No. 01-704

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

*v.*

THOMAS LAMAR BEAN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR PETITIONERS

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Respondent contends that a district court has authority under 18 U.S.C. 925(c) to award convicted felons relief from their firearms disabilities. As an initial matter, he argues for the first time in these proceedings that the Secretary of the Treasury retains authority to award relief from firearms disabilities, notwithstanding that the Act appropriating funds to the Bureau of Alcohol, Tobacco, and Firearms (ATF) bars the use of funds to act on applications for relief. He then argues that, in any event, the Secretary's failure to act on an application for relief constitutes a "denial" of relief that is subject to judicial review, and that, on review of such a denial, a district court may decide independently that an applicant is eligible for and warrants relief, and may award the applicant that relief. Each of those arguments is incorrect.

Because the Secretary has delegated his authority to implement Section 925(c) to the Director of the ATF, he does not have authority to act on his own. But even if the Secretary had retained authority to act on his own, established principles of appropriation law would preclude him from cir-

cumventing the appropriations bar by invoking that authority.

Nor did Congress intend for district courts to assume the role that ATF had previously performed. A district court has never had authority under Section 925(c) to decide independently that an applicant satisfies the statutory preconditions and warrants relief as a matter of discretion, or to award relief on its own. The appropriations bar does not invest a court with that authority for the first time.

In addition, Section 925(c) only authorizes judicial review of the Secretary's "denial" of an application. In light of the appropriations bar, the Secretary may neither grant nor deny an application; instead, he must decline to act on the merits of the application. As a result, the essential predicate for judicial review under Section 925(c)—a "denial" of an application—is lacking. Moreover, even if the Secretary's failure to act on an application were treated as a "denial" of relief within the meaning of Section 925(c), the Administrative Procedure Act (APA) would supply the standards for judicial review, and would preclude a district court from setting aside that "denial" because the Secretary's failure to act is compelled by the appropriations bar,

A district court's exercise of authority to afford relief from firearms disabilities would also give rise to the very dangers that Congress sought to avert when it enacted the appropriations bar. Congress suspended the Secretary's authority to relieve convicted felons of their firearms disabilities because it concluded that providing such relief endangers public safety. That risk would not be diminished if a court awarded relief. Indeed, because a judicial determination would be based largely on a one-sided record created by the applicant, rather than an impartial investigation conducted by ATF, the risks to the public would be even greater.

Respondent argues that the government has failed to demonstrate that Congress impliedly repealed Section 925(c).

But this case does not involve any issue of implied repeal. Congress expressly barred the Secretary from acting on applications for relief under Section 925(c). Congress did not, however, repeal judicial authority under Section 925(c), and judicial authority under that provision therefore remains intact. To be sure, respondent cannot obtain relief from firearms disabilities under Section 925(c). But that is because Section 925(c) has never authorized courts to decide independently that an applicant may obtain relief, because Section 925(c) does not authorize review of a failure by the Secretary to act on an application, and because the Secretary's decision not to act on the merits of an application would have to be sustained even if Section 925(c) did provide for such review.

### A. The Secretary May Not Act On Applications For Relief From Firearms Disabilities

Respondent contends (Br. 32-34) for the first time in these proceedings that the Secretary retains authority to act on applications for relief from firearms disabilities notwithstanding the appropriations bar in each annual appropriations law since 1992. In particular, he argues that, because the appropriations bar appears in the appropriation for ATF, it does not limit the Secretary's authority to grant relief from firearms disabilities on his own, without the assistance of ATF. That contention is incorrect for two reasons.

