No. 18-3595

In the United States Court of Appeals for the Third Circuit

RAYMOND HOLLOWAY, JR.,
Plaintiff–Appellee,

v.

ATTORNEY GENERAL OF THE UNITED STATES; DEPUTY DIRECTOR BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; DIRECTOR OF FEDERAL BUREAU OF INVESTIGATION; UNITED STATES OF AMERICA,
Defendants–Appellants.

Appeal from the United States District Court
for the Middle District of Pennsylvania
Case No. 1:17-cv-00081

REPLY TO RESPONSE TO PETITION FOR REHEARING *EN BANC*

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ARGUMENT

The government argued that rehearing is unnecessary because "[t]he panel's conclusion is correct and accords with the precedent of this Court…" Resp. 1. But what "the precedent of this Court" *is* remains unclear, and the government offered few theories.

The government failed to address which *Marks* analysis applies in this Circuit, why Judge Ambro's multifactor test is controlling under *Marks*, why the multifactor test—supported by only three judges—represents the majority view of this Court, or how the panel modifying the multifactor test "accords with [] precedent." Nor did the government explain why new research about the history of prohibited persons—which resolves the greatest divide among the *Binderup* Court—should be disregarded. Moreover, the government's response highlights the need for this Court to determine whether underinclusivity should be considered in Second Amendment cases.

This case necessitates rehearing *en banc* because it involves the unjust deprivation of a constitutional right and presents several outstanding issues that inevitably must be resolved.

I. This Court has never adopted a method for resolving fractured opinions.

A. *Marks* has at least four applications, only one of which favors the multifactor test, and none of which this Court has endorsed.

This Court has never established an approach for interpreting fractured opinions. Thus, when—as here—a fractured opinion controls, nobody knows how it applies—not even Judges. *Cf. Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 356 (3d Cir. 2016) (*en banc*) (Ambro, J.) (Judge Ambro declaring the multifactor test "the law of our Circuit" under *Marks*) *with Holloway v. Attorney Gen. United States*, 948 F.3d 164, 180 (3d Cir. 2020) (Fisher, J., dissenting) ("I do not think *Marks* requires us to treat the multifactor test as controlling authority").

The government contends that "[u]nder *Marks v. United States*, 430 U.S. 188 (1977), Judge Ambro's plurality opinion represents the 'position taken by those Members who concurred in the judgment on the narrowest grounds.'" Resp. 12 (quoting *Marks*, 430 U.S. at 193). But the government elides the fact that the *Marks* rule has at least four different applications, "the multifactor test would be Circuit precedent under only one of these versions," and this "Court has not adopted this

interpretation of the *Marks* rule above the others." *Holloway*, 948 F.3d at 180 (Fisher, J., dissenting).

1. Shared Agreement.

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.

2. All Opinions.

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." Richard Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1989 (2019). 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.); *id.* at 362 (Hardiman, J., concurring); *id.* at 389 (Fuentes, J., concurring in part,

dissenting in part, and dissenting from the judgments). 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, at 1980.

Applied to *Binderup*, the logical subset supports only prohibitions on violent persons.

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, 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."). As Judge Fisher noted, this is the

only *Marks* application that may favor the multifactor test, and this "Court has not adopted this interpretation of the *Marks* rule above the others." *Holloway*, 948 F.3d at 180 (Fisher, J., dissenting).

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 does when applied to *Freeman v. United States*, 564 U.S. 522 (2011). *See* Re, 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 panel 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.'" *Holloway*, 948 F.3d at 171 n.5 (quoting *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011))

(brackets omitted). Neither the panel nor the government has asserted that a majority on this Court agree with the multifactor test or the results it produces. Only three judges—one-fifth of the *en banc* panel—endorsed it, and Judge Ambro stated that "no single rationale explaining the result enjoys the support of a majority of the Court." *Binderup*, 836 F.3d at 356 (Ambro, J.).

The multifactor test applies only under the approach to fractured opinions that requires the *least* support among the judges, which this Court has not endorsed. Rehearing *en banc* should be granted to identify the correct approach.

II. The government does not dispute the new history presented in this case, which resolves the greatest divide in *Binderup*.

