No. 01-704

IN THE

Supreme Court of the United States

United States of America, et al.,

Petitioners,

v.

Thomas Lamar Bean,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Federal law prohibits a person who is convicted of a crime punishable by imprisonment for a term exceeding one year from possessing firearms. The Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if the applicant meets certain criteria. See 18 U.S.C. § 925(c). The denial of such relief is subject to judicial review. *Id.* Since 1992, appropriations bills have specified that ATF may not expend funds to act upon applications under Section 925(c). Neither those appropriations bills nor any other statute, however, has suspended the availability of judicial review.

The question presented is whether the annual appropriations provisions barring ATF from expending appropriated funds to act upon applications for relief from federal firearms disabilities also repeal the jurisdiction of federal district courts to grant relief from firearms disabilities.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Thomas L. Bean ("Respondent") respectfully submits that the petition for a writ of certiorari should be denied.

STATEMENT

Respondent, a respected former firearms dealer, was arrested by Mexican authorities at the border when his assistants inadvertently left ammunition in plain view in the rear of respondent's sport-utility vehicle. Respondent was convicted in Mexico of illegally importing ammunition and was imprisoned in that country for several months. The conviction rested on a confession that Mexican authorities prepared in Spanish and required respondent to sign, notwithstanding that respondent did not speak or understand the Spanish language.

This case involves whether, subsequent to the Mexican conviction, respondent has the right to transport, possess, or receive firearms under federal law. The district court held that he has that right on two independent grounds: (i) respondent's firearm privileges were never revoked because the specific circumstances surrounding the Mexican conviction were not sufficient to terminate petitioner's firearms privileges under 18 U.S.C. § 922(g)(1); and (ii) in any event, respondent was entitled to have his firearms privileges restored under 18 U.S.C. § 925(c) because the evidence conclusively established that respondent presented no danger to the community and granting the relief would not be contrary to the public interest.

On the government's appeal, the Fifth Circuit affirmed on the basis of the district court's second holding, concluding that a prior Fifth Circuit decision in *United States* v. *McGill*, 74 F.3d 64 (1996), construing various budget bills as temporarily suspending the availability of judicial review under Section 925(c), had been undermined by "the intervening passage of time and its effect." Pet. App. 4a. The court of ap-

peals explicitly left the district court's first holding – that respondent's firearms privileges were never suspended in the first instance – undisturbed. *Id.* 11a.

I. Respondent was a licensed firearms dealer and is a respected member of his community. See generally Pet. App. 35a-36a (district court's findings of facts). On March 14, 1998, respondent attended a gun show in Laredo, Texas, and at the conclusion of the show decided to have dinner with his assistants in nearby Nuevo Laredo, Mexico. Although respondent directed the assistants to remove all firearms and ammunition from his vehicle, they inadvertently left ammunition of mixed calibers (approximately 200 rounds) in plain view in the rear cargo area, where it was seen by Mexican border officials. They arrested respondent because he owned the vehicle and the ammunition. He was held in custody for two months and then convicted on the basis of a statement that Mexican officials prepared in Spanish and required respondent to sign, notwithstanding that he did not speak that language. Respondent's Mexican conviction only involved ammunition, not the possession of firearms or any crime involving drugs or violence.

Mexican authorities imprisoned respondent for four months, then transferred him to the United States pursuant to the International Prisoner Transfer Treaty and applicable federal statutes. He was placed on supervised release a month later and was finally released on August 30, 1999. See Pet. App. 12a-14a.

A federal statute, 18 U.S.C. § 922(g)(1) (hereinafter referred to as "§ 922(g)(1)"), makes it a crime for any person "who has been convicted in any court[] of a crime punishable by imprisonment for a term exceeding one year" to transport, possess, or receive firearms or ammunition. Under 18 U.S.C. § 925(c) (hereinafter referred to as "§ 925(c)"), persons subject to § 922(g)(1) may apply to the Secretary of the Treasury for relief from that disability on the ground that the applicant "will not be likely to act in a manner dangerous to public

safety and that the granting of the relief would not be contrary to the public interest." If the application is "denied by the Secretary" (or the Bureau of Alcohol, Tobacco, and Firearms (hereinafter referred to as the "ATF") as the Secretary's designee (see 27 C.F.R. § 178.144(b)), the applicant may "file a petition" for relief in federal district court. "The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice." 18 U.S.C. § 925(c).

II. Pursuant to § 925(c), respondent requested that ATF grant him relief from any firearms disability arising from the Mexican conviction. ATF responded that it would not act on the application. Congress, ATF explained, had withheld any funds for it to investigate or act on applications under § 925(c). See Pet. App. 15a-16a.