First, as Congress was obviously aware when it enacted the appropriations bar, the Secretary has delegated his authority to act on applications for relief under Section 925(c) to the Director of ATF. Treas. Dep't Order No. 221, §§ 1, 2(d) (June 6, 1972); 27 C.F.R. 178.144. The Secretary therefore does not have authority to grant relief from firearms disabilities on his own. See *United States* v. *Nixon*, 418 U.S. 683, 695-696 (1974); *Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-267 (1954). It is true that the Secretary's delegation order specifies that the Director of ATF shall exercise the

Secretary's authority under Section 925(c) subject to "the general direction of the Secretary." Treas. Dep't Order No. 221, §1. But in light of the appropriations bar, any direction from the Secretary to the Director to act upon applications for relief from firearms disabilities would be unlawful. Respondent does not argue that the Secretary was required to rescind the delegation of authority to ATF. And it plainly was not arbitrary or capricious for him to decline to do so in light of the manifest congressional policy expressed in the statutory bar included in each year's annual appropriations act and the impracticality of the Secretary personally conducting the necessary investigations.

Second, even if the Secretary had retained or recalled his authority to grant relief from firearms disabilities, the Act of Congress making appropriations of funds to the Department of Treasury does not include any funding that the Secretary may use for that purpose. No money appropriated to the Secretary is specifically designated for use in acting on applications for relief from firearms disabilities. While Congress has appropriated money to the Department of Treasury for certain general purposes, Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 514, use of that money to act upon applications for relief from firearms disabilities would constitute an impermissible circumvention of the appropriations bar, and therefore an expenditure for an unauthorized purpose, in violation of 31 U.S.C. 1301(a). Under a fundamental background principle of appropriations law, "an appropriation made for a specific purpose is available for that purpose to the exclusion of a more general appropriation that might also include that purpose." 64 Comp. Gen. 138, 140 (1984); see 36 Comp. Gen. 526, 528 (1957); 31 Comp. Gen. 491, 492 (1952); 19 Comp. Gen. 892, 893-894 (1940); 17 Comp. Gen. 974, 976 (1938); 4 Comp. Gen. 476, 478 (1924). That principle prevents circumvention of congressional spending limits, and is consistent with the

general rule of statutory construction that "a specific statute will not be controlled or nullified by a general one." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Here, the use of a general appropriation to implement a program for which Congress has expressly barred the use of *any* appropriated funds would constitute an even greater circumvention of Congress's appropriation authority.

That is particularly true in the present context. Congress enacted the appropriations bar in order to protect the public from potentially dangerous convicted felons, and to direct the resources previously expended on applications for relief from firearms disabilities to the important task of fighting crime. U.S. Opening Br. 4, 12-13 & n.5. It is implausible to believe that Congress intended to undercut those purposes by allowing the Secretary to use money from a general appropriation to investigate and act upon such applications himself.

**B. A Court Has Never Had Authority To Decide Independently That An Applicant Satisfies Eligibility Requirements And Warrants Discretionary Relief From Firearms Disabilities, Or To Award Relief Itself**

Respondent contends (Br. 31-32) that, even if the appropriations bar suspends the Secretary's authority to grant relief from firearms disabilities, a court has authority to decide independently that an applicant satisfies the statutory and regulatory preconditions and warrants relief as a matter of discretion, and to award such relief. But a court has never had such authority under Section 925(c). The text of Section 925(c) allocates that authority exclusively to the Secretary. Under Section 925(c), it is "the Secretary" who is authorized to "grant such relief," and only when it is established "to his satisfaction" that the preconditions for relief have been met. 18 U.S.C. 925(c). Moreover, even when the Secretary determines that the preconditions for relief have

been satisfied, the Secretary is not required to grant it. Section 925(c) provides only that the Secretary "may" grant relief in those circumstances. As a result, the Secretary may, as a matter of discretion, decline to grant relief to certain individuals or categories of individuals even if they might otherwise be able to satisfy the statutory preconditions. See, *e.g.*, 27 C.F.R. 178.144(d) (ordinarily no relief will be granted "if the applicant has not been discharged from parole or probation for a period of at least 2 years"); *ibid.* ("Relief will not be granted to an applicant who is prohibited from possessing all types of firearms by the law of the State where such applicant resides.").

