No. 126153

IN THE SUPREME COURT
STATE OF ILLINOIS

	) Petition for Leave to Appeal
	) from the Appellate Court of
	) Illinois,
THOMAS D. BROWN,	) Third District, No. 03-18-0409
	)
Petitioner- Appellant	) There heard on Appeal from the
	) Circuit Court of the Tenth
vs.	) Judicial Circuit, Putnam County,
	) Illinois
	) Circuit No. 16-MR-13
DEPARTMENT OF ILLINOIS	) Honorable Stephen A. Kouri,
STATE POLICE	) Circuit Judge
Respondent-Appellee.	)

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. THOMAS BROWN'S "CIVIL RIGHTS" WERE "RESTORED" BY VIRTUE OF CALIFORNIA AUTOMATICALLY ALLOWING MISDEMEANANTS FIREARM POSSESSION TEN YEARS AFTER CONVICTION

A. CALIFORNIA DECIDES WHETHER TO DISPENSE FORGIVENESS, NOT THE MEANING OF FEDERAL LAW

The Attorney General does not appear to argue that the Putnam County Circuit Court's granting of Thomas Brown a FOID Card, was not a "civil right" as per this Court's decision in *Johnson v. Department of State Police*, 2020 IL 124213,[1] (which held that firearm rights are "civil rights" within the meaning of Section 921(a)(33)(B)(ii) of the FGCA, 18 U.S.C. § 921(a)(33)(B)(ii). Nor does he dispute that civil right was "restored" within the meaning of *Johnson*, or the Third District Appellate Court's decision in *Pournaras v. People of the State of Illinois*, 2018 IL App. 3d 170051, ¶14, which found automatic restoration upon completion of felony probation. (In fact, the Response Brief omits any discussion of *Pournaras*.)

Instead, the Attorney General argues (Response Brief, pp. 14,19) that because California does not consider

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[1] To the extent the Attorney General (Response, pp. 14-15) reads the Appellate Court opinion below to require an additional civil right other than firearm rights to be restored to meet the requirements of 18 U.S.C. § 921(a)(33)(B)(ii), that argument is no longer plausible in light of the *Johnson* petitioner only losing her firearm rights, having been sentenced to time served, similar to Mr. Brown.

restoration of firearm rights a "civil right" for purposes of federal law, Mr. Brown's "civil right" (despite California Penal Code §29805 automatically restoring firearm rights ten(10) years after conviction) was not restored. In reaching this conclusion, the Attorney General, conflates this Court's statement in *Johnson*, ¶41, that the convicting jurisdiction must dispense the forgiveness, with the conclusion that such convicting jurisdiction (or in the case of *Enos v. Holder*, 855 F. Supp. 2d 1088 (E.D. Cal. 2012) *aff'd*, 585 Fed. App'x 447 (9th Cir. 2014) a federal court sitting in the convicting jurisdiction, not even the state court itself) somehow has a superior view of the meaning of federal law. Rather, while Congress defers to the individual states in determining what, if any, dispensation of forgiveness, to give prohibited persons, it does not defer to them in determining the meaning of federal law.

The Attorney General's conclusion would require a substantial rewriting, if not evisceration of *Johnson*, not the least of which is *Johnson's* rejection of *Enos* as not a well-reasoned decision. *Johnson*, ¶48. *Enos* was also distinguished on the basis of its automatic restoration provisions and conflicts *Pournaras'* conclusion that automatic restoration upon expiration of felony probation

qualifying as "civil rights restored" for purposes of federal law. The Attorney General effectively advocates for overruling *Pournaras sub silento*.

B. ILLINOIS GRANTING BROWN A FOID CARD DOES NOT INTRUDE OF CALIFORNIA'S STATUTORY "THRESHOLD JUDGMENT" THAT MISDEMEANANTS SUCH AS BROWN ARE "TRUSTWORTHY."

