partially diverging *reasons* for that judgment, lower courts can identify a domain of shared agreement

among the majority Justices regarding *why* that result was correct." Ryan Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 864–65 (2017). This test "limit[s] precedential effect to statements that are both supported by a majority of the Justices and necessary to the judgment in the precedent-setting case." *Id.* at 803.

The "shared agreements" among the *Binderup* majority were the need for modern bans to be consistent with history, 836 F.3d at 347 (Ambro, J.); *id.* at 362 (Hardiman, J., concurring), and the need to consider whether the prohibited person is likely to commit violent offenses, *id.* at 348 (Ambro, J.); *id.* at 370 (Hardiman, J., concurring).

There was no shared agreement over the need to consider any other factors (besides violence) in the multifactor test—only three judges supported those factors.

**2. All Opinions Approach.**

To apply the "all opinions" approach is "to run the facts and circumstances of the current case through the tests articulated in the Justices' various opinions in the binding case and adopt the result that a majority of the [court] would have reached." *United States v. Duvall*,

740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J., concurring). "[P]recedent exists where there are zones of overlap among opinions collectively joined by a majority." Re, *Beyond the* Marks *Rule*, at 1989. Then-Judge Kavanaugh described this approach as "the necessary logical corollary to *Marks*" when "splintered decisions have no 'narrowest' opinion that would identify how a majority" would resolve a case. *Duvall*, 740 F.3d at 611 (Kavanaugh, J., concurring).

Every *Binderup* Judge agreed that present-day bans must be consistent with historical bans. 836 F.3d at 347 (Ambro, J., opinion); *id.* at 362 (Hardiman, J., concurring); *id.* at 389 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). And every Judge agreed that dangerous persons can be disarmed. 836 F.3d at 348; *id.* at 370 (Hardiman, J., concurring). Only three supported the multifactor test.

**3. Logical Subset.**

Under the "logical subset" approach, "the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir.

1991) (*en banc*). Thus, *Marks* applies "only when one opinion concurring in the judgment necessarily approves all the results reached under another concurrence in the judgment." Re, *Beyond the* Marks *Rule*, at 1980.

Applied to *Binderup*, the logical subset approach allows for prohibitions on violent persons, and it allows peaceable persons to successfully challenge arms prohibitions, but it does not establish that challengers must satisfy the multifactor virtue test to retain their Second Amendment rights.

**4. Median Opinion.**

"The median opinion approach is the idea that the binding precedent in a fragmented decision is the concurring opinion that represents the views of the median Justice." Re, *Beyond the* Marks *Rule*, at 1977. *See, e.g.*, *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009) ("Because the other Justices divided 4 to 4, and Justice Kennedy was in the middle, his views establish the holding."). It is unclear whether any *Binderup* opinion was the median opinion. Thus, as Judge Fisher noted, this is the only *Marks* application that does not clearly favor the dangerousness test. *Holloway*, 948 F.3d at 180 (Fisher,

J., dissenting). Nevertheless, this "Court has not adopted this interpretation of the *Marks* rule above the others." *Id.*

Nor should this interpretation be adopted. Unlike the other tests, which seek some aspect of the opinions that a majority of judges agree with, the median opinion test can produce the absurd result of adopting a holding that every judge but one *disagrees* with—as it would if it were applied to *Freeman v. United States*, 564 U.S. 522 (2011). *See* Re, *Beyond the* Marks *Rule*, at 1978 ("the median opinion approach [applied to *Freeman*] would give precedential force to Justice Sotomayor's solo concurrence in the judgment, even though all eight other Justices wrote or joined opinions rejecting her approach").