The text of Section 925(c) does not grant authority to a court to determine whether the preconditions for relief have been met "to its satisfaction," or to decide as a matter of discretion who among the class of eligible applicants "may" obtain relief, or to "grant such relief." Instead, the court may only "review" the Secretary's "denial" of relief. 18 U.S.C. 925(c). While the text of Section 925(c) is silent on the scope of that review, the APA supplies the governing standards. 5 U.S.C. 704 (actions reviewable under the APA include "[a]gency action made reviewable by statute"); 5 U.S.C. 706 (setting forth the scope of review for any "agency action"). Under the APA, a court may review agency action for the limited purpose of determining whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Absent statutory authorization to do so, a court is not empowered "to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Moreover, if the court finds that agency action is not justified on the existing record under the applicable standards, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.*

"[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Thus, even before the enactment of the appropriations bar, a district court lacked authority to determine independently that an applicant satisfied the preconditions for removal of firearms disabilities and warranted that relief as a matter of discretion, or to award such relief. The appropriations bar—which now bars even the Secretary from granting relief—did not *sub silentio* vest such extraordinary de novo authority in the courts for the first time. Indeed, respondent does not identify any language in the annual appropriations bar, Section 925(c), or the APA that would support such an exercise of judicial authority.[1]

### C. A District Court Does Not Have Authority Under Section 925(c) To Review The Secretary's Failure To Act Upon Applications For Relief

1. Respondent's contention that a district court has authority to grant relief from firearms disabilities under

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[1] Relying on an administrative law treatise, respondent argues (Br. 50) that a court may award relief when the record clearly establishes that a party has satisfied the preconditions for relief. This Court has never endorsed such an expansive exception to the principle that a court must remand a case to the agency after finding the agency's decision unjustified. Such an exception would fail to respect an agency's authority to reopen the record and gather additional evidence that might alter the propriety of an award of relief. It also would fail to recognize an agency's authority to exercise its discretion to deny relief even when the statutory preconditions for relief have been satisfied. Moreover, the most recent edition of the treatise cited by respondent asserts that where the record establishes a party's entitlement to relief and further delay would be unjust, "[a] reviewing court *can order an agency* to provide the relief it denied." Richard J. Pierce, Jr., *Administrative Law Treatise* § 18.1, at 1323 (4th ed. 2002) (emphasis added). It does not assert that a court itself may provide the relief sought by a party.

Section 925(c) is incorrect for a second reason. An essential predicate for judicial review under Section 925(c) is the Secretary's issuance of a "denial" of relief. 18 U.S.C. 925(c). Because the appropriations bar precludes the Secretary from "act[ing] "upon" applications for relief, the Secretary is powerless to issue such a denial.

Respondent contends (Br. 35) that the Secretary's failure to act on an application for relief is a "denial" of relief within the meaning of Section 925(c). But in the context of agency action, a denial of relief means a decision on the merits rejecting a request for relief, not a failure to act on such a request.

The APA's definitional section expressly treats a "denial" and a "failure to act" as two distinct forms of agency action. 5 U.S.C. 551(13). That distinction, moreover, is carried over into the standards for reviewing agency action. When an agency issues a decision on the merits, a court shall "hold unlawful and set aside agency action, findings and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). In contrast, when final agency action takes the form of a failure to act, a court may only "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). See *Sierra Club* v. *Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987); *Public Citizen Health Research Group* v. *FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984). Because the Secretary's failure to act on respondent's application for relief did not reject respondent's claim on the merits, it did not constitute a "denial" of relief reviewable under Section 925(c).

*Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), cited by respondent (Br. 35), does not suggest otherwise. That case holds only that a failure to act is subject to review as final agency action when its effect is equivalent to the effect of a denial of relief. *Id.* at 1098-1099.

It does not hold that a failure to act *is* a denial of relief. *Ibid.* The other cases respondent cites (Br. 35-36 & n.15) also do not hold that a failure to act is a denial of relief.[2]

Respondent also errs in contending (Br. 35, 49) that ATF's decision should be treated as a denial of relief because it constituted a "refusal" to act. A refusal to act on an application, as required by an Act of Congress, no more constitutes a decision on the merits than any other kind of failure to act.

