

No. 01-8272

IN THE SUPREME COURT OF THE UNITED STATES

JOHN LEE HANEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Amendment to the Constitution guarantees an individual right to possess a machinegun.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 264 F. 3d 1161.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2001. A petition for rehearing was denied on October 30, 2001. The petition for a writ of certiorari was filed on January 28, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for

the Western District of Oklahoma, petitioner was convicted of unlawful possession of a machinegun, in violation of 18 U.S.C. 922(o). He was sentenced to 33 months' imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-21.

1. On August 25, 1999, petitioner appeared at a police station and informed the officer on duty that he owned semiautomatic and fully automatic firearms. Petitioner stated that the firearms were not licensed and that the federal government lacked authority to require him to obtain a license. Law enforcement officials subsequently found two fully automatic weapons in petitioner's car and house, along with literature describing how to convert a semiautomatic firearm to an automatic weapon. Petitioner admitted possession of the guns. Pet. App. 2.

Petitioner was indicted for possessing two machineguns, in violation of 18 U.S.C. 922(o). Pet. App. 3. Section 922(o) provides, with exceptions not applicable here, that "it shall be unlawful for any person to transfer or possess a machinegun." 18 U.S.C. 922(o)(1). A person who "knowingly violates" Section 922(o) is subject to a term of imprisonment of not more than ten years. 18 U.S.C. 924(a)(2). After a jury trial, petitioner was found guilty and was sentenced to 33 months' imprisonment. Pet. App. 3.

2. The court of appeals affirmed. Pet. App. 1-21. The court rejected petitioner's contention that, by banning the possession of

machineguns, Section 922(o) infringes his right to keep and bear arms and therefore violates the Second Amendment. Pet. App. 4-9. Relying on its prior decision in United States v. Oakes, 564 F.2d 384 (10th Cir. 1977), the court stated that the purpose of the Second Amendment is "to preserve the effectiveness and to assure the continuation of the state militia." Pet. App. 5 (quoting Oakes, 564 F.2d at 387). On that basis the court held that "a federal criminal gun-control law does not violate the Second Amendment unless it impairs the state's ability to maintain a well-regulated militia." Id. at 6.

Applying that test, the court of appeals held that application of Section 922(o) to petitioner's conduct did not violate his rights under the Second Amendment. The court found it "clear that § 922(o) is facially constitutional" because "Section 922(o)(2)(A) sets forth a specific exemption for possession of a machinegun 'under the authority of' a state." Pet. App. 7. It also noted that petitioner had failed to establish either that he was a member of a state militia or that machineguns are used in militia service. Ibid. The court concluded that, as applied to petitioner, Section 922(o) "does not impair the state's ability to maintain a well-regulated militia and therefore does not violate the Second Amendment." Ibid.¹

¹ The court of appeals also rejected petitioner's claim that, because Section 922(o) contains no jurisdictional element such as a requirement that the possession of a machinegun be in or

ARGUMENT

Petitioner contends (Pet. 11-15) that Section 922(o) violates his right under the Second Amendment "to keep and bear Arms." He relies on United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), pet. for cert. pending, No. 01-8780 (filed Feb. 28, 2002), in which the Fifth Circuit held that the Second Amendment guarantees an individual right to possess firearms. Petitioner's constitutional challenge to Section 922(o) lacks merit and does not warrant this Court's review.

Like the Tenth Circuit in this case, other courts of appeals have rejected Second Amendment challenges to various provisions of 18 U.S.C. 922 on the ground that the Amendment protects the possession of firearms only in connection with state militia activity. See, e.g., United States v. Napier, 233 F.3d 394, 402-404 (6th Cir. 2000); United States v. Hancock, 231 F.3d 557, 565-566 (9th Cir. 2000), cert. denied, 532 U.S. 989 (2001); Gillespie v. City of Indianapolis, 185 F.3d 693, 710-711 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000); United States v. Wright, 117 F.3d 1265, 1271 (11th Cir. 1997); United States v. Rybar, 103 F.3d

affecting interstate commerce, the statute exceeds the authority of Congress under the Commerce Clause. Pet. App. 9-20. The court explained, inter alia, that the regulation of intrastate activities involving automatic weapons that fall within the ambit of the statute is an essential part of a federal scheme to regulate interstate commerce in dangerous firearms. Id. at 15-19. Petitioner does not press his Commerce Clause challenge in this Court.

