No. 99-106

In the Supreme Court of the United States

FRATERNAL ORDER OF POLICE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

MARK B. STERN
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

In 1996, Congress amended the Gun Control Act of 1968 to bar persons convicted of a misdemeanor crime of domestic violence from possessing a firearm that has traveled through interstate commerce. See 18 U.S.C. 922(g)(9) (Supp. III 1997). The questions presented are as follows:

1. Whether the application of Section 922(g)(9) to state and local employees who would otherwise carry firearms in the performance of their duties violates the Tenth Amendment.

2. Whether Section 922(g)(9) is subject to strict scrutiny because it affects the possession of firearms.

3. Whether Congress could rationally prohibit persons convicted of domestic violence misdemeanors from possessing firearms issued for use in government employment, when it did not impose a similar prohibition with respect to domestic violence felons.

4. Whether Congress acted within its Commerce Clause powers in enacting Section 922(g)(9).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 99-106

FRATERNAL ORDER OF POLICE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals upon panel rehearing (Pet. App. 1-20) is reported at 173 F.3d 898. The order of the court of appeals granting the government's petition for rehearing (Pet. App. 45-46) is reported at 159 F.3d 1362. The original opinion of the court of appeals (Pet. App. 21-33) is reported at 152 F.3d 998. The opinion of the district court (Pet. App. 34-44) is reported at 981 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals upon rehearing was entered on April 16, 1999. The petition for a writ of certiorari was filed on July 14, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1216, prohibits specified classes of persons from possessing firearms "in or affecting commerce." 18 U.S.C. 922(g) (1994 & Supp. III 1997). Those classes include, *inter alia*, felons, fugitives, illegal aliens, and persons committed to a mental institution. See 18 U.S.C. 922(g)(1)-(8) (1994 & Supp. III 1997). The prohibitions contained in Section 922(g)(1)-(8) are inapplicable to firearms "issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof." 18 U.S.C. 925(a)(1) (Supp. III 1997).

In 1996, Congress amended the Gun Control Act to bar the possession of firearms by any person convicted of a misdemeanor crime of domestic violence. See 18 U.S.C. 922(g)(9) (Supp. III 1997).[1] Unlike the other prohibitions set forth in Section 922(g), Section 922(g)(9) applies to firearms issued by federal, state, and local governments. 18 U.S.C. 925(a)(1) (Supp. III 1997).

2. This case involves a challenge to the constitutionality of Section 922(g)(9) brought by petitioner Fraternal Order of Police (FOP), an association of law enforcement officers. Petitioner contended that Section 922(g)(9) exceeds Congress's power under the Commerce Clause and violates the Tenth Amendment. Petitioner further argued that the provision violates the due process and equal protection rights of petitioner's members.

---

[1] Section 922(g)(9) does not apply to an individual whose conviction has been set aside or expunged, or who has been pardoned or has had his civil rights restored. See 18 U.S.C. 921(a)(33)(B)(ii) (Supp. III 1997).

The district court rejected petitioner's constitutional claims and granted summary judgment in favor of the United States. Pet. App. 34-44. The court held that Section 922(g)(9) is a permissible exercise of congressional power under the Commerce Clause. *Id.* at 38-39. The court also held that petitioner's due process and equal protection arguments are without merit. *Id.* at 39-42. The court found that, because no fundamental right or suspect class is at issue, the statute is subject to rational basis review. *Id.* at 40. Citing evidence in the legislative record showing that the presence of a gun during a domestic dispute substantially increases the likelihood that a victim will be killed, the court found that the statute survives rational basis review. *Id.* at 41-42. The court also rejected petitioner's argument that the statute disproportionately affects law enforcement officers, holding that the "disparate impact of a facially neutral law is of no constitutional significance unless the uneven effect is traced to a discriminatory purpose." *Id.* at 42.

Finally, the district court held that Section 922(g)(9) does not violate the Tenth Amendment. Because Section 922(g)(9) "places no requirements on States or state officials," the court explained, "[t]he Tenth Amendment is not implicated by the new law." Pet. App. 43.