### B. The "Majority View Test" does not support the multifactor test.

Acknowledging the unsettled issue within this Circuit, the majority in *Holloway* declared that "[w]hatever the test, 'our goal in analyzing a fractured opinion is to find a single legal standard . . . that when properly applied, produces results with which a majority of justices in the case articulating the standard would agree.'" 948 F.3d at 171 n.5 (quoting *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011)) (brackets omitted). But only three judges—one-fifth of the *en banc*

panel—endorsed the multifactor virtue test, and the other judges who believed virtue was relevant disagreed with the result the multifactor virtue test produced. In fact, Judge Ambro's *Binderup* opinion acknowledged that "no single rationale explaining the result enjoys the support of a majority of the Court." 836 F.3d at 356 (Ambro, J., opinion).

In *Binderup*, all 15 Judges agreed that violent persons were historically prohibited from possessing arms. 836 F.3d at 348 ("People who have committed or are likely to commit 'violent offenses' . . . lack Second Amendment rights."); *id.* at 370 (Hardiman, J., concurring) ("people who have demonstrated that they are likely to commit violent crimes have no constitutional right to keep and bear arms."). Thus, the legal standard with the broadest consensus is that individuals with violent criminal convictions can be prohibited from possessing arms. For individuals with nonviolent criminal convictions, the strongest consensus is that prohibited persons may successfully challenge a prohibition by distinguishing themselves from those historically barred.[1] 836 F.3d at 347 (Ambro, J., opinion); *id.* at 362 (Hardiman, J.,

[1] The *Holloway* majority cited authority allowing votes from the dissent to be combined with votes from the plurality or concurrence to establish a majority view. 948 F.3d at 171 n.5. Presumably, a consensus

concurring); *id.* at 389 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments).

### C. The panel opinions in *Holloway* and *Folajtar* do not overrule the controlling rationale from *Binderup*.

Although, in the absence of a *Marks* analysis, panels of this Court in *Holloway* and *Folajtar* applied the multifactor virtue test after *Binderup*, as those decisions contradict the controlling rationale of the *en banc Binderup* decision, they are not binding. "A panel of this court cannot overrule a decision of the court in banc." *In re Penn Cent. Transp. Co.*, 553 F.2d 12, 17 (3d Cir. 1977). *See also United States v. Monaco*, 23 F.3d 793, 803 (3d Cir. 1994) ("To the extent that the decision of a later panel conflicts with existing circuit precedent, we are bound by the earlier, not the later, decision.").

## II. Section 922(g)(1), as applied to Williams, is unconstitutional under the dangerousness test.

It is well established in this Circuit that challengers may retain their rights by distinguishing their circumstances from historically barred persons. The entire *en banc* Court in *Binderup* agreed that present-day

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involving the plurality and concurrence should take precedence over any consensus involving the dissent. And a consensus among an entire *en banc* panel should take the highest priority.

arm bans must be consistent with historical bans. 836 F.3d at 347 (Ambro, J., opinion); *id.* at 362 (Hardiman, J., concurring); *id.* at 389 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments); *see also Holloway*, 948 F.3d at 173 (someone may successfully challenge an arms prohibition by demonstrating that they are "different from those historically barred from possessing firearms"); *id.* at 178 n.1 (Fisher, J., dissenting); *Barton*, 633 F.3d at 174; *Folajtar*, 980 F.3d at 901–02.

Peaceable citizens like Williams have *never* been prohibited from possessing arms. Indeed, "[t]he most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment." *Binderup*, 836 F.3d at 357 (Hardiman, J., concurring).

"In England and colonial America, the Government disarmed people who posed a danger to others." *Folajtar*, 980 F.3d at 913 (Bibas, J., dissenting). "In England, royal officers could seize arms from those who were 'dangerous to the Peace of the Kingdom.'" *Id.* at 914 (quoting Militia Act of 1662, 13 & 14 Car. 2, c.3, § 13). "And they could seize

arms from and imprison 'people who [went] armed to terrify the King's subjects.'" *Id.* (quoting *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686)). "Both sources authorized disarming the dangerous." *Id.*

"The American colonies had similar laws. They were particularly fearful of the disloyal, who were potentially violent and thus dangerous." *Id.* "Some colonies, like Virginia and Massachusetts, disarmed Catholics on the basis of allegiance . . . with the intent of preventing social upheavals and rebellion." *Id.* (quotations and citations omitted).

