No. 21-104

In The
Supreme Court of the United States

ROBERT TIMOTHY HARLEY,

Petitioner,

v.

MERRICK B. GARLAND,
ATTORNEY GENERAL, ET AL.,

Respondents.

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

REPLY BRIEF

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Table of Contents

Table of Authorities

Constitutional Provisions

Statutes

REPLY BRIEF FOR PETITIONER

Petitioner has requested this Court to decide whether an individual, personal as-applied challenge based on the challengers own unique circumstances may be raised against the application of a statutory prohibition on the possession of a firearm for home defense the same as individual, personal as-applied challenges may be raised against statutes impinging speech under the First Amendment. The first ten Amendments to the United States Constitution, although numbered, are not ranked as to degrees of importance. The Second Amendment is equal in stature to the First Amendment. Just as there are legislative enactments which are constitutional under the First Amendment, but are not constitutional when individually applied to a specific person or entity due to their individual, unique circumstances, there are also legislative enactments under the Second Amendment which are constitutional, but are not constitutional when individually applied to a specific person because of their individual, personal circumstances. That is the premise of this case.

The First and Second Amendments are not more important that the rest of the Bill of Rights, but they are more alike than the others. The others concern rights when government is directly interacting with its citizens. It may not impose the quartering of troops under the Third. Four, Five, Six, And Eight are protections in the realm of the

enforcement of criminal law. Seven concerns rights in court in civil trials. Nine and ten clarify a government whose powers are limited to what is specifically conferred. The First and Second are different. They involve everyday life. What you say and what you believe is not a government matter under the First. The right to hunt with a gun or protect the hearth and home by being armed is also, generally, what one does on one's own and not a government matter. To be sure, there are limits under the First and Second Amendments but, they allow government to intervene where they do not normally get involved based on special interests. That is unlike national defense on our home soil and criminal law or civil suits. The similarity of the type of rights protected by those two Amendments should result in constitutional challenges being allowed for both under the same approach.

Relying on the fact that some federal circuits have recognized that there can be an individual, personal as-applied challenge to Second Amendment prohibitions under 18 U.S.C. §922(g), Petitioner filed suit in the United States District Court in Alexandria VA, asking that court to conduct an individual, personal, as-applied analysis regarding the constitutionality of the application of 18 U.S.C. §922(g)(9) to him based on his personal and individual circumstances. Petitioner's challenge conceded that §922(g)(9) was constitutional, but contended that it was not constitutional as applied to him individually. He wanted an analysis of his individual unique circumstances because the result

would establish that §922(g)(9) was unconstitutional when applied to him. The district court found that the statute was constitutional and would not conduct an analysis of his individual circumstances. It held that "… Congress' categorical, lifetime ban is reasonable tailored to …" a legitimate government interest" … plaintiff cannot obtain judicial relief for his problem …". (Appx.B at 49). The statute was constitutional. No personal, individual as-applied challenge was allowed. The Fourth Circuit sustained that decision.

In their opposition, Respondents urge this Court to deny the Petition because those federal courts of appeals which have considered challenges to prohibitions under §922(g) have addressed sections other than §922(g)(9) or they have failed to validate an as-applied challenge to the prohibitions under §922(g). That is not controlling because there are circuits such as the District of Columbia, the Third, and the Seventh, which do recognize that there may be individual, personal as-applied challenges to otherwise constitutional prohibitions to the exercise of rights under Second Amendment. Regardless of whether or not they have had a case where they have granted an individual as-applied challenge, they have recognized that such a challenge may be brought. Other circuits, such as the Fourth, Ninth, and Eleventh have not recognized the right to bring an individual, personal as-applied challenge. This disagreement should be resolved. Whether or not anyone has won a case on an individual, as-applied challenge to §922(g)(9) is not

material as to whether or not individuals should be allowed to bring such cases. It is appropriate for this Court to make that decision and settle whether such cases may be brought. The circuit in which one lives should not be the determinant.

ARGUMENT

The opposition brief seems to conflate as-applied challenges which challenge the facial constitutionality of the statute with what is presented in this case which is an individual, personal as-applied challenge. The two are not the same.

1. A facial challenge, as defined, challenges the constitutionality of the statute as a general proposition. As this Court recognized in *United States v. Salerno,* 481 U.S. 739 (1987), a facial challenge is correctly described as requiring the challenger to establish that there are no set of circumstances which could exist under which the act would be valid. *Id.* at 745. A personal, individual as-applied challenge, on the other hand, concedes the constitutionality of the statute but contends that its individual application to a specific individual, because of their personal circumstances make the application unconstitutional. See e.g., *Greater New Orleans Broadcasting Assn. v. United States*, 187 U.S. 173, 185 (1999), where this Court allowed and sustained an individual as-applied challenged to a legislative ban affecting speech. The statute was constitutional, but it was not constitutional when

applied to the individual challenger. There ought to be recognition that challenges such as Petitioner raised in the district court in this case, are allowed for the Second Amendment just as they are for the First.

After this Court is seminal Second Amendment decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008), there were a myriad of challenges to various prohibitions to the possession of firearms under §922(g). The challengers sought to rely on the *Heller* decision to justify overturning the ban that applied to them. Some of the cases on which Respondent relies were direct appeals of criminal convictions, such as *United States v. Booker*, 644 F.3d 12 (1st Cir 211) Cert.denied, 565 U.S. 1204 (2012). That case involved convictions under §922(g)(9). The Court of Appeals did not find it unconstitutional in light of this Court's decision in *Heller, supra. United States v. White*, 593 F.3d 1199 (11th Cir. 2010), another case on which the opposition brief relied also involved a challenge to the constitutionality of §922(g)(9) in light of this Court's *Heller* decision. It, too, found that *Heller* did not invalidate §922(g)(9). Citation to the Tenth Circuit decision of *In Re United States*, 578 F.3d 1195 (10th Cir. 2009) also does not advance Respondent's position. In that case, a defendant charged with a violation of §922(g)(9) sought a mandamus in an effort to have the jury instructed that the government had to prove the risk of violence issue. That case did not address whether an individual has the right to bring an individual,

personal as-applied challenge to the otherwise facially constitutional statute, §922(g)(9).

