No. 05-365

In the Supreme Court of the United States

SANDRA SEEGARS, ET AL., PETITIONERS

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL, ET AL.,

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DANIEL MERON
Deputy Assistant Attorney General

MARK B. STERN
LEWIS S. YELIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The District of Columbia Code prohibits the possession of pistols and requires firearms to be kept disassembled or bound by trigger locks. The questions presented are:

1. Whether petitioners may bring a preneforcement challenge to the pistol ban when they have not alleged a threat of prosecution and can obtain judicial review of the statute in the District of Columbia's courts without risking criminal prosecution.

2. Whether petitioner Hailes may bring a preenforcement challenge to the trigger lock requirement, when she has alleged only that she wants to remove the trigger lock when necessary for self-defense if such an occasion arose in the future.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 396 F.3d 1248. The opinion of the district court (Pet. App. 32a-117a) is reported at 297 F. Supp. 2d 201.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2005. A petition for rehearing was denied on June 21, 2005 (Pet. App. 21a-30a). The petition for a writ of certiorari was filed on September 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, the City Council of the District of Columbia enacted the Firearms Control Regulation Act of 1975, D.C. Code §§ 7-2502.01 *et seq*. (2001). One provision of the Act prohibits a person from possessing a firearm in the District of Columbia unless the individual holds a valid registration certificate. *Id.* § 7-2502.01. Another provision prohibits the registration of pistols that were not already registered before September 24, 1976, the effective date of the Firearms Control Regulations Act. *Id*. § 7-2502.02(a)(4). A third provision requires registrants to "keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." *Id.* § 72507.02.

Under the Act, an applicant for a registration certificate must file an application "prior to taking possession of a firearm from a licensed dealer or from any person or organization holding a registration certificate therefor." D.C. Code § 7-2502.06(a) (2001). But "[i]n all other cases, an application for registration shall be filed immediately after a firearm is brought into the District." *Ibid*. If the Chief of Police denies an application, an individual has the right to seek reconsideration of the decision. *Id*. § 7-2502.10(a). Upon receipt of the Chief of Police's "final decision," an applicant may seek review under the District of Columbia Administrative Procedure Act. *Id*. §§ 7-2502.10(b), 7-2507.09. Such review culminates in judicial review of the Chief of Police's decision in the District of Columbia Court of Appeals, *id.* § 7-2502.10(b); *id.* § 2-510(a), where the individual may

challenge the constitutionality of the Chief's decision, *id* § 2-510(a)(3)(B); see *Fesjian* v. *Jefferson*, 399 A.2d 861 (D.C. 1979). Within seven days of a final decision upholding the denial of a registration certificate, the applicant must "[l]awfully remove such firearm from the District for so long as he has an interest in such firearm," or "[o]therwise lawfully dispose of his interest in such firearm." D.C. Code § 7-2502.10(c)(2) and (3) (2001).

Possession of an unregistered firearm may be punished by a fine of up to $1000 or imprisonment of up to one year. D.C. Code § 7-2507.06 (2001). A second offense is punishable by a fine of $5000 or five years of imprisonment. *Id*. § 7-2507.06(2)(A). Failure to keep a firearm disassembled or bound by a trigger lock is punishable by a fine of up to $1000 or imprisonment for up to one year. *Id*. § 7-2507.06.

The District of Columbia has licensing requirements for pistols that are distinct from the registration requirements. D.C. Code § 22-4506 (2001) authorizes the Chief of Police to issue licenses to certain persons to carry a pistol if "if it appears that the applicant has good reason to fear injury to his or her person or property or has any other proper reason for carrying a pistol." However, an applicant for a license must "register the pistol for which the license will apply." D.C. Mun. Regs. tit. 24, § 2304.15 (2004).

Carrying an unlicensed pistol in one's dwelling is punishable by a fine of up to $1000 or imprisonment for up to one year. D.C. Code § 22-4504(a)(1) (2001); *id*. § 22-4515. A person who carries an unlicensed pistol outside his or her dwelling, place of business, or other land owned by the person is subject to a fine of up to $5000 or imprisonment of up to five years. *Id*. § 22-4504(a)(1). The penalty increases to a fine of up to

$10,000 or imprisonment for up to ten years for a second offense. *Id.* § 22-4504(a)(2). The offense of carrying an unlicensed pistol (*id.* § 22-4504(a)) is a separate offense from possessing an unregistered pistol. *Id.* §§ 7-2502.01, 7-2507.06). See *Tyree* v. *United States*, 629 A.2d 20 (D.C. 1993).

