No. _____

In The
Supreme Court of the United States

ROBERT TIMOTHY HARLEY,

Petitioner,

v.

THE ATTORNEY GENERAL OF THE UNITED STATES AND THE DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

MARVIN D. MILLER
THE LAW OFFICES OF MARVIN D. MILLER
1203 DUKE STREET
ALEXANDRIA, VA 22314
(703) 548-5000
OFC@MDMILLERLAW.COM

COUNSEL FOR PETITIONER

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LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

After this Court's landmark Second Amendment decision in *District of Columbia v. Heller*, 554 U.S. 270 (2008), there were a series of cases in the Courts of Appeals challenging the application of restrictions on possession of firearms. By and large, these cases were direct appeals of criminal convictions. Essentially the challengers took the position that the prohibition or disarmament statute under which they were prosecuted was not constitutional in light of this Court's decision in *Heller*. These challenges were generally categorized by the Courts of Appeals as "as-applied" challenges, even though they were, in actuality, facial challenges to the constitutionality of the statute which prohibited the individuals from possessing firearms. There were other "as-applied" challenges also raised which, as in this case, did not contest the constitutionality of the statute at issue; rather, they contended that the statute, although constitutional, was not constitutional as applied to the challenger individually because of their personal circumstances.

The Courts of Appeals are split on individual as-applied challenges which contend that, under the Second Amendment, an otherwise constitutional disarmament statue is not constitutional when applied specifically to a given individual because of their unique circumstances. Some, such as the D.C., the Seventh, and the Third Circuits accept that there may be such challenges, and others, such as the Ninth, Eleventh, and Fourth Circuits do not.

This case presents the issue of whether individual, personal as-applied challenges to the

application of statutory prohibition on possession of firearms for the protection of hearth and home are allowed under the Second Amendment like they are under the First Amendment.

The question presented is:

1) Can there be a personal, individual as-applied challenge under the Second Amendment to a prohibition on the possession of a firearm for the protection of hearth and home which contends that the statutory ban at issue, in this case 18 U.S.C. §922(g)(9), is constitutional, but that it is not constitutional when applied specifically to the individual person raising the challenge, because of their unique and individual circumstances?

PARTIES TO THE PROCEEDINGS

All parties to these proceedings are noted in the caption of the case. No party is a corporation.

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PETITION FOR WRIT OF CERTIORARI

This petition asks this Court to address whether a citizen may bring an individual, personal as-applied challenge to a disarmament statute. Since the Second Amendment is a fully equal part of the Bill of Rights, then, as allowed in First Amendment cases, may an individual bring a personal "as-applied" challenge to a statute which restricts or prohibits their rights under the Second Amendment to possess a firearm for home defense, while agreeing that the statute is constitutional, although not constitutional when applied to them because of their unique circumstances. "As-applied" challenges of this sort have been allowed in the First Amendment context in cases such as *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), where a restriction on commercial speech was not constitutional as applied to petitioners. There has been no decision by this Court on whether such as-applied challenges are also permissible under the Second Amendment. There is a split in the circuit on the issue which this case will allow this Court to resolve.[1]

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[1] Cases recognizing that there may be such individual, personal as-applied challenges are in D.C. in *Schrader v. Holder*, 704 F.3d 980 (DC Cir. 2013); the Seventh in *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); the Third in *Binderup v. Attorney General,* 836 F. 3d 386 (3rd Cir. 2016) (*en banc*); but see the opposite in the Fourth in this case and in *United States v. Staten*, 666 F.3d 154 (4th Cir. 2016); the Ninth in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); and the Eleventh in *United States v. White*, 593 F.3d 1199 (11th Cir. 2010).

Petitioner, who is now 58 years old, sought declaratory and injunctive relief in the United States District Court in Alexandria, Virginia, allowing him to possess a firearm for protection of hearth and home despite the fact that in 1993, he pled guilty and received a $75.00 fine in a Virginia court for an unwanted touching of his then wife under Virginia's domestic assault statute, Va. Code §18.2-57.2. He has had no run-ins with the law since then. After graduating from high school, he rose from a common laborer to an Electrician II in the Fairfax County Water Department by the time he retired in 2012. He also distinguished himself in the Volunteer Fire Department over a many year career, including being captain of the department. The district court determined that, no matter how he had lived or what he had achieved, the statute was constitutional and that was the end of the inquiry. The Fourth Circuit affirmed, even though they have allowed such challenges under the First Amendment. *See*, e.g., *Educ. Media Co. at Va. Tech v. Insley,* 731 F.3d 291 (4th Cir. 2013).