3. The court of appeals initially reversed the judgment of the district court. Pet. App. 21-33. The court held that petitioner had standing to sue as the representative of members who are chief law enforcement officers (CLEOs). *Id.* at 23-27. On the merits, the court agreed with the United States that Congress's "special focus on domestic violence as compared to other misdemeanors [wa]s rational." *Id.* at 28. The court held, however, that the statutory scheme is

irrational because it permits gun possession by a police officer who has been convicted of a domestic violence felony, while barring gun possession by a police officer who is a domestic violence misdemeanant. *Id.* at 32-33. The court therefore concluded that the statute is "unconstitutional insofar as it purports to withhold the public interest exception [18 U.S.C. 925(a)(1) (Supp. III 1997)] from those convicted of domestic violence misdemeanors." Pet. App. 32.

4. The government filed a petition for rehearing and rehearing en banc. See Pet. App. 3. The panel granted the petition. *Id.* at 45. After additional briefing and oral argument, the court of appeals withdrew its prior opinion and issued a new decision rejecting petitioner's constitutional claims and affirming the district court's judgment. *Id.* at 1-20.

a. The court of appeals explained that because domestic violence misdemeanants are not a suspect class for equal protection analysis, and Section 922(g)(9) does not infringe any fundamental right, the statutory classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Pet. App. 8 (quoting *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The court held that the challenged provision is supported by a rational basis. The court acknowledged that "[t]reating misdemeanants more harshly than felons seems irrational in the conventional sense of that term." Pet. App. 8. It concluded, however, that

> on reflection it appears to us not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic vio-

> lence misdemeanants—adequately at least in the sense of explaining how Congress might have found that as to felons the net benefit of federal prohibition (and non-exemption) fell below the net benefit of prohibition and non-exemption as to misdemeanants. Although state laws do not uniformly ban felons from possessing guns * * * nonlegal restrictions such as formal and informal hiring practices may, as the government argues, prevent felons from being issued firearms covered by § 925(a)(1) in a large measure of the remaining cases.

Id. at 9. The court found that, in the absence of evidence negating those propositions, "they indicate that there is a reasonably 'conceivable state of facts' under which it is rational to believe that the felon problem makes a weaker claim to federal involvement than the misdemeanant one." *Ibid.* The court also "reaffirm[ed]" its prior holding that a "special focus on domestic violence misdemeanants, as opposed to other misdemeanants, was not irrational under the norms of equal protection jurisprudence." *Id.* at 11.

b. The court of appeals rejected petitioner's contention that Section 922(g)(9) infringes on fundamental rights protected by the Second Amendment and should therefore be subject to strict scrutiny. Pet. App. 13-15. The court noted that petitioner had presented no "evidence supporting a finding that the disputed rule would materially impair the effectiveness of a militia." *Id.* at 15. The court observed that Section 922(g)(9) "does not hinder the militia service of all police officers, only of domestic violence misdemeanants whose convictions have not been expunged, etc. [Petitioner]

never indicates how restrictions on the latter, relevant class would have a material impact on the militia." *Ibid.*

c. The court of appeals rejected petitioner's Tenth Amendment claim. Pet. App. 15-17. The court explained that "[petitioner's] Tenth Amendment challenge fails because § 922(g)(9) does not force state officials to do anything affirmative to implement its bar on domestic violence misdemeanants' possession of firearms." *Id.* at 15. The court also observed:

> It may commonly be a side effect of federal prohibitions to impair offenders' fitness for service as a police officer. Showing up for work at some spot other than a federal prison is a qualification for most state positions; federal incarceration intrudes inescapably. Of course § 925(a)(1)'s exemption for state-issued weapons protects states from this sort of peripheral interference as to all persons barred by federal law from weapons possession other than domestic violence misdemeanants, but the exemption's existence does not establish it either as a constitutional right or as a baseline for measuring claims under the Tenth Amendment—or any other constitutional provision.