Prosecutorial responsibilities for District of Columbia firearms laws is shared by the Office of the Attorney General for the District of Columbia and the United States Attorney for the District of Columbia. See *United States* v. *Bailey*, 495 A.2d 756, 760 n.10 (D.C. 1985). The Code authorizes the Office of the Attorney General for the District of Columbia—previously known as the Office of the Corporation Counsel for the District of Columbia—to prosecute certain minor crimes, such as violations of municipal ordinances, "in the name of the District of Columbia." D.C. Code § 23-101(a) (2001). The Code directs the United States Attorney for the District of Columbia to prosecute all other crimes, including felonies, "in the name of the United States." *Id.* § 23-101(c).

2. Petitioners are five residents of the District of Columbia. They filed suit in the United States District Court for the District of Columbia against the Attorney General of the United States and the Mayor of the District of Columbia. Pet. App. 32a-33a. Their complaint alleged that the District of Columbia's prohibition against the registration of pistols, its requirement to keep firearms disassembled or bound by a trigger lock, and its prohibition against carrying a pistol without a license in one's dwelling, violated, *inter alia*, the Second Amendment to the United States Constitution. Pet. App. 4a-5a, 32a.

No petitioner claimed that he or she attempted to register a pistol before filing suit. Instead, each alleged that "[b]ut for D.C. Code § 7-2502.02(a)," he or she "would forthwith obtain and register a pistol to keep at home for self protection." C.A. App. 14, 15. Petitioner Hailes further alleged that she possesses a registered shotgun, which she keeps at home bound by a trigger lock, and that, "[b]ut for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home." *Id.* at 15. Petitioners did not allege that they have been prosecuted or threatened with prosecution under the provisions they challenge. Instead, they alleged that they "face arrest, prosecution, and incarceration should they possess an unregistered pistol in violation" of the D.C. Code. C.A. App. 15-16 (alleging that petitioner Hailes would be subject to prosecution were she not to keep her shotgun disabled).

The United States moved to dismiss petitioners' complaints on the ground that petitioners lack standing to challenge the firearms provisions and that their challenges are not ripe. C.A. App. 34. The District of Columbia adopted the United States' justiciability arguments but argued also that petitioners' complaints must be dismissed because, in its view, the Second Amendment does not create an individual right to possess firearms. *Id.* at 29 n.1, 34.[1]

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[1] While the United States did not take a position on the merits of petitioners' claims, it informed the district court of its position that the Second Amendment "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

3. The district court dismissed petitioners' claims. The court held that petitioners lack standing to challenge the provisions prohibiting the possession of pistols because they did not allege that they face[] a threat of prosecution under the statute which is *credible and immediate*, and not merely abstract or speculative." Pet. App. 43a (quoting *Navegar, Inc.* v. *United States*, 103 F.3d 994, 998 (D.C. Cir. 1997)).

The court concluded that petitioner Hailes had standing to challenge the trigger lock provision, because she did not have a mechanism for administrative review, culminating in judicial review, to challenge the lawfulness of the trigger lock requirement. Pet. App. 61a-62a. The court rejected petitioner Hailes' Second Amendment claim on the merits, on the ground that "the Second Amendment does not confer an individual right to possess firearms," *id.* at 101a, and that the Second Amendment does not apply to the District of Columbia, because "the District of Columbia is not a state for Second Amendment purposes." *Id.* at 111a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-16a. The court held that petitioners had not established a "threat of prosecution reaching the level of imminence required by" the court of appeals' *Navegar* decision. *Id.* at 13a (pistol petitioners); *id.* at 15a-16a (trigger lock petitioner). In *Navegar*, the court of appeals held that, in order to establish standing to bring a preenforcement challenge to a criminal statue restricting conduct that is arguably constitutionally protected, a plaintiff must show a credi-

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firearms that are particularly suited to criminal misuse." Motion to Dismiss 013 n.11 (quoting Memorandum by the Attorney General included in the government's Br. in Opp. at 19-20 n.3, *United States* v. *Emerson*, 536 U.S. 907 (2002) (No. 01-9780)).

ble threat of imminent prosecution. *Navegar*, 103 F.3d at 998. Under *Navegar*, a plaintiff cannot establish such a threat merely by showing that the law is generally enforced. *Id.* at 1001. Rather, under *Navegar*, plaintiffs must demonstrate "prior threats against them or [other] characteristics indicating an especially high probability of enforcement against them." Pet. App. 13a. The court of appeals concluded that none of the petitioners had made such a showing. *Id.* at 13a-15a.

Judge Sentelle dissented. Pet. App. 16a-20a. In his view, because petitioners had shown that their intended behavior is covered by a criminal statute that is generally enforced, they satisfied the standard for alleging a credible threat of enforcement set forth in *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). Pet. App. 16a-18a. Judge Sentelle also concluded that while *Babbitt* involved a First Amendment claim, the same standard should apply to Second Amendment claims. *Id.* at 18a-19a.