It would be appropriate for this Court to settle the split in the circuits on individual, personal as-applied challenges such as in this case, and determine that, because the Second Amendment is equal to the First Amendment, it is proper to allow personal, individual as-applied challenges, in the Second Amendment context, to restrictions on the exercise of the right to possess firearms for home defense.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit issued its decision on 22 February 2021, and it is set forth in Appendix A. The memorandum opinion of the district court of 16 April 2017 is set forth in Appendix B, and judgment on 17 April 2017 is set forth in Appendix C.

JURISDICTION

Due to this Court's orders of March and April 2020 and its extension to one hundred and fifty days to file a petition for a writ of certiorari, the decision by the Fourth Circuit on 22 February 2021 makes this petition due on 22 July 2021. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides in pertinent part: "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

Prohibition on the possession of firearms by domestic violent misdemeanants is in 18 U.S.C. §922 (g)(9) which provides, in pertinent part, that "It shall be unlawful for any person … who has been convicted in any court of a misdemeanor crime of domestic violence … to … possess … any firearm or ammunition … which has been transported in interstate or foreign commerce.

STATEMENT

Your Petitioner, Timothy Harley, who is 58 years old, filed a civil suit in the United States District Court for the Eastern District of Virginia at Alexandria against the Attorney General of the United States and the Director of the Bureau of Alcohol, Tobacco, and Firearms, in their official capacities, seeking declaratory judgment and injunctive relief pursuant to 28 U.S.C. §§2201 and 2202. He asked the court to bar the Defendants from enforcing 18 U.S.C.§922(g)(9) as to him. His case was an individual, personal as-applied challenge to §922 (g)(9) on the basis that, while it is a constitutional statute, it is, nonetheless, unconstitutional as applied to him individually. He did not contest the statute's overall constitutionality; only its application to him.

In 1993, now 28 years ago, he was convicted of misdemeanor domestic assault pursuant to Va. Code §18.2-57.2. He and his then wife had an altercation during which he was outside of a Ford Bronco and she was behind the wheel with the engine on. When the vehicle rolled forward and stopped, he stepped up on the running board to reach in and turn off the ignition switch. She apparently pushed him. He grabbed to hold on and, in the process, grabbed her arm. According to her affidavit, filed on his behalf with his civil suit, she went to a local Fairfax County Police Station where she presented herself to a magistrate, and obtained a warrant to arrest him for misdemeanor assault. He pled guilty in July 1993, and received a minimal fine of $75.00, with no other penalty from the court. His then wife, in her affidavit for this case, said that this one time event

did not involve either of them having punched, slapped, or hit the other. In Virginia, any "offensive touching" constitutes common law assault and battery. *United States v. White*, 606 F.3d 144, 147-148 (4th Cir. 2010), *abrogated on other grounds* by *United States v. Castleman*, 572 U.S. 157, 162-163 (2012). Although their marriage ended in divorce, they remained friends and cooperated with each other in raising their two children. He has had no run-ins with the law since 1993.

Graduating high school in 1980, Mr. Harley obtained a job with Fairfax County Virginia in the Wastewater Treatment Department as a common laborer. During his employment with the County, he was promoted numerous times and achieved the rank of Industrial Electrician II before his retirement in 2012. After he retired, he opened a successful local business as a licensed electrician which he continues to operate today.

Not only did Mr. Harley rise through the ranks in Fairfax County, he also served as a Volunteer Fireman beginning at the age of 16 and rose to become Fire Captain of the Dale City Volunteer Fire Department. He was held in such high regard that he was elevated to its Board of Directors. During his service, he received numerous awards, including for bravery, when he risked his life to make a rescue.

In the United States District Court for the Eastern District of Virginia at Alexandria the Respondents, in support of their motion for summary judgment, filed an unsworn report from a police officer who claimed to have been told by Mr. Harley, on the day of the altercation with his wife, that he

had slapped her; however, that officer did not obtain the arrest warrant, nor was he involved in the case in Fairfax County Juvenile and Domestic Relations Court. The affidavit of the Petitioner's then wife, filed in support of his civil suit, and his own declaration under penalty of perjury regarding the conduct resulting in the misdemeanor, established it did not involve violence, but merely an offensive touching.