Id. at 17.

d. Finally, the court of appeals held that Section 922(g)(9) is a permissible exercise of Congress's power under the Commerce Clause. Pet. App. 18-20. The court explained that Section 922(g)(9) "contains a 'jurisdictional element': in any prosecution under the provision for possession, the government must prove that the defendant possessed the firearm 'in or affecting commerce.'" *Id.* at 18. The court also observed that its resolution of the Commerce Clause issue is

consistent with decisions issued by "all the numbered circuits." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Every court of appeals that has considered the question has held that Section 922(g)(9)'s application to state and local employees does not violate the Tenth Amendment.[2] See Pet. App. 15-17; *Gillespie* v. *City of Indianapolis*, No. 98-2691, 1999 WL 463577, at *10-*11 (7th Cir. July 9, 1999); *Hiley* v. *Barrett*, 155 F.3d 1276 (11th Cir. 1998) (affirming and adopting *National Ass'n of Gov't Employees, Inc.* v. *Barrett*, 968 F. Supp. 1564, 1575-1576 (N.D. Ga. 1997)). See also *United States* v. *Meade*, 175 F.3d 215 (1st Cir. 1999) (rejecting Tenth Amendment challenge to 18 U.S.C. 922(g)(8) (1994 & Supp. III 1997)). That holding is correct and consistent with this Court's precedents. In *New York* v. *United*

---

[2] Although we agree with the court of appeals that petitioner's Tenth Amendment claim lacks merit, we believe that the court erred in holding that petitioner has standing to raise that claim. The court held that petitioner had standing to represent the interests of members who are CLEOs. See Pet. App. 11-13, 23-27. A CLEO would have standing to raise a Tenth Amendment claim, however, only if he was authorized by state law to do so on behalf of the State. See *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 144 (1939); but see *Gillespie* v. *City of Indianapolis*, No. 98-2691, 1999 WL 463577, at *4-*7 (7th Cir. July 9, 1999) (concluding that *Tennessee Elec. Power Co.* has been superseded by more recent decisions and that private plaintiffs may raise Tenth Amendment claims). In our view, petitioner—a private organization—cannot appropriately sue as the representative of members who themselves could sue only on behalf of their respective States.

States, 505 U.S. 144 (1992), the Court emphasized the longstanding distinction between laws passed by Congress "requiring or prohibiting certain acts," and laws that "directly * * * compel the States to require or prohibit those acts." *Id.* at 166; see also *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988). Section 922(g)(9) does not compel the States to enact regulations, nor does it commandeer state officials to implement a federal program. Rather, Section 922(g)(9) regulates the behavior of individuals, making it a federal crime— enforceable by federal authorities and prosecutable in the federal courts—for a category of persons deemed unsuitable by Congress to possess or receive firearms in or affecting commerce.

Petitioner argues that barring certain persons with the predicate criminal record from carrying an interstate firearm improperly displaces the discretion of state and local government to entrust such individuals with firearms. As the Seventh Circuit recently explained in upholding Section 922(g), however, "it [is not] constitutionally significant that the firearms ban now happens to include individuals employed in state and local law enforcement or who would otherwise be qualified to serve in state militias." *Gillespie*, 1999 WL 463577, at *11. Section 922(g)(9) "regulates individual behavior * * *. It singles out no one by occupation or affiliation with state or local government." *Ibid.* To the extent that the statute renders certain individuals ineligible for employment in state and local law enforcement and ineligible to serve in a state militia, "it does so incidentally." *Ibid.* Thus, "Congress has not superseded the criteria state and local governments employ to select those serving on their behalf; it has instead, in the exercise of its authority over interstate commerce, merely rendered some individuals unable, as

a practical matter, to meet one of the criteria that state and local governments have themselves established." *Ibid.*[3]

2. The court of appeals correctly rejected petitioner's claim that Section 922(g)(9) should be subjected to strict scrutiny based upon its alleged interference with rights protected by the Second Amendment. See Pet. App. 13-15. In *Lewis* v. *United States*, 445 U.S. 55, 65 & n.8 (1980), this Court held that the federal bar on

---

[3] Under 18 U.S.C. 922(d)(9) (Supp. III 1997), one who knowingly transfers a firearm to a person previously convicted of a domestic violence misdemeanor is subject to possible criminal penalties. See also 18 U.S.C. 924(a)(2) (1994 & Supp. III 1997) (establishing criminal penalties for any person who "knowingly violates" Section 922(d)). State supervisory officials who knowingly issue firearms to domestic violence misdemeanants would be covered by that provision. Section 922(d)(9) is not targeted at state officials, however, nor does it require state officials to assist in the enforcement or administration of federal law. Rather, it (like Section 922(g)(9)) simply encompasses state officials within the class of individuals subject to a generally applicable prohibition. Application of Section 922(d)(9) to state officials in that manner raises no genuine constitutional concern. Compare *Printz* v. *United States*, 521 U.S. 898, 913 (1997) (noting "the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law").