5. The court of appeals denied the petition for rehearing en banc. Pet. App. 23a-24a. Three judges filed statements concerning the order denying rehearing en banc. Chief Judge Ginsburg concurred in the denial of rehearing en banc. He concluded that the pistol petitioners did not satisfy the standards for bringing a preenforcement challenge to a criminal statute. He reasoned that because petitioners could have sought to register pistols and then challenged the subsequent denial of their applications in the courts of the District of Columbia, this case "does not present a circumstance in which a plaintiff is 'required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* at 26a (quoting *Babbitt*, 442 U.S. at 298). Chief Judge Ginsburg further concluded that petitioner Hailes

lacked standing to challenge the trigger lock requirement, because "it is highly speculative" whether "she would ever find it necessary to remove the trigger lock in order to defend herself in her home," and whether "she would then be prosecuted for that action." *Id.* at 26a-27a.

Judge Williams expressed the view that the pistol petitioners had established a sufficiently imminent threat of prosecution to establish standing because the D.C. Code "unequivocally" bars issuance of permits for pistols. Pet. App. 28a. Judge Williams also concluded that petitioner Hailes had established standing, because "[t]he risk of prosecution in the event of the contingency [Hailes] fears is high." *Id.* at 29a. Judge Sentelle largely agreed with Judge Williams' reasoning. *Id.* at 27a.

ARGUMENT

The court of appeals correctly held that petitioners failed to satisfy the standards for bringing a preenforcement challenge to a criminal statute. The court's decision does not conflict with any decision of this Court or any other courts of appeals. Review by this Court is therefore not warranted.

1. Petitioners contend (Pet. 7) that the decision below conflicts with *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). In particular, they argue that the court of appeals failed to follow *Babbit*'s holding that "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await a criminal prosecution as the sole means of seeking relief." *Id.* at 298.

The court of appeals, however, did not depart from that holding. Instead, applying its previous decision in *Navegar* v. *United States*, 103 F.3d 994 (D. C. Cir. 1997), the court concluded that petitioners failed to establish a credible threat of prosecution as required by *Babbitt*. As the court explained, *Navegar* held that, in order to establish a credible threat of prosecution, a plaintiff must show either that he was threatened with prosecution or that he has a characteristic that puts him at a heightened risk of prosecution, and petitioners failed to make either showing. Pet. App. 13a.

Petitioners argue (Pet. 11) that, under *Babbitt*, a plaintiff can demonstrate a credible threat of prosecution by showing that he intends to engage in conduct that violates the statute and that the government maintains a general intent to enforce the statute. But *Babbitt* did not purport to hold that a such a showing would always enable a plaintiff to establish that he faces a sufficiently credible threat of prosecution to justify a preenforcement challenge to a criminal statute. *Babbitt* involved a First Amendment claim, and what is sufficient to satisfy the credible threat requirement in that context is not necessarily sufficient in other contexts. Indeed, in *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965), the Court expressly held that preenforcement challenges to criminal statutes on First Amendment grounds involve distinct considerations because "free expression" has a "transcendent value to all society, and not merely to those exercising their rights."

In any event, even if petitioners could satisfy *Babtitt*'s credible threat requirement, that would not make their preenforcement challenge justiciable. *Babitt* authorizes a preenforcement challenge to a criminal statute only when "await[ing] criminal prosecution" is

"the sole [alternative] means of seeking relief." 442 U.S. at 298. Petitioner failed to satisfy that independent requirement here. As Chief Judge Ginsburg correctly observed in his opinion concurring in the denial of rehearing en banc, petitioners had a ready means for seeking relief with respect to the pistol prohibition without awaiting criminal prosecution. They could have applied to register a pistol with the Chief of Police and then challenged the subsequent denial in the District of Columbia Court of Appeals. Pet. App. 26a; see D.C. Code §§ 2-510(a), 7-2502.10(b), 7-2507.09 (2001); *Fesjian* v. *Jefferson*, 399 A.2d 861 (D.C. 1979) (considering constitutional challenges to District gun statute upon appeal from denial of registration). And if that court issued an adverse decision, petitioners could seek a petition for a writ of certiorari from this Court. 28 U.S.C. 1257. The existence of that alternative avenue for review also renders their claim here unripe and furnishes an independent basis for a court to withhold the equitable relief petitioners seek.

Petitioners argue (Pet. 22) that the existence of that alternative remedy is not relevant because they have sued under 42 U.S.C. 1983, and exhaustion of administrative remedies is not a prerequisite to such suits. But Section 1983 does not create a cause of action against federal officials acting under color of federal law. *Wheeldin* v. *Wheeler*, 373 U.S. 647, 650 & n.2 (1963). And when the United States Attorney prosecutes District firearms violations, he is a federal official acting under color of federal law. See Act of July 29, 1970, Pub. L. No. 91-358, § 210(a), 84 Stat. 604 (D.C. Code § 23-101 (2001)) (authorizing the United States Attorney to prosecute such offenses "in the name of the United States").