During the American Revolution, several colonies disarmed loyalists to the Crown because "[l]oyalists were potential rebels who were dangerous before they erupted into violence." *Id.*

At the Constitution ratifying conventions, New Hampshire, Massachusetts, and Pennsylvania proposed arms guarantees with similar limitations. "The concern common to all three is not about felons in particular or even criminals in general; it is about threatened violence and the risk of public injury." *Kanter v. Barr*, 919 F.3d 437, 456 (7th Cir. 2019) (Barrett, J., dissenting); *see also Folajtar*, 980 F.3d at

915 (Bibas, J., dissenting) ("[T]his evidence is thin and mostly consistent with focusing on dangerousness.").

Others considered potentially violent and disarmed were "Slaves and Native Americans," who "were thought to pose more immediate threats to public safety and stability." *Kanter*, 919 F.3d at 458.

Throughout the nineteenth century, slaves, freedmen, and tramps[2]—all perceived as dangerous—were regulated most severely. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 269–72 (2020). And when arms prohibitions became more prevalent in the twentieth century, non-citizens—who were blamed for crime and social unrest—and violent criminals were targeted. *Id.* at 272–75.

Other jurists who have conducted historical analyses have similarly concluded that potential for violence was the motivating factor in founding-era firearm regulations. *See Kanter*, 919 F.3d at 451 (Barrett, J., dissenting) ("History . . . demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are dangerous."); *State v. Weber*,

[2] Tramps were typically defined as males begging for charity outside their home county and viewed as potentially violent.

2020-Ohio-6832, 2020 WL 7635472, at ¶89 (DeWine, J., concurring) (finding "considerable historical evidence that restrictions on firearm use by those who presented a present danger to others fell outside the Second Amendment right"); *State v. Roundtree*, 2021 WI 1, at ¶129 (Hagedorn, J., dissenting) (finding that historical firearm regulations were "aimed at persons or classes of people who might violently take up arms against the government in rebellion, or at persons who posed a more immediate danger to the public").

There is no tradition in American history of disarming peaceable citizens like Williams. People were disarmed only if it was expected that their possession of a firearm would result in violence. Williams' conviction, by contrast, had nothing to do with firearms or violence. There is no reason to suspect that his possession of a firearm would result in violence—indeed, unlike Holloway, Williams even provided an expert psychological opinion concluding that he poses no risk. Moreover, Judges Ambro, Chagares, Fisher, Greenaway, Hardiman Jr., Jordan, and Smith of this Court have previously recognized that a DUI is not the type of crime that has historically resulted in a firearms prohibition. *Binderup*, 836 F.3d at 377 n.25 (Hardiman, J., concurring) ("To be sure,

Suarez's 1998 DUI conviction was a dangerous act—but not in the sense of the traditional concerns motivating felon dispossession." (citing *Begay v. United States*, 553 U.S. 137, 145 (2008) ("holding that drunk driving is not a 'violent felony' under the Armed Career Criminal Act because it does not involve 'purposeful, violent, and aggressive conduct'")); *Holloway*, 948 F.3d at 178 (Fisher, J., dissenting).

## III. The Multifactor Virtue Test is inconsistent with history, and the entire *Binderup* Court agreed that modern-day bans should reflect historical bans.

The virtuous citizen theory has no basis in history, and therefore contradicts the principle on which every *Binderup* judge agreed—that present-day disarmament laws must reflect historical laws. 836 F.3d at 347 (Ambro, J., opinion); *id.* at 362 (Hardiman, J., concurring); *id.* at 389 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments).

In *Folajtar*, Judge Bibas analyzed every source commonly cited to support the virtue theory and found that "each layer lacks historical support or even undermines" the theory and that it is based on "scholars and courts' citing one another's faulty analyses." 980 F.3d at 915–19 (Bibas, J., dissenting). The five concurring judges in *Binderup*

likewise found no historical support for the theory: "We have found no historical evidence on the public meaning of the right to keep and bear arms indicating that 'virtuousness' was a limitation on one's qualification for the right—contemporary insistence to the contrary falls somewhere between guesswork and *ipse dixit*." 836 F.3d at 372 (Hardiman, J., concurring).