Petitioner contends that "the criminal penalty for transfer [of a firearm] to a domestic violence misdemeanant is a *de facto* command from the federal government to a CLEO to disarm any state officer otherwise entitled to perform his firearm-related duties." Pet. 11. That claim is without basis. As the court of appeals recognized, neither the statute itself nor the implementing instructions given by the Bureau of Alcohol, Tobacco and Firearms suggest that state officials are required to "disarm" persons covered by Section 922(g)(9), or otherwise to assist in the enforcement of the federal prohibition. See Pet. App. 16.

receipt and possession of firearms by felons was subject only to rational basis review. The Seventh Circuit, the only other court of appeals that has addressed such a challenge to Section 922(g)(9), also rejected it. *Gillespie*, 1999 WL 463577, at *14-*15. See also *National Ass'n of Gov't Employees, Inc.* v. *Barrett*, 968 F. Supp. at 1573 n.11; *United States* v. *Boyd*, No. 99-40001-01-SAC, 1999 WL 318497, at *4 (D. Kan. Mar. 30, 1999).

As the Seventh Circuit explained in *Gillespie*, "[t]he link that the [Second A]mendment draws between the ability 'to keep and bear Arms' and '[a] well regulated Militia' suggests that the right protected is limited, one that inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia." 1999 WL 463577, at *14. Under *United States* v. *Miller*, 307 U.S. 174 (1939), the Second Amendment does not apply in the absence of "some reasonable relationship" between the subject of the regulation at issue and "the preservation or efficiency of a well regulated militia." *Id.* at 178. "*Miller* and its progeny * * * confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia." *Gillespie*, 1999 WL 463577, at *14. See also *Lewis*, 445 U.S. at 65 n.8 (restriction on possession of firearms by felons does not "trench upon any constitutionally protected liberties"); *United States* v. *Rybar*, 103 F.3d 273, 285-286 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997); *San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1124-1125 & n.1 (9th Cir. 1996); *Hickman* v. *Block*, 81 F.3d 98, 101 (9th Cir.), cert. denied, 519 U.S. 912 (1996); *Love* v. *Pepersack*, 47 F.3d 120, 124 (4th Cir.), cert. denied, 516 U.S. 813 (1995);

United States v. *Johnson*, 497 F.2d 548, 550 (4th Cir. 1974).

Section 922(g)(9) "does not hinder the militia service of all police officers, only of domestic violence misdemeanants whose convictions have not been expunged, etc." Pet. App. 15. Because petitioner "never indicates how [such] restrictions on the latter, relevant class would have a material impact on the militia," its Second Amendment claim fails. *Ibid.* See also *Gillespie*, 1999 WL 463577, at *15 (rejecting Second Amendment challenge to Section 922(g)(9) because the plaintiff had failed to demonstrate that "the viability and efficacy of state militias will be undermined by prohibiting those convicted of perpetrating domestic violence from possessing weapons in or affecting interstate commerce.").

3. Under rational basis review, a legislative classification "must be upheld * * * if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). As the court of appeals correctly held (Pet. App. 8-11), Section 922(g)(9) satisfies that standard.

a. Section 922(g)(9) is an entirely reasonable means of removing firearms from likely scenes of domestic violence. Evidence before Congress showed that "the presence of a gun increases the likelihood that a woman will be killed threefold." 142 Cong. Rec. S11,227 (daily ed. Sept. 25, 1996) (Sen. Lautenberg). As one court of appeals recently explained:

> The rationale for keeping guns out of the hands of those convicted of domestic violence crimes is eminently reasonable. Persons convicted of such offenses have, by definition, already employed violence against their domestic partners on one or

> more occasions. Congress could reasonably believe that such individuals may resort to violence again, and that in the event they do, access to a firearm would increase the risk that they might do grave harm, particularly to the members of their household who have fallen victim to their violent acts before.

