C.A. No. 11-50107

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL EDWARD CHOVAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Honorable John A. Houston, District Judge

SUPPLEMENTAL BRIEF FOR APPELLEE UNITED STATES

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I

QUESTIONS PRESENTED

A. Whether this Circuit's holding in United States v. Hancock, 231 F.3d 557 (9th Cir. 2000) – that the "civil rights restored" provision in 18 U.S.C. § 921(a)(33)(B)(ii) does not violate equal protection – should be overruled in light of the Supreme Court's recent decisions in District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

B. Whether the present case should be reheard en banc.

II

SUMMARY OF ARGUMENT

This circuit's holding in United States v. Hancock, 231 F.3d 557 (9th Cir. 2000) – that the "civil rights restored" provision in 18 U.S.C. § 921(a)(33)(B)(ii) does not violate equal protection – has not been overruled by the Supreme Court's recent decisions in District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, 130 S. Ct. 3020 (2010). Nor can or should this Court overrule Hancock's holding. It is true that Heller and McDonald overrule a particular rule of law stated in Hancock, i.e., that "the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen." Hancock, 231 F.3d at 565-66; cf. Heller, 554 U.S. at 595. But the equal protection analysis in Hancock does not depend solely on this proposition, or even solely on rational basis review. Instead, the equal protection analysis in Hancock depends equally on the reasoning that (1) domestic violence misdemeanants, banned from owning firearms under 18 U.S.C. § 922(g)(9), have several adequate legal mechanisms at their disposal

for regaining their right to possess firearms: pardon, expungement, and setting aside of convictions; and (2) while restoration of civil rights under 18 U.S.C. § 921(a)(33)(B)(ii) might not be one of those mechanisms, as it can be for some felons seeking to restore their right to own firearms, "that minor distinction between felons and misdemeanants is not sufficient to constitute a violation of equal protection." Hancock, 231 F.3d at 567. But this line of reasoning stands on its own: it is not cast into doubt by Heller and McDonald, and it does not depend on rational basis review.

The present case does not meet any of the criteria for en banc rehearing, itself disfavored. En banc consideration is not necessary to secure or maintain uniformity of this Court's decisions, because a panel decision sustaining Chovan's conviction would not conflict with a decision of the United States Supreme Court, or of this Court. In addition, the proceeding does not involve a question of exceptional importance, because a decision sustaining Chovan's conviction also would not conflict with the authoritative decisions of other United States Courts of Appeals that have addressed the issue, or substantially affect a rule of national application.

III

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

In 1996, Chovan was convicted of inflicting corporal injury on a spouse, a misdemeanor, in violation of Cal. Penal Code § 273.5(a). [PSR 4; ER 44-46, 116;

SER 8-15.][1/] In 2009, Chovan tried to purchase a firearm. [PSR 4; ER 116.] When completing the required ATF Form 4473 (Firearms Transaction Record), he denied that he had "ever been convicted in any court of a misdemeanor crime of domestic violence." [Id.]

Based on his misdemeanor domestic violence conviction, Chovan's application to purchase the firearm was rejected. [PSR 1; SER 20-21.] A copy of the notice of denial was mailed to Chovan at the address he provided on the ATF form. [Id.]

After learning this information, federal agents also learned that a San Diego county sheriff had responded to a call of domestic abuse on March 29, 2010, at the home Chovan shared with his wife, Cheryl – the same person he had hit in 1996, and who said he had hit her again now. [PSR 1.] Among other things, Cheryl told the sheriff that Chovan had threatened her, and that she believed his threat because he had weapons inside the house, including a shotgun. [PSR 1, 5.]

Federal agents then executed a search warrant at Chovan's home on April 15, 2010. Two shot guns, a rifle and ammunition were seized during the search. [Id.] In a post-arrest interview, Chovan admitted to shooting guns and going on "border patrol" with members of the National Socialist Movement. [PSR 2; SER 29-23.] Later, agents recovered: (1) an additional handgun, based on Cheryl Chovan's consent, from Chovan's home; and (2) videos, depicting Chovan firing a shouldered

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[1/] "PSR" refers to the Presentence Report, "ER" refers to Appellant Chovan's Excerpts of Record, and "SER" to Appellee United States' Supplemental Excerpts of the Record. All have been previously submitted to the Court.

weapon, and acting as a firearms instructor to a female, from the internet. [ER 21, 116; SER 27.]

B. PRIOR PROCEEDINGS

1. District Court Proceedings

Chovan was indicted for being a prohibited person in possession of a firearm in violation of 18 U.S.C. § 922(g)(9), and for making a false statement in acquisition of a firearm in violation of 18 U.S.C. § 924(a)(1)(A). [ER 4-6.]