Other judges who have conducted historical analyses agree. As then-Judge Barrett explained, the Second Amendment's "limits are not defined by a general felon ban tied to a lack of virtue or good character." *Kanter*, 919 F.3d at 464 (Barrett, J., dissenting). Moreover, *District of Columbia v. Heller*, 554 U.S. 570 (2008) "forecloses the 'civic right' argument on which a virtue limitation depends" because "virtue exclusions don't apply to individual rights." *Kanter*, 919 F.3d at 463, 469 (Barrett, J., dissenting). It was no surprise then, that the parties in *Kanter* introduced no "evidence that founding-era legislatures imposed virtue-based restrictions on the right" to keep and bear arms. *Id.* at 451; *see also Weber*, 2020-Ohio-6832, at ¶88 n.3 (DeWine, J., concurring) ("I find that [virtue] explanation less persuasive and underprotective of the Second Amendment right"); *Roundtree*, 2021 WI, at ¶94 (Hagedorn, J.,

dissenting) ("The virtuous citizenry standard lacks any foundation in the historical backdrop to the Second Amendment."); Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, at 275–83 (tracing the virtuous citizen theory to its roots in scholarship from the 1980s and finding no historical law disarming anyone based on virtue).

In fact, unvirtuous citizens sometimes were expressly allowed to maintain their arms in the founding era. For example, a 1786 Massachusetts law provided for the estates of criminal tax collectors and sheriffs to be sold to recover money they stole, but the necessities of life—including firearms—could not be sold. 1786 Mass. Laws 265. Additionally, the federal Uniform Militia Act in 1792 exempted militia arms "from all suits, distresses, executions or sales, for debt or for the payment of taxes." 1 Stat. 271, § 1 (1792). Maryland and Virginia had similar exemptions. 13 ARCHIVES OF MARYLAND, PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, APRIL 1684 - JUNE 1692, at 557 (William Hand Browne ed., 1894); 3 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 339 (1823).

The Government itself has denounced this Court's multifactor virtue test as "a test with no foundation in [the Supreme] Court's decisions or the history of the right to bear arms." Pet. For a Writ of Cert. 15, *Sessions v. Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847). An ahistorical test is inconsistent with *Binderup*'s requirement that modern bans be consistent with history. 836 F.3d at 347 (Ambro, J., opinion); *id.* at 362 (Hardiman, J., concurring).

## IV. Even if applicable, the multifactor test from *Binderup* compels a ruling in favor of Williams.

Williams' ability to distinguish himself from those historically barred should be sufficient to retain his rights under this Court's precedents—every Judge in *Binderup* agreed that prohibitions today should be consistent with prohibitions throughout history. 836 F.3d at 347 (Ambro, J., opinion); *id.* at 362 (Hardiman, J., concurring); *id.* at 389 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). Nonetheless, the multifactor virtue test also compels a ruling for Williams.

The multifactor virtue test applied in *Binderup* included four factors to determine whether a crime is "serious" enough to warrant disarmament: (1) whether the crime is a felony or misdemeanor; (2)

whether the use or attempted use of force was an element of the crime; (3) the sentence imposed; and (4) whether a consensus exists among other jurisdictions that the crime is serious. 836 F.3d at 351–52 (Ambro, J., opinion).