2. Respondent contends (Br. 34-35) that if a failure to act is not treated as a denial of relief, the result would conflict with the presumption that Congress intends for there to be judicial review of final agency action. There is no such conflict. Although respondent may not seek judicial review under Section 925(c) in these circumstances, respondent

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[2] *Clouser* v. *Espy*, 42 F.3d 1522, 1532 n.12 (9th Cir. 1994), stated that a District Ranger's refusal to act on a proposed plan of operations "appears to qualify" as a decision "related to issuance, denial or administration of * * * written instruments to occupy and use National Forest System Lands," and that "[s]uch rulings are appealable under the Forest Service regulations." *Ibid.* *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1323 n.23 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979), held that the Secretary of Interior's failure to act on an application did not constitute a "denial" of an application within the meaning of 5 U.S.C. 555(e). That court stated in dicta that "an indefinite refusal to act might at some point constitute a 'denial.'" *Ibid.* Four other circuit court decisions cited by respondent (Br. 36 n.15) held that a failure to act may in some circumstances be reviewed as final agency action, not that a failure to act is a denial of relief. *Coalition for Sustainable Res., Inc.* v. *United States Forest Serv.*, 259 F.3d 1244, 1251 (10th Cir. 2001); *Sierra Club* v. *Glickman*, 156 F.3d 606, 618 n.7 (5th Cir. 1998); *Sierra Club* v. *Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987); *Public Citizen Health Research Group* v. *FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984). The final circuit court decision cited by respondent observed that it could "treat an unjustified failure to act within a reasonable period as an effective denial of [a] motion to reopen" where the consequence otherwise would have been deportation of a resident alien. *Dabone* v. *Karn*, 763 F.2d 593, 597 n.2 (3d Cir. 1985). That statement was unnecessary to the court's decision because the court ultimately held that it had authority to act under 28 U.S.C. 1651. *Ibid.*

could have obtained judicial review of the Secretary's failure to act on his application in another way. Because the ATF Director issued a final decision that he would not act on respondent's application, respondent could have sought judicial review under the APA, which authorizes judicial review of final agency action when there is no other adequate remedy in a court. 5 U.S.C. 704. In such an action, respondent could have invoked the provision of the APA that authorizes a court to "compel agency action unlawfully withheld." 5 U.S.C. 706(1). That action would have failed on the merits, however, because the Director's refusal to act upon respondent's application was entirely lawful.

By eschewing the APA and attempting to proceed under Section 925(c), respondent sought to invoke the court's authority under that Section to "admit additional evidence," as a springboard for obtaining a de novo judicial determination that he was entitled to relief from his firearms disabilities. Had respondent sought review in the manner provided by Congress, arguing that the Director's failure to act constituted final agency action and was unlawful under the APA, 5 U.S.C. 704, 706(1), he could not have invoked the court's "additional evidence" authority under Section 925(c), and a court plainly would not have had authority to grant relief from firearms disabilities. Thus, respondent's argument that a court may receive and weigh evidence in the first instance and award relief in a case such this is contrary not only to Section 925(c) and the judgment of Congress in the appropriations bar, but also to the text of the APA and fundamental principles of administrative law.

3. Respondent's remaining arguments for treating a failure to act as a "denial" of relief under Section 925(c) are also unpersuasive. Respondent contends (Br. 38) that unless a failure to act may be reviewed under Section 925(c), the Secretary could escape review of a decision to refuse to process applications for relief filed by corporations, even

though the appropriations bar does not apply to corporate applications. If the Secretary adopted such a practice, however, it too would be subject to review under the APA as final agency action for which there is no other adequate remedy in a court. The same basic flaw inheres in respondent's contention (Br. 36-37) that a failure to act must constitute a denial of relief because Section 925(c) refers only to grants and denials of relief. Congress's failure to address anything other than grants and denials in Section 925(c) simply means that Congress intended for the consequences of other responses by the Secretary, such as a failure to act, to be governed by other applicable provisions of law, such as the APA.