The Respondents also filed four studies, generally related to the topic of domestic assault, as exhibits to their motion for summary judgment in the district court below. Mr. Harley objected to each of those studies because they were not scientifically reliable, were not pertinent or relevant to the issues before the court in his individual as-applied challenge, and did not address the key issue in his case which was whether Mr. Harley, or someone in his individual circumstances, presents a risk to public safety if allowed to possess a firearm for home defense. Those invalid studies had inherent flaws in their methodology which made their conclusion unreliable, and not a single one provided any analysis to disprove Mr. Harley's contention that, at this time, as a long term, law abiding and responsible member of his community, he did not pose a risk of violence or danger if allowed to possess a firearm for home defense.

Mr. Harley filed a cross motion for summary judgment. The district court entered judgment for the Respondents. That decision did not view the facts in a light most favorable to Mr. Harley, and also accepted as valid the contested and objected, flawed studies offered by Respondents. (Appx. B at

47 and n.20). Mr. Harley's objections, based on their flawed research methods, lack of reliability, and irrelevance were not addressed by the district court. (Appx. B at 47 and n.20). That court also ruled that the "…lifetime ban is reasonably tailored to its [Congress's] interest in protecting family members from gun violence by domestic abusers, plaintiff cannot obtain judicial relief for his problem …". (Appx. B at 49). The court would not conduct an individual, personal as-applied analysis. 18 U.S.C. §922(g)(9) was constitutional on its face and that was all, it held, it needed to decide.

Mr. Harley appealed to the Fourth Circuit which sustained the district court in a two-to-one decision. Their decision, as in the district court, assumed, without deciding, that domestic violence misdemeanants are entitled to some degree of Second Amendment protection and applied intermediate scrutiny to the challenge to §922(g)(9). App. A at 7, 8. That analysis focused on whether the government met its burden of establishing a reasonable fit between the challenged law and a substantial government objective.

The Fourth Circuit's analysis relied heavily on its decision in *United States v. Staten*, *supra*, which was a direct appeal of a criminal conviction for violating §922(g)(9). *Staten* was a post–*Heller* challenge to the constitutionality of the application of §922(g)(9) to all individuals with domestic assault convictions. *Id.* at 156-157. It was a facial challenge to the constitutionality of §922(g)(9). *Id.* It was not an individual, personal as-applied challenge such as presented in this case. At a pretrial motion to dismiss in *Staten*, on the claim that the statute,

§922(g)(9), was unconstitutional, the government in its opposition, introduced various studies. Mr. Staten "… never disputed the accuracy of … the government's representations as to their content." *Id*. at 165. He made no objection to their reliability or relevance. Mr. Harley, on the other hand, did contest the studies that the government filed in his case because they were scientifically flawed, used invalid methodology, and were unreliable. They were also not relevant to the issue before the court in Mr. Harley's case. His objections were ignored. The district court did not rule on his objections, and simply accepted what the government offered as valid. Appx. B at 48 n.20.

The appellate opinion in this case also accepted the studies as valid, incorrectly claiming that Mr. Harley's objection to the studies filed with Respondent's motion for summary judgment was based solely on the "… relevance of those studies to his individual circumstances, he does not challenge the conclusions reached in the studies or the methodology used." Appx. A at 12 n.2. That is clearly erroneous. In his opening brief in the Fourth Circuit at 11-13, as in his opposition to Respondent's motion for summary judgment, dkt. 23 at 16-20, Harley disputed each study's scientific validity and the flawed approach of each. He questioned their unreliable findings and the inaccurate research methods they used in addition to their lack of relevance to the issue in his case.

Respondent's DEX5A exhibit for their motion for summary judgment, for example, was a 22-year-old study which only examined recidivism among those arrested and did not focused on those actually

convicted. The demographics for the locale where that study was conducted were not comparable to the demographic of the rest of the Country, according to the Census Bureau. It was Cleveland, Ohio, which, back then, presented an unusual and odd demographic in its population. DEX6 was based solely on reports of "incidents to the police", none of which were verified to have been founded; no data showed which of the reported incidents actually occurred. There was no analysis of recidivism nor any indication of how many were convicted. It addressed, instead, police responses to reports of domestic violence. Failure to show the number of founded incidents is not reliable science. Police responses are not relevant. DEX7, a 1984 report comparing the risk of death and non-fatal injury during firearm associated assaults compared to non-firearm associated assaults (based on the remarkable premise that guns make assaults more dangerous than assaults without guns), failed to address recidivism or age, and was based on a study in a single city well over 30 years prior to this case. Mr. Harley's case involved no weapon and no violence. DEX6 studied the risk factors in what it called a "Danger Assessment" to determine the reliability of that assessment tool for identifying women at risk. It relied on studies by other researchers, but the validity of the studies that formed the basis for its conclusions are unknown and unascertainable, thereby making it scientifically unreliable. It had nothing to do with this case.