The Attorney General argues (Response Brief, page 19), that since California must determine whether a person is "sufficiently trustworthy to possess firearms" California must also determine the meaning of federal law with regard to its convictions, which all other courts must respect. This argument for individual state determination of federal law is in marked contrast with the Attorney General's argument for a uniform interpretation of federal law as discussed in Section II.

In making this argument, the Attorney General attempts (Response Brief, p. 21,23) to argue Section 29805 does not really mean what it appears to say and walk-back his previous conclusion that Mr. Brown could possess firearms in California under California law (C120). He cites (Response Brief, p. 21) *People v. Delacy*, 192 Cal. App. 4th (Cal. App. 1st Div. 2011) for the proposition that persons with convictions for misdemeanor domestic violence have no

Second Amendment firearm rights. *Delacy* actually stands for the unremarkable proposition that Section 29805's ten (10) year ban does not violate the Second Amendment, at least facially. *Delacy* says nothing about whether restoration of firearm rights after ten (10) years constitutes "civil rights restored" for purposes of federal law, nor does it address the constitutionality of a permanent ban for misdemeanants who pose no danger to others. Ironically, *Delacy* recognized an exception under California law for the otherwise-banned party to possess and use weapons to defend themselves and presumably their home, *Delacy*, 192 Cal. App. 4th at 225, a right the Attorney General denied Mr. Brown had in oral argument before the Appellate Court. *See also Kanter v. Barr*, 919 F.3d at 465 (J. Barrett, noting ban stopped non-violent felon from even possessing weapon in home for purposes of self-defense).

The Attorney General's argument that Section 29805 "…merely removes the possibility of criminal prosecution" raises two questions demonstrating the illogic of this argument: 1) If Section 29805 eliminates the "possibility of criminal prosecution" or "jail time or fine" (Response Brief, p. 21) for firearm possession, what, if anything, is there to stop a person falling under Section 29805 from

possessing weapons, and how is that not a "restoration" of firearm rights?; and 2) if Section 29805 does not "restore" firearm rights, then how is it not an empty statute with no force or effect?

The Attorney General's final argument in this regard, that applying *Johnson* to Brown's California conviction replaces California's threshold judgment regarding dangerousness (Response Brief, p. 22), ignores that California has already made the judgment in enacting Section 29805. If California truly believes misdemeanants such as Brown are a real danger to themselves or others (despite not sentencing him to a day in jail), it can change Section 29805 to reflect that opinion. Until that happens, California has made a judgment that misdemeanants like Brown, after a period of ten (10) years, are no longer a significant danger to others. *See Johnson* at ¶41, (stating restoration of firearms "…reflects a determination by the convicting jurisdiction that the particular consequences of the conviction should no longer be imposed.")

C. THE ATTORNEY GENERAL'S POSITION LEADS TO ARBITRARY RESULTS *JOHNSON* SOUGHT TO PREVENT

While the FOID statute should be construed to avoid arbitrary results, *Pournaras* at ¶¶ 9, 17, the Attorney

General's position leads to just that. For example, the Attorney General argues (Response Brief, p. 23) that ruling in Brown's favor means California misdemeanants are subject to the federal bar while Illinois misdemeanants are not. Aside from being inconsistent with his prior position (C120) and California law discussed above, that means Section 29805 is a deceptive "bait and switch" statute, promising to give misdemeanants their firearm rights back after ten (10) years), knowing all along that Section 922(g)(9) will be a permanent ban. One also wonders how law enforcement applicants prevailing under California Penal Code Section 29855 (an individualized court determination prior to expiration of the ten year period) would also not be barred by federal law. Accepting that argument, by extension, the Petitioner in *Johnson* should not have had her FOID restored because she would still be subject to the Section 922(g)(9) ban.

