No. 20-782

In The
Supreme Court of the United States

RAYMOND HOLLOWAY, JR.,

Petitioner,

v.

JEFFREY A. ROSEN,
ACTING ATTORNEY GENERAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICUS BRIEF OF FIREARMS POLICY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, SECOND AMENDMENT FOUNDATION, AND MADISON SOCIETY FOUNDATION IN SUPPORT OF PETITIONER

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MISCELLANEOUS

INTERESTS OF THE *AMICI*

Amici Firearms Policy Foundation, California Gun Rights Foundation, Second Amendment Foundation, and Madison Society Foundation are §501(c)(3) tax-exempt organizations, whose goals include securing the right to keep and bear arms as a meaningful individual right. They here desire to document for the Court additional reasons for the grant of certiorari, including the need to reinforce this Court's teachings that the right to arms is not a second-class right, and to document the origins of federal prohibitions on arms possession by persons convicted of certain offenses.[1]

SUMMARY OF ARGUMENT

The ruling of the Third Circuit exemplifies a trend in the lower courts toward treating the right to arms as a second-class right. It sustains a federal bar on possession of arms as applied to a person who committed a state misdemeanor sixteen years ago, a misdemeanor that involved neither violence nor firearms.

When Congress changed the bar on firearms ownership to cover nonviolent and misdemeanor offenses, it was aware that many of the persons affected would

[1] No counsel for a party authored this brief in whole or in part, or made a contribution to fund the preparation and submission of this brief. The Firearms Policy Foundation is the only person or entity that made a contribution to fund the preparation of this brief. This brief is filed with the written consent of the parties. *Amici* complied with the conditions by providing ten days' advance notice to the parties.

have no proclivity to misuse firearms. It dealt with this by creating an administrative "relief from disabilities" that enabled these persons to establish their peaceful inclinations and be exempted from the bar to legal firearms possession. But, beginning in 1992, Congress forbade the expenditure of appropriated funds to give individuals this relief, allowing it only for corporations. Thus, individuals situated similar to petitioner now face a lifetime bar on firearms ownership, however peaceful and trustworthy they might be.

ARGUMENT

I

This Court Should Grant Certiorari in Order to Reinforce Its Teaching That the Second Amendment Does Not Guarantee a Second-Class Right

This Court has refused to treat the right to arms as "a second-class right," *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010), a refusal supported by early commentators' description of the right as the "true palladium of liberty" and the "palladium of the liberties of a republic." 1 St. George Tucker, ed., Blackstone's Commentaries, with Notes of Reference to the Constitution and Laws 300 (1803); 2 J. Story, Commentaries on the Constitution of the United States 607, §1897 (2d ed., 1851).

The statute here at issue indeed treats the right to arms as a second, if not third, class right. As a

misdemeanant, petitioner did not lose the political rights of a citizen; indeed, even if he had been convicted of a felony, he would have regained his franchise upon release from incarceration.[2]

Petitioner's misdemeanor consisted of driving under the influence, with a prior offense, some sixteen years ago. 75 Pa. Con. Stat. §3802(c). The offence bore no connection to misuse of firearms, but rather to misuse of a motor vehicle. Under Pennsylvania law, his right to drive a motor vehicle was suspended for 18 months, not for life. 75 Pa. Con. Stat. §3804(e)(2)(ii).[3]

The vehicular misdemeanor petitioner committed thus would result in only a temporary suspension of his driving privileges, yet, under the statute here challenged, it results in a lifetime loss of his right to possess arms for self-defense.

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[2] Pennsylvania law provides that a felon's right to register to vote is suspended until five years after his release. 25 Pa. Con. Stat. §1301(a). The five-year requirement has been voided on constitutional grounds. *Mixon v. Commw.*, 759 A.2d 442 (Pa. Commw. 2000).

[3] The 18 months could be halved by his installing an ignition interlock on his vehicle. 75 Pa. Con. Stat. §1556(f)(2)(iii). The degree to which Pennsylvania focuses the suspension of this *privilege* upon the harm sought to be avoided stands in sharp contrast to the federal regulation of the constitution *right* to arms.