Holloway and *Amici* presented novel research covering the United States' entire history and proving that only violent and likewise dangerous persons have traditionally been disarmed. Answer Br. 19, 47; Pet. 8-12; *Amici Curiae* Briefs of Firearms Policy Coalition, et al. (both panel and rehearing stages). This important development, which

resolves the greatest divide among the *Binderup* Court, was ignored by the government. Its accuracy was never once disputed.[1]

The entire *Binderup* 15-judge panel agreed that present-day arm bans must be consistent with historical bans. 836 F.3d at 347 (Ambro, J.); *id.* at 362 (Hardiman, J., concurring); *id.* at 389 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). Yet, the government hopes this Court will disregard the historical evidence presented here and consider only what was available when *Binderup* was decided. Specifically, the government noted that "ten of the fifteen judges on the Court rejected the notion that only violent crimes are serious," that Judge Ambro found "no historical support…for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights," and that Judge Ambro endorsed a theory that prohibited "unvirtuous citizens" from possessing arms. Resp. 13-14. But Holloway has proven each of these findings decisively incorrect; reinforcing that "this Circuit has never had the benefit of a comprehensive historical analysis of arms

[1] Nor did the government provide any new historical evidence of its own. The oldest case it cites is from 1977, the oldest legislative source is from 1968.

prohibitions. Now that such an analysis is available, it is important for this Court to more precisely define who retain their constitutional rights." Pet. 8-9.

The government hopes this Court will continue to implement a test based on a limited historical analysis available in 2016 instead of a comprehensive, all-inclusive one, which has been presented here. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Parham v. Johnson*, 126 F.3d 454, 457 (3d Cir. 1997) (quoting *Henslee v. Union Planters Bank,* 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

III. It is unclear whether underinclusivity must be considered in Second Amendment cases.

The government incorrectly asserted that the district court's holding—that the ban fails intermediate scrutiny as-applied to Holloway—is "not at issue on rehearing." Resp. 4 n.2. The application of heightened scrutiny has been considered at every stage of this proceeding and has never been waived. Moreover, the government's argument highlights another compelling reason for rehearing: whether underinclusivity must be considered in the Second Amendment context. *See* Pet. 16 n.7; *Holloway*, 948 F.3d at 191–94 (Fisher, J., dissenting).

The government argued that there is a cross-jurisdictional consensus regarding Holloway's DUIs: "All branches of the federal government, as well as jurisdictions across the country, have recognized the reckless disregard for human life inherent in this conduct. By any of these measures, plaintiff committed a serious offense such that the Second Amendment's protections do not apply to him." Resp. 9.

But as Judge Fisher noted, "Holloway's crimes…implicate § 922(g)(1) in only eight of fifty-one jurisdictions (the fifty states and the District of Columbia)….On average, then, only about one in five individuals behaving *exactly as Holloway did* would be barred from possessing a firearm under § 922(g)(1)." *Holloway*, 948 F.3d at 192 (Fisher, J., dissenting). "Under this standard, the law appears to be significantly underinclusive." *Id.*

Indeed, "[a] law cannot be regarded as protecting an interest of the highest order…when it leaves appreciable damage to that supposedly vital interest unprohibited." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) (citation omitted); *McDonald v. Chicago*, 561 U.S. 742, 778 (2010) ("the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty"). The

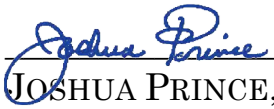
government should have been required to prove that disarming 20 percent of people in Holloway's position, while allowing 80 percent to retain their firearms, is sufficiently tailored to its important interest. This is true, "regardless of the reasonableness of disarming recidivist DUI offenders." *Holloway*, 948 F.3d at 192 (Fisher, J., dissenting).

But this Court has not definitively stated whether underinclusivity must be considered in the Second Amendment context. Judge Fisher believes "that determination must now be left either to this Court sitting en banc or to the Supreme Court." *Id.* at 193 (Fisher, J., dissenting). This case provides an ideal opportunity to address the question of underinclusivity, among the many other unresolved issues presented.

CONCLUSION

Rehearing *en banc* should be granted to define the proper test for fractured opinions and *as-applied* Second Amendment challenges, to determine whether underinclusivity must be considered in Second Amendment cases, and to correct the misapplication of precedent that has resulted in a lifetime deprivation of Holloway's constitutional right.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this Reply to Response to Petition for Rehearing *En Banc* complies with the type-volume limitation of this Court's Order and Fed. R. App. P. 5(c) and 32(c)(2) because, according to the word-count feature of Microsoft Word, this brief contains 1,996 words, excluding the parts of the petition 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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I certify that counsel for Plaintiff-Appellee are admitted to practice in the Third Circuit Court of Appeals and are members in good standing.

Dated this 24th day of June 2020.

Joshua Prince, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2020, I served the foregoing petition 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 24th day of June 2020.

Joshua Prince, Esq.