273, 286 (3d Cir. 1996); United States v. Hale, 978 F.2d 1016, 1018-1020 (8th Cir. 1992). The court of appeals in Emerson, however, rejected the analytic approach employed in those decisions. The Fifth Circuit stated that the Second Amendment "protects the rights of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons." 270 F.3d at 260.

The government agrees with petitioner that the Fifth Circuit's decision in Emerson reflects a sounder understanding of the scope and purpose of the Second Amendment than does the court of appeals' decision in the instant case.² Petitioner's constitutional challenge to Section 922(o) does not warrant this Court's review, however, because the statutory ban on private possession of machineguns is valid under either analytic approach. The court in

² In its brief to the court of appeals in this case, the government argued that the Second Amendment protects only such acts of firearm possession as are reasonably related to the preservation or efficiency of the militia. See Gov't C.A. Br. 6-8. The current position of the United States, however, is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse. See Memorandum From the Attorney General To All United States Attorneys, Re: United States v. Emerson, Nov. 9, 2001. A copy of that memorandum is appended to this brief.

Emerson recognized that the right to keep and bear arms protected by the Second Amendment is subject to "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." 270 F.3d at 261. And the court described the right in question as a right to possess firearms, such as a pistol, "that are suitable as personal, individual weapons," id. at 260 -- a description that does not encompass the machineguns at issue here. Nothing in Emerson suggests that the Fifth Circuit would find a Second Amendment right implicated on the facts of this case. Nor does anything in Emerson, which upheld a restriction on firearms rights for individuals subject to a domestic violence restraining order under 18 U.S.C. 922(g)(8), indicate that the Fifth Circuit would find the prohibition on possession of a machinegun unreasonable.

Although the courts of appeals are in disagreement concerning the abstract question whether the Second Amendment protects an individual right to bear arms for reasons unrelated to militia service, no circuit conflict exists on the constitutionality of 18 U.S.C. 922(o) or of any other firearms prohibition contained within Section 922. Because there is no basis for concluding that the outcome of this case would have been different had it arisen in the Fifth Circuit, petitioner's Second Amendment Claim does not warrant

further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2002

APPENDIX

[Seal Omitted]

Office of the Attorney General

Washington, D.C. 20530

November 9, 2001

MEMORANDUM TO ALL UNITED STATES' ATTORNEYS

FROM: The Attorney General /s/ John Ashcroft

RE: *United States v. Emerson*

On October 16, 2001, the United States Court of Appeals for the Fifth Circuit issued its decision in *United States v. Emerson*. I am pleased that the decision upholds the constitutionality of 18 U.S.C. 922(g)(8) - which prohibits violent persons who are under domestic restraining orders from possessing firearms. By taking guns out of the hands of persons whose propensity to violence is sufficient to warrant a specific restraining order, this statute helps avoid tragic episodes of domestic violence. As I have stated many times, reducing gun crime is a top priority for the Department. We will vigorously enforce and defend existing firearms laws in order to accomplish that goal.

Emerson is also noteworthy because, in upholding this statute, the Fifth Circuit undertook a scholarly and comprehensive review of the pertinent legal materials and specifically affirmed that the Second Amendment "protects the right of *individuals*, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms. . . ." The Court's opinion also makes the important point that the existence of this individual right does not mean that reasonable restrictions cannot be imposed to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse. In my view, the *Emerson* opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment.

The Department can and will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws. The Department has a solemn obligation both to enforce federal law *and* to respect the constitutional rights guaranteed to Americans. Because it may be expected that *Emerson* will be raised in any number of firearms case handled by this Department, it is important that the Department carefully assess the implications of the *Emerson* decision and how it interacts with existing circuit precedent. Accordingly, United States Attorney's Offices should promptly advise the Criminal Division of all cases in which Second Amendment issues are raised, and coordinate all briefing in those cases with the Criminal Division and the Solicitor General's office.

As the Supreme Court has long observed, the mission of the Department "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Justice is best achieved, not by making any available argument that might win a case, but by vigorously enforcing federal law in a manner that heeds the commands of the Constitution.