II

The Need for Certiorari Is Underscored by the Arbitrary Nature of the Gun Control Act's Prohibition on Possession by Persons Convicted of State Law Misdemeanors

Historically, the offenses that disqualified an American from exercise of the fundamental right to arms keyed upon his or her status as a felon, or more narrowly, a violent felon.

A. Pre-1968 Restrictions on Possession Following Conviction

New York's "Sullivan Act," a 1911 enactment, is generally seen as the earliest form of strict gun control law. Yet it did not ban possession by persons based on their criminal record: it required a permit to possess a handgun, and authorities were forbidden to issue permits to non-citizens and those under the age of 16. An applicant's criminal record was not made a consideration. N.Y. Laws 1911, ch. 195.

In the early 20th century, the Sullivan Act's main competitor was the Uniform Pistol Act, sometimes titled the Uniform Firearms Act. The first draft of this model statute dated to 1924, and forbade handgun transfers where there was reason to believe the recipient was an "unnaturalized foreign-born person or has been convicted of a felony." Report of the Committee on a Uniform Act to Regulate the Sale and Possession of Firearms 23, §12(3) (1924).

The 1925 and later versions[4] contained a more narrow prohibition, which forbade handgun possession by those convicted of a "crime of violence," defined as "murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery [larceny], burglary, and housebreaking."[5] Uniform Firearms Act Drafted by the National Conference of Commissioners on Uniform State Laws, §§1, 3 (1925). A contemporaneous commentator explained,

> The justification for the section is the protection afforded by prohibiting the possession of pistols to men who are liable to use them in a way dangerous to society. Experience has shown that crimes of violence are much more likely to be committed by men who have previously been convicted of such offenses.

Sam B. Warner, *Uniform Pistol Act*, 29 J. of Crim. L. and Criminology, 529, 538 (1938).

The first federal restriction on receipt or possession of firearms came in the Federal Firearms Act of 1938, 52 Stat. 1250. This forbade a "person who has been convicted of a crime of violence or is a fugutive [*sic*] from justice" to receive a firearm in interstate commerce. It defined "crime of violence" much as the

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[4] Later editions were issued in 1926, 1928, and 1930. Prior to the promulgation by the Commissioners on Uniform State Laws, a version had been proposed by the U.S. Revolver Association.

[5] The bracketed word was inserted with the suggestion that adopting states substitute whatever word their statutes employed to describe the named offense.

Uniform Firearms Act had, adding assault with a deadly weapon and "assault with intent to commit any offense punishable by imprisonment for more than one year." §§(6), (2)(f), 52 Stat. 1250, 1251.

A 1961 amendment deleted the definition of "crime of violence" and replaced that term with "crime punishable by imprisonment for a term exceeding one year." An Act to Strengthen the Federal Firearms Act, 75 Stat. 757. This, for the first time, made the federal bar applicable to non-violent offenses, and keyed the prohibition to the length of potential imprisonment rather than a violent past.

One problem with this broadened definition was that it encompassed many offenses that demonstrated no proclivity toward future violence. This problem quickly came to the fore when the firm Olin-Mathieson, which owned a firearms manufacturer, was convicted of violating 18 U.S.C. §1001 in connection with foreign pharmaceutical sales. *See United States v. Olin-Mathieson Chemical Corporation*, 368 F.2d 525 (2d Cir. 1966) (affirming conviction).

Senator Thomas Dodd, Sr. secured passage of 1965 legislation creating a "relief from disabilities" (the disability to possess firearms). Under this, a person convicted of a disabling offense could receive an exception from the bar, if they demonstrated to the Treasury Department that "the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to conduct his operations in an unlawful manner, and that the

granting of the relief will not be contrary to the public interest." An Act to Amend the Federal Firearms Act, 79 Stat. 788. The relief from disabilities provision gave an administrative remedy, on a case-by-case basis, for situations where the law's broad bar on possession after conviction served no useful purpose.

