No. _____

In the Supreme Court of the United States

BARRY MICHAELS,
Petitioner,
v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL OF THE UNITED STATES, and THOMAS E. BRANDON, as DEPUTY DIRECTOR, HEAD OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two important, unresolved federal questions arose from this Court's landmark decision, *District of Columbia v. Heller*, 554 U.S. 570 (2008) ("*Heller*" throughout). The questions resonate throughout the circuit courts with uneven resolution and application, adversely affecting millions of felons including Petitioner, that have served their sentences and have returned to free society, living responsible lives in full compliance with the law. Depending on how these questions are answered, determines whether a felon is entitled to lodge an as-applied challenge to the constitutionality of a felon disarmament law such as 18 U.S.C. §922(g)(1).

The questions presented are as follows:

1. What does the phrase "law-abiding, responsible citizens" mean?
2. What does it mean to say that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful regulatory measures?"

LIST OF PARTIES

Petitioner and Plaintiff below

- Barry Michaels

Respondents and Defendants below

- Jefferson B. Sessions III, Attorney General of The United States (Successor to Lorretta Lynch – originally named in U.S. District Court action)

- Thomas E. Brandon, As Deputy Director, Head of The Bureau Of Alcohol, Tobacco, Firearms And Explosives

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Petitioner Barry Michaels ("Petitioner") prays that a writ of certiorari issue to review the judgment in favor of respondents Jefferson B. Sessions III, Attorney General of The United States and Thomas E. Brandon, As Deputy Director, Head of The Bureau Of Alcohol, Tobacco, Firearms And Explosives ("Respondents") below:

- Michaels v. Sessions, et.al., No. 17-15279 (9th Cir.) (November 3, 2017) (unreported) (App. 3a)

- Michaels v. Lynch, et.al., 2:16-cv-00578-JAD-PAL (U.S. District Court of Nevada) (January 26, 2017) (unreported) (App 7a)

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals entered its judgment on November 3, 2017 and denied a petition for rehearing on March 29, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS

- **U.S. Const. amend. 2**

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

- **5 U.S.C. § 702**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute

that grants consent to suit expressly or impliedly forbids the relief which is sought.

- **5 U.S.C. § 703**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

- **18 U.S.C. §921(a)(20)(A)**

(a) As used in this chapter—
(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—
(A) 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, or
(B) any 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. §922(g)(1)**

(g) It shall be unlawful for any person—
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) who is a fugitive from justice;
(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
(5) who, being an alien—
(A) is illegally or unlawfully in the United States; or
(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
(6) who has been discharged from the Armed Forces under dishonorable conditions;
(7) who, having been a citizen of the United States, has renounced his citizenship;
(8) who is subject to a court order that—
(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner

in reasonable fear of bodily injury to the partner or child; and
(C)
(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
(9) who has been convicted in any court of a misdemeanor crime of domestic violence,
to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

- **18 U.S.C. §925(c)**

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.

Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

STATEMENT OF THE CASE

A. Statutory Background

1. "Enacted in its earliest incarnation as the Federal Firearms Act of 1938, [18 U.S.C. § 922(g)(1)] initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *United States v. Booker*, 644 F .3d 12, 24 (1st Cir. 2011), cert. denied, 132 S. Ct. 1538 (2012) (citations omitted); see Federal Firearms Act, ch. 850, §§ 1(6), 2(f) Pub. L. No. 75-785, 52 Stat. 1250,1250-51 (1938).

2. In 1961, Congress amended this Act to prohibit "any person . . . convicted of a crime punishable by imprisonment for a term exceeding one year" from "receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." See An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342,75 Stat.757 (1961); H.R. Rep. No. 87-1202, at 4-5 (1961).

3. These prohibitions are codified at 18 U.S.C. §922(g)(1), which, as amended, prohibits "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" from possess[ing] in or affecting commerce, any firearm or ammunition."

4. Excluded from the term "crime punishable by imprisonment for a term exceeding one year" are "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," or "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less," and "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of [the statute], unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms," 18 U.S.C.

§921(20).