The circuit opinion below held that, based on its analysis in *Staten* of the challenge to the constitutionality of that statute in that case, it "…

declined Harley's request to review his individual characteristics as part of our consideration of his as-applied challenge to the Section 922(g)(9)." Appendix A at 8. Since "Congress did not provide a sunset clause or a good behavior exception to the statue" it would not consider a challenge based on individual circumstances. Unlike in *Staten*, however, Petitioner Harley was not challenging the overall constitutionality of the statute. He only challenged its application to him individually because of his unique personal circumstances. The court would not consider such a challenge.

Whether such challenges should be allowed is a question for this Court to answer. Some circuits, such as the Third, Seventh, and D.C., recognize that there can be such individual, personal as-applied challenges, while other circuits, like the Fourth, the Ninth, and the Eleventh, do not. *See*, *infra.* n.1.

Addressing whether there can be the sort of individual, personal as-applied challenges raised in this case would settle the circuit split about what challenges are allowed and bring clarity to the decision-making process for many such post-*Heller* cases.

REASONS FOR GRANTING THE PETITION

In this Country, where one lives does not, and should not, define the justice one receives in a federal court. Today, with the split in the circuits on whether there can be personal, individual as-applied challenges to the disarmament provisions of 18 U.S.C. §922(g), the justice one receives in federal court depends on where one lives.

It is unfortunate that this is the state of affairs on as-applied challenges to disarmament provisions under 18 U.S.C. 922 (g). For example, if Mr. Harley had brought his suit for declaratory and injunctive relief in Philadelphia, Pennsylvania, rather than in Alexandria, Virginia, then, under the Third Circuit's holding in *Binderup, supra*, the district court would have given his individual, personal as-applied challenge due consideration. The court would have, consistent with that circuit's opinion, determined whether, even though §922(g)(9) is constitutional, it is unconstitutional when applied to him, individually and personally, due to his circumstances. As it turns out, however, he brought the suit in Alexandria, Virginia, where the district court held that the only issue was whether the statute is constitutional, and the appellate court sustained that decision. There is no right to an individual, personal as-applied challenge for Second Amendment restrictions in the Fourth Circuit according to the holding in this case and in *Staten, supra,* but there is a right to such a challenge for the First Amendment. See, e.g., *Med. Center for Women v. Herring*, 570 F.3d 165 (4th Cir. 2009).

In a similar vein, the justice one receives in a federal court when challenging the application of a law restricting a constitutional right should not depend on which constitutional right is being restricted. It should make no difference whether the challenged restriction is in the realm of First Amendment protections or in the realm of Second Amendment protections. Unfortunately, however, such a distinction does exist. Had Mr. Harley brought a challenge to restriction on his constitutional rights in the context of the First Amendment, then he would have been entitled to an individual, as-applied analysis and decision. See, e.g., *Greater New Orleans Broadcasting Assn., supra*, and *Educ. Media Co. at Va. Tech, Inc. v. Insley, supra. See, accord, Pitt News v. Pappert*, 379 F.3d 96 (3rd Cir. 2004). In a First Amendment case in the Fourth Circuit, according to its decision in *Insley, supra*, Petitioner would have been entitled to an analysis consistent with the statement in *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 329 (2006), that a statute may be constitutional when applied to one person, but may be unconstitutional when applied to another.

The disparaging treatment given the Second Amendment, when compared to the First Amendment, would be resolved were this Court to grant this petition, hear this case, and decide the issue. Both should be treated the same as is done in the Third Circuit. *See, Binderup, supra,* and *Pitt News v. Pappert, supra.*

Rhetorically speaking, Mr. Harley should not have to pull up stakes and move to Pennsylvania to have his case considered.

