No. 21-104

In the Supreme Court of the United States

ROBERT TIMOTHY HARLEY, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(9), the federal statute that prohibits the possession of firearms by individuals convicted of a misdemeanor crime of domestic violence, violates the Second Amendment as applied to petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is available at 988 F.3d 766. The opinion of the district court (Pet. App. 39-51) is available at 2019 WL 1673308.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2021. The petition for writ of certiorari was filed on July 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has made it illegal for a person who has been convicted of a misdemeanor crime of domestic violence to possess a firearm. 18 U.S.C. 922(g)(9). In 1993, petitioner was convicted of misdemeanor assault and battery of a family member, in violation of Virginia Code Annotated § 18.2-57.2 (2014), after an altercation

with his now ex-wife. Pet. App. 4. That offense amounts to a misdemeanor crime of domestic violence under Section 922(g)(9) and thus precludes petitioner from possessing a firearm. *Id.* at 5; see 18 U.S.C. 921(a)(33)(A).

Petitioner filed this suit in the United States District Court for the Eastern District of Virginia, claiming that Section 922(g)(9) violates the Second Amendment as applied to him. Pet. App. 2-3. The court granted summary judgment to the federal defendants. *Id.* at 39-51. The court observed that the Fourth Circuit had rejected a Second Amendment challenge to Section 922(g)(9) in *United States* v. *Staten*, 666 F.3d 154 (2011), cert. denied, 566 U.S. 950 (2012). Pet. App. 42-46. The court acknowledged that the Fourth Circuit had "never directly addressed the argument raised by [petitioner] in this case, namely whether the passage of time combined with demonstrated rehabilitation invalidates an otherwise constitutional prohibition on the possession of firearms by misdemeanant domestic abusers." *Id.* at 48. The court noted, however, that "several other circuits have addressed and rejected [petitioner's] passage of time argument in the context of § 922(g)(9)." *Ibid.* The court agreed with those decisions, concluding that courts "should not read expiration clauses or good behavior exceptions into otherwise constitutional regulations when there is no evidence that passage of time would alleviate the concern addressed by Congress"—here, the interest in "protecting family members from gun violence by domestic abusers." *Id.* at 49.

2. The court of appeals affirmed. Pet. App. 1-38.

a. The court of appeals relied on its previous decision in *Staten*, which rejected an as-applied challenge to Section 922(g)(9). In *Staten*, the court had assumed without deciding that Section 922(g)(9) burdens conduct

protected by the Second Amendment, held that intermediate scrutiny is the appropriate standard for an as-applied challenge to Section 922(g)(9), and held that Section 922(g)(9) satisfies that standard because it is reasonably tailored to the government's important interest in reducing domestic gun violence. Pet. App. 7-8; see *Staten*, 666 F.3d at 160-168. The court in this case observed that, "in making this determination, [the *Staten* court] did not consider any individual characteristics of the person raising the as-applied challenge but focused entirely on the statute itself." Pet. App. 8. Applying *Staten*, the court rejected petitioner's as-applied challenge without considering "his individual characteristics." *Ibid.* The court noted that other courts of appeals had likewise "declin[ed] to read into Section 922(g)(9) an exception for good behavior or for the passage of time following a disqualifying conviction for a misdemeanor crime of domestic violence." *Id.* at 12 (citing *Stimmel* v. *Sessions*, 879 F.3d 198, 210-211 (6th Cir. 2018); *United States* v. *Chovan*, 735 F.3d 1127, 1142 (9th Cir. 2013), cert. denied, 574 U.S. 878 (2014)).

b. Judge Richardson dissented. Pet. App. 19-38. He noted that the parties had offered conflicting evidence concerning the conduct underlying petitioner's conviction, with the government contending that petitioner "shoved and struck his ex-wife" and petitioner claiming that it was "a reckless offensive touching." *Id.* at 31. Because Judge Richardson took the view that "the conduct underlying the conviction may create an avenue for a successful as-applied challenge," he would have remanded the case to the district court for it to "consider in the first instance whether [petitioner's] actions are constitutionally sufficient to deprive [him] of the right

to keep and bear arms under the Second Amendment." *Id.* at 30-31.

c. Judge Wynn concurred to explain his disagreement with the approach reflected in Judge Richardson's dissent. Pet. App. 13-19.

ARGUMENT

Petitioner renews his contention that 18 U.S.C. 922(g)(9) violates the Second Amendment as applied to him. 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. Indeed, no court of appeals has held Section 922(g)(9) unconstitutional in any of its applications. Further review is unwarranted.

