No. 14-1216

In the Supreme Court of the United States

RICHARD ENOS, ET AL., PETITIONERS

v.

LORETTA E. LYNCH, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the restoration of a misdemeanant's state-law right to possess a firearm qualifies as a restoration of "civil rights" under 18 U.S.C. 921(a)(33)(B)(ii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter* but is reprinted in 585 Fed. Appx. 447. The first opinion of the district court (Pet. App. 30-45) is not published in the *Federal Supplement* but is available at 2011 WL 2681249. The second opinion of the district court (Pet. App. 5-29) is reported at 855 F. Supp. 2d 1088.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2014. A petition for rehearing was denied on January 13, 2015. The petition for a writ of certiorari was filed on April 7, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 18 U.S.C. 922(g)(9), it is a federal crime for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to "possess in or affecting commerce * * * any firearm." But under 18 U.S.C. 921(a)(33)(B)(ii), a person will not be considered to have been convicted of a misdemeanor crime of domestic violence "if the conviction has been expunged or set aside" or if the misdemeanor was "an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

Petitioners are individuals who have been convicted of misdemeanor crimes of domestic violence under the statutory predecessors to Cal. Penal Code §§ 243(e) and 273.5. Pet. App. 7-8; Gov't C.A. Br. 14. In addition to the prohibition imposed by Section 922(g)(9), they were subject to a state-law prohibition on owning a firearm, but that prohibition expired by operation of law ten years after their convictions. See Pet. App. 7-8; Cal. Penal Code § 12021(c) (West 2011).[1] Petitioners have also each obtained a "record clearance" under Cal. Penal Code § 1203.4 (West 2011), which "released [them] from all penalties and disabilities resulting from the offense" of conviction (other than firearms disabilities), but which did not expunge their

[1] One petitioner whose conviction predated the enactment of the state-law firearms disability successfully petitioned a state court for relief from that disability pursuant to statutory procedures, see Cal. Penal Code. § 12021(c)(3) (West 2011). See Pet. App. 7.

convictions, *Jennings* v. *Mukasey*, 511 F.3d 894, 898-899 (9th Cir. 2007). See Pet. App. 7-9. According to the complaint in this case, each petitioner has attempted to purchase a firearm and has been informed that he may not do so under federal law. *Ibid.*

2. Petitioners filed suit against the United States and federal officials in the United States District Court for the Eastern District of California. As relevant here, petitioners sought a declaratory judgment that their civil rights had been restored under Section 921(a)(33)(B)(ii). Pet. App. 9. They also challenged Section 922(g)(9) under the Second Amendment. *Ibid.* The district court dismissed the complaint for failure to state a claim on which relief could be granted. *Id.* at 5-29, 30-45.

The district court first rejected petitioners' argument that their civil rights had been restored within the meaning of Section 921(a)(33)(B)(ii) because their state-law firearms disability had expired. Pet. App. 15-21. The court held that the "civil rights" referred to in Section 921(a)(33)(B)(ii) do not include the right to possess a firearm. *Id.* at 19-21. The court explained that "courts have repeatedly classified [the relevant rights] as the right to vote, hold public office and sit on a jury," *id.* at 20, and that petitioners had never lost any of those rights and thus could not have had them restored, *id.* at 16 (citing *Logan* v. *United States*, 552 U.S. 23, 36 (2007)). Petitioners, the court further noted, "were unable to cite to any case supporting their argument that the restoration of an individual's right to possess a firearm constitutes a restoration of 'civil rights' under 18 U.S.C. § 921(a)(33)(B)(ii)." *Id.* at 20.

The district court then rejected petitioners' Second Amendment challenge to Section 922(g)(9). Pet. App. 21-29. The court observed that "domestic violence misdemeanants are, by statutory definition, violent criminals," and that "[k]eeping guns out of the hands of those convicted of domestic violence fits squarely into the prohibitions" recognized as presumptively lawful in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). Pet. App. 26-27. The court further held that petitioners had "not set forth facts to rebut th[e] presumption of lawfulness, distinguishing them from other domestic violence misdemeanants sufficiently to state an as-applied or overbreadth challenge." *Id.* at 29.

3. The court of appeals affirmed in an unpublished memorandum order. Pet. App. 1-4. Citing its precedent in *United States* v. *Chovan*, 735 F.3d 1127 (9th Cir. 2013), cert. denied, 135 S. Ct. 187 (2014), the court held that petitioners' "civil rights (the right to vote, to sit as a juror, or to hold public office) were never lost under California law," and so "were not restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii)." Pet. App. 4 (citing *Chovan*, 735 F.3d at 1131-1133). With respect to petitioners' Second Amendment challenge, the court held, again citing *Chovan*, that Section 922(g)(9) "is constitutional on its face, because the statute is substantially related to the important government purpose of reducing domestic gun violence." *Id.* at 2-3. The court also noted that "there is no evidence in this record demonstrating the statute is unconstitutional as applied to [petitioners]" and that "when questioned" petitioners' counsel had "declined to suggest that evidence exists." *Id.* at 3.