I. Challenges to Constraints on Second Amendment Rights Should Not Be More Circumscribed Than Those on First Amendment Rights.

This Court should decide whether challenges to the constitutionality of restrictions on rights under the First Amendment are deserving of greater protection than challenges to the restrictions on rights under the Second Amendment.

The Fourth Circuit allows individual, personal as-applied challenges to restrictions on First Amendment rights but, as this case shows, not on Second Amendment rights.

In *Insley, supra*, the Fourth Circuit was faced with a regulation from Virginia's Alcohol Beverage Control Board that banned alcohol advertisements in all of the college newspapers in Virginia. *Insley* held that, although the restrictions on First Amendment rights at issue served a valid government interest, it was unconstitutional as applied to two of Virginia's many college newspapers under the given individual circumstances of the two newspapers that had sued. *Id*. at 302. The *Insley* court discussed the difference between a facial challenge and an individual as-applied challenge, noting that a facial challenge addresses the constitutionality of the challenged law without regard to its impact on the plaintiff asserting the challenge but that, in contrast, an individual, personal as-applied challenge is based on a developed factual record and the application of the statute to a specific person. *Id*. at 299 n.5. Examining the individual circumstances of the two college newspapers which challenged the otherwise

constitutional statute, the court determined that the specific characteristics of the plaintiff newspapers made application of the statute unconstitutional as to them because, among other reasons, the majority of those newspaper's readers were age 21 or older. *Id*. at 299. Readership of these papers placed them in a different category than the many other colleges, universities, and community colleges to which the statute applied. The as-applied challenge was granted and the ban was not applied to the two plaintiff newspapers while it remained in effect for the others.

In *Greater New Orleans Broadcasting Assn. v. United States, supra,* this Court held that a statutory ban under 18 U.S.C. §1304 and a related Federal Communications Commission regulation on advertising private commercial casino gambling could not be applied to the broadcasters in that case even though the statute was, otherwise, constitutional. The broadcasters were located in New Orleans, Louisiana, where gambling was legal. *Id*. at 180. They wanted to advertise the legal gambling there and also the legal gambling in the neighboring state of Mississippi. Their circumstance, like the circumstance of the college newspapers in *Insley, supra,* meant that the statute and regulation restricting constitutional rights under the First Amendment did not survive a constitutional challenge when applied to them because their facts placed them out of the constitutional application of the statute. *Id*. at 195. "[A]s applied to petitioners and the messages that they wish to convey, the broadcast prohibitions in 18 U.S.C. §1304 and 47 C.F.R. §73.1211 (1998) violate

the First Amendment." *Id*. Those petitioners, the broadcasters in New Orleans, were entitled to and received individual analysis of their circumstances when their individual, as-applied challenges were decided. Restrictions on constitutional rights should receive the same scrutiny, whether they be under the First or the Second Amendment. The Second Amendment is not a lesser part of the Bill of Rights than the First. Restrictions on rights under the Second may, like those under the First, be constitutional as a general proposition, but be unconstitutional when applied to specific challengers.

In *Heller*, the Second Amendment was held to be on equal footing with the rest of the Bill of Rights. The Court said that its long-standing view is that the Bill of Rights codified venable, widely understood liberties. *Id*. at 605. There was no hierarchical rating among the amendments in the Bill of Rights. The Second Amendment was compared to the First when the Court said that "… it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." *Id*. at 592 (emphasis added).

The ten amendments in the Bill of Rights were appended to the Constitution because each was considered to be for the protection of the individual liberty of the citizens of these United States. They were numbered but they were not ranked in order of importance. While the Second Amendment may not have been given much consideration in the courts until the 2008 decision in *Heller*, and the 2010 decision in *McDonald v. Chicago*, 561 U.S. 742 (2010), that does not justify a lesser standard of care

and review of a citizen's challenge to the application of a restriction on their constitutional rights under the Second Amendment. The equality in the ranking of the amendments that constitute the Bill of Rights is clear from *McDonald v. Chicago, supra.* The Court noted that it has fully incorporated particular rights contained in the Bill of Rights as applicable to the states under the due process clause of the Fourteenth Amendment. They are the rights of the people and the states may not abridge them. To make this point clear, the Court cited, as examples, *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963); *Malloy v. Hogan*, 378 U.S. 1, 5-6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403-404 (1965); *Washington v. Texas*, 388 U.S. 14, 18 (1967); *Duncan v. Louisiana*, 391 U.S. 145, 147-148 (196_); *Benton v. Maryland*, 395 U.S. 784, 794 (1969). *Id*. at 763. The decision in *McDonald* that the Second Amendment was applicable to the states under the due process clause of the Fourteenth Amendment clearly placed it on the same level as the other amendments applicable to the states, which means that it is not constitutionally permissible to treat that amendment and the analysis of restrictions on the rights it protects in such a way that provides lesser protection for it than for the other amendments such as the First.