1. In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment protects an individual right to possess handguns for self-defense. *Id.* at 635. The Court cautioned, however, that the right to keep and bear arms is "not unlimited." *Id.* at 595. It described the right as one that belongs to "law-abiding, responsible citizens," and it stressed that "nothing in [its] opinion should be taken to cast doubt" on certain established firearms regulations, including "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626, 635. Two years later, a plurality of the Court "repeat[ed]" *Heller*'s "assurances" that its holding "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" *McDonald* v. *City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626). Section 922(g)(9) similarly qualifies as a permissible firearms regulation.

First, "Section 922(g)(9) is, historically and practically, a corollary outgrowth of the federal felon disquali-

fication statute"—a statute that both *Heller* and *McDonald* indicate is constitutional. *United States* v. *Booker*, 644 F.3d 12, 24 (1st Cir. 2011), cert. denied, 565 U.S. 1204 (2012). Congress added Section 922(g)(9) as part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371. "Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *United States* v. *Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg)). "By extending the federal firearm prohibition to persons convicted of 'misdemeanor crime[s] of domestic violence,' proponents of § 922(g)(9) sought to 'close this dangerous loophole.'" *Ibid.* (quoting 142 Cong. Rec. 22,986 (1996) (statement of Sen. Lautenberg)) (brackets in original).

Second, the historical record confirms that Congress may categorically disarm groups of individuals whose past conduct indicates that they cannot be trusted to use firearms responsibly. "*Heller* identified * * * as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting *Heller*, 554 U.S. at 604), cert. denied, 562 U.S. 1303 (2011). That report explained that "citizens have a personal right to bear arms '*unless for crimes committed, or real danger of public injury*.'" *Ibid.* (emphasis added) (quoting 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 662, 665 (1971)). Consistent with that under-

standing, legislatures in England and America have long categorically disarmed persons they have deemed dangerous. See, *e.g.*, *Kanter* v. *Barr*, 919 F.3d 437, 456-458 (7th Cir. 2019) (Barrett, J., dissenting). Here, Congress reasonably determined that domestic-violence misdemeanants have not only committed crimes, but also pose a real danger of public injury. As this Court has recognized, "[f]irearms and domestic strife are a potentially deadly combination." *Hayes*, 555 U.S. at 427.

Finally, Section 922(g)(9) satisfies intermediate scrutiny. Petitioner does not challenge the court of appeals' holding that Section 922(g)(9) is subject, at most, to intermediate scrutiny, which requires "a reasonable fit between the challenged law and a substantial governmental objective." Pet. App. 7. "It is self-evident that the government interest of preventing domestic gun violence is important." *United States* v. *Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013), cert. denied, 574 U.S. 878 (2014). And disarming domestic-violence misdemeanants is an appropriately tailored means of furthering that interest. As the court of appeals concluded, based on "extensive social science research," individuals convicted of domestic violence have high recidivism rates, and the presence of a firearm during a domestic altercation significantly increases the risk of serious injury or death. Pet. App. 7-8; see, *e.g.*, U.S. Dep't of Justice, National Institute of Justice, John Wooldredge & Amy Thistlethwaite, *Reconsidering Domestic Violence Recidivism: Individual and Contextual Effects of Court Dispositions and Stake in Conformity* 6 (Oct. 3, 1999), https://go.usa.gov/xM2fg.

2. Petitioner contends (Pet. 10) that the court of appeals should have considered his "unique personal cir-

cumstances" in evaluating his as-applied challenge. That contention is mistaken. *Heller* and the history of the right to keep and bear arms make clear that "some categorical disqualifications are permissible," and that "Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons." *Skoien*, 614 F.3d at 641. In addition, intermediate scrutiny requires "a fit that is not necessarily perfect, but reasonable." *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989). Even if petitioner could show that Section 922(g)(9) is "somewhat over-inclusive given that every domestic violence misdemeanant would not necessarily misuse a firearm," that showing "merely suggests that the fit is not perfect," not that the statute is unconstitutional. *United States* v. *Staten*, 666 F.3d 154, 167 (4th Cir. 2011), cert. denied, 566 U.S. 950 (2012).

Even assuming that the circumstances of petitioner's offense were relevant, moreover, they would not show that Section 922(g)(9) violates the Second Amendment as applied to him. In district court, the government introduced a contemporaneous police report indicating that petitioner's conviction was based on an incident in which petitioner struck his wife while she was dropping off their children at his home. See D. Ct. Doc. 17-1. Petitioner, for his part, maintains that he merely "grabbed [his wife's] arm" during an argument. Pet. App. 30 (citation omitted). But even accepting that account, petitioner's version of events does nothing to call into question Congress's judgment that he should be disarmed, especially given the reality that "[d]omestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide." *United States* v. *Castleman*, 572 U.S. 157, 160 (2014) (citation omitted). This was not, for example,

a case involving the sort of "slightest touch[ing]" hypothesized in Judge Richardson's dissent. Pet. App. 29.