Williams' DUI conviction was a misdemeanor, which did not involve the use or attempted use of force. *See Holloway*, 948 F.3d at 173–77 (DUI does not involve the use of force). In fact, Justice Scalia's concurring opinion in *Begay* sheds some light on the seriousness of DUI:

> The Government cites the fact that in 2006, 17,062 persons died from alcohol-related car crashes, and that 15,121 of those deaths involved drivers with blood-alcohol concentrations of 0.08 or higher. Drunk driving is surely a national problem of great concern. *But the fact that it kills many people each year tells us very little about whether a single act of drunk driving "involves conduct that presents a serious potential risk of physical injury to another."* It may well be that an even greater number of deaths occurs annually to pedestrians crossing the street; but that hardly means that crossing the street presents a serious potential risk of injury. Where the issue is "risk," the annual number of injuries from an activity must be compared with the annual incidents of the activity. Otherwise drunk driving could be said to pose a more serious risk of physical harm than murder. In addition, drunk driving is a combination of two activities: (1) drinking and (2) driving. If driving alone results in injury in a certain percentage of cases, it could hardly be said that the entirety of the risk posed by drunk driving can be attributed to the combination. (Internal citations omitted and emphasis added).

553 U.S. at 153–54 (Scalia, J., concurring).

Moreover, as discussed *supra*, Judges Ambro, Chagares, Fisher, Greenaway, Hardiman Jr., Jordan, and Smith of this Court previously held that a DUI is not a serious offense. *Binderup*, 836 F.3d at 377 n.25 (Hardiman, J., concurring) ("To be sure, Suarez's 1998 DUI conviction was a dangerous act—but not in the sense of the traditional concerns motivating felon dispossession." (citing *Begay*, 553 U.S. at 145)).

Additionally, Williams received the lightest punishment that the law allowed—90 days of house arrest. Finally, there is no cross-jurisdictional consensus that a DUI is a "serious" crime. As the district court explained, "a second DUI at the BAC that Williams had (.223%) would result in only eleven other states punishing his conduct by a term of imprisonment exceeding one year (the traditional threshold for a felony)." App. Vol. 1, P. 19. "Of those eleven states, four would classify the offense as a felony. Accordingly, given that Williams' conduct would meet the traditional definition of a felony in only eleven other states, he has shown that there is no consensus regarding the seriousness of his offense." App. Vol. 1, P. 20. Compared to *Binderup*, where there was no cross-jurisdictional consensus because "more than half" of the states

"prescribe a maximum sentence that does not meet the threshold of a traditional felony," [3] 836 F.3d at 352 (Ambro, J., opinion), there is certainly no cross-jurisdictional consensus here. Thus, all four *Binderup* factors favor Williams.

In *Holloway*, the majority recognized that the original *Binderup* factors favored Holloway. *See Holloway* at 179 (Fisher, J., dissenting) ("The majority appears to concede that at least three of the four *Binderup* factors are in Holloway's favor, but still concludes that Holloway is not entitled to Second Amendment protection."). But, noting that "[t]here are no fixed rules for determining whether an offense is serious," *id.* at 172, the Court added an additional factor: the "potential for danger and risk of harm to self and others," *id.* at 173. This factor had never been considered previously, it has not been considered since—including in the *Folajtar* opinion drafted by Judge

[3] The wide range of potential sentences for Williams' crime cuts against any argument relying on the maximum sentence permitted by law, as the Commonwealth has favored judicial discretion over a state judgment as to the seriousness of a particular crime. In many states, the more serious versions of recidivist drunk driving are their own crime and their own, narrower yet higher sentencing range, while the less serious versions are designated as misdemeanors. As the General Assembly left broad discretion to the courts, such undermines the notion that the maximum sentence permitted by law constitutes an intended judgment regarding the underlying behavior.

Ambro who created the multifactor virtue test—and it is improper under *Binderup* consensus. Stated slightly differently, the consideration of the potential for danger and risk of harm enjoys no support from the *Binderup* consensus under *Marks* and seven judges of this Court in granting Suarez relief found that a DUI, even in conjunction with another conviction that was prohibiting, was not of an ilk allowing for the evisceration of a constitutional right. *Binderup*, 836 F.3d at 377 n.25 (Hardiman, J., concurring). Even if, *arguendo*, it did enjoy support from the *Binderup* consensus, in this matter, as demonstrated *infra*, Williams—unlike Holloway—has proven through both his individual conduct and a psychological examination that he does not pose any danger or risk of harm to others. Thus, even if, *arguendo*, such generic "risk of harm" factor were permitted to define a general group of prohibited persons, in this as-applied challenge, Williams has amply distinguished himself from the general group of persons with DUIs.