If California's interpretation of federal law controls, California could also determine that despite *Logan v. U.S.*, 552 U.S. 23 (2007) stating to the contrary, the restoration of the right to vote, sit on a jury or hold public office are not "civil rights restored" for federal law purposes. Some states, upon completion of good behavior over a period time for certain offenses, allow a

person to reduce those charges from felonies to misdemeanors, presumably resulting in the right to vote, sit on a jury or hold public office. Under the Attorney's General's logic, such state could conclude restoration of these rights does not "restore" firearm rights for federal law. This argument also conflicts with *Johnson's* observation it would be very odd to allow restoration of certain civil rights (voting, public office, jury) to serve as proxies for the determination of trustworthiness to possess firearms, but not the restoration of the very firearm right itself. The Attorney General's argument also apparently seeks to draw a distinction between uniform (or automatic) restoration for a certain class of offenders and those restored on an individual basis, without any articulated reason for doing so.

Finally, *Johnson* (and *Coram* before that) sought to avoid the arbitrary result of minor offenders being permanently barred from possessing firearms (despite no showing of danger) while allowing more severe offenders to receive their FOID cards back. Acceptance of the Attorney General's argument brings that inequity back, such that a petitioner would actually be on stronger footing having served one day in jail post-conviction, Coram at ¶18, and flies contrary to this Court's recent acknowledgment in

People v. Reed, 2020 IL 124940 that persons often plead guilty for a variety of reasons, including to get the matter over with.

D. THE ATTORNEY GENERAL'S SECTION 10(C)(2) AND 10(C)(3) ARGUMENTS SIMPLY SEEK TO RETRY THE HEARING.

On pages 24-27 of her Response Brief, the Attorney General simply seeks to retry the evidentiary hearing by arguing the Circuit Court's decision was against the manifest weight of the evidence. She cites a history of convictions and arrests, the latest being in 2005, for no reason other than to suggest Thomas Brown is a bad person. A review of the evidence presented and testimony, however, amply supports the Circuit Court's decision.

In his order granting Mr. Brown a FOID card, Judge Kouri expressed significant doubts as to the factual validity of the conviction. (C287). Suzette Brown, the alleged victim, stated Thomas Brown did not intend to hurt her nor did he actually hurt her (beyond minor road rash). (C285). Mr. Brown testified that in the events surrounding the wake of 9/11, being in LA County jail for three (3) days (2000 miles from home), the amount of the bail versus the actual fine, no knowledge that it would affect his FOID card, and the suggestion of his employer to get it

resolved, he plead guilty "to put it behind me." (R. 14, 24-25).

While the Attorney General claims granting Mr. Brown a FOID card was against the manifest weight due to an allegedly untruthful answer on his FOID application, he ignores that such forms are commonly misinterpreted by individuals without legal training. In fact, the *Johnson* petitioner herself checked "no" when filling out the application for a FOID card (allegedly based on advice from the local sheriff). *Johnson* at ¶4. Brown thought the disposition was a supervision, and like the *Johnson* petitioner, was under the understanding that if he completed his sentence without incident, that was the last he would hear of the matter. (C155, R.27).

Testimony from Thomas Brown (R.19-20), Suzette Brown (C285), and Kari Brown (R.30-31), all showed he had handled guns safely for several years before the 2001 California incident, as well as for 15 years afterward. The Browns testified how loss of his FOID card has affected social and cultural activities they used to enjoy. As the Circuit Court noted, guns have been in the house legally for a long period of time by virtue of Kari Brown's (his current wife) FOID card. (C287). The fact the Putnam County State's Attorney, despite knowledge of these proceedings, and who

would be most likely to have to contend with Mr. Brown in the future, declined to participate is further evidence the Circuit Court's decision was supported by adequate evidence.

Finally, Mr. Brown's employment has been steady at XPO Logistics for over fourteen (14) years (R.6), residing in Putnam County for over 7 years at the time without incident (C284), and is authorized to transport hazardous materials. (R.7). All of these facts reflects on his trustworthiness and support the Circuit Court's conclusion Mr. Brown is not a danger to himself or others.