### D. The Secretary's Compliance With The Appropriations Bar Would Not In Any Event Furnish A Basis For Setting Aside The Secretary's Action

There is a third reason that a court may not order relief from firearms disabilities under Section 925(c). Even if the Secretary's failure to act triggered a right to judicial review under Section 925(c), the scope of that review would be governed by the APA, which limits review to a determination whether an agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). As long as the appropriations bar is in effect, the Secretary's failure to act on an application for relief from firearms disabilities does not fall into any of those categories. To the contrary, it is required by law. Thus, if the Secretary's failure to act were reviewable under Section 925(c), it would result in an affirmance of the Secretary's decision.

1. Respondent contends (Br. 46-47) that review under Section 925(c) is not governed by APA standards. By its express terms, however, the APA applies to "[a]gency action made reviewable by statute." 5 U.S.C. 704. Morever, the APA's scope of review provision applies categorically to any

"agency action." 5 U.S.C. 706. Accordingly, "a reviewing court must apply the APA's court/agency review standards in the absence of an exception." *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999); see *ICC* v. *Bortherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987). Nothing in the text of Section 925(c) suggests that Congress intended to displace the APA's standards of review. To the contrary, the text of Section 925(c) is silent regarding the scope of judicial review, confirming that Congress intended for traditional APA standards to apply. See 5 U.S.C. 559 (subsequent legislation does not supercede or modify the provisions of the APA "except to the extent that it does so expressly").

The background to the enactment of Section 925(c)'s judicial review provision reinforces that conclusion. Prior to the enactment of that provision, the Ninth Circuit held in *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199-1200 (1976), that an applicant for relief from firearms disabilities could obtain judicial review of the Secretary's denial of relief under the APA's arbitrary or capricious standard. The Ninth Circuit rejected the government's argument that the Secretary's decision was unreviewable. *Ibid.* By enacting the judicial review provision in Section 925(c), Congress codified the holding in *Kitchens* that the Secretary's denial of relief is subject to review under the APA, and foreclosed the government from arguing in the future that such a decision is unreviewable.

Respondent argues (Br. 47) that APA standards do not apply under Section 925(c) because a sentence from a prior version of the bill that expressly incorporated APA standards into Section 925(c) was omitted from the law as finally enacted. Because APA standards apply of their own force to statutory review provisions, however, that sentence was superfluous. A decision to eliminate that redundancy fully justifies that deletion. Respondent's alternative explanation attributes to Congress an intent to displace otherwise appli-

cable APA standards without substituting any alternative standard of review at all. Congress did not act in such an inexplicable manner. Instead, in Section 925(c), Congress specified the procedure for obtaining judicial review of denials of relief, and allowed the existing standards in the APA to govern the scope of that review.[3]

2. Respondent argues (Br. 49) that, if APA standards do apply, the Secretary's failure to act on applications for relief from firearms disabilities violates several of those standards. In particular, he contends that the Secretary's failure to act on his application was "short of statutory right," and either "unsupported by substantial evidence" or "unwarranted by the facts." *Ibid.* (quoting 5 U.S.C. 706(2)(C), (E), and (F)). The Secretary's failure to act did not violate those standards.

Even before the enactment of the appropriations bar, Section 925(c) did not confer any rights on convicted felons. It granted authority to the Secretary to award relief from firearms disabilities as a matter of discretion. Nor do convicted felons now have a right to have the Secretary act on their applications for relief. To the contrary, in light of the appropriations bar, the Secretary has a statutory obligation *not* to do so.

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[3] Respondent does not argue that a district court's authority under Section 925(c) to "admit additional evidence where failure to do so would result in a miscarriage of justice" displaces APA standards of review, and any such argument would be insubstantial. The authority to "admit additional evidence" does not address the standards for reviewing administrative action once the evidence is admitted. In the rare case in which the admission of additional evidence would be justified, Congress contemplated that a court would permit the Secretary to reconsider his decision in light of the new evidence, and then review the Secretary's decision on reconsideration under the ususal standards. S. Rep. No. 583, 98th Cong., 2d Sess. 27 (1984). In that respect, Section 925(c) tracks other statutes that authorize a party to offer new evidence after administrative action has been taken. See 28 U.S.C. 2347(c); 42 U.S.C. 405(g) (sentence six) (discussed in *Sullivan* v. *Finkelstein*, 496 U.S. 617, 625-626 (1990)).