Moreover, the State clearly did not believe Williams posed a "potential for danger and risk of harm to self and others." Not only did Williams receive the mandatory minimum sentence—90 days on house arrest—but his driver's license was reinstated after his DUI conviction.

App. Vol. 3, P. 12, ¶6. What is more, under Pennsylvania law, Williams is not prohibited from possessing firearms. *See* 18 Pa.C.S. 6105(c)(3); *see also Holloway v. Sessions*, 349 F. Supp. 3d 451, 459 (M.D. Pa. 2018) ("the limited circumstances under which the Commonwealth prohibits DUI offenders from transferring and purchasing new firearms suggests that it views Holloway's offense less seriously than defendants claim."). Insofar as Section 922 is dependent upon and intended to enforce the judgments of States as to the seriousness of an offense, this Court should defer to the far more specific judgment of the State that Williams is not too dangerous (or lacking in virtue) to be allowed possession of a firearm (or a motor vehicle).

## V. Because Section 922(g)(1) eviscerates Williams' Second Amendment rights it should be held categorically unconstitutional, or in the alternative, to fail even intermediate scrutiny.

### A. A complete prohibition on Williams' Second Amendment rights is categorically invalid.

*Heller* held that a law that destroys a core Second Amendment right is categorically invalid. 554 U.S. at 630 (a handgun ban "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional"). *Heller* applied no tiered

scrutiny analysis, considered no social science evidence, included no data or studies about the costs or benefits of the ban at issue, and expressly rejected the balancing test proposed by Justice Breyer's *Heller* dissent. After all, the Court explained, "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* at 634.

In *McDonald v. City of Chicago*, the Court reaffirmed its rejection of an interest-balancing approach for bans on core Second Amendment rights. 561 U.S. 742, 785 (2010) ("In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.").

Because 18 U.S.C. § 922(g)(1) is a prohibition on Williams' Second Amendment rights it should be held categorically invalid as applied to him.

### B. Section 922(g)(1) as applied to Williams fails both strict and intermediate scrutiny because it is poorly tailored and both over- and under-inclusive.

At a minimum, strict scrutiny should apply because 18 U.S.C. § 922(g)(1) destroys Williams' Second Amendment rights. Strict scrutiny requires that the regulation be "the least restrictive means of

achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000)). While intermediate scrutiny does not demand the least restrictive means available, it does require that "the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

The fit between 18 U.S.C. § 922(g)(1) and forever disarming Williams based on a sixteen-year-old DUI conviction is insufficiently tailored to "preventing armed mayhem" because the government's interest is not achieved by disarming Williams, who poses no dangerous threat, and because the law is both over- and under-inclusive, as reflected by the cross-jurisdictional analysis.

Disarming Williams does not serve the government's interest in preventing armed mayhem is because Williams poses no threat of armed mayhem. He has no history of violence nor has he used a firearm for any illicit purpose. Moreover, on August 7, 2018, Robert Gordon, Ph.D., ABPP, a Board-certified clinical psychologist, conducted an examination of Williams to determine whether he "is fit to be allowed to

own, possess, carry, and use a firearm without risk to him or any other person." App. Vol. 3, P. 163. The examination consisted of an interview, a battery of psychological tests, and the rating of Williams on a psychodiagnostic chart. Dr. Gordon's report found that Williams "has a normal personality, *without psychopathology and without addiction or violent tendencies*." *Id.* at 173–74. Dr. Gordon found that "Mr. Williams may possess a firearm without risk to himself or any other person," and "recommend[ed] that Mr. Williams be allowed to own, possess, carry, and use a firearm." *Id.* at 174. Indeed, Williams has been a peaceable citizen his entire life.