B. Factual Background

1. In or about 1973, Petitioner pleaded guilty to one count of mail fraud for falsifying information on a credit application for American Express, that involved approximately six thousand five hundred dollars. Petitioner pleaded guilty in federal court and was sentenced to three years' probation.

2. Subsequently, in or about 1975, Petitioner pleaded guilty in state court to one count for kiting checks – creating a liability owing to Bank of America in the sum of approximately five to seven thousand dollars. Although Petitioner's sentence in the state court proceeding did not require him to serve any time, it violated Petitioner's federal probation, which triggered an approximate four-month period of incarceration.

3. On May 6, 1998, Petitioner pleaded guilty to one count of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, and 17 U.S.C. § 240.10b-5; and to one count of subscribing to a false tax return, in violation of 26 U.S.C. §7206(1). Judgment and Probation/Commitment Order, *United States v. Michaels,* No. 2:97-cr-00799 (C.D. Cal. May 11, 1998). Petitioner was sentenced to 21 months' imprisonment, serving 15, at the Nellis Federal Prison Camp in North Las Vegas, Nevada, and three years of supervised release.

4. Since serving his last sentence nearly twenty years ago, Petitioner has been responsible and living his life in compliance with the law. Petitioner earned his Bachelor of Arts Degree in political science in 2005, and a Master of Arts Degree in public administration in 2007, both from the University of Las Vegas.

5. Petitioner has been involved in small businesses, has assisted others in developing their own small business, and has made multiple attempts for Congress in Nevada's 3rd Congressional District. Petitioner is currently an Independent candidate for the U.S. Senate in this 2018 election.

6. As a person gaining some notoriety in the public eye, Petitioner desires to purchase a firearm for self-defense in his home but refrains from doing so only because he reasonably fears criminal prosecution under 18 U.S.C. § 922(g)(1). It is for this reason that Petitioner filed his underlying action against the government.

C. Proceedings Below

1. In March of 2016, Petitioner filed his complaint against the Respondents in the U.S. District Court of Nevada, alleging among other things, that 18 U.S.C. 922(g)(1) was unconstitutional as applied to him as it unfairly infringed upon his fundamental Second Amendment right to defend himself in his home.

2. Respondents filed a motion to dismiss the complaint, pursuant to Fed. R. Civ. P 12(b)(1) for lack

of subject matter jurisdiction, and 12(b)(6) for failure to state a claim on which relief could be granted.

3. Petitioner cross-moved to amend his complaint to, among other things, name appropriate State Officials and to articulate appropriate causes of action against them in their official capacities, to obtain complete legal redress. Petitioner asserted that Nev. Rev. Stat. Ann. § 202.360(1)(b) violated Petitioner's fundamental Second Amendment rights in similar fashion to 18 U.S.C. 922(g)(1).

4. Although Petitioner's underlying complaint had asserted the District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(1), 1346(a)(2), 2201(a) and 2202, Petitioner also sought by his cross-motion to assert waiver of immunity, which Petitioner alleged existed pursuant to 5 U.S.C. §§702-703.

5. The District Court granted Respondents' motion to dismiss and denied Petitioner's cross-motion to amend, finding that Petitioner's claims failed as a matter of law. (App.7a)

6. Relying upon *District of Columbia v. Heller*, 554 U.S. 570 (2008) and Ninth Circuit precedent, *United States v Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *United States v. Phillips*, 827 F.3d 1171, 1176 (9th Cir. 2016), the District Court found that Petitioner's "as applied" challenge was foreclosed, on the premise and precedent that "felons are categorically different from individuals who have a

fundamental right to bear arms," *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010).

7. The District Court stated, "Though the Phillips court noted that there may be some 'good reasons to be skeptical about the correctness of the current framework of analyzing the Second Amendment rights of [all] felons,' it concluded that it was bound by Heller and Vongxay and upheld the defendant's §922(g)(1) conviction."

8. Since the District Court deprived Petitioner of any opportunity to come forward with evidence to illustrate his trustworthiness for having a firearm in his home for self-defense as based on his approximate twenty-year history of living a productive, responsible life in compliance with the law, Petitioner appealed to the Ninth Circuit Court of Appeals.