II. BROWN'S SECOND AMENDMENT AS-APPLIED CHALLENGE WAS PROPERLY PERMITTED BY THE CIRCUIT COURT

A. THE ATTORNEY GENERAL'S PARDON ARGUMENT, ALREADY REJECTED IN THE FOID CONTEXT, IS NOT REQUIRED PRIOR TO PURSUING A SECOND AMENDMENT AS-APPLIED CHALLENGE

As part of his Response to Brown's Second Amendment As-Applied Challenge, the Attorney General argues (Response Brief pp. 28-30) Brown's challenge is pre-mature because he can seek a pardon. In making this argument, he first cites the opinion of the dissenting justices in *Coram*, who would have required a pardon prior to FOID relief being granted, and two later opinions, one of which is *Heitmann*, whose conclusion of firearm rights not constituting "civil rights

restored" does not survive *Johnson*. Contrary to footnote 2 on Page 29 of the Attorney General's Response Brief, Brown does not recognize part of *Heitmann* as still good law, but believes it conflicts with *Coram*. As *Coram* rejected a pardon requirement for a statutory claim, it makes little sense to require a pardon for constitutional claim, particularly where such is rarely, if ever, required outside the due process context. The Attorney General's view (Response Brief, pp. 28-29) that a pardon should be required to follow the "elementary" rule of avoid answering constitutional questions flips that rule on its head, as constitutional rights protect citizens, not the government. The rule is meant as a prudential limit on the courts' power to grant a citizen relief if possible upon statutory grounds, not meant to indefinitely delay adjudication of a citizen's constitutional claims. Finally, the Attorney General's argument that Brown must go to expense and indefinite time of seeking a pardon (Response p. 30)fails to acknowledge what the judges in the opinions he cited in the next section have acknowledged, *Stimmel v. Sessions*, 879 F. 3d 198, 208 (6th Cir. 2018)(majority opinion)- that the Attorney General's position is a lifetime ban. (Boggs, J. dissenting) 879 F. 3d at 214(noting three percent (3% pardon approval rate in Ohio, mostly for non-violent

crimes). *See also Harley v. Wilkinson,* 988 F. 3d 766, 767 ("…prohibited for life.")

B. A PERPETUTUAL BAN FOR MISDEMEANANTS FLUNKS INTERMEDIATE SCRUTINY

On pages 31-34 of his Response Brief, the Attorney General cites miscellaneous cases, including *Stimmel v. Sessions*, 879 F. 3d 198, 208 (6th Cir. 2018) and *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011) for the propositions that "unanimous federal authority" have upheld the constitutionality of Section 922(g)(9) and that Brown, as a person convicted of misdemeanor domestic battery, is outside the scope of Second Amendment's protection at the time it was ratified. (Response Brief, p. 32). A close reading of these cases provides neither contention is accurate.

With respect to the "unanimous federal authority," the majority opinion in *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019)notes that federal courts are only unanimous in finding Section 922(g)(9) was constitutional on its face as applied to felons. *Kanter*, 919 F. 3d at 442-443, noted that the circuits were split in allowing as-applied challenges based on the particular circumstances of the offenders and the offenses for felons.

1. Persons Convicted of Misdemeanor Domestic Battery Such as Brown Still Fall Within the Protection of the Second Amendment

At Step 1 of the relevant inquiry, the Attorney General argues (Response pp. 33-34) misdemeanants convicted of domestic battery have no Second Amendment protection because such restriction falls within the "presumptively lawful" scope of *Heller*, and Section 922(9) closed a "loophole" to existing felon-in-possession laws because domestic violence is underreported and charged. In making this argument, he ignores the historical context where misdemeanants were not considered beyond the protection, and one of the opinions he cites, *Stimmel*, 879 F. 3d at 205, noting the government's lack of success in other circuits, likewise rejected such an argument in that case. *Kanter,* 919 F. 3d at 447 likewise concluded the evidence was ambiguous with regard to non-violent felons, with *Schrader v. Holder*, 740 F.3d 980, 991 (D.C. Circ. 2013) (and cited by this Court with approval in *Coram* at ¶¶54-55)likewise suggested that that petitioner with a long period of good behavior, despite a 40 year old assault conviction, fell within the "law abiding responsible citizens" protected by the Second Amendment (though no challenge was preserved).

