

In The
Supreme Court of the United States

—◆—
JEFF B. SESSIONS, ET AL.,

Petitioners,

v.

DANIEL BINDERUP, ET AL.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

—◆—
SUPPLEMENTAL BRIEF FOR THE RESPONDENTS
—◆—

DOUGLAS GOULD
PIZONKA, RIELLEY, BELLO
& MCGRORY, P.C.
144 E. DeKalb Pike, Suite 300
King of Prussia, PA 19406
(610) 992-1300

ALAN GURA
Counsel of Record
GURA PLLC
916 Prince Street,
Suite 107
Alexandria, VA 22314
alan@guraplhc.com
(703) 835-9085

Counsel for Respondents

No. 16-847

In The
Supreme Court of the United States

JEFF B. SESSIONS, ET AL.,

Petitioners,

v.

DANIEL BINDERUP, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

**SUPPLEMENTAL BRIEF
FOR THE RESPONDENTS**

Pursuant to Rule 15.8 of the Rules of this Court, Respondents bring to the Court's attention the Fourth Circuit's decision in *Hamilton v. Pallozzi*, 848 F.3d 614 (4th Cir. 2017). The Fourth Circuit decided *Hamilton* on February 17, 2017, eleven days after Respondents filed their brief in opposition. On March 17, 2017, the Fourth Circuit declined to rehear *Hamilton* en banc.

Hamilton deepened a circuit split to which the Government’s certiorari petition alluded, regarding the availability of as-applied Second Amendment relief from felon disarmament laws. Indeed, *Hamilton* will soon present an unusually compelling vehicle upon which this Court can (and should) resolve that circuit split. Yet *Hamilton* also highlights a significant shortcoming in the Government’s instant petition, by acknowledging – as Respondents have argued – that the disarmament of misdemeanants is more difficult to justify.

1. The Government cited Fourth Circuit precedent for the proposition that “[o]ther courts of appeals have left open the ‘theoretical[]’ possibility of successful as-applied challenges to Section 922(g)(1).” Pet. at 22 (quoting *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012)) (other citations omitted). It contrasted this “theoretical possibility” against the decisions of three circuits purportedly foreclosing such relief. Pet. at 21-22.

Respondents explained that five of the six circuits that had addressed the question, including the Fourth Circuit, held “that individuals may ask whether Section 922(g)(1)’s application against them comports with constitutional values.” BIO at 27; *id.* at 27-29 (citing, inter alia, *United States v. Pruess*, 703 F.3d 242, 245 (4th Cir. 2012); *United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012); *Moore*, 666 F.3d at 318-19)); see also *United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012).

2. In *Hamilton*, the Fourth Circuit eliminated the possibility of as-applied relief from 18 U.S.C. § 922(g)(1) and its analogs' applications to felons.

a. James Hamilton received a suspended jail sentence, and was ordered to make restitution and pay court costs, upon conviction for three Virginia felonies relating to the misuse of a credit card. Hamilton successfully completed probation, made restitution, and paid his costs. *Hamilton*, 848 F.3d at 618.

Virginia's Governor restored Hamilton's rights to vote, hold public office, sit on a jury, and serve as a notary; and a Virginia court restored Hamilton's firearms rights under Virginia law. *Id.* The full restoration of Hamilton's rights removed his federal firearms disability. See 18 U.S.C. § 921(a)(20).

"Hamilton subsequently was registered as an Armed Security Officer with the Virginia Department of Criminal Justice Services, and is certified in the use of handguns and shotguns." *Hamilton*, 848 F.3d at 618. Hamilton is now "employed through a contractor as a Protective Security Officer with the Department of Homeland Security (DHS). Hamilton is married, has three children, serves as the head coach of a junior league wrestling team, and has no history of violent behavior." *Id.* (citation omitted).

But although Hamilton carries a gun in the course and scope of his employment guarding federal installations, he cannot possess a gun for self-defense in his Maryland home. Maryland bars Hamilton from possessing firearms on account of his Virginia

felony convictions. *Id.*; Md. Pub. Safety Code Ann. §§ 5-133(b)(1), 205(b)(1).

b. Hamilton brought suit in the United States District Court for the District of Maryland, seeking as-applied Second Amendment relief from the operation of Maryland’s felon disarmament laws. The district court dismissed Hamilton’s case, *Hamilton v. Pallozzi*, 165 F. Supp. 3d 315 (D. Md. 2016), and the Fourth Circuit has now affirmed that dismissal.

The Fourth Circuit explained that its earlier precedent applying a “streamlined” analysis in as-applied Second Amendment challenges, to determine whether an individual is a “responsible, law-abiding citizen,” merely addresses step one of the now-familiar Second Amendment two-step process. *Hamilton*, 848 F.3d at 624. That is, even if a previously-convicted person has become a “responsible, law-abiding citizen,” the government may still disarm him or her if it satisfies some means-ends balancing test. This much of *Hamilton* tracks Judge Ambro’s approach below.

But from that point, the Fourth Circuit’s approach diverged from that of the Third Circuit and others. “We find the main opinion in *Binderup* well-reasoned and thoughtful, but decline to adopt it in its entirety . . . we simply hold that conviction of a felony necessarily removes one from the class of ‘law-abiding, responsible

citizens' for the purposes of the Second Amendment, absent the narrow exceptions mentioned below." *Id.* at 626.

Including "the narrow exceptions," the Fourth Circuit now holds:

A felon cannot be returned to the category of "law-abiding, responsible citizens" for the purposes of the Second Amendment and so cannot succeed at step one . . . unless the felony conviction is pardoned or the law defining the crime of conviction is found unconstitutional or otherwise unlawful.

Id. at 626 (citation and footnote omitted).

In other words, people enjoy as-applied relief from felon disarmament laws, only if they are no longer felons or cannot be considered to have committed any felonies.

By confining the step one analysis to the challenger's criminal history, we consider only the conviction or convictions causing the disability to the challenger. As a result, we also hold that evidence of rehabilitation, likelihood of recidivism, and passage of time are not bases for which a challenger might remain in the protected class of "law-abiding, responsible" citizen.

Id. (footnote omitted). "We reject rehabilitation, recidivism, and passage of time evidence at step one. . . ." *Id.* at 627.

Absent this Court's intervention, this type of decision will continue to pass for Second Amendment law in the lower courts – securing a largely illusory right that might protect Officer Hamilton, if only the challenged statute didn't apply to him in the first place.

3. Yet even in *Hamilton*, the Second Amendment proved only “largely” illusory.

[W]e leave open the possibility that persons who are not convicted of felonies, but otherwise fall within the sweep of what we refer to as “felon disarmament laws,” such as persons convicted of crimes labeled as a misdemeanors, but punishable by a term of prison such that the misdemeanor falls within the sweep of a felon disarmament law, may still potentially succeed at step one. . . .

Id. at 626 n.11.

Time will tell whether *Hamilton*'s reservation of as-applied Second Amendment challenges to misdemeanor disarmament will prove to have any more value than did the Fourth Circuit's earlier pronouncements purportedly offering such relief to felons. But for now, even the Fourth Circuit, in eliminating as-applied

Second Amendment relief for felons, paused before banishing misdemeanants like the Respondents from the Second Amendment's scope.

Respectfully submitted,

DOUGLAS GOULD
PIZONKA, RIELLEY, BELLO
& MCGRORY, P.C.
144 E. DeKalb Pike, Suite 300
King of Prussia, PA 19406
(610) 992-1300

ALAN GURA
Counsel of Record
GURA PLLC
916 Prince Street,
Suite 107
Alexandria, VA 22314
alan@gurapllc.com
(703) 835-9085

March 2017