Petitioners' suit against the Mayor of the District of Columbia arises under Section 1983. But nothing in Section 1983 eliminates the established rule that a plaintiff may not bring a preenforcement challenge to a criminal statute when there is an alternative way to challenge the law without awaiting criminal prosecution. The existence of an alternative mechanism to challenge the law is relevant to the ripeness analysis, which is distinct from principles of exhaustion. Petitioners' reliance on Section 1983 is therefore misplaced.

Petitioners also argue (Pet. 3) that they should not be required to invoke a futile administrative remedy. But that assertion of futility ignores the availability of judicial review for their claims in the District of Columbia Court of Appeals.[2]

2. Petitioners contend (Pet. 7, 15-18) that the decision below conflicts with the Sixth Circuit's decision in *Peoples Rights Organization, Inc.* (*PRO*) v. *Columbus*, 152 F.3d 522 (1998). There is, however, no conflict.

In *PRO*, plaintiffs brought a preenforcement challenge to a provision of the Columbus City Code that prohibited the possession and sale of assault weapons. The plaintiffs alleged that they could not determine whether weapons they owned were "assault weapons" within the meaning of the ordinance, and that the ordinance was

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[2] For the same reason, petitioners' reliance (Pet. 22) on *Bach* v. *Pataki*, 408 F.3d 75 (2d Cir. 2005), is misplaced. In that case, the court held that a plaintiff did not have to file a futile application for a license before bringing a preenforcement challenge to a gun licensing statute. But the court in that case focused solely on the absence of a viable administrative remedy. *Id.* at 83. It did not address the question whether the availability of judicial review of the denial of a licence would serve as an adequate alternative remedy.

therefore unconstitutionally vague. 152 F.3d at 526, 528. The Sixth Circuit held that, based on the city's representation "that it fully intends to prosecute anyone who violates the provisions of the ordinance," *id.* at 529, the plaintiffs had alleged a sufficient threat of prosecution to confer standing, *id.* at 530. But in so holding, the Sixth Circuit expressly distinguished its prior decision in *National Rifle Ass'n* v. *Magaw*, 132 F.3d 272 (1997). In that case, the Sixth Circuit held that plaintiffs lacked standing to challenge federal gun legislation because they merely expressed the "desire" and "wish" to engage in certain possibly prohibited activities, but were "restrained" and "inhibited" from doing so by the federal legislation. *Id.* at 293.

Petitioners here are more like the plaintiffs in *Magaw* than like the plaintiffs in *PRO*. Petitioners do not allege that they presently own pistols within the District. They have alleged only a desire or wish to possess pistols and claim to be restrained from doing so by the District's prohibition. C.A. App. 14, 15. There is therefore no conflict between the D.C. and Sixth Circuits on the question presented here.

This case is distinguishable from *PRO* in another important respect. As discussed above, petitioners have an alternative way to challenge the laws at issue without violating them and risking criminal punishment. By contrast, the plaintiffs in *PRO* had no apparent means of obtaining a judicial determination of their claims, other than by undergoing a criminal prosecution. See 152 F.3d at 530. For that reason as well, the Sixth Circuit's decision in *PRO* provides no assistance to petitioners here.

3. As petitioners note (Pet. 23), there is no administrative process that would permit petitioner Hailes to

challenge the trigger lock requirement. Petitioner Hailes' claim is not justiciable, however, because it is too speculative to satisfy standing and ripeness requirements.

In order to have standing, a plaintiff bringing suit to prevent a future injury must show that the injury is "imminent" or "certainly impending." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990). "Allegations of possible future injury do not satisfy the requirements of Art. III." *Ibid.* In addition, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (citation omitted).

Under those standards, petitioner Hailes has failed to establish standing and ripeness. Rather than alleging an imminent harm, she alleges only that she currently possesses a registered shotgun in her home, C.A. App. 14-15, and that, "[b]ut for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home." *Id.* at 15. That chain of events is too speculative to satisfy standing or ripeness requirements.

Petitioner Hailes' alleged injury is speculative for another reason. Even if the chain of events petitioner Hailes identifies were to occur, it is entirely speculative whether a prosecutor would bring criminal charges against her. See *Blanchette* v. *Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 143 n.29 (1974). Indeed, if petitioner Hailes were to use her shotgun in self-defense, she would likely have a defense to any criminal charge. See *Wilson* v. *United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (holding that, though not expressly provided

for in the statute, self-defense is a defense to the analogous crime of carrying an unlicensed pistol).

Because petitioner Hailes' alleged injury is doubly speculative, she failed to satisfy standing and ripeness requirements. In any event, that question is fact-bound and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DANIEL MERON
Deputy Assistant Attorney General
MARK B. STERN
LEWIS S. YELIN
Attorneys

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