Moreover, neither the "substantial evidence" standard nor the "unwarranted by the facts" standard is applicable to review under Section 925(c). The "substantial evidence" standard applies when a hearing is required by statute, 5 U.S.C. 706(2)(E), and Section 925(c) contains no such requirement. The "unwarranted by the facts" standard applies when a statute requires a trial de novo, 5 U.S.C. 706(2)(F), and Section 925(c) does not require such a trial. In any event, in light of the appropriations bar, the Secretary's failure to act on respondent's application was both supported by substantial evidence and warranted by the only material facts—that respondent applied to the Secretary for relief from firearms disabilities at a time when the appropriations bar precluded the Secretary from acting on his application.

### E. Judicial Authority To Grant Relief From Firearms Disabilities Would Undercut The Purposes Of The Appropriations Bar

1. The assumption of judicial authority to relieve convicted felons of their firearms disabilities would also defeat the purposes of the appropriations bar. As previously noted, Congress enacted that bar in order to protect the public from potentially dangerous convicted felons and to devote scarce federal resources to the prosecution of crime. U.S. Opening Br. 4, 12-13 & n.5. Judicial consideration of applications for relief under Section 925(c) would undercut those purposes.[4]

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[4] Respondent contends (Br. 39-40) that it is impermissible to rely on legislative history to determine the purposes of an appropriations law, that the legislative history of the appropriations bar is contradictory (*id.* at 42), and that the legislative history is irrelevant because it concerns appropriations bars from earlier years (*id.* at 40). Those objections are all without merit. In the first place, the text of the appropriations bar makes clear Congress's intent not to have resources directed to relieving firearms disabilities. Legislative history is also relevant in determining the purposes of an appropriations law. See *United States* v. *Will*, 449 U.S.

Respondent contends (Br. 28-29) that such a judicial role does not pose the same risk to public safety that prompted the appropriations bar. In fact, however, judicial consideration of applications for relief would pose an even greater danger. While ATF made its decisions on applications for relief after conducting a thorough impartial investigation, a court must rely on the parties to present relevant evidence. Because the appropriations bar precludes ATF from conducting an investigation into an applicant's background or the circumstances surrounding his conviction, a court would have to make its decision based largely on the applicant's one-sided presentation. The risks of erroneous fact-finding from such a process are apparent.[5]

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200, 222 & n.24 (1980); *United States* v. *Dickerson*, 310 U.S. 554, 561-562 (1940). All of the relevant legislative history identifies the same two reasons for the appropriations bar. See U.S. Opening Br. 4, 12-13 & n.5. And respondent offers no reason to believe that later appropriations bars using the exact same language as earlier ones were intended to achieve different purposes. See *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988).

[5] While respondent asserts (Br. 30) that the evidence establishes that he satisfied the statutory preconditions for relief, that evidence consists largely of evidence that he presented. Because of the appropriations bar, ATF could not investigate either the circumstances of respondent's conviction or his background. Even so, respondent's description of the evidence is incomplete. For example, respondent fails to mention that he fired his Mexican attorney and hired a Mexican accountant to help him circumvent Mexico's criminal justice system. J.A. 51-52. Moreover, when respondent applied to the Secretary for relief, and when the district court issued its decision, respondent was disabled from possessing firearms under state law, and he had not yet been discharged from supervised release for at least two years. Gov't C.A. Reply Br. 5-8. Respondent therefore did not qualify for relief under the Secretary's regulations. See 27 C.F.R. 178.144(d). In addition, the court of appeals' finding (Pet. App. 11a; *id.* at 5a n.9), relied on by respondent (Br. 30), that respondent's inability to possess firearms prevents him from pursuing his livelihood is misleading. While respondent had a licence to sell firearms before his felony conviction, he earned his livelihood as a used car salesman both before and after his conviction. J.A. 11, 20, 24, 30-31, 39. Respondent