2. Congress Itself Has Not Made the Argument That a Perpetual Ban on Misdemeanants Survives Intermediate Scrutiny

At Step 2, in arguing against the possibility of any as-applied challenge, the Attorney General states that intermediate scrutiny is met because there is an substantial government objective of preventing domestic violence (Response Brief, p. 35) (which objective is not disputed), and that a permanent ban constitutes a "reasonable fit" (Response Brief, p. 36). He cites studies showing recidivism rates over a short period of time and the heightened risks of homicide when a firearm is present. The Attorney General concludes by arguing that federal courts have properly refused to read in an as-applied challenge into a statute that Congress did not intend (Response Brief, p. 38). The Attorney General (Response Brief, P. 39) also distinguishes the availability of as-applied challenges under Section 922(g)(1)for felons because such statute includes potential conditions and conduct beyond "…the statutory purpose of Section 922.

3. As-Applied Challenges Under the Second Amendment Are As Valid As They Are For Other Constitutional Rights

The flaws in the Attorney General's logic are significant. As-applied challenges are of a constitutional nature, whether Congress intended to create a statutory

exception is irrelevant, *Harley*, 988 F.3d at 782 (Richardson, J. dissenting)(noting a strong preference for as-applied challenges) and treats the Second Amendment as a "…second class right subject to an entirely different body of rules.." Kanter, 919 F. 3d at 469 (Barrett, J. dissenting). The reasons given by the Attorney General for an as-applied challenge to the felon ban, namely applying to a wide-array of nonviolent conduct, also apply with respect to Section 922(g)(9). Judge Richardson noting in *Harley* the domestic violence statute had been expanded since the decision in *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011) by *United States v. Castleman*, 572 U.S. 157 (2014) to be interpreted to include "offensive" touching such as spitting, pinching or squeezing, or reckless driving. *Harley*, 988 F. 3d 779-780 (4th Cir. 2021). Justice (Anne) Burke's concurring opinion in *Coram*, although *dictum*, likewise suggests some showing of dangerousness is needed to support a permanent ban. *Coram*, ¶ 104, footnote 6. The Attorney General's attempt to distinguish a possible as-applied challenge in *Schrader* as being a non-violent felony under Section 922(g)(1) ignores that it was neither a felony nor non-violent, the charge being for "common law misdemeanor and assault." *Schrader*, 704 F.3d at 982.

4. Allowing Perpetual Bans with A High Number of "False Positives" Does Not "Put the Government to Its Paces" of Justifying the Restrictions

Judge Boggs, dissenting in *Stimmel*, cited the Sixth Circuit's prior opinion in *Tyler v. Hillsdale County Sheriff's Dept.*, 837 F.3d 678, 694, (6th Cir. 2016) for the proposition that with respect to a permanent firearms ban on the mentally ill, the government must produce some evidence of the need for a continuing ban. *Stimmel* 879 F. 3d at 213. The longer the ban, the more "false positives" (i.e. people banned who would not use a firearm dangerously) exist relative to the "true positives" (those banned who actually would use a firearm in a dangerous manner), making the fit more likely to be unreasonable. *Id.* Judge Boggs concluded noting that evidence after twenty (20) years, showing only a slightly higher risk of arrest than those without criminal records, does not meet the government's burden of justification. *Stimmel,* 879 F. 3d at 214. Similarly, Judge (now Justice) Barrett, noted given the statutory purpose of preventing weapons in the hands of dangerous persons, a blanket ban for all felons did not "…put the government through its paces." *Kanter*, 919 F. 3d at 469.(Barrett, J. dissenting).