III. Respondent then filed a petition in federal district court to have his firearms privileges restored. The district court ruled for respondent on two separate grounds.

a. Acting *sua sponte*, the district court held that, in light of the specific circumstances surrounding the Mexican conviction, respondent was not subject to the firearms disability of § 922(g)(1). The district court recognized the holdings of other courts that § 922(g)(1) applies to convictions "in courts outside the United States," but found a "dangerous flaw with this reasoning": "a 'serious' crime in one country is not necessarily considered 'serious' in the United States." Pet. App. 31a. Deeming respondent's conduct a felony, the district court concluded, would be "far too severe" because he was merely "carrying a box of ammunition." *Id.* 32a. Indeed, "even Mexican lawmakers have realized that the penalty does not fit the crime": "After Mr. Bean's case was made public through the media, the Republic of Mexico relaxed the criminal statute in question to make the offense of introducing firearms or ammunition across its border a misdemeanor offense with only a fine on the first occasion." *Id.*

The district court relied heavily on the "disturbing" facts surrounding respondent's arrest and conviction:

> Knowing that Mr. Bean could not read, speak, or understand the Spanish language, the Mexican officials prepared a statement for Mr. Bean to sign. Bean was then instructed to sign the documents prepared in Spanish without the benefit of an interpreter who could explain to Mr. Bean what the documents stated or represented. Mr. Bean came to find out later that the documents which he signed amounted to a confession.

Id. 31a-32a. In sum, the district court concluded, "[t]his case is a perfect illustration as to why the phrase 'any court' in 18 U.S.C. § 922(g)(1) cannot be interpreted to mean 'any court in the world regardless of the severity of the crime or the due process [to] which the defendant was entitled during the defense of his case.'" *Id.* 32a-33a.

b. The district court separately held that it had jurisdiction to consider respondent's application under § 925(c) (see Pet. App. 16a-30a) and that the application should be granted (see *id.* 34a-36a).

On the jurisdictional question, the district court reasoned that § 925(c) explicitly provides applicants with a right of judicial review. Although Congress had withdrawn funding for ATF to act on applications, it had not taken any steps to remove the federal courts from the process. Particularly given that this Court has deemed findings of implied repeals of substantive law through funding restrictions to be "'strongly' disfavored" (Pet. App. 17a (quoting *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974)), the district court concluded that the funding restrictions on *ATF* were not sufficiently clear to deprive applicants of any right of *judicial* review. *Id.* 25a-26a.

In response to the government's reliance on excerpts of legislative history expressing a concern that firearms privileges not be wrongfully restored to dangerous felons, which according to the government implicitly suggested a congressional intent to block even the courts from acting under § 925(c), the court "diligently searched the legislative history

of both 18 U.S.C. § 925(c)" and the relevant appropriations acts, but found only "many contradictory statements." *Id.* 20a. See also *id.* 27a ("If various district and appellate courts read the exact same legislative history and come to different conclusions (as the courts do on this issue), then it is this Court's opinion that the legislative history is far from 'clear.'"). Ultimately, "it is consistent to infer that Congress withheld funding to the ATF for *economic reasons*, not because they intended outright suspension of relief for worthy individuals." *Id.* 24a (emphasis in original).

The district court explained that the government's characterization of Congress' intent also could not be rationalized with the overall statutory scheme: under 18 U.S.C. § 921(a)(20), "a state felon may obtain restoration of his federal firearm rights by operation of state law and without the involvement of any special ATF competency" in a variety of ways, including through "pardons, expungements, and restorations of civil rights" under state law. Pet. App. 24a. Indeed, "'many states restore civil rights to convicted felons by means of a general law stating that all rights shall be reinstated upon the service of [a] sentence'" or "after a given period of time following sentence or parole." *Id.* 25a (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1008 (CA2 1995)). It thus cannot be said that Congress intended to preclude individuals convicted of felonies from having their firearms privileges restored.

The district court also concluded that respondent's application had been "denied" by ATF, triggering the judicial review provisions of § 925(c). "Congress did not intend to apply rigidly the doctrine of exhaustion of administrative remedies in this context," the court explained, "because it gave the district courts discretion to create or supplement the administrative record when necessary to avoid a miscarriage of justice." Pet. App. 30a. Here, exhaustion is not required because it "would be wholly futile or inadequate due to lack of appropriations." *Id.*

c. On the merits of respondent's application, the district court compiled an extensive record, ultimately finding it indisputable that respondent "will not be likely to act in a manner dangerous to public safety and that the granting of the relief requested would not be contrary to the public interest." Pet. App. 37a. The district court heard live testimony to that effect from, *inter alios*, an ATF inspector, a local chief of police, and a deputy sheriff. *Id.* 35a. The court also received written submissions to the same effect from, *inter alios*, a state court judge, two local chiefs of police, a local sheriff, a local city marshal, and a local prosecutor. *Id.* 36a.

IV. While this case was pending in the district court, respondent pursued a second avenue for relief from any firearms disability. Respondent sought and secured a state court declaration that, in light of "the circumstances of [respondent's] conviction in Mexico and the subsequent reduction of the sentence imposed for a like offense to the equivalent of a misdemeanor offense," respondent "is not a convicted felon as that term is defined under Texas law, including but not limited to any such definition or construction of the term 'felon' in the Texas Penal Code." Order of Feb. 25, 2000, No. D-990, 424-C (Orange Cty., TX, 260th Jud. Dist.).