B. Post-1968 Restrictions Following Conviction

These standards – a broad bar on firearms possession after conviction for certain offenses, violent and non-violent, ameliorated by a case-by-case exemption for persons who could demonstrate their non-violent nature – were continued by the next significant federal enactment, the Gun Control Act of 1968.

The Gun Control Act actually began as multiple pieces of legislation, which in combination created the current chapter 44 of Title 18, U.S. Code.

The first to be enacted was the Omnibus Crime Control and Safe Streets Act, 82 Stat. 197. This legislation made it illegal for a person, *inter alia*, convicted "of a crime punishable by imprisonment for a term exceeding one year" to receive any firearm that had ever been transported in interstate commerce. §922(f), 82 Stat. 231. Possession by such a person was, rather awkwardly, dealt with in a separate section of the legislation, which was codified separately as 18 U.S.C. App. §1202. This forbade firearm possession by a person convicted of a "felony," defined as an offense punishable by imprisonment for more than a year. §1202(a), (c)(2), 82 Stat. 236-37.

The definitions portion of the statute modified these bars somewhat, by providing that:

> The term "crime punishable by imprisonment for a term exceeding one year" shall not include any Federal or State offenses pertaining to antitrust violations, unfair trade practices, constraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate.

§921(b)(3), 82 Stat. 228. The legislation retained the relief from disabilities procedure, codifying it as 18 U.S.C. §925(c). 82 Stat. 233.

The final 1968 legislation was entitled the Gun Control Act of 1968, 82 Stat. 1213. This measure essentially re-enacted, with some changes, the firearms-related portions of the Omnibus Crime Control and Safe Streets Act. One of the changes was to the exemptions contained in 18 U.S.C. §921(b)(3), which was renumbered as §921(a)(20) and expanded:

> The term 'crime punishable by imprisonment for a term exceeding one year' shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

82 Stat. 1216. At the end of this legislative process, the statutory regime had become, essentially,

1. Firearms possession was forbidden following a conviction for any offense punishable by more than a year's imprisonment;

2. With general exceptions for some business felonies and most state offenses expressly classed as misdemeanors and punishable by no more than two years' imprisonment; and

3. With a case-by-case exception for persons who could demonstrate that, considering the nature of their conviction, and their personal character, they were unlikely to misuse firearms.[6]

C. 1992: Relief from Disabilities Is Ended

The system functioned reasonably well, and the Treasury Department readily granted relief from disabilities where the offense was nonviolent and sufficiently far in the past. That came to an end in 1992, when the Violence Policy Center made relief from disabilities the focus of a press campaign, charging that the system involved spending taxpayer money to allow felons to have arms. The campaign succeeded, and riders were attached to each Treasury appropriations bill,

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[6] A 1986 amendment repealed 18 U.S.C. App. §1202, incorporated its provisions into 18 U.S.C. §§922 and 923, and eliminated many of the inconsistencies between §1202 and §922. Firearm Owners Protection Act, 100 Stat. 449 (1986).

precluding the expenditure of appropriated sums on granting relief – at least, relief for *some* "persons." A recent example reads,

> *Provided*, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code: *Provided further*, That such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code. . . .

Consolidated Appropriations Act, 2020, 133 Stat. 2317, 2402-03. This is, to our knowledge, the only provision of federal law that discriminates against natural persons and in favor of corporations.

Were the petitioner here not Raymond Holloway, but Holloway Holdings, Inc., there would have been no need for this litigation. As a corporate prohibited person, it would have been allowed to prove that the nature of the conviction and its corporate history and reputation showed its future harmlessness. But Mr. Holloway's status as a natural person, a citizen, bars him from seeking such administrative relief, leaving an as-applied judicial challenge as his only remedy.

CONCLUSION

This case affords an opportunity for the Court to clarify its teaching that the Second Amendment does not guarantee an inferior, second-class, constitutional right. The writ should be granted.

Respectfully submitted,

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