Respondent similarly errs in contending (Br. 27) that, because a court could require an applicant to bear the costs of additional investigation, a judicial remedy would address Congress's concern that government resources are better spent on fighting crime than on processing applications for relief. That approach would not eliminate the flaw of a one-sided investigation, because it would not enable ATF to conduct its *own* investigation on behalf of the government. The approach also would still require the court, ATF officials, and government attorneys to expend scarce resources responding on the merits to applications for relief from firearms disabilities.

2. Respondent argues (Br. 23-24) that Congress's failure to enact bills that would have repealed Section 925(c) shows that Congress did not intend to affect that program through the appropriations bar. Failed legislative proposals, however, provide an inherently unreliable basis for discerning Congress's intent. *Solid Waste Agency of N. Cook County* v. *Army Corps of Engineers*, 531 U.S. 159, 170 (2001). The inference respondent seeks to draw is especially unwarranted. As respondent acknowledges (Br. 41 (citation omitted)), there is a fundamental difference between an appropriations bar and a permanent repeal of legislation: an appropriations bar "forces Congress to revisit the issue each year as part of the annual appropriations process." Congress's failure to enact a permanent repeal of the program for relieving convicted felons of their firearms disabilities is perfectly consistent with Congress's decision to suspend that program one year at a time, leaving its future fate to be decided in the next year's appropriation.

Respondent's reliance (Br. 24) on Congress's failure to enact an amendment to the appropriations bar that would have foreclosed judicial review is also misplaced. Congress

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indicated in his testimony that he sought relief from firearms disabilities so that he would be able to hunt. J.A. 51.

easily could have viewed such an amendment as unnecessary because Section 925(c) does not authorize review of a failure to act, and the APA adequately protects an agency decision made in accordance with law. In any event, Congress's *failure* to enact legislation foreclosing judicial *review* cannot possibly establish that Congress *enacted* legislation affirmatively authorizing courts for the first time to determine *independently* that an applicant is eligible for relief and warrants a favorable exercise of discretion, and to award that relief.

3. Respondent also argues (Br. 44-45) that judicial consideration of applications for relief is consistent with Congress's failure to repeal a provision that permits States to relieve convicted felons of their firearms disabilities when those disabilities stem from state law convictions. See 18 U.S.C. 921(a)(20). But Congress's respect for the States' traditional role in protecting the public from the dangers associated with firearms does not suggest that Congress intended to transfer responsibility for administration of the federal relief program from ATF to the federal courts. See S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993) (noting that "[u]nder current policy, States have authority to make these determinations, and the Committee believes that this is where the responsibility ought to rest").

### F. Respondent's Reliance On Rules Of Construction Is Misplaced

In support of his contention that courts have authority to award relief from firearms disabilities, respondent invokes several canons of statutory construction. Those canons have no application here.

1. Respondent first argues (Br. 16-19) that the government has failed to substantiate its claim that the appropriations bar has impliedly repealed the Secretary's and the courts' authority to award relief from firearms disabilities. The government's position in this case, however, does not

depend on a theory of an implied repeal. The appropriations bar *suspends* the Secretary's ability to act on applications for relief one year at a time; it does not *repeal* it. Moreover, there is noting implied about that suspension. The appropriations bar *expressly* prohibits the use of any funds "to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." 115 Stat. 519.