V. On the government's appeal, a panel of the Fifth Circuit unanimously affirmed the district court's decision. The court was "mindful of the serious concerns articulated about convicted felons regaining the right to possess firearms," but concluded that it was "beyond peradventure to believe that Congress, or those seeking to rescind § 925(c), intended for someone like Bean to lose his livelihood on the basis of the facts such as are before us." Pet. App. 11a.

Recognizing that *United States* v. *McGill*, 74 F.3d 64 (CA5 1996), had construed the funding restrictions on ATF as suspending the operation of § 925(c), the court found it appropriate to consider whether that conclusion remained persuasive in light of "the intervening passage of time and its effect." Pet. App. 4a. In the court's view, time had revealed

that "[t]his is not a case of mere agency delay in processing [respondent's] petition, it is complete preclusion of administrative remedies for an indefinite, possibly infinite, period of time." *Id.* 9a n.20. The court thus regarded "the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights" as "a critical additional factor." *Id.* 9a.[1]

The Fifth Circuit emphasized that § 925(c) grants important and substantial rights to persons whose firearms privileges have been revoked. The court of appeals recognized this Court's holding that a finding that Congress indirectly abrogated statutory provisions through funding restrictions is "'especially disfavored.'" Pet. App. 7a (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)). But even that stringent standard, the Fifth Circuit explained, is somewhat too lenient in this context because it arose from cases involving "purely financial rights that Congress then rescinded by expressly refusing to fund." *Id.* 8a n.19. Here, by contrast, the government is arguing that, rather than merely having "promis[ed] money then chang[ed] its mind and not making it available," Congress supposedly abrogated a substantive right. *Id.* 8a. "We must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Id.* 9a.

The Fifth Circuit separately affirmed the district court's decision that respondent was entitled to have his firearms privileges restored under § 925(c). *Id.* 9a-11a.

Having concluded that the district court properly granted respondent's application under § 925(c), the court of appeals left undisturbed the district court's separate holding "that

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[1] On this basis, the Fifth Circuit also concluded that respondent's "administrative remedies *de facto* were exhausted." Pet. App. 9a & n.20.

Bean's foreign conviction was not a predicate offense triggering the provisions of 18 U.S.C. § 922(g)(1)." Pet. App. 11a.

The Fifth Circuit denied the government's petition for rehearing *en banc* without a single member of the court calling for a vote.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied for three reasons. *First*, any decision by this Court on the question presented would have no significance in this case because the district court ruled in respondent's favor on an independent ground that the Solicitor General explicitly acknowledges is not presented by the petition – *viz.*, that the facts and circumstances of the Mexican conviction do not trigger the firearms disability of § 922(g)(1). As the government itself made clear in its brief on appeal: "The district court concluded *alternatively* that plaintiff's foreign conviction could not serve as a predicate offense for loss of firearms privileges under 18 U.S.C. § 922(g)(1). *In the court's view, the federal firearms disabilities never attached.*" Gov't C.A. Br. 10 (emphasis added). *Second*, no other circuit has yet addressed the specific question decided by the Fifth Circuit: whether "the intervening passage of time and its effect" (Pet. App. 4a) undermine prior circuit precedent holding that judicial review is not available under 18 U.S.C. § 925(c). The *en banc* Third Circuit, however, will soon decide that question in an ideal vehicle to resolve any circuit conflict that might emerge (*Pontarelli* v. *ATF*, No. 00-1268 (argued Nov. 28, 2001)), and there is no reason that this Court must decide the question prior to the Third Circuit's decision. *Third*, the Solicitor General's principal argument – that the decision below misinterprets various statutes – is both irrelevant to the certiorari determination and also incorrect.

I. Certiorari should be denied because the question presented by the Solicitor General – whether respondent had a right to seek judicial review of the revocation of his firearms

privileges pursuant to § 925(c) – is entirely academic in the context of this case.

a. The district court held that respondent's firearms privileges were never revoked because the Mexican conviction did not trigger § 922(g)(1). Pet. App. 31a-33a. Cf. *id.* 16a (district court's recitation that respondent's case separately raised the question "whether a foreign conviction may serve as the predicate offense for a prohibition of firearms privileges under 18 U.S.C. § 922(g)(1)"). That conclusion is further buttressed by the Texas court's entry, subsequent to the district court's decision, of a declaratory judgment that the state does not deem him a felon in light of the circumstances of the Mexican conviction. See *supra* at 6.

