No. 20-6046

IN THE SUPREME COURT OF THE UNITED STATES

ERIC GERARD MCGINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(8), the federal statute that prohibits persons subject to certain domestic-violence protective orders from possessing firearms, violates the Second Amendment on its face.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 956 F.3d 747.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 2020. A petition for rehearing was denied on July 1, 2020. The petition for a writ of certiorari was filed on October 13, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on

one count of possession of an unregistered firearm, in violation of 26 U.S.C. 5841, 5861(d), and 5871; and one count of possession of ammunition by a person subject to a domestic-violence protective order, in violation of 18 U.S.C. 922(g)(8) and 924(a)(2). Judgment 1; Pet. App. B1. The district court sentenced him to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3; Pet. App. B2-B3. The court of appeals affirmed. Pet. App. A1-A9.

1. Recognizing that "[f]irearms and domestic strife are a potentially deadly combination," Congress has enacted various statutes designed to keep guns out of the hands of perpetrators of domestic violence. United States v. Hayes, 555 U.S. 415, 427 (2009). One such provision, 18 U.S.C. 922(g)(8), makes it unlawful for any person who is subject to a qualifying protective order to possess any firearm or ammunition in or affecting commerce. An individual falls within the statute only if the protective order:

> (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.

Ibid. The disqualification lasts only for the duration of the protective order. Ibid.

2. Petitioner physically assaulted his former girlfriend Sherry Thrash on two occasions, injuring her wrists, ribs, and face. Pet. App. A2. In August 2015, a state court in Texas issued a protective order prohibiting petitioner from "committing family violence against Thrash or engaging in conduct . . . reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass Thrash or a member of her family or household." Ibid. (brackets and citation omitted). The order included findings that "family violence has occurred" and that "family violence is likely to occur in the foreseeable future." Ibid. The order separately prohibited petitioner from possessing a firearm and warned him that such possession would be a federal crime under 18 U.S.C. 922(g)(8). Ibid. The protective order remained in effect for two years. Ibid.

In June 2016, while the protective order was still in effect, petitioner attempted to buy a lower receiver (a component of a firearm). Pet. App. A2. Petitioner lied in response to a background-check question about whether he was subject to a domestic-violence protective order. Ibid. The Bureau of Alcohol, Tobacco, Firearms, and Explosives caught the lie and informed

petitioner by phone and certified mail that he could not lawfully own a firearm or ammunition. Ibid. At some point after that incident, petitioner created his own lower receiver using a 3D printer. Ibid.

In July 2017, while petitioner was still subject to the protective order, police officers in Texas encountered him after he had apparently fired a gun outdoors. Pet. App. A2. The officers searched petitioner's backpack discovered a short-barreled AR-15 rifle with a 3D-printed lower receiver, five 30-round magazines, and a list that included the names and addresses of several prominent politicians. Ibid.

A federal grand jury in the Northern District of Texas indicted petitioner on one count of possession of an unregistered firearm, in violation of 26 U.S.C. 5841, 5861(d), and 5871; and one count of possession of ammunition by a person subject to a domestic-violence protective order, in violation of 18 U.S.C. 922(g)(8) and 924(a)(2). Indictment 1-2; Pet. App. A2. A jury found petitioner guilty on both counts. Judgment 1; Pet. App. A2. The district court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3; Pet. App. B2-B3.

3. The court of appeals affirmed petitioner's convictions, but remanded for the limited purpose of enabling the district court

to amend its written judgment to conform to its oral pronouncements at sentencing. Pet. App. A1-A9.

As relevant here, the court of appeals rejected petitioner's contention that Section 922(g)(8) violates the Second Amendment on its face. Pet. App. A3-A7. The court explained that, under its precedents, it would first "'look to whether the [challenged] law harmonizes with the historical traditions associated with the Second Amendment'" and, if not, "determine and 'apply the appropriate level of means-ends scrutiny.'" Id. at A3 (quoting National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194-195 (5th Cir. 2012), cert. denied, 571 U.S. 1196 (2014)). The court found it unnecessary to conduct the first step of that inquiry because, "[e]ven assuming arguendo that the conduct burdened by § 922(g)(8) falls within the Second Amendment right, [petitioner's] facial challenge fails." Id. at A5. The court explained that, because Section 922(g)(8) "applies only to a discrete class of individuals for limited periods of time," the appropriate level of scrutiny under its precedents was intermediate scrutiny. Ibid. The court then determined that Section 922(g)(8) satisfies intermediate scrutiny: petitioner conceded that the statute serves "not just an important government interest, but a compelling one," and the statute's procedural requirements and temporary duration render it

at least "'reasonably adapted' to the goal of reducing domestic gun abuse." Id. at A6-A7.

In a concurring opinion, Judge Duncan stated that the court of appeals "should retire" its two-step framework "in favor of an approach focused on the Second Amendment's text and history." Pet. App. A9. Judge Duncan believed that such an approach would "provide firmer ground for evaluating restrictions on the right to bear arms" and would "cabin judicial application of the 'tiers-of-scrutiny approach to constitutional adjudication,' an exercise which 'is increasingly a meaningless formalism.'" Ibid. (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 7-13) that 18 U.S.C. 922(g)(8) violates the Second Amendment on its face. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. In District of Columbia v. Heller, 554 U.S. 570 (2008), this Court held that the Second Amendment codifies an "individual right to possess and carry weapons in case of confrontation." Id. at 596. The Court emphasized, however, that the right is "not unlimited." Id. at 592; see McDonald v. City of Chicago, 561 U.S.