ARGUMENT

Petitioners contend (Pet. 9-22) that the court of appeals erred in holding that their civil rights had not been restored within the meaning of Section 921(a)(33)(B)(ii). The decision below, however, was correct and does not conflict with the decision of any other circuit. Although the New Hampshire Supreme Court recently issued a decision in which it construed a similar provision of federal law differently from the decision below in the course of applying state-law licensing requirements, that disagreement has little practical importance because federal prosecutions under Section 922(g) proceed only in federal court, not in state court. Further review is therefore not warranted.

1. The court of appeals correctly concluded that petitioners' civil rights were never restored within the meaning of Section 921(a)(33)(B)(ii), and that holding does not warrant further review.

a. Petitioners do not contend that they ever lost the ability to vote, sit on a jury, or hold public office as a result of their convictions for misdemeanor crimes of domestic violence. See Pet. App. 16. Under this Court's holding in *Logan* v. *United States*, 552 U.S. 23 (2007), therefore, those rights could not have been "restored," because they were never taken away. See *id.* at 26. Petitioners argue, however, that because under California law they were prohibited from possessing a firearm for a statutorily prescribed term of years, the expiration of that period constituted the restoration of their "civil rights" under Section 921(a)(33)(B)(ii). Pet. App. 13. That is incorrect.

The right to possess a firearm is not among the "civil rights" to which Section 921(a)(33)(B)(ii)

refers. As this Court explained in *Logan* with respect to the materially identical restoration-of-rights provision governing felony convictions, "[w]hile [18 U.S.C.] 921(a)(20) does not define the term 'civil rights,' courts have held * * * that the civil rights relevant under the [ ] provision are the rights to vote, hold office, and serve on a jury." 552 U.S. at 28; see, *e.g.*, *United States* v. *Caron*, 77 F.3d 1, 2 (1st Cir. 1996); *United States* v. *Metzger*, 3 F.3d 756, 758 (4th Cir. 1993), cert. denied, 511 U.S. 1006 (1994); *United States* v. *Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990). That statement echoed this Court's prior identification of those three rights as the relevant "civil rights" in *Caron* v. *United States*, 524 U.S. 308, 316 (1998). The courts' settled interpretation of "civil rights" rests in part on the inference "that Congress used the term 'civil rights,' as opposed to 'all rights and privileges,'" because "Congress intended to encompass those rights accorded to an individual by virtue of his citizenship in a particular state." *Cassidy*, 899 F.2d at 549.

Petitioners' contrary view not only conflicts with the settled understanding of the term "civil rights," but is also difficult to reconcile with the context in which that term appears in Section 921(a)(33)(B)(ii). The statute provides that a "pardon, expungement, or restoration of civil rights" that would otherwise trigger the exception to Section 922(g)(9) does not count if it "expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. 921(a)(33)(B)(ii). Thus, for a restoration of civil rights to overcome the Section 922(g)(9) prohibition, the misdemeanant must *also* have regained (or never lost) his firearm rights. That separate requirement would

have been largely superfluous if the restoration of civil rights itself included the restoration of firearm rights. Following that statutory distinction, this Court's decision in *Logan* repeatedly differentiated the restoration of "civil rights" from "the removal of firearms disabilities." See 552 U.S. at 31 ("Under Wisconsin law, felons lose but can regain their civil rights *and* can gain the removal of firearms disabilities.") (emphasis added); *id.* at 32 ("Many States that restore felons' civil rights * * * nonetheless impose or retain firearms disabilities."); see also *Caron*, 524 U.S. at 313 (drawing same distinction).

Petitioners suggest (Pet. 15-16) that the court of appeals' interpretation of Section 921(a)(33)(B)(ii) renders that provision ineffectual because no States deprive misdemeanants of their civil rights. Pet. 15-16. Even if that were so, Congress could reasonably have intended to account for the possibility that some States would do so in the future and to ensure that Section 921(a)(33)(B)(ii) operates in parallel with Section 920(a)(20), the restoration-of-rights provision for felons.

b. Petitioners have identified no federal court of appeals decision holding that a restoration of firearms rights can qualify as a restoration of civil rights under Section 921(a)(33)(B)(ii). Petitioners rely exclusively on the New Hampshire Supreme Court's recent decision in *DuPont* v. *Nashua Police Department*, No. 13-513, 2015 WL 737120 (Feb. 20, 2015), as a basis for further review.