Certiorari should be denied because the district court's holding under § 922(g)(1) – which resolves this case entirely – is not raised by the petition. The Solicitor General framed the question presented by the petition so as not to encompass the proper construction of § 922(g)(1). See Pet. i. In addition, the petition explicitly states that the government is not raising that question. See *id.* 5 n.2. Because the district court's decision in this case establishes that respondent could not be charged with any offense under § 922(g)(1), respondent has no need to seek to have his firearm privileges "restored" under § 925(c), which is the only issue presented by the petition. Section 922(g)(1) is a self-executing federal criminal statute, which is enforced by charging the defendant as a felon in possession of firearms. See 18 U.S.C. § 922(g) ("It shall be unlawful for any person * * *."). Under the district court's holding, respondent simply could not be charged with a violation of § 922(g)(1).[2]

b. The petition contends that respondent conceded in the court of appeals that "his conviction in Mexico triggered fire-

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[2] For decisions discussing § 922(g)(1), see, *e.g.*, *Old Chief* v. *United States*, 519 U.S. 172, 174 (1997), and *Custis* v. *United States*, 511 U.S. 485, 487 (1994).

arms disabilities under 18 U.S.C. 922(g)(1)." See *id.* 5 n.2 (citing Resp. C.A. Br. 18). That contention is inaccurate, and it would be entirely counterintuitive to believe that respondent would have abandoned such an independent ground of decision that grants him all the relief he seeks. Respondent explicitly *embraced* the district court's holding, but argued that the government had misconstrued the district court's decision as having adopted a categorical rule that foreign convictions may never trigger § 922(g)(1), when in fact the district court had undertaken a nuanced analysis of the facts and circumstances surrounding the foreign conviction. See Resp. C.A. Br. 19. Respondent agreed with the district court's conclusion that, under such a case-by-case approach, he was not subject to a firearms disability:

> [The government] correctly cite[s] the dicta of two cases which indicate that further inquiry might be warranted to question foreign convictions where the facts demonstrate that the foreign conviction was the "result of the violation of the defendant's civil rights or contrary to any cherished principal [sic] of American constitutional law." *United States v. Atkins*, 872 F.2d 94, 95-6 (4th Cir. 1989), *cert. denied*, 493 U.S. 836 (1989); and, *United States v. Winson*, 793 F.2d 754 (6th Cir. 1986).
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> As stated in Appellee's petition for relief and included in the evidence admitted at trial, Mexican law required Appellee to sign a statement prepared in Spanish, which Appellee could not understand and which Appellee later learned constituted a confession, which incriminated Appellee. R3, Tr. 13, 14. The right of an accused not to be required to make an incriminating statement against himself is certainly a cherished principal [sic] of American constitutional law, which the district court noted.

Id. 19-20.

In purporting to identify a concession by respondent in the Fifth Circuit, the government cites to a single clause in a single sentence in respondent's brief on appeal that just states his position in the *district court* before the district judge *sua sponte* decided the § 922(g)(1) question in respondent's favor. Plainly using the past tense, respondent's Fifth Circuit brief stated: "Appellee never *disputed* he was prohibited from possessing firearms under 18 U.S.C. § 922(g)(1) as a result of his foreign conviction * * *." Resp. C.A. Br. 18 (emphasis added). Moreover, that statement in respondent's appellate brief simply echoes the identical statement in the government's brief, which again was limited to respondent's position prior to the district court's decision: "Plaintiff never disputed that he was prohibited from possessing firearms under 18 U.S.C. § 922(g)(1) as a result of his felony conviction in Mexico. * * * * Without briefing or argument from either party, the district court *sua sponte* considered whether plaintiff's Mexican felony conviction could serve as a predicate offense for prohibition of firearms under § 922(g)(1)." Gov't C.A. Br. 17.

Any doubt on this score is resolved by the fact that the government expressly conceded below, and the Fifth Circuit agreed, that the district court's holding under § 922(g)(1) was an independent ground of decision. The government stated: "The district court concluded *alternatively* that plaintiff's foreign conviction could not serve as a predicate offense for loss of firearms privileges under 18 U.S.C. § 922(g)(1). *In the court's view, the federal firearms disabilities never attached.*" Gov't C.A. Br. 10 (emphasis added). See also *id.* 2 (separately appealing, as question three, "Whether the district court erred *in ruling* that plaintiff's foreign conviction *cannot serve as a predicate offense* for a prohibition of firearms privileges under § 922(g)(1)." (emphasis added)); *id.* 17-23 (extensive argument section separately contesting this holding). The court of appeals, in turn, acknowledged that the district court had separately held "that Bean's foreign conviction was not a predicate offense triggering the provisions of 18 U.S.C.

§ 922(g)(1)," and explicitly left that holding undisturbed. Pet. App. 11a.