This Court, by hearing this case, can solve the issue of the disparity between the courts, such as the Fourth Circuit, which allow individual, personal as-applied challenges under the First Amendment but do not under the Second Amendment and those which allow individual, personal as-applied

challenges under both Amendments such as the Third Circuit.

II. The Split in the Circuits on Individual As-Applied Challenges.

The Split in the Circuits on whether there can be individual, personal as-applied challenges to disarmament provisions under 18 U.S.C. §922(g) should be resolved by this Court.

A. Individual As-Applied Challenge Allowed.

Those courts which have allowed individual, personal as-applied challenges to the disarmament statutes in 18 U.S.C. §922(g) have generally applied the same principles that have been used in such challenges under First Amendment restrictions on free speech. A principle example of this is *Binderup v. Attorney General, supra*, from the Third Circuit. Cert was denied, 2017 US LEXIS 4098 (2017). Mr. Binderup pled guilty in 1998 in Pennsylvania, to misdemeanor corruption of a minor. He had a five year potential sentence but received probation. He later sued in federal court in Philadelphia to be allowed to possess a firearm, notwithstanding the prohibition on felons possessing firearms in 18 U.S.C. §922 (g)(1). A felony – for §922 (g)(1) - is defined as an offense for which the punishment could exceed one year. There is a provision in 18 U.S.C. §921(a)(20)(B) that, if the penalty for an offense designated a misdemeanor by state law is two years or less, then it does not count as a felony, even though the potential sentence exceeds one year. His potential penalty of five years made him a felon.

Another litigant in *Binderup,* was Mr. Suarez, who in 1990, in Maryland, had possession of a pistol without a permit. That offense was designated a misdemeanor by that state but the penalty ranged from 30 days to three years. The three-year maximum punishment, like the five-year potential maximum for Mr. Binderup, made Mr. Suarez's conviction a felony, placing him also under the purview of §922(g)(1).

In 2009, both Mr. Binderup and Mr. Suarez obtained removal, under Pennsylvania law, of their prohibited status and were, under that state's law, entitled to possess firearms. Mr. Binderup filed in the Eastern District of Pennsylvania, and Mr. Suarez in the Middle District of Pennsylvania, lawsuits seeking declaratory and injunctive relief because §922(g)(1), as applied to them individually, was not constitutional given their circumstances. *Id*. at 340. That is the same claim raised by Mr. Harley in the Alexandria federal court that is the genesis of this case.

The Third Circuit, in deciding the cases, which had been consolidated for appeal, examined the facts about each challenger and looked at their personal, individual background to determine whether they were distinguished in their circumstances from persons historically banned by the statutory class of felon who are prohibited from possessing firearms by §922(g)(1).

In its analysis, the Third Circuit, *en banc*, found that each had distinguished their circumstances from those historically excluded from the right to possess a firearm. *Id*. at 353. The court found that

there was "no evidence explaining why banning people like [the specific plaintiff's in those cases] from possessing firearms promotes public safety, …[ ] nor was there any evidence … to show why people like [plaintiffs] remain potentially irresponsible after years of apparently responsible behavior." *Id* at 355-356. The Third Circuit ruled in favor of the plaintiffs. This Court declined to hear cross-appeals. 2017 U.S. LEXIS4098 (2017). Messrs. Binderup and Suarez had their day in court. Mr. Harley did not.