742, 786 (2010) (plurality opinion) (explaining that the Second Amendment "does not imperil every law regulating firearms"). The Court also stated that the right to keep and bear arms belongs to "law-abiding, responsible citizens." Heller, 554 U.S. at 635 (emphasis added).

The "historical background of the Second Amendment," Heller, 554 U.S. at 592, confirms that Congress may disarm individuals who cannot be trusted to use firearms responsibly. In England, the government had the power to disarm people who were "'dangerous to the Peace of the Kingdom.'" Kanter v. Barr, 919 F.3d 437, 456 (7th Cir. 2019) (Barrett, J., dissenting) (quoting Militia Act, 13 & 14 Car. 2, c. 3, § 13 (1662)). English common law also punished people who engaged in dangerous conduct with "forfeiture of their 'armour.'" Ibid. (citation omitted). "Similar laws and restrictions appeared in the American colonies." Id. at 457. "[F]ounding-era legislatures categorically disarmed [various] groups whom they judged to be a threat to public safety." Id. at 458.

"[V]arious Second Amendment precursors proposed in the state [ratifying] conventions," Heller, 554 U.S. at 603, confirm the understanding that Congress may disarm dangerous individuals. A "highly influential" proposal presented at the Pennsylvania ratifying convention, id. at 604, stated that "no law shall be passed for disarming the people or any of them unless for crimes

committed, or real danger of public injury from individuals." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 665 (1971) (emphasis added). Similarly, a proposal presented by Samuel Adams at the Massachusetts ratifying convention provided that Congress may not "prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Id. at 681 (emphasis added). At the time of the framing, "peaceable" meant "[n]ot violent; not bloody"; "[n]ot quarrelsome, not turbulent." 2 Samuel Johnson, A Dictionary of the English Language (5th ed. 1773).

In this case, petitioner has brought (Pet. 7) a "facial constitutional challenge" to Section 922(g)(8). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Petitioner thus bears the burden of establishing that Section 922(g)(8) violates the Second Amendment as to all individuals in all circumstances.

Petitioner has not fulfilled that burden. Section 922(g)(8) applies only to persons subject to domestic-violence protective orders issued after notice and the opportunity for a hearing, and even then (under the prong at issue here) only when the order includes a finding that the target represents a "credible threat"

to the physical safety of the partner or child. 18 U.S.C. 922(g)(8); see Pet. App. A2 (explaining that the order in this case included such a finding). The disqualification, moreover, lasts only as long as the protective order remains in place. Pet. App. A2. The persons in the narrow category covered by the statute by definition pose a "real danger of public injury." 2 Schwartz 665. At a minimum, Congress was permitted to conclude that at least some individuals covered by the statute pose such a danger in at least some circumstances -- which suffices to defeat petitioner's facial challenge.

Petitioner contends (Pet. 14-15) that "§ 922(g)(8) is a relatively recent invention" and that "protective orders are a modern approach to addressing domestic violence." This Court has never held, however, that modern firearms regulations can be constitutional only if they mirror colonial regulations. Just as the Second Amendment protects some modern weapons that were not "in existence in the 18th century," Heller, 554 U.S. at 582, so too it permits some modern regulations that were not in existence in the 18th century. It is enough if the modern law is "fairly supported" by tradition. Id. at 627; see Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[W]hen legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there

obviously will not be a history or tradition of banning such weapons or imposing such regulations. That does not * * * mean that the government is powerless to address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach is to reason by analogy from history and tradition."). Here, the historical understanding that the government may disarm people because of "real danger of public injury," 2 Schwartz 665, fairly supports Section 922(g)(8).

2. Petitioner does not contend that there is any circuit conflict about the constitutionality of Section 922(g)(8). To the contrary, every court of appeals to consider the question has held that Section 922(g)(8) complies with the Second Amendment. See United States v. Chapman, 666 F.3d 220, 225-226 (4th Cir. 2012); United States v. Bena, 664 F.3d 1180, 1182-1185 (8th Cir. 2011); United States v. Reese, 627 F.3d 792, 799-805 (10th Cir. 2010), cert. denied, 563 U.S. 990 (2011).

Petitioner instead argues (Pet. 7) that there is a circuit conflict about the more abstract question whether a court should use "a two-step means-end scrutiny framework" or a historical framework when evaluating restrictions on the right to keep and bear arms. But regardless of whether that broader issue warrants this Court's review in some other case, it makes no difference to the outcome of this case. Petitioner does not challenge the court of appeals' determination that Section 922(g)(8) complies with the

Second Amendment under a levels-of-scrutiny framework, and as just shown, the provision also passes muster under the historical framework that petitioner advocates. Indeed, the Eighth Circuit has upheld Section 922(g)(8) applying just such a historical framework. See Bena, 664 F.3d at 1182-1185.

There exists no sound basis for granting review to determine whether the court of appeals used the correct legal framework, when the result would be the same regardless of the framework. "This Court * * * reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956); see McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 603 (1821) ("The question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed."). "The fact that the [court below] reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the [lower] court's decision." California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2021