No. 18-496

IN THE

Supreme Court of the United States

BARRY MICHAELS,

Petitioner,

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL OF THE UNITED STATES, AND THOMAS E. BRANDON, 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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

There is a five-to-five circuit conflict on "whether a felon is entitled to lodge an as-applied [Second Amendment] challenge to the constitutionality of a felon disarmament law such as 18 U.S.C. §922(g)(1)." Pet. i. In approximately half the circuits, such a claim is justiciable; in the other half, it is not. In other words, in approximately half the circuits, individuals have the right to assert their individualized Second Amendment right to self-defense in the home in this context; in the other half, they do not.

The Solicitor General has acknowledged this entrenched conflict in a case where the Attorney General sought certiorari review. Petition at 21-23, *Sessions v. Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847), 2017 WL 83637 (*Binderup* Pet.). Unless this Court intervenes now, citizens in the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits will continue to be deprived of the right to assert important individual rights under the U.S. Constitution while similarly situated citizens in the First, Third, Seventh, Eighth, and D.C. Circuits will be entitled to due process on their constitutional claims. The Second Amendment applies to the entire country, not just to five circuits. This Court should grant the petition to decide whether individuals throughout the Nation can assert their individual Second Amendment rights in an as-applied challenge to Section 922(g)(1).

The issue presented in this case also implicates the constitutionality of a federal statute. Five circuits have held that Section 922(g)(1) is constitutional in all of its applications, four circuits have held that it may be unconstitutional in some applications not yet before those courts, and one circuit has held it to be unconsti-

tutional in some circumstances. It is truly anomalous for this Court to leave unaddressed the determination of some lower courts that a federal statute is unconstitutional in some applications. Perhaps that is why Justices Ginsburg and Sotomayor would have granted the petition for a writ of certiorari in *Binderup*, 137 S. Ct. at 2323.

The Court should also address, on plenary review, the significant arguments raised in the motion to substitute Rod Rosenstein as respondent in his official capacity as Acting Attorney General. The longer those arguments go unaddressed, the more difficult it becomes to unwind the consequences of Matthew Whitaker's unlawful appointment as Acting Attorney General.

I. The Petition Presents An Important Second Amendment Question On Which Circuit Courts Are Intractably Divided.

The government has admitted (when it suited its litigation posture) that the circuit courts are deeply divided about whether an individual can even assert an as-applied challenge to 18 U.S.C. § 922(g)(1)'s categorical ban on possession of firearms by a convicted felon. Cert. Reply at 3, *Binderup*, *supra* (No. 16-847), 2017 WL 1353289 (*Binderup* Reply); *Binderup* Pet. 21-23. That circuit conflict is directly implicated in this case because the *only* issue decided below was the threshold question of whether petitioner's as-applied challenge is justiciable. The Ninth Circuit held that it is not; if petitioner had asserted his claim in the First, Third, Seventh, Eighth, or D.C. Circuits, he would have had his day in court. The justiciability of an American's rights under the Second Amendment should not

depend on the happenstance of where in the country he lives.

A. The Courts of Appeals Are Divided on the Threshold Question of Whether an As-Applied Second Amendment Challenge to 18 U.S.C. § 922(g)(1) Is Ever Cognizable.

1. As explained in the petition (Pet. 12-15), the courts of appeals are deeply divided about whether a felon can *ever* be heard to argue that, as applied to him, Section 922(g)(1) violates the Second Amendment. The First, Third, Seventh, Eighth, and D.C. Circuits have each held that an individual may assert an as-applied Second Amendment challenge to Section 922(g)(1). *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011), *cert. denied*, 565 U.S. 1271 (2012); *Binderup v. Attorney Gen.*, 836 F.3d 336, 354-355 & nn.7-8 (3d Cir. 2016) (en banc) (opinion of Ambro, J.), *cert. denied*, 137 S. Ct. 2323 (2017); *id.* at 370 (Hardiman, J., concurring in part and concurring in the judgments); *United States v. Williams*, 616 F.3d 685, 693 (7th Cir.), *cert. denied*, 562 U.S. 1092 (2010); *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *Schrader v. Holder*, 704 F.3d 980, 991 (D.C. Cir.), *cert. denied*, 571 U.S. 989 (2013). In contrast, the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have held that individuals with felony convictions *cannot* assert as-applied Second Amendment challenges to Section 922(g)(1). *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir.), *cert. denied*, 138 S. Ct. 500 (2017); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir.), *cert. denied*, 562 U.S. 867 (2010); *United States v. Phillips*, 827 F.3d 1171, 1174 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 56 (2017); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), *cert. denied*, 559

U.S. 970 (2010); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir.) (per curiam), *cert. denied*, 560 U.S. 958 (2010).