In any event, it would make no difference if respondent *had* conceded for purposes of the proceedings in the Fifth Circuit that the Mexican conviction triggered § 922(g)(1), now that the Fifth Circuit has decided the case without adopting any such concession. The critical question is whether the district court's ruling establishes (as a matter of *res judicata* or otherwise) that respondent is not subject to § 922(g)(1) such that respondent has no need to resort to the provisions of § 925(c). That is a question of law that would be determined by a later court reviewing the district court's decision. Plainly, the better reading of the opinion is that the district court held that the Mexican conviction does not trigger § 922(g)(1). See *supra* at 3-4. Just as important, the government conceded that was the better reading in the Fifth Circuit and the court of appeals agreed. It would be nothing less than absurd for the government now to attempt to charge respondent criminally under § 922(g)(1).

Nor can the Solicitor General resuscitate the petition by retreating to the argument that the Fifth Circuit could address the application of § 922(g)(1) on remand. That argument would depend on two separate premises that have been *rejected* by the only courts to decide them – *i.e.*, that the government will prevail in its arguments under § 925(c) and also its arguments under § 922(g)(1). In other words, the government's position would have to be that a ruling by this Court could, conceivably, have a practical consequence if various contingencies occur. Not only does this Court ordinarily not grant certiorari to decide a question that is presented in such a hypothetical context, but leaving the application of § 922(g)(1) for proceedings on remand would require this Court to decide the question presented based on an artificial assumption: logically, the question whether an individual has had his firearms privileges revoked under § 922(g)(1) (on which respondent separately prevailed in the district court) is

antecedent to the question (presented by the petition) whether the individual must seek to have those privileges restored.[3]

c. The question presented by the Solicitor General is framed artificially, and thus is inappropriate for certiorari, in still another respect. After concluding that judicial review is available under § 925(c), the district court made factual findings, supported by extensive testimony, that respondent's firearms privileges should be restored because he indisputably presents no threat to the community. See *supra* at 5-6. The government unsuccessfully challenged that holding. See Gov't C.A. Br. 15-17; see also Pet. App. 9a-11a (rejecting those arguments). In this Court, the Solicitor General abandons those contentions. Although it no longer disputes that the district court correctly held that respondent is entitled to have his firearms privileges restored if judicial review is ever available under § 925(c), the government argues that district courts will endanger communities by restoring firearms privileges too freely. See Pet. 17. If that is a legitimate concern, it would be more appropriate for this Court to grant certiorari in a case in which the petitioner seeks review of both the question whether judicial review is available under § 925(c) and, if the answer to that question is yes, what the appropriate legal standard is. Otherwise, the Court may find it necessary to expend its resources in granting certiorari in two separate cases.

II. Certiorari also is not warranted because there is no circuit conflict over the specific question decided by the court of appeals in this case: whether "the intervening passage of time and its effect" (Pet. App. 4a) undermine prior circuit prece-

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[3] Furthermore, the Solicitor General has successfully opposed certiorari in innumerable cases on the ground that the lower courts' decisions rested on an independent ground not presented by the petition. It would be both surprising and noteworthy if the government announced here that the opposite view is correct.

dent holding that judicial review is not available under 18 U.S.C. § 925(c).

a. As the Solicitor General frankly acknowledges, "The Fifth Circuit in this case departed from [its prior decision in] *McGill* on the ground that 'we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights.'" Pet. 15 (quoting Pet. App. 9a). The decision below is thus properly distinguished from decisions of other courts that considered, in previous years, whether Congress intended to suspend review of applications to restore firearms privileges temporarily. Thus, the Fifth Circuit held in 1996 that various budget bills had impliedly effected such a suspension (see *United States* v. *McGill*, *supra*, 74 F.3d 64) but held five years later in this case that the passage of time demonstrated that Congress had merely intended to conserve resources by preventing *ATF* (as opposed to the courts) from considering such applications (see Pet. App. 4a). Indeed, no member of the Fifth Circuit called for a vote on the government's petition for rehearing *en banc* in this case, including any of the Fifth Circuit judges who ruled in the government's favor in that court's previous decision in *McGill* or who subsequently affirmed a district court's holding that it lacked jurisdiction under *McGill* (see *Kostmayer* v. *Department of Treasury*, No. 98-30355 (Apr. 9, 1999) (order), *cert. denied*, 528 U.S. 928 (1999)).

The question whether the passage of time undermines the inference created by congressional suspension of ATF's funding with respect to § 925(c) has not yet been considered by any other court of appeals. When those courts do consider the issue, there is every reason to believe that they will agree with the Fifth Circuit's decision in this case. The passage of time is tied directly to the question whether an application as a result of funding suspension has been "denied," thereby triggering access to judicial review under § 925(c), when funding restrictions cause ATF to refuse to act on the application. Al-

though a relatively short delay in considering the application is arguably not a "denial," it has now become clear that Congress has imposed an effectively permanent suspension of funding and that all applications to ATF are being at least "constructively denied" rather than merely deferred. Thus, although the Fourth Circuit has held in denying relief under § 925(c) that an applicant could not claim a "constructive denial" when "the agency has not acted for only a relatively short period of time" (*Saccacio* v. *ATF*, 211 F.3d 102, 104 (2000)), that conclusion does not preclude a later determination by that court and other circuits that the funding restriction has become permanent, such that applicants are entitled to judicial review on the basis of the constructive denial of their applications.