9. The Ninth Circuit, in its November 3, 2017 Memorandum Opinion (App. 3a), found that the District Court properly dismissed Petitioner's action, since its "prior precedent forecloses [Petitioner's] as-applied challenge to §922(g)(1)" (relying upon United *States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) stating that "felons are categorically different from the individuals who have a fundamental right to bear arms," and upholding § 922(g)(1) against a Second Amendment challenge; also *United States v. Phillips*, 827 F.3d 1171, 1174-75 (9th Cir. 2016), rejecting as foreclosed by precedent the argument that imposing § 922(g)(1) on non-violent felons violates the Second Amendment).

10. The Ninth Circuit also rejected as meritless, Petitioner's contention that the District Court committed reversible error by failing to apply strict scrutiny, relying upon *United States v. Chovan*, 735 F.3d 1127, 1136-38 (9th Cir. 2013) (holding that a statute "does not implicate this core Second Amendment right [if] it regulates firearm possession for individuals with criminal convictions").

11. Petitioner petitioned for panel rehearing and/or rehearing en banc, and same was denied by the Court on March 29, 2018. (App. 1a)

REASONS FOR GRANTING THE PETITION

I. There are Conflicts Among the Courts of Appeals as to Whether a Felon May Lodge an As-Applied Challenge to the Constitutionality of Felony Dispossession Laws such as 18 U.S.C. §922(g)(1).

A. The First, Third, Seventh, Eighth and D.C. Circuits permit (or would permit) such as-applied challenges.

The First Circuit Court in *United States v. Torres-Rosario*, 658 F.3d 110 (1st Cir. 2011), opined that "given 'the presumptively lawful' reference in Heller, the Supreme Court may be open to claims that some felonies do not indicate potential violence and cannot be the basis for applying a categorical ban."

The Third Circuit in *Binderup v. Atty. Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), petition for certiorari denied, *Sessions v Binderup*, No. 16-847 (June 26, 2017), affirmed two lower court judgments that upheld as-applied challenges to the constitutionality of 18 U.S.C. §922(g)(1), finding that the statute unlawfully infringed upon the Second Amendment rights of both challengers. Although the challengers' underlying offenses were considered felonies under the federal statute, the court went to great lengths to distance the challengers from more "serious" felons, rationalizing that under the state court framework, the crimes committed were not that serious, constituting just misdemeanors, although admittedly, potentially punishable by three to five years of imprisonment. Propensity for violence (or lack thereof) was a significant factor in the court's decision to affirm.

The Seventh Circuit in *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010), relying upon *Heller*, found that felon disarmament bans were only "presumptively lawful," meaning that "there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge."

The Eighth Circuit in *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014), was dealing with a violent offender, and although it rejected the challenger's as-applied challenge, it did so because the challenger had failed to present facts about himself and his background that distinguished his

circumstances from those of persons historically barred from Second Amendment protections and did not allege, e.g., that his prior felony conviction was for a nonviolent offense or that he is was no more dangerous than a typical law-abiding citizen (relying upon *United States v. Brown*, 436 Fed.Appx. 725, 726 (8th Cir. 2011) (per curiam) (unpublished) and *United States v. Barton*, 633 F.3d 168, 174 (3d Cir.2011)).

The D.C. Circuit in *Schrader v. Holder*, 704 F.3d 980, 992 (D.C. Cir. 2013), was grappling with "common law misdemeanants" as the challengers, and although it held that "disarmament of common-law misdemeanants as a class is substantially related to the important governmental objective of crime prevention, we reject plaintiffs' constitutional challenge," the court opined that "[w]ithout the relief authorized by section 925(c), the federal firearms ban will remain vulnerable to a properly raised as-applied constitutional challenge brought by an individual who, despite a prior conviction, has become a "law-abiding, responsible citizen entitled to 'use arms in defense of hearth and home. Heller, 554 U.S at 635, 128 S.Ct. 2783.'"

B. The Fourth, Ninth and Tenth Circuits reject such as-applied challenges.

The Fourth Circuit in *Hamilton v Pallozzi*, 848 F.3d 614 (2017), held that "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second

Amendment," absent certain narrow exceptions (e.g., being pardoned). "A felon cannot be returned to the category of 'law-abiding, responsible citizens' for the purposes of the Second Amendment" and "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.'"