5. A Perpetual Ban For Minor Offenders is Irrational and Does Not Further Congress Objectives

The opinions cited by the Attorney General, besides including individuals such as the Staten defendant with a long history of criminal conduct, omit this Court's conclusion in *Coram* (*Coram* at ¶25) that Congress itself, in allowing relief, did not make the argument that a perpetual ban was needed, particularly for misdemeanants. While Congress certainly has a justifiable goal in keeping weapons out of the hands of dangerous individuals, that goal is not furthered, much less meeting of intermediate scrutiny, by a policy of restoration of rights for more severe offenders while permanently banning those who did not commit an offense severe enough to lose a civil right. The Attorney General himself makes no such argument that banning Mr. Brown, while letting more severe offenders obtain relief, furthers Congress' goals. Nor does the Attorney General seek to retract his previous concession in *Coram* ¶18 that that petitioner would have been eligible had he served a day in jail post-conviction. As such, allowance of a Second Amendment as-applied challenge for offenders who have lost no rights and possess no danger is actually consistent with Congress' stated objectives.

This conclusion in the prior paragraph is consistent with applicable Illinois and Seventh Circuit precedent. Despite claiming (Response Brief, pp. 39-40) that *Skoien* is

inapposite and that *United States v. Miller*, 588 F. 3d 418 involves a different statute (Section 925 rather than Section 922), *Coram* did in fact cite *Miller* (*Coram* at ¶50) *Schrader* (*Coram* at ¶¶ 53-54) and *Skoien* (*Coram* at ¶18) in support of the conclusion that a perpetual ban, whether by virtue of Section 922 or Section 925 could very well be unconstitutional. The Appellate Court itself, in *O'Neill v. Director of Illinois Department of State Police*, 2015 IL App (3d) 14011, ¶29, likewise observed "…a serious constitutional issue with the perpetual ban on the possession of firearms based upon a misdemeanor crime of domestic violence." (further citations omitted), though noting the challenge had not been preserved in that instance.

CONCLUSION

Thomas Brown respectfully states that California Penal Code Section 29805 actually did what it says it does- it automatically restored his firearm rights ten (10) years after his misdemeanor domestic battery conviction. The Illinois Appellate Court has previously recognized automatic restoration is sufficient in *Pournaras*, and such recognition of automatic restoration, in addition to case-by-case restoration, is warranted to avoid arbitrary results of disproportionately punishing less severe

offenders. As such, California has determined misdemeanants such as Thomas Brown are trustworthy after ten (10) years and has dispensed forgiveness. If California did not believe so, it always remains free to change Section 29805. As such, there is no multi-state conflict in the Illinois Circuit Court granting Thomas Brown a FOID Card.

This Court has previously rejected a pardon requirement in *Coram* for a statutory FOID claim and requiring seeking a pardon in the Second Amendment context would create an anomaly among constitutional rights. With respect to Brown's as-applied challenge, such challenge is permissible as there is a strong preference for recognition of such rights. Aside from misdemeanants convicted of domestic battery not being beyond the protection of the Second Amendment, as-applied challenges are warranted given the breadth of conduct covered by the domestic battery statute to include all kinds of "offensive" conduct. Congress did not make the argument that a perpetual ban was necessary to further its goal of preventing domestic violence, nor does it further that goal by permanently banning individuals who did not lose a civil right, while letting more severe offenders be restored. Mr. Brown respectfully suggests that such a ban, besides being

contrary to Congress' intended purpose, violates the Second Amendment of the United States Constitution, as well as Article I, Section 22 of the Illinois Constitution as applied in his particular case and respectfully requests this Court direct the ISP to issue him a FOID card.

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CERTIFICATE OF COMPLIANCE

I certify, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents containing the statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

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CERTIFICATE OF FILING AND SERVICE- APPELLANT'S REPLY BRIEF

I hereby certify that on July 19, 2021, I electronically filed the foregoing **Appellant's Reply Brief** with the Clerk of the Supreme Court, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served by the Odyssey eFileIL system.

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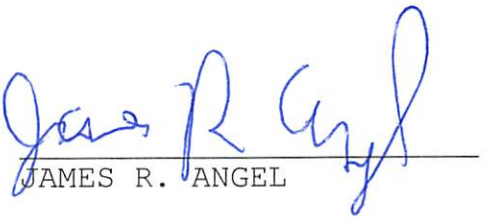
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct to the best of my knowledge, information and belief.



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