Not only should this Court's consideration of the question decided by the Fifth Circuit in this case await a ruling on that issue by at least one other circuit to see if a conflict develops, but such a ruling is in fact imminent. On November 28, the *en banc* Third Circuit heard oral argument in a case that presents the question whether that court should follow the Fifth Circuit's decision in this case and adhere to its prior precedent in *Rice* v. *United States*, 68 F.3d 702 (1995), or instead should hold that judicial review is not available under § 925(c). *Pontarelli* v. *ATF*, No. 00-1268. Prior to oral argument, the Third Circuit specifically directed the parties to submit supplemental briefs addressing the Fifth Circuit's decision in this case. The Third Circuit's decision in *Pontarelli* will accordingly provide this Court with substantial guidance regarding whether the circuits will reach a common understanding on the application of § 925(c). *Pontarelli* will also provide this Court with the opportunity to resolve any circuit conflict that might emerge because the applicant in *Pontarelli* will certainly seek certiorari if the Third Circuit declines to follow the Fifth Circuit's decision in this case.

b. The Solicitor General offers no persuasive reason to conclude that the question presented by the petition so ur-

gently requires resolution that it would be inappropriate to await the Third Circuit's decision in *Pontarelli*. To be sure, the petition paints an eye-catching image of federal district judges dispensing gun permits like candy to tens of thousands of marauding Texas felons. See Pet. 16, 17. But that hyperbolic claim is provably false. Texas no doubt has its fair share of felons, but so do the states within the Third Circuit, which since 1995 has permitted district courts to grant precisely the relief that the Fifth Circuit authorized here. Through print and electronic resources, respondent has been able to identify only *three* individuals who filed such an application in district courts in the Third Circuit in that entire six-year period: Philip Rice (see *Rice* v. *United States*, No. 93-6107, 1997 U.S. Dist. LEXIS 1126 (E.D. Pa. Jan. 31, 1997) (application granted)); Louis Pontarelli (see *Pontarelli* v. *United States Dep't of the Treasury*, No. 98-5081, 2000 U.S. Dist. LEXIS 2702 (E.D. Pa. Mar. 10, 2000) (application granted), *appeal pending*, CA3 No. 00-1268); and Jerome Palma (see *Palma* v. *United States*, 228 F.3d 323 (CA3 2000) (application denied)). That was precisely the point made by the Solicitor General in opposing certiorari in *McGill*: "we are informed that no felon has yet obtained relief from a district court in [the Third Circuit], and that no applications for relief are currently pending before district courts there (other than the application in *Rice* itself)." U.S. BIO, No. 95-2015, *McGill* v. *United States* 11.

Any contention by the government that the question presented requires immediate resolution would also stand in considerable tension with the Solicitor General's argument, successfully made in opposition to petitions that sought to resolve the conflict between the Fifth Circuit's decision in *McGill* and the Third Circuit's decision in *Rice*, that the conflict was tolerable. In *McGill*, the Solicitor General advised this Court to wait until the Third Circuit has the opportunity to "reconsider its decision in *Rice*," which is precisely what will occur in the pending *Pontarelli* case. U.S. BIO, No. 95-2015, *McGill* v. *United States* 11. See also U.S. BIO, No. 99-

71, *Kostmayer* v. *Department of Treasury* 8 n.4 (adhering to position expressed in *McGill* BIO).

Finally, the Solicitor General greatly overstates the significance of any divergence in the circuits' interpretation of § 925(c). The Third and Fifth Circuits hold that district courts may grant relief from firearms disabilities only in the most extraordinary circumstances. The Third Circuit holds that an individual is not even entitled to produce evidence in support of his application unless he first establishes, as a "threshold" matter, that the failure to restore his firearms privileges would constitute a "miscarriage of justice." *Palma* v. *United States*, 228 F.3d 323, 329 (2000). "Then, and only then, can the district court receive such evidence and consider it in determining whether the applicant satisfies the other requirements of § 925(c) – *i.e.*, whether the applicant will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest. " *Id.* Similarly, in this case, the Fifth Circuit held that respondent was entitled to have his firearms privileges restored only because of the extraordinary facts of his case. See *supra* at 6. It will be a rare case in which an applicant will successfully petition to have his firearms privileges restored under that stringent standard.

III. The government addresses the supposed circuit conflict presented by the petition in only three paragraphs (see Pet. 8-9), then spends eight pages attempting to establish that the Fifth Circuit's decision misconstrues Congress' intent (see *id.* 9-16). But these arguments on the merits amount to nothing more than a request for error correction because the Solicitor General cannot, and does not, contend that the decision below conflicts with this Court's precedents. In any event, the government's arguments are simply wrong for the reasons described by the lower courts but ignored by the petition.

a. The petition argues first (at 10) that annual funding restrictions unambiguously express Congress' intent to impliedly repeal ATF's authority to act on § 925(c) applications.