Chovan moved to dismiss the Indictment, arguing that his Second Amendment rights were violated, that he was not subject to prosecution under 18 U.S.C. § 922(g)(9) because his civil rights had been restored, and that his equal protection rights were violated in that felons from other states could have their civil rights restored, whereas as a California misdemeanant, he could not. [ER 15-24.] The district court denied Chovan's motions, and issued a written order. [ER 98-107.]

On November 9, 2010, Chovan entered a conditional plea of guilty to Count 1 of the Indictment, preserving his right to appeal the denial of his pre-trial motions, prohibited person in possession of a firearm, in violation of 18 U.S.C. § 922(g)(9). [ER 113-125.]

2. Appellate Proceedings

Chovan appealed his conviction, challenging the constitutionality of § 922(g)(9) on Second Amendment grounds, both on its face and as applied to him. The case was fully briefed, and then argued on February 15, 2012. Simultaneous supplemental briefs – concerning the applicability of United States v. Brailey, 408 F.3d 609 (9th

Cir. 2005) on the present case – were filed on April 26, 2012. Finally, on December 24, 2012, this Court – after receiving a request for clarification from the parties – ordered the parties to file simultaneous briefing:

> setting forth their respective positions on whether the case should be reheard en banc . . . addressing . . . whether our circuit's holding in United States v. Hancock, 231 F.3d 557 (9th Cir. 2000), that the "civil rights restored" provision in 18 U.S.C. § 921(a)(33)(B)(ii) does not violate equal protection, should be overruled in light of the Supreme Court's recent decisions in District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

IV

ARGUMENT

A. HANCOCK'S EQUAL PROTECTION HOLDING IS CONSISTENT WITH HELLER AND MCDONALD AND SHOULD NOT BE OVERRULED BY THIS COURT

1. Hancock's Facts

Like Chovan here, Hancock was convicted of violating 18 U.S.C. § 922(g)(9), the federal statute that prohibits persons who have been convicted of "misdemeanor crime[s] of domestic violence" from possessing firearms. Hancock, 231 F.3d at 560.

Again like Chovan, Hancock moved to dismiss his indictment on equal protection grounds. Id. at 565. And just as Chovan did here, Hancock contended that 18 U.S.C. § 922(g)(9) should be subjected to strict scrutiny. Id.

In response, this Court noted that while "A law is subject to strict scrutiny if it targets a suspect class or burdens the exercise of a fundamental right. See Heller v. Doe, 509 U.S. 312, 319 (1993)," Hancock had conceded that he was not a member

of a suspect class. Thus, Hancock's argument was instead that 18 U.S.C. § 922(g)(9) burdened his fundamental right to bear arms under the Second Amendment. Id.

The Hancock Court rejected this fundamental rights argument, writing that "this court has concluded that 'the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.' Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996) (citing United States v. Miller, 307 U.S. 174 (1939))." According to the Hancock Court, this rule of law:

> dispose[d] of [Hancock's] argument that the Second Amendment confers on individual citizens a fundamental right to bear arms. Accordingly, 18 U.S.C. § 922(g)(9) does not burden the exercise of a fundamental right, and we review [Hancock]'s equal protection claim under the rational-basis standard.

Id. at 565-66.

2. Heller and McDonald's Impact on Hancock

Here, Heller and McDonald have overruled the view that the Second Amendment is a right held only by the states, and does not protect the possession of a weapon by a private citizen. Instead, Heller and McDonald establish that the Second Amendment recognizes a right of individuals, not just the states. See, e.g., Heller, 554 U.S. at 595.

In this case, however, Chovan's misdemeanor conviction for domestic violence means he falls outside the core individual right protected by the Second Amendment: the right of "law-abiding responsible citizens to use arms in defense of their hearth and home." Heller, 554 U.S. at 635 (emphasis added); see also United States

v. Chester, 628 F.3d 673, 683 (4th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1115 n.1 (9th Cir. 2010).

Further, Heller and McDonald's view that the Second Amendment recognizes an individual right may, in certain contexts, call into question employment of the rational basis test. See Vongxay, 594 F.3d at 1118 and n.5 ("We acknowledge Vongxay's contention that, if the right to bear arms is a fundamental right, rational basis analysis may no longer be appropriate for all Second Amendment challenges," but also writing that "Heller did not establish that Second Amendment restrictions must be reviewed under strict scrutiny").

As explicitly recognized in Vongxay, however, Heller does not mandate rejection of rational basis analysis in all challenges – including specifically equal protection challenges – that invoke the Second Amendment. See Vongxay, 594 F.3d at 