In their effort to dissuade this Court from allowing individual, personal as-applied challenges under the Second Amendment as are allowed under the First, Respondents stress the fact that §922(g)(9) is aimed at a recognized problem, domestic violence. Domestic violence is a serious problem and that justifies the facial constitutionality of §922(g)(9), but that does not mean that there cannot be and should not be individual, personal as-applied challenges. Respondent's reference to the fact that Congress is not required to establish case by case exclusions is, not the point. That Congress did not include an individual as-applied process does not mean that, under the constitution, there may not be individual, personal as-applied challenges brought in court. Such challenges acknowledge a statute's constitutionality but require an analysis of its application to a given individual. Such challenges are recognized in the First Amendment context and should be allowed in the Second.

2. In support of their proposition, the opposition brief cited to *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) cert. denied 562 U.S. 1303 (2011) Op Brf at 7. An important thing about *Skoien* is that it specifically recognized that there may be individual, as-applied challenges such as raised in this case. It noted that, "Whether a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again, even if he cannot satisfy §921(a)(33)(B)(II) is a question not presented today.

There will be time enough to consider that subject when it arises." *Id.* at 645.[1] They will consider the subject but it has not yet been presented to them. *Skoien* was the direct appeal of a criminal conviction for possession of firearms by an individual with two prior domestic violence convictions. It was not an as-applied challenge of the type presented here.

The opposition brief reference to *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) is also not on point. That was a criminal conviction in which the defendant contended that the indictment should be dismissed under §922(g)(9) because of the decision in *Heller, supra.* That request was denied. The Ninth Circuit did not find §922(g)(9) to be a violation of the fundamental right to bear arms. Mr. Chovan's alternative argument that his civil rights were restored, a ten-year ban on owning firearms under California law expired, plus his conviction should be vacated, was likewise rejected. *Id.* at 1131. The issues in *Chovan* were not the same as are presented here. This case concerns whether Petitioner should be allowed to have a court consider an individual, personal as-applied challenge to an otherwise constitutionally valid statute, i.e., §922(g)(9). *Chovan, supra,* sheds no light on that issue.

Stimmel v. Sessions, also cited in the opposition brief, does not benefit their position either. In *Stimmel v. Sessions*, 879 F.3d 198 (6th

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[1] The provision in §921 concerns persons whose convictions are expunged, set aside, pardoned, or whose rights are restored to allow receipt of firearms.

Cir. 2018), Mr. Stimmel challenged the constitutionality of §922 (g)(9). The court found that the statute was substantially related to a compelling government interest and survived intermediate scrutiny. *Id*. at 211. He also claimed that Congress' creation of a means of relief available to individuals disarmed under §922(g)(4), because of a prior mental health commitment, meant that he, under §922(g)(9), was denied equal protection for not having the same relief available for him. *Id*. at 212. That argument was rebuffed because he was not similarly situated to someone with an illness that can be cured. Mr. Stimmel also requested a chance to demonstrate that he no longer posed a risk of future dangerousness, but the court did not read *Heller* as requiring that. *Id*. at 210. The court did not examine, and was not asked to examine the principle of individual, as-applied challenges. He came close to but did not raise the same issue as presented here.

In *Schrader v. Holder*, 704 F.3d 980 (DC Cir. 2013), there was a lawsuit seeking to declare §922 (g)(1) unconstitutional as applied to common law misdemeanants who were felons. It was a challenge to a category, not an individual, personal as-applied challenge. Arguments raised by Mr. Schrader and a Second Amendment organization that joined the suit were unsuccessful. Pointedly, for this case, the District of Columbia Circuit observed that, to the extent he argued on appeal that the statute is invalid as applies to him specifically, that argument was not properly before them because it had not

been argued in the district court. *Id*. at 991. They did not reject individual as-applied challenges base on a challenger's individual circumstances, but left it to another day when it was properly before them. *Id*. at 922. The D.C. Circuit, like the Seventh in *Skoien*, has not rebuffed the right to bring individual, as-applied challenges. That is consistent with the Third Circuit decision in *Binderup* where an individual, as-applied challenge under §922(g) was granted. That court found that the lifetime ban to possession of weapons under §922(g) violated the Second Amendment. The individual challengers were given an analysis of their own individual, unique circumstances and obtained relief without challenging the facial constitutionality of the statute. See, *Binderup v. Attorney General*, 836 F.3d 386 (3rd Cir. 2016).

CONCLUSION

The federal circuit courts of appeals are in not agreement on whether an individual can bring a personal and individualized as-applied challenge to a ban over prohibition of their right to possess firearms under §922(g). While the statutes prohibiting possession under the various provisions, including §922(g)(9) in this case, are constitutional on their face, that does not mean that they, and §922(g)(9) specifically in this case, are always constitutional when applied to everyone. Just as there are constitutionally valid statutes that impinge on First Amendment rights which are

otherwise constitutional, that does not mean that they might be unconstitutional when applied to a specific person or entity. This Court should hear this case and decide whether a citizen can challenge a prohibition under §922(g)(9), based on the fact that the statute, while constitutional on its face, is unconstitutional as individually applied to them.

The Court is asked to grant this Petition and decided that issue.

Respectfully submitted,

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