In *DuPont*, the petitioner had been convicted of a crime punishable by more than two years in Massachusetts, and thus was barred from possessing a firearm by both Massachusetts law and 18 U.S.C.

922(g)(1), but had subsequently received a restoration of his state-law right to carry a firearm by the Massachusetts Firearm License Review Board. 2015 WL 737120, at *1. He then filed suit to obtain a firearms permit and an armed-guard license in New Hampshire. See *id.* at *1-*2. The New Hampshire Supreme Court held that he was eligible to obtain those licenses under New Hampshire law because, by virtue of Massachusetts's restoration of his right to own a firearm, he was no longer barred by Section 922(g)(1) from obtaining a firearm. The court concluded that a restoration of a state-law right to possess a firearm qualifies as a restoration of "civil rights" within the meaning of Section 921(a)(20). See *id.* at *7-*9. The court noted that its construction of the federal provision conflicted with the district court's decision in this case and the decision of the Eighth Circuit in *United States* v. *Keeney*, 241 F.3d 1040, cert. denied, 534 U.S. 890 (2001). *DuPont*, 2015 WL 747120, at *9.

That decision provides no basis for further review. The ultimate question in *DuPont* was whether the petitioner had been properly denied a firearms permit and an armed-guard license by New Hampshire officials under New Hampshire law. Although the New Hampshire Supreme Court interpreted a restoration-of-rights provision of federal law differently from federal courts, that disagreement has little practical importance. Section 922(g) is not enforced in state courts. And while the federal government considers a number of discretionary factors in deciding whether to bring prosecutions under Section 922(g), the New Hampshire Supreme Court's decision would have no bearing on the legal question whether a particular

defendant's possession of a firearm violates Section 922(g)(1) or Section 922(g)(9).

2. Petitioners list two other questions presented in their certiorari petition, relating to whether the federal government should be required to incorporate state-law procedures for the restoration of firearms rights and whether petitioners' plea bargains were knowing and intelligent, see 18 U.S.C. 921(a)(33)(B)(i). See Pet. i (questions one and three). But to the extent that those arguments differ from the question of Section 921(a)(33)(B)(ii)'s applicability to petitioners, the arguments are not sufficiently developed in the body of the petition. They are therefore forfeited. See Sup. Ct. R. 14.2 (requiring that all contentions in support of granting a petition for a writ of certiorari be set forth as provided in Supreme Court Rule 14.1(h), requiring a "direct and concise argument amplifying the reasons relied on for allowance of the writ").[2]

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[2] At points in their petition, petitioners appear to invoke the Second Amendment claim that they pressed below, although they do not identify that as a question presented and therefore have forfeited it. See Sup. Ct. R. 14.1(a). In any event, several courts of appeals have addressed the constitutionality of Section 922(g)(9) in published opinions since this Court's decision in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), and none has held that the statute is unconstitutional. See *United States* v. *Booker*, 644 F.3d 12, 25-26 (1st Cir. 2011), cert. denied, 132 S. Ct. 1538 (2012); *United States* v. *Staten*, 666 F.3d 154, 168 (4th Cir. 2011), cert. denied, 132 S. Ct. 1937 (2012); *United States* v. *Skoien*, 614 F.3d 638, 641-642 (7th Cir. 2010) (en banc), cert. denied, 131 S. Ct. 1674 (2011); *United States* v. *Chovan*, 735 F.3d 1127 (9th Cir. 2013), cert. denied, 135 S. Ct. 187 (2014); *United States* v. *White*, 593 F.3d 1199, 1205-1206 (11th Cir. 2010); see also *In re United States*, 578 F.3d 1195 (10th Cir. 2009) (unpublished). Petitioners' assertion (Pet. 11) that the Ninth Circuit's decision in *Chovan*, on which the decision below relied, employed a "discredited interest balancing test" is

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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incorrect; *Chovan* applied means-end scrutiny, as has every court of appeals to consider a challenge to federal firearms laws following *Heller*. See *Chovan*, 735 F.3d at 1139-1142; accord, *e.g.*, *Booker*, 644 F.3d at 25-26 (1st Cir.); *Staten*, 666 F.3d at 167 (4th Cir.); *NRA* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives,* 700 F.3d 185, 198, 205-211 (5th Cir. 2012), cert. denied, 134 S. Ct. 1364 (2014); *Skoien*, 614 F.3d at 642 (7th Cir.).