The Ninth Circuit in Petitioner's own case below, held that "felons are categorically different from individuals who have a fundamental right to bear arms," relying upon *United States v Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *United States v. Phillips*, 827 F.3d 1171, 1176 (9th Cir. 2016), and rejected Petitioner's as-applied challenge as "foreclosed" by such precedent.

The Tenth Circuit in the case of *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (citing *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)) stated, "We have already rejected the notion that Heller mandates an individualized inquiry concerning felons pursuant to § 922(g)(1)."

These cases demonstrate a level of disparity in the due process afforded felons that lodge as-applied challenges. The case *sub judice* presents this Court with a pressing need and an opportunity to provide uniformity among the circuits as to the redress to be afforded a felon such as Petitioner.

II. This is the Only Case to Come Up Before this Court That Poses the Two Questions Presented, and the Answers Will Determine Whether Millions of Felons Living Responsible Lives in Compliance with the Law Have an Opportunity to Prove Their Entitlement to the Fundamental Second Amendment Right in Defense of Hearth and Home

Heller spoke about two very important presumptions. The first, is a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans. The second, is that longstanding prohibitions on the possession of firearms by felons are presumptively lawful regulatory measures.

It is axiomatic that when speaking of a simple "presumption" - strong or otherwise - there is an opportunity to overcome it. If there is not, then it isn't a presumption at all, but rather, a conclusion. And there is hardly an opportunity that can ever be experienced, without some burden of effort.

Heller chose its words carefully, when labelling its propositions as presumptions rather than as conclusions. This Court wisely left the door open on both counts, presenting the legion of lower courts and the parties that come before them, with opportunities to make the case as to why a particular American would or would not be excluded from those that have a fundamental Second Amendment right, and equally,

opportunities to make the case as to why a presumptively lawful prohibition on the possession of firearms by felons might or might not be unconstitutional as applied to a particular felon.

The caveat to the first strong presumption that the Second Amendment right (at its core) belongs to all Americans, is that any particular American would have to be "law-abiding and responsible."

As a threshold determination, we are a country with only one class of citizenship. There are no special carveouts for felons. They are included in that class, assuming they are otherwise American.

It is the *caveat* where things get a bit thorny.

Several of the Circuit Courts and their inferior courts have reached the conclusion that felons as a class, can never be law-abiding and responsible. Their logic dictates that because an individual felon is a part of that class, no matter how non-violent his individual underlying felony was, no matter how strictly in compliance with the law he has lived his individual life since completion of his sentence, no matter how many years he has lived his individual life in such strict compliance, no matter how productive he has individually spent his time - perhaps in great service to his community or in great accomplishment for the benefit of all mankind, no matter how responsible the office he now individually holds – he could be chauffeuring the Pope in the Vatican City; he could even be the President of the United States

(*Petitioner himself is presently running for a U.S. Senate seat*) - none of this matters. He will never, ever be law-abiding and responsible in the eyes of their law. It is the humble beginnings of the creation of "second-class" citizenship in this country.

This Honorable Court is not so short-sighted. *Heller* was a labor of great vision. If the presumptions enunciated in *Heller* mean anything at all, they mean that before the government can strip away an individual's fundamental Second Amendment right, it must meet the burden of that opportunity by presenting personal facts and personal circumstances surrounding the individual it is targeting. Merely providing a historical analysis of how felons as a class were perceived or treated under the law, falls way short of the mark.

After all, the presumption of validity that *Heller* pointedly speaks to, is one that concerns felon disarmament laws. There is no reason to believe that a challenger would be anyone *other* than a felon, and *Heller* had to implicitly recognize this.

In barring individual felons from lodging as-applied challenges to the constitutionality of felon disarmament laws such as 18 U.S.C. §922(g)(1), those courts that do so give the government a free pass or an opportunity without an attendant burden, ignoring what is really a mandate of *Heller*.

Heller of course, did not involve the various plights of felons, and a more in-depth analysis of those plights was simply not called for in the *Heller* case.

The *Barry Michaels* case, however, is ripe for such attention.

CONCLUSION

Petitioner respectfully requests this Court to grant this petition for writ of certiorari.

Respectfully Submitted,

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