For each of the past several years, Congress has provided that "none of the funds appropriated herein [*i.e.*, to ATF] shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)." *E.g.*, Pub. L. No. 102-393, 106 Stat. 1732 (1992). But it does not necessarily follow that Congress implicitly intended to preclude judicial review. Moreover, the funding restrictions do not necessarily imply that Congress intended to forbid *even ATF* from acting. As the Fifth Circuit explained, this Court's decisions grudgingly finding implied repeals on the basis of funding restrictions involve Congress "promising money then changing its mind and not making it available." Pet. App. 8a. Here, by contrast, the implied repeal would be of a *substantive right* and the agency could separately secure the funds in another way. In particular, ATF could charge an applicant a fee that would cover the costs of its investigation. Cf. Pet. App. 23a (district court's conclusion that ATF spent an average of $3700 per investigation).

b. The Solicitor General next argues that four aspects of the statutory scheme establish Congress' intent to impliedly repeal the judicial review provision of § 925(c). See Pet. 11-16. But this Court's precedents reject the logic underlying the government's argument – *i.e.*, that Congress will be held to have impliedly repealed substantive law through inferences piled upon top of still other inferences. The already "strongly disfavored" inference that Congress intended funding restrictions on ATF to repeal *that agency's* authority to act on § 925(c) applications (see *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974)) is stretched past the breaking point when invoked to establish that Congress impliedly intended to repeal the *judiciary's* authority to act as well. Federal law expressly provides: "Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial." 18 U.S.C. § 925(c). Congress did not repeal that provision and did not take any direct step to preclude judicial review. So long as the judicial

review provision of § 925(c) can be rationalized with ATF's refusal to act on applications – and it can – the Fifth Circuit's decision is correct on the merits. Any other result would require this Court to discard the first principle of statutory construction: that the plain statutory language controls. See Pet. App. 26a (citing *Norfolk & W. Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991); *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 557-58 (1990)).

1. The government's principal argument is that § 925(c)'s judicial review provision is *per se* ineffective unless and until ATF acts on an application because the statute predicates judicial review upon the application first being "denied" by ATF. See Pet. 11-12. But ATF's categorical refusal to act on an application – whether voluntarily or as a result of a funding restriction – constitutes a "denial." As the dictionary definition quoted by the petition makes clear, a "denial" is not limited to an affirmative "rejection" but also includes a "'refusal to grant'" the requested relief. Pet. 12 (quoting *Webster's Third Int'l Dict.* 602 (1993)).

Here, ATF conclusively stated that it would not act on respondent's application and thereby "refus[ed] to grant" the application. On the government's contrary view, an individual could not seek judicial review if ATF were authorized to expend funds on § 925(c) applications but categorically refused to do so, because the agency's refusal to act would never constitute a "denial." Congress could not have intended the statute to operate in that way.

The government's argument is also refuted by its own contention (Pet. 12) that judicial review under § 925(c) is subject to the Administrative Procedure Act ("APA"). Assuming that is correct, then ATF's refusal to act suffices to permit an applicant to proceed to court. The APA explicitly renders an agency's "failure to act" subject to judicial review. 5 U.S.C. § 551(13) ("'agency action' includes * * * failure to act"); *id.* § 702 ("A person suffering legal wrong because of agency

action, or adversely affected or aggrieved by agency action * * * is entitled to judicial review thereof."). Because § 925(c) explicitly provides a mechanism for an applicant to seek review in court, this is a case in which Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion," such that ATF's inaction is subject to judicial review. *Heckler* v. *Chaney*, 470 U.S. 821, 834-35 (1985).

2. The government's next argument is that the APA renders a court powerless to provide an applicant any relief under § 925(c). See Pet. 13. The Solicitor General acknowledges that a court may declare the refusal to grant relief to be "unlawful." But the government contends that ATF's action cannot be deemed "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance *with law*'" because ATF has acted in accordance with the funding restrictions placed upon it. *Id.* (quoting 5 U.S.C. § 706(2)(A) (emphasis added)). But the relevant "law" for these purposes has to be the substantive standard for restoring firearms privileges, not the appropriations statutes governing ATF. On the government's alternative view, a district court could never overturn ATF's refusal to grant relief under § 925(c) if ATF had properly investigated, or refused to investigate, the application in accordance with all relevant *funding* legislation, even if its substantive decision ran totally contrary to the statutory standard for granting relief. That cannot be right. At the very least, given that respondent's reading of § 925(c) is a reasonable one, the funding provisions identified by the government do not provide the clear and convincing proof required by this Court's precedents to establish that Congress intended to implicitly suspend the statute's judicial review provision.