The Seventh Circuit recognized, but did not rule on an individual as-applied challenge in *United States v. Skoien, supra*. In that case, the court was faced with a defendant who had two prior misdemeanor convictions for domestic violence in 2003 and 2006 and was appealing a conviction for illegally possessing multiple guns which he had in his possession only one year after his second conviction. *Id*. at 639, 645. That court recognized that categorical limits to rights in the Bill of Rights are permissible and that *Heller* allowed such restrictions on Second Amendment rights. As examples of restrictions on constitutional rights under the First Amendment, the court referenced obscenity, defamation, and insightment to crime. *Id*. at 641. Because of *Skoien*'s recidivism and intentional illegal possession of firearms within a year of his second conviction, he was not found suitable for relief under an individual, personal as-applied challenge. The court did acknowledge that "a differently situated person" could be able to obtain relief from the blanket disarmament of §922 (g)(9) depending on whether the misdemeanant had been law abiding for an extended period of time. *Id*. at

645. Such a case, however, was not then before them, but they did recognize that such a case could properly be brought. *Id*.

In the District of Columbia, a man named Schrader sued then Attorney General Eric Holder and the FBI because he was banned from possessing a firearm under §922 (g)(9) based on a misdemeanor domestic assault conviction. *Schrader v. Holder, supra*. The conviction was forty years old and was for common law misdemeanor assault and battery for which he served no jail time. At the time of his suit, he was 60 years old and an honorably discharged Vietnam War Veteran. *Id*. at 982. Mr. Schrader stood convicted of what the local law designated a common law misdemeanor, but the penalty exceeded two years because there was no statutory limit. That meant that, under 18 U.S.C. §921(a)(20)(B), his case was treated as a felony placing him under the purview of §922 (g)(1). *Id*. at 984. The plaintiff's precise challenge in his suit was to the application of §922(g)(1) to all common law misdemeanants and not for himself in an individual, personal as-applied challenge. *Id*. at 990. In his briefs, however, the court observed that he appeared to go beyond the argument that the statute was unconstitutionally applied to all common law misdemeanants as a class. He appeared to claim that the statute was invalid as it applied to him specifically. *Id*. at 991. Had that argument properly been before the court, it noted, it would hesitate "to find that Mr. Schrader was outside the class of "law-abiding, responsible citizens" whose possession of firearms is, under *Heller*, protected by the Second Amendment." (citing to *Heller,* 554 U.S. at 635). *Id*.

The court, recognizing that Mr. Schrader, had he made an individual, personal as-applied challenge, would likely have prevailed, did not weigh in on that issue because it was not properly before them and he had not raised it in the district court. The District of Columbia, like the Seventh and Third Circuits, recognized the right to bring individual, personal as-applied challenges to Second Amendment restrictions or prohibitions under §922(g).

The Eighth Circuit left open the possibility of a successful individual, personal as-applied challenge to §922(g)(1) (felon in possession) but rejected the challenge when it was raised in *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014). He had three prior felony convictions: two for resisting arrest and one for aggravated assault. *Id*. at 909.

There was a successful challenge to the lifetime disarmament for commitment to a mental institution in *Tyler v. Hillsdale Sheriff's Dept*., 837 F.3d 678 (6th Cir. 2016). That court found that §922(g)(4) was not constitutional when applied to Mr. Tyler who, in 1986, spent four to six weeks involuntarily committed to a mental hospital. He had serious depression related to his divorce, but for 18 to 19 years thereafter, he was successful in his job and had no problems. *Id*. at 683. A permanent ban for someone like him with no intervening mental illness, criminal activity, or substance abuse was not constitutional. *Id*. at 694.

While the Fourth Circuit in *United States v. Staten, supra,* and in this case, held that it would not entertain individual, as-applied constitutional challenges to disarmament statutes under §922 (g),

that position does seem to be in conflict with other circuit cases such as *United States v. Moore*, 666 F.3d 313 (4th Cir. 2012), where a different three-judge panel of that court acknowledged that long-standing regulations could be unconstitutional in the face of an as-applied challenge by someone properly situated; however, Mr. Moore, in that case, was not properly situated. *Id*. at 319. *Moore* had a cocaine distribution felony, three common law robberies, plus two assaults with a deadly weapon on government officials. *Id*. at 315. That panel cited to *Broadrick v. Oklahoma*, 413 U.S. 601, 609 (1973), which recognized that a statute restricting constitutional rights might be constitutional in some situations and not in others. There appears to be a split within the Fourth Circuit, just as there is a split between those circuits which recognize individual, personal as-applied challenges under the Second Amendment and those which do not.