What is more, the government has previously restored the rights of criminals who *did* have violent tendencies, as well as individuals convicted of similar crimes as Williams.

Prior to 1993, ATF regularly conducted federal firearms relief determinations as provided for by 18 U.S.C. § 925(c). ATF can no longer conduct these determinations because Congress has inserted language into the appropriations bill that states: "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." App.

Vol. 3, P. 50; William J. Krouse, *Gun Control: FY2017 Appropriations for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and Other Initiatives* at 24, CONGRESSIONAL RESEARCH SERVICE, Aug. 7, 2017, https://fas.org/sgp/crs/misc/R44686.pdf; Consolidated Appropriations Act, 2018, Pub. L. No. 115–141, 132 Stat. 348. But before Congress prohibited ATF from conducting those determinations, ATF granted relief to 7,722 individuals from 1968 to 1992 for a multitude of different crimes, *see* App. Vol. 3, P. 51 n.94, some of which were identical to and some far more egregious than Williams' crime.[4] In fact, some had more than six separate federal prohibitions and some had been convicted of vehicular homicide while DUI. *See* App. Vol. 3, P. 99, 102, 112.

Some individuals that ATF determined, pursuant to 27 C.F.R. § 478.144, would "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

[4] *See* App. Vol. 3, P. 51 n.95 (citing 36 F.R. 22321 (Morrow, Clyde Franklin), 37 F.R. 18636 (Cook, Judson Vernon. Jr.), 46 F.R. 46456 (Crawford, Cleo J., Metz, Ira G.), 48 F.R. 28385 (Blackburn, Vaughn), 49 F.R. 25060 (Karl, Earl Jerome), 49 F.R. 29503 (Adams, Richard Gerald), and 55 F.R. 14549 (Search, Herman Samuel)).

public interest," demonstrate by contrast just how nonthreatening Williams is.

1. John Kraszewski and Kim Blake

Kraszewski was granted federal firearms relief on February 20, 1992, from a 1984 Pennsylvania conviction. 57 F.R. 6160-02. The court records show that he had been charged with and pleaded guilty to one count of driving under the influence and *one count of homicide by vehicle*. *See* App. Vol. 3, P. 102; *see also id.* at 100 (57 FR 6160).

Likewise, Kim Blake was granted relief from a conviction in 1981 of homicide by vehicle and DUI. App. Vol. 3, P. 112; *id.* at 100 (54 FR 33108).

2. Barry Shoop

Mr. Shoop was granted federal firearms relief on April 11, 1977 from a 1975 Pennsylvania driving under the influence conviction, which was prohibiting like Williams'. 42 F.R. 21156; App. Vol. 3, P. 132. To find the Section 922(g)(1) prohibition against Williams furthers an important governmental interest when the Government previously granted relief to individuals convicted of the same or more egregious offenses, cannot withstand any form of scrutiny.

3. Carl Fareri

Fareri was granted federal firearms relief on November 23, 1990 from a 1984 conviction. 55 F.R. 48951-03 (spelled "Fareri" in the publication). The court records show that Fareri was convicted of felonious burglary twice, felonious conspiracy, theft by unlawful taking or disposition, and receiving stolen property. App. Vol. 3, P. 139.

The Government's position that disarming Williams furthers its interest but disarming Fareri does not is untenable.

4. Charles Spangler

Spangler was granted federal firearms relief on June 10, 1991 from five convictions in 1963, 1965, and 1985. 56 F.R. 26713-02. Spangler had been convicted of adultery, statutory rape, contributing to the delinquency of a minor, possession of a firearm, and resisting an officer. App. Vol. 3, P. 155. Spangler's multiple convictions cover a broad spectrum, and illustrate that ATF considered an individual who had five convictions, ranging from statutory rape to resisting an officer, to be of such little threat to society that the restoration of his right to own and possess firearms and ammunition would not be contrary to the public safety or interest.

Notably, ATF granted Spangler relief only six years after his last conviction—which was for the unlawful possession of a firearm and resisting an officer.