3. The court of appeals' decision does not conflict with the decision of any other court of appeals. Every court of appeals to consider a challenge to Section 922(g)(9) in any of its applications has upheld the statute. See *Booker*, 644 F.3d at 23-24 (1st Cir.); *Staten*, 666 F.3d at 168 (4th Cir.); *Stimmel* v. *Sessions*, 879 F.3d 198, 210-211 (6th Cir. 2018); *Skoien*, 614 F.3d at 642 (7th Cir.); *Chovan*, 735 F.3d at 1141-1142 (9th Cir.); *United States* v. *White*, 593 F.3d 1199, 1205-1206 (11th Cir. 2010); see also *In re United States*, 578 F.3d 1195, 1197, 1200 (10th Cir. 2009) (unpublished order) (suggesting that Section 922(g)(9) is "presumptively lawful" under *Heller*) (citation omitted).

Petitioner urges this Court to grant review to resolve a "[s]plit in the Circuits on whether there can be individual, personal as-applied challenges to disarmament provisions under 18 U.S.C. § 922(g)" generally. Pet. 17. But in each case that petitioner claims conflicts with the decision below, the court of appeals considered a challenge to a provision other than Section 922(g)(9), failed to validate an as-applied challenge, or both.

For example, petitioner errs in arguing (Pet. 17-19) that the decision below conflicts with *Binderup* v. *Attorney General United States*, 836 F.3d 336 (3d Cir. 2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017). In that case, the Third Circuit held that Section 922(g)(1), the felon-disqualification statute, violated the Second Amendment as applied to certain individuals who had committed "non-violent crimes." *Id.* at 352 (opinion of Ambro, J.). The controlling opinion acknowledged, however, that "violent criminal conduct" is plainly "disqualifying." *Ibid.* *Binderup* thus does not suggest that

the Third Circuit would entertain as-applied challenges to Section 922(g)(9), which by definition reaches only misdemeanor crimes of domestic violence.

Petitioner similarly errs in arguing (Pet. 21) that the decision below conflicts with *Tyler* v. *Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016) (en banc). No opinion in *Tyler* commanded a majority, but, according to the lead opinion's count, a majority of the judges concluded that (1) the government had not yet established the constitutionality of Section 922(g)(4), the mental-commitment disqualification, as applied in that case, (2) the government could establish the constitutionality of Section 922(g)(4) by introducing "additional evidence" that a ban on possession of firearms by a person committed to a mental institution satisfied "intermediate scrutiny," and (3) it was necessary to remand the case so that the district court could apply that standard. *Id.* at 699 (opinion of Gibbons, J.). On remand, the plaintiff voluntarily dismissed his suit. See D. Ct. Doc. 59, *Tyler* v. *Hillsdale County Sheriff's Department*, No. 12-cv-523, (W.D. Mich. Aug. 7, 2017). The Sixth Circuit thus never reached any definitive conclusion about the constitutionality of Section 922(g)(4) as applied in that case. Much less did the Sixth Circuit in *Tyler* reach a conclusion about Section 922(g)(9), the distinct provision at issue here. Indeed, when the Sixth Circuit considered a challenge to an application of Section 922(g)(9), the court rejected it. *Stimmel*, 879 F.3d at 210-211.

Finally, contrary to petitioner's contention (Pet. 19-22), the decision below does not conflict with the Seventh Circuit's decision in *Skoien*, the Eighth Circuit's decision in *United States* v. *Woolsey*, 759 F.3d 905 (2014), the D.C. Circuit's decision in *Schrader* v. *Holder*,

704 F.3d 980, cert. denied, 571 U.S. 989 (2013), or the Fourth Circuit's decision in *United States* v. *Moore*, 666 F.3d 313 (2012). In *Skoien*, the Seventh Circuit upheld the application of Section 922(g)(9) to a domestic-violence misdemeanant who had been convicted of other crimes as well; the court stated that "[w]hether a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again * * * is a question not presented today." 614 F.3d at 645. In *Woolsey*, the Eighth Circuit rejected an as-applied challenge to Section 922(g)(1), the felon-disqualification statute; the decision, at most, "left open the possibility" of a successful as-applied challenge on different facts. 759 F.3d at 909. In *Schrader*, the D.C. Circuit rejected a broader as-applied challenge to Section 922(g)(1) while specifically declining to decide whether the law was valid as applied in the particular plaintiff's circumstances because that claim was neither "properly raised" nor "fully briefed." 704 F.3d at 992. And in *Moore*, the Fourth Circuit rejected an as-applied challenge to Section 922(g)(1) and merely stated that it "d[id] not foreclose the possibility that a case might exist in which an as-applied Second Amendment challenge to § 922(g)(1) could succeed." 666 F.3d at 320. In short, none of those cases validated an as-applied challenge to any part of Section 922(g), let alone to the provision at issue here. In addition, any intra-circuit conflict between *Moore* and this case would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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