B. Individual As-Applied Challenge Not Allowed.

Many of the courts which have held that the disarmament provisions under §922(g) are lawful and not subject to individual, personal as-applied challenges, have done so in reference to this Court's decision in *Heller*. The Eleventh Circuit in *United States v. White, supra*, addressed an appeal of a conviction under §922(g)(9). The Court said that it saw "… no reason to exclude §922(g)(9) from the list of long-standing prohibitions on which *Heller* does not cast doubt." *Id*. at 1206. *Heller*'s endorsement of long-standing prohibitions was the clencher. That court observed that both an armed robber and a tax evader lose their right to bear arms on convictions

for a felony under §922 (g)(1) and, had no problem with the failure to distinguish between violent and non-violent felons. *Id.* at 1205-1206. It cited, in support of its position, *In Re United States*, 578 F.3d 1195 (10th Cir. 2009), which was a mandamus case. The mandamus was occasioned by a judge indicating he would give a jury instruction under §922(g)(9) that allowed the defendant an affirmative defense that he posed no risk of violence if allowed to possess a firearm. The Tenth Circuit rejected his right to such a defense at trial.

The *White* court cited with approval the statement in *In Re United States, supra,* that "Nothing suggests that the *Heller* dictum, *which we must follow,* is not inclusive of section 922(g)(9) involving those convicted of misdemeanor domestic violence." *White* at 1206 (emphasis added). The First Circuit in *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011), found that the disarmament provision of §922(g)(9) "appears consistent with *Heller*'s reference to certain presumptively lawful regulatory measures".

The Ninth Circuit in *United States v. Chovan, supra*, found that Mr. Chovan had core Second Amendment rights even though he was convicted of misdemeanor domestic assault and applied intermediate scrutiny to consideration of his constitutional challenges to §922(g)(9). *Id.* at 1137. He was appealing his conviction for §922(g)(9) and had a domestic violence misdemeanor conviction in 1996. The court determined that if Congress had wanted, it could have easily created a limited duration rather than a lifetime ban, and that Congress wanted a "zero tolerance policy" toward

gun domestic violence. *Id*. at 1142. As a result of its analysis of what was in the statute, the court denied Mr. Chovan any relief. His appeal of his conviction based on claims that the statute was unconstitutional and unconstitutional as applied to him were denied. *Id*. at 1131, 1142.

As noted in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), "the Fifth, Sixth, Ninth, Tenth and Eleventh Circuits have suggested that §922(g)(1) is always constitutional as applied to felons …"; collecting cases. Id. at 443. In the dissent in *Kanter*, however, there is also a detailed, historically grounded analysis that lifetime disarmament for all felons, regardless of their offense and circumstances is not consistent with the Second Amendment. *Id*. at 451-469.

In Petitioner's case, the opinion below, by two of the three judges on the panel, held that §922(g)(9) survived intermediate scrutiny because it was a reasonable fit to a substantial government interest in reducing domestic gun violence. Appx. A at 7-8. Two members of the panel would not consider any individual characteristics of someone raising a challenge to the constitutionality of this statute as applied to him, individually, but would focus "… entirely on the statute itself and the evidence addressing statutory purpose in fit." *Id.* The fundamental flaw, according to those jurists, was that individual, personal as-applied challenges would create an exception to the statute that is not in the statute as written. *Id.* at 8. Since Congress did not provide a provision allowing individuals to claim that a statute was unconstitutional as specifically applied to them, then there could be no

such attack. That is interesting in that it is limited to the context of the Second Amendment since the Fourth Circuit, as is clear from *Educ. Media Co. at Va. Tech Inc. v. Insley, supra;* and *Med Ctr. for Women v. Herring, supra,* allows such challenges to be made in the context of the First Amendment even when the basis for the individual, personal as-applied challenge is not written into the statute restricting First Amendment rights. The dissent recognized the propriety of individual, personal as-applied challenges as recognized in the Fourth Circuit and elsewhere. Appx. A at 20-24.

Constitutional amendment discrimination where there is one set of rules for determining constitutional challenges related to First Amendment restrictions and another set of rules regarding constitutional challenges on restrictions under the Second Amendment is not consistent with the fact that all of the Amendments in the Bill of Rights enjoy equal stature. That distinction, which distinguishes some rights as more important than others, ought to be addressed, and this is a case which presents that opportunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARVIN D. MILLER
THE LAW OFFICES OF
MARVIN D. MILLER
1203 DUKE STREET
ALEXANDRIA, VA 22314
(703) 548-5000
OFC@MDMILLERLAW.COM

Counsel for Petitioner

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