United States v. *Lewitzke*, 176 F.3d 1022, 1026 (7th Cir. 1999), petition for cert. pending, No. 99-5677; accord *Gillespie*, 1999 WL 463577, at *12-*13; *National Ass'n of Gov't Employees, Inc.* v. *Barrett*, 968 F. Supp. at 1573-1575.

b. In its initial opinion, the court of appeals held that the statutory scheme is irrational because it allows domestic violence felons, but not domestic violence misdemeanants, to possess firearms issued by government agencies. Pet. App. 27-33. On rehearing, however, the court considered the question anew and concluded that the legislative classification is supported by a rational basis. *Id.* at 8-10. The court explained that "on reflection it appears to us not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic violence misdemeanants." *Id.* at 9.[4]

That decision is correct. Congress could rationally have concluded that government agencies generally do not hire violent felons, and that the possession of government-issued firearms by violent misdemeanants

---

[4] The court also noted that "Congress's self-limitation here may reflect a legitimate accommodation of the inherent interest in minimizing the scope of potentially intrusive federal legislation." Pet. App. 10.

poses a far more significant real-world problem.[5] The legislative history, moreover, reflects Congress's awareness that acts of violence that would generally be classified as felonies are often classified as misdemeanors when they occur in the domestic context. See 142 Cong. Rec. S10,377-S10,378 (daily ed. Sept. 12, 1996) (Sen. Lautenberg); see also *id.* at S10,380 (Sen. Feinstein); *id.* at S10,379 (Sen. Wellstone); *id.* at S8831 (daily ed. July 25, 1996) (Sen. Lautenberg). Precisely because of that anomalous classification, the perpetrators of domestic violence may evade screening processes that focus on felonies.

c. To support its equal protection argument, petitioner relies (Pet. 18) on *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), and *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). In those cases, however, the Court applied strict scrutiny because the challenged government practices involved the use of racial classifications (*McLaughlin* and *Yick Wo*) or infringed upon a fundamental right (*Skinner*). Under strict scrutiny, it is appropriate to examine whether a statute is underinclusive. Such an analysis has no place under rational basis review, however. See *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 316 (1993). Absent a showing of invidious discrimination,

---

[5] For example, felons are generally prohibited from enlisting in any of the armed forces. See 10 U.S.C. 504. Moreover, as detailed in the government's petition for rehearing, state and local governments overwhelmingly have strict policies against hiring or retaining persons convicted of a violent felony. See Gov't Rehearing Pet. 13 n.6. Although such agencies typically have unambiguous policies against the hiring of felons, they do not generally have such clear policies against the hiring of misdemeanants. *Id.* at 14 n.7.

"it makes no difference" that the classification could logically be applied to an additional category of persons. See *Vance* v. *Bradley*, 440 U.S. 93, 109 (1979).

4. Petitioner contends (Pet. 19-21) that Section 922(g)(9) exceeds Congress's power under the Commerce Clause. As the court of appeals noted, all of the "numbered circuits" have rejected similar Commerce Clause challenges to the various restrictions on gun possession imposed by 18 U.S.C. 922(g). See Pet. App. 18 (citing cases from 11 courts of appeals). The restrictions are constitutional because Section 922(g) bars the specified categories of persons from possessing firearms "in or affecting commerce." 18 U.S.C. 922(g) (1994 & Supp. III 1997). The statute thus contains a jurisdictional element that "ensure[s], through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 561 (1995); see also *Scarborough* v. *United States*, 431 U.S. 563, 564, 575 (1977) (felon's possession of a firearm satisfies the Omnibus Crime Control Act's "in commerce or affecting commerce" requirement if the gun has moved in interstate commerce at any time in the past).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

MARK B. STERN
ROBERT M. LOEB
Attorneys

SEPTEMBER 1999