Nor has the government argued that the appropriations bar repeals any provision for judicial review. The appropriaions bar leaves both the specific provision for judicial review under Section 925(c) and the general provisions of the APA unaffected. To be sure, respondent may not obtain relief from firearms disabilities under either Section 925(c) or the APA. That is because (1) a court has never had authority under Section 925(c) to determine independently that an applicant satisfies the statutory preconditions and warrants relief as a matter of discretion, or to award relief itself, see pp. 5-7, *supra*; (2) a court has never had authority under Section 925(c) to review a Secretary's failure to act on applications, see pp. 7-11, *supra*; (3) even if Section 925(c) did confer that authority, a court would be required to sustain the Secretary's failure to act because it is compelled by the appropriations bar, see pp. 11-14, *supra*; and (4) a suit under the APA would fail for the same reason. See pp. 9-10. The fact that a suit to obtain relief from firearms disabilities would fail on the merits, however, does not mean that there has been a repeal of the statutes authorizing judicial review.

2. The principle that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress," Resp. Br. 20 (quoting *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)), is also inapposite here. The district courts remain free to exercise all of the jurisdiction they have. They are only authorized by Section 925(c) to "review" the Secretary's action, and because the Secretary is

not authorized to grant relief from firearms disabilities, there is no basis for a court to do so on judicial review.

3. Similarly unpersuasive is respondent's reliance (Br. 20-21) on the rule of lenity, which respondent describes as requiring doubts to be resolved "in favor of the defendant." Respondent is not a defendant; he is a plaintiff seeking an exercise of discretion to remove a clear consequence of his felony conviction. See 18 U.S.C. 922(g)(1). In any event, the rule of lenity applies only when, "after seizing everything from which aid can be derived," a court "can make 'no more than a guess as to what Congress intended.'" *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998); see also *Lewis* v. *United States*, 445 U.S. 55, 65 (1980). (noting that the "touchstone" of the rule of lenity "is statutory ambiguity"). Here, the appropriations bar unambiguously prevents ATF from granting relief, and the courts do not have independent authority to do so.

4. Finally, the principle that Acts of Congress should be interpreted to avoid difficult constitutional issues (Resp. Br. 21-21) is inapplicable here.[6] That principle applies only when Congress has not made its intent clear. *Miller* v. *French*, 530 U.S. 327, 341 (2000); *Lewis*, 445 U.S. at 65. Here, Congress has made clear that a court does not have authority under Section 925(c) to determine de novo whether the preconditions for relief have been satisfied or to award relief itself.

Moreover, a court's inability to perform that role does not raise any serious constitutional question. This Court has already rejected a constitutional challenge to the firearms bar for convicted felons in the predecessor to 18 U.S.C. 922(g). *Lewis*, 445 U.S. at 65 n.8. Respondent invokes the reasoning of the Fifth Circuit in *United States* v. *Emerson*,

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[6] Respondent did not raise any Second Amendment objection to the appropriations bar in the court of appeals or in his brief in opposition in this Court.

270 F.3d 203, 261 (2001), cert. denied, 122 S. Ct. 2362 (2002), that "the Second Amendment *does* protect individual rights." While the United States agrees that the Second Amendment protects individual rights, see Br. in Opp. at 19-20 n.3, *Emerson*, *supra* (No. 01-8780), that does not affect the constitutionality of either the firearms disability for felons or the appropriations bar. As the Fifth Circuit explained, the Second Amendment does not protect persons convicted of a felony. *Emerson*, 270 F.3d at 261 ("it is clear that felons * * * may be prohibited from possessing firearms"); *id.* at 226 n.21 (citing evidence that, at the time of the framing of the Second Amendment, the right to bear arms did not extend to convicted felons).

* * * * *

For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for consideration of any other claim that legitimately remains in the case.[7]

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*

JULY 2002

[7] Respondent urges (Br. 50 n.23) a remand for a determination whether his foreign conviction subjects him to disabilities. On remand, however, the court of appeals must first decide whether it has jurisdiction to reach that issue, and if so, whether respondent has adequately preserved that claim. See Gov't Reply Br. Pet. Stage 3-5.

## APPENDIX

## STATUTORY PROVISIONS INVOLVED

1. 5 U.S.C. 551(13) provides in pertinent part:

**Definitions**

* * * * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act;

* * * * *

2. 5 U.S.C. 704 provides in pertinent part:

**Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

3. 5 U.S.C. 706 provides:

**Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.