Mr. Spangler is not the only individual who had multiple prohibiting convictions who was granted relief by ATF. The Federal Register denotes numerous examples.[5]

In addition to demonstrating the lack of fit between the government's interest in preventing armed mayhem and disarming Williams, the above examples demonstrate how underinclusive 18 U.S.C. § 922(g)(1) is. Indeed, "[a] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly

[5] *See* 36 F.R. 20449, 36 F.R. 22321, 36 F.R. 23731, 37 F.R. 10406, 37 F.R. 11790, 37 F.R. 13352, 37 F.R. 15009, 37 F.R. 16113, 37 F.R. 18636, 37 F.R. 23, 37 F.R. 23642, 37 F.R. 26352, 37 F.R. 28640, 37 F.R. 2893, 37 F.R. 4921, 37 F.R. 6361, 37 F.R. 6769, 37 F.R. 7168, 37 F.R. 8403, 38 F.R. 14299, 38 F.R. 1944, 38 F.R. 3414, 38 F.R. 4524, 38 F.R. 4583, 38 F.R. 8071, 39 F.R. 9212, 41 F.R. 50368, 41 F.R. 7550, 42 F.R. 21156, 43 F.R. 25755, 43 F.R. 51736, 44 F.R. 71492, 45 F.R. 26868, 45 F.R. 39998, 45 F.R. 49733, 45 F.R. 65393, 45 F.R. 6878, 45 F.R. 76838, 46 F.R. 11751, 46 F.R. 23646, 46 F.R. 33410, 46 F.R. 46456, 46 F.R. 57812, 47 F.R. 10132, 47 F.R. 47714, 48 F.R. 10508, 48 F.R. 28385, 48 F.R. 29650, 48 F.R. 36720, 48 F.R. 50977, 49 F.R. 25060, 49 F.R. 29503, 49 F.R. 35707, 49 F.R. 48252, 50 F.R. 1026, 50 F.R. 23374, 54 F.R. 33108, 54 F.R. 43378, 55 F.R. 14549, 55 F.R. 33208, 55 F.R. 48951, 55 F.R. 5939, 56 F.R. 14791, 56 F.R. 26713, 56 F.R. 36865, 56 F.R. 65926, and 57 F.R. 6160.

vital interest unprohibited." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) (citation omitted). *See McDonald*, 561 U.S. at 778 ("the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty").

Among individuals convicted of driving under the influence, Section 922(g)(1) is wholly underinclusive, to the extent the government continues to contend that there exists some governmental interest in prohibiting Williams as a result of his DUI. Judge Fisher explained in *Holloway* that due to varying state criminal classifications across the country, "only about one in five individuals behaving *exactly as Holloway did* would be barred from possessing a firearm under § 922(g)(1)." 948 F.3d at 192 (Fisher, J., dissenting) (emphasis in original). The same is true for Williams, and the district court here added that "Williams' conduct would meet the traditional definition of a felony in only eleven other states." App. Vol. 1, P. 20. Thus, "regardless of the reasonableness of disarming recidivist DUI offender," the government was required to prove that disarming 20 percent of people in Williams' position, while allowing 80 percent to retain their firearms,

is sufficiently tailored to its important interest.[6] *Holloway*, 948 F.3d at 192 (Fisher, J., dissenting). Accordingly, the "the statute as applied here is wildly underinclusive." *Id.* at 191 (Fisher, J., dissenting).

## CONCLUSION

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

Respectfully submitted,

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[6] If the supposed federal interest is the derivative one of supporting individual State judgments regarding seriousness, then this case gets that precisely backwards, as the State specifically rejects any interest in disarming Williams or even of denying him the ability to drive a vehicle, which has a far more direct connection to his conduct than does the right to possess a firearm.

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 8,676 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionately spaced Century Schoolbook font.

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Dated this 28th day of May 2021.

Joshua Prince

*Counsel for Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2021, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Third Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 28th day of May 2021.

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