3. The government next argues that the Fifth Circuit's decision conflicts with what it describes as "Congress's stated reasons for suspending ATF's authority," including particularly to prevent *any* person from having his firearms privi-

leges restored. Pet. 13-14. But that supposed "reason" for preventing ATF from acting on applications is not "stated" anywhere in the statute, which unambiguously grants a right of judicial review. Fidelity to plain meaning is, in fact, the foundation of this Court's holdings that repeals by implication are strongly disfavored (see, *e.g.*, *Johnson* v. *Robison*, *supra*, 415 U.S. at 373-74) and that funding restrictions will be deemed to repeal substantive law only upon a clear and convincing showing of congressional intent (see, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)). Given that Congress is made up of many individuals, who seldom agree as a whole, the views of the few members who considered the legislative history quoted in the petition cannot trump the unambiguous language of § 925(c) enacted by the Congress as a whole.

Furthermore, the inference that the government attempts to draw from the legislative history could not be weaker. Its position rests on a single sentence in a 1992 Senate Report and two sentences in a 1995 House Report. See Pet. 3-4. Neither of those references so much as mentions suspending judicial review. Moreover, the district court, having "diligently searched the legislative history," correctly concluded that it contains only "many contradictory statements." Pet. App. 20a. The best reading of the legislative history is "that Congress withheld funding to the ATF for *economic reasons*, not because they intended outright suspension of relief for worthy individuals." *Id.* 24a.

Just as important, even assuming that the brief references invoked by the government had any persuasive force at all with respect to the appropriations bills they discussed, they certainly do not have that force when interpreting *different* appropriations statutes enacted in *later years*. If "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress" (*Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted)), then prior legislative history *a fortiori* offers little

or no guidance with respect to a bill that was not enacted until years later. The government's contention that members of Congress, in enacting ATF's 1999 appropriation (the relevant year for purposes of this case), had in mind (much less implicitly intended to endorse) three sentences from congressional reports issued many years before is totally implausible.

The district court also correctly rejected the suggestion that Congress intended to prevent felons from having their firearms privileges restored. See Pet. App. 24a-26a. The broader statutory scheme makes clear that Congress could not have been pursuing that goal. Under 18 U.S.C. § 921(a)(20), a state felon's federal firearms privileges are restored by an array of state-law procedures, including "pardons, expungements, and restorations of civil rights." Pet. App. 24a-25a. Indeed, "'many states restore civil rights to convicted felons by means of a general law stating that all rights shall be reinstated upon the service of a sentence'" or "after a given period of time following sentence or parole." *Id.* 25a (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1008 (CA2 1995)).

4. The government's final argument is that district judges are ill-equipped to determine whether an individual is entitled to have his firearms privileges restored. See Pet. 13-15. As to the factual determination to be made – whether the individual represents a danger to the community – that is obviously wrong: on a daily basis, district judges make more difficult factual determinations in far weightier circumstances. Cf. *Hilton* v. *Braunskill*, 481 U.S. 770, 777 (1987) (in determining whether to release successful habeas petitioner pending final determination of case, court may consider, *inter alia*, "risk that the prisoner will pose a danger to the public"); *United States* v. *Salerno*, 481 U.S. 739, 751 (1987) (upholding constitutionality of provision of Bail Reform Act of 1984, pursuant to which courts evaluate, *inter alia*, likelihood of future dangerousness). District judges are also perfectly capable of requiring the applicant to produce an array of witnesses and documentary evidence – co-extensive with the fac-

tual inquiry that ATF makes in its field investigations. In court, ATF has the power to subpoena its own witnesses to appear and to testify, as well as to conduct discovery from the applicant and to cross-examine witnesses. Indeed, the in-person, adversarial format of a court hearing is ideally suited to credibility determinations. If the district court is not fully satisfied with the evidence presented, it can and will deny the application or require the applicant to conduct additional investigative work. And, as the district court concluded in this case, the applicant would bear all the costs of this process. See Pet. App. 28-29a.

At bottom, the government's real argument is that district judges should grant relief under § 925(c) only when the applicant has made an extraordinary factual showing. That point just illustrates that this case is an inappropriate certiorari vehicle because the Solicitor General no longer disputes that the record developed by the district court in this case conclusively demonstrates that respondent is entitled to relief under the statute. See *supra* at 12-13. The evidence in support of respondent's application was supplied by the same individuals ATF would have contacted in its field investigation, as well as from local law enforcement and judicial officials who were personally familiar with respondent's reputation and character. The district court ultimately granted respondent relief because, unlike the applicants in any of the other cases cited by the government, he (i) was convicted in another nation based on an innocent and inadvertent act by a third party and after he was deprived of basic constitutional rights, (ii) is a respected member of his community, (iii) presents no danger at all to the community (as numerous credible and objective witnesses testified), and (iv) suffered the loss of his livelihood as a firearms dealer. As the Fifth Circuit concluded, it is "beyond peradventure to believe that Congress, or those seeking to rescind § 925(c), intended for someone like Bean to lose his livelihood on the basis of the facts such as are before us." Pet. App. 11a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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