The Solicitor General does not dispute that the circuits are intractably divided on the issue decided below and presented here: whether an as-applied challenge to Section 922(g)(1) is ever cognizable. Indeed, the Solicitor General has previously decried that circuit conflict in seeking certiorari review of the Third Circuit's en banc decision in *Binderup*, *supra*. There, the Solicitor General explained that circuits were divided about "the availability of as-applied Section 922(g)(1) challenges." *Binderup* Reply 3 (citation omitted); *see Binderup* Pet. 21-23. Such a division on a question of justiciability is untenable, particularly when it implicates a fundamental individual right under the Constitution. The question presented by this case has been fully vetted in the lower courts, and further percolation is unwarranted. Ten circuits have weighed in, and there is no need to wait for the two remaining two regional circuits to pick sides. This Court should grant the petition to decide whether a convicted felon may ever assert an as-applied Second Amendment challenge to the categorical ban in Section 922(g)(1).

2. In his brief in opposition in this case, however, the Solicitor General sings a different tune. Rather than addressing whether the circuit conflict on the threshold question of justiciability continues to warrant this Court's review, the Solicitor General ignores that circuit conflict and instead addresses a different potential conflict not relied on by petitioner. The Solicitor General argues (BIO 10-13) that review is not warranted because the decision below does not conflict

with the Third Circuit's ultimate holding in *Binderup* that Section 922(g)(1) was unconstitutional as applied to a defendant in that case—because the Ninth Circuit in this case did not hold that petitioner's as-applied challenge would fail under the reasoning employed in *Binderup*. But that argument is a blatant attempt to obfuscate the real circuit conflict implicated by this case.

Of course the decision below does not conflict with any holding on the merits of an as-applied challenge to Section 922(g)(1)—because in the Ninth Circuit no such as-applied challenge is cognizable. And petitioner is not asking this Court to decide the merits of his as-applied challenge in the first instance. Rather, petitioner asks this Court to take the next incremental step in developing Second Amendment law in the wake of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In *Heller*, the Court explained that traditional bans on felons' possessing firearms are "presumptively lawful," 554 U.S. at 626-627 & n.26, a suggestion the Court reiterated in *McDonald*, 561 U.S. at 786 (opinion of Alito, J.). But noting that a categorical ban is "presumptively" valid is a far cry from suggesting that it is not susceptible to as-applied challenges. Indeed, it is the exact opposite of that—because a presumptively valid law is by definition open to being proven invalid when the presumption can be overcome. This case does not ask the Court to decide *which* as-applied challenges would succeed in overcoming that presumption; it asks the Court to decide the antecedent question of whether an as-applied challenge is ever cognizable. Interest groups across the ideological spectrum have urged the Court to address these questions. *E.g.*, Brady Ctr. to

Prevent Gun Violence *Amicus* Br., *Binderup*, *supra* (No. 16-847), 2017 WL 511828; Cato Inst. *Amicus* Br., *Hamilton*, *supra* (No. 16-1517), 2017 WL 3141399. The Court should step in now to resolve the deep circuit conflict on that question.

B. This Case Is an Ideal Vehicle to Resolve the Circuit Conflict.

In arguing against certiorari review, the Solicitor General States stops short of suggesting that this case is a bad vehicle for resolving the circuit conflict over the threshold justiciability question. And for good reason: this is an ideal case in which to resolve that conflict.

The Court held in *Heller* that the core of the individual right secured by the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Reasonable minds may differ about whether that important right should be categorically denied to all individuals who have been convicted of any crime, whether deprivation of that right should be limited to those who have committed violent offenses or have otherwise shown a propensity to violence, or whether no such deprivation is ever appropriate after an individual has paid his debt to society. And petitioner is not asking this Court to make those determinations in this case. But reasonable minds have already disagreed about whether those questions can ever be addressed by a federal court—and petitioner asks this Court to resolve that disagreement.

That being said, this is an ideal vehicle to decide that threshold question because there is substantial reason to doubt the Solicitor General's assertion (BIO

12-13) that petitioner could not prevail on his as-applied challenge if permitted to pursue it. Petitioner has never been convicted of a crime involving violence or even plausibly suggesting a connection to dangerousness or a propensity to commit violence.

The Solicitor General nevertheless contends that petitioner forfeited his Second Amendment rights when he committed nonviolent offenses because by tradition this Nation has limited Second Amendment rights to law-abiding citizens. That is an overstatement at best. In its earliest incarnation as the Federal Firearms Act, Section 922(g)(1) stripped Second Amendment rights only from individuals who had committed violent or dangerous crimes (felonies and misdemeanors) such as murder, rape, kidnapping, and burglary. Pub. L. No. 75-785, §§ 1(6), 2(f), 52 Stat. 1250, 1250-1251 (1938). "[H]istorically the rationale for disarming felons has focused on actually dangerous people, not whoever the legislature decides will be punished by over a year in prison." Cato Inst. *Amicus* Br. at *5, *Hamilton*, *supra* (No. 16-1517).

That calculus reflects a concern about limiting access to firearms for individuals who have shown a propensity for violence—rather than a strict adherence to labels such as "felony" or "misdemeanor" as the Solicitor General suggests (BIO 6). There is good reason for that: a firearm is by its nature a dangerous weapon, and Congress may have valid reasons for restricting its availability to individuals plausibly connected to dangerous or violent activity. But that is true whether the violent crime is labeled a felony or a misdemeanor. And the same considerations that might counsel in favor of limiting the gun rights of someone convicted of a misdemeanor domestic-violence offense, *see* 18 U.S.C.

§ 922(g)(9), would not suggest that someone who has committed tax fraud should suffer a similar deprivation of rights.

Indeed, that very calculus is reflected in the U.S. Code. The definitions provision applicable to Section 922 specifies that an individual convicted of certain nonviolent felonies such as "antitrust violations" and "other similar offenses relating to the regulation of business practices" shall not be subject to the deprivation of rights in Section 922(g)(1). 18 U.S.C. § 921(a)(20)(A). Where the statutory scheme already includes exemptions from the categorical deprivation of felons' rights, it makes little sense for half the country to prohibit felons who are similarly situated from even arguing that they should be exempt as well.

This Court has emphasized that "the inherent right of self-defense has been central to the Second Amendment right"—and that "the need for defense of self, family, and property is most acute" "in the home." *Heller*, 554 U.S. at 628. It is that acute need that drives petitioner here. Petitioner is a well-known figure who has run for public office numerous times. Because of his notoriety, he wishes to obtain a firearm for the sole purpose of self-defense in his own home. Petitioner has never committed a crime with even a plausible connection to violence or dangerousness. In the 20 years since his most recent conviction, he has obtained college and graduate degrees, has been an upstanding member of his community, and has lived a law-abiding life. He now seeks an opportunity to argue that Section 922(g)(1)'s lifetime ban on possessing firearms is unconstitutional as applied to him. This Court should grant certiorari and hold that his claim is at least justiciable.

This issue will not go away. In seeking this Court's review in *Binderup*, the Solicitor General argued that review was warranted because "Section 922(g)(1) is by far the most frequently applied of Section 922(g)'s firearms disqualifications, forming the basis for thousands of criminal prosecutions and tens of thousands of firearm-purchase denials each year." *Binderup* Pet. 23. The scope of defenses an individual can assert in such circumstances should not vary from circuit to circuit. The lower courts are divided about whether Section 922(g)(1) is constitutional in all or only some of its applications. It is anomalous for this Court to leave unaddressed conflicting lower court rulings on the constitutionality of a federal statute. Justices Ginsburg and Sotomayor would have granted the petition in *Binderup*, *supra*, perhaps reflecting the Court's usual practice of stepping in to resolve these types of conflicts. There is no reason to believe that the conflict on the justiciability question will resolve itself—and as long as that conflict lingers, the conflict on the underlying substantive questions will only deepen as some courts find applications of the statute unconstitutional and others adhere to their view that it is constitutional in every application.

II. If The Court Grants The Petition, It Should Carry With It The Question Of Whether Matthew Whitaker's Appointment As Acting Attorney General Was Lawful.

If the Court grants certiorari, it should also direct the parties to brief and argue the question whether the President lawfully designated respondent Matthew Whitaker temporarily to perform the functions of the Attorney General. The Court may wish to expand the time allotted for oral argument accordingly.

In the time since briefing was completed on the Motion to Substitute, we have learned another startling fact: Mr. Whitaker took the extraordinary step of disregarding the advice of Department of Justice career ethics officials to recuse from the Special Counsel's investigation in light of his prior overt, stated hostility to it. While that question was pending, Mr. Whitaker did not exercise authority over the investigation. As of this week, he does for the first time.

That question of the lawfulness of his designation as Acting Attorney General arises in this case in two ways. First, Mr. Whitaker is a party, automatically substituted in his official capacity. Petitioner's pending Motion to Substitute details this Court's authority to decide the issue in that posture.

Second, Mr. Whitaker is an attorney overseeing matters on behalf of the Department of Justice. Importantly, the Government has stressed this Court's exclusive authority to address that question in this case. In the District Court for the District of Columbia, petitioner sought a preliminary injunction against Mr. Whitaker overseeing this litigation. But he withdrew that request in light of the Government's emphatic argument that this Court alone had that authority. Mem. in Opp. to Mot. for Prelim. Inj. at 1-2, 12-14, *Michaels v. Whitaker*, No. 18-cv-2906-RDM (D.D.C. Dec. 13, 2018) (ECF 16).

As discussed in the Reply Brief in support of the Motion to Substitute, this Court should decide the question because of its overriding importance and because there still remains no realistic prospect of it reaching this Court otherwise—at least in a remotely timely fashion. The Government has successfully objected to every single vehicle that might give rise to an

appealable order. No one doubts the mass disruption that would arise from a ruling of this Court a year later that the designation was unlawful.

We recognize the prospect that—although the President has not yet nominated a permanent Attorney General—the Senate could confirm someone before this Court rules in this case. But that would perfectly fit the doctrine that the government may not moot a controversy through its own voluntary acts when it claims the right to repeat the same unconstitutional conduct. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (explaining that "voluntary cessation of challenged conduct" does not moot case when defendant "continues to defend the legality" of the challenged conduct). Again, the sooner this Court rules, the better the national interest will be served. And if it does not rule in this case, it may never get another opportunity.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the Motion to Substitute, and the Reply in support of that motion, the petition should be granted so that the Court can determine both whether petitioner's claim is cognizable and whether Mr. Whitaker's appointment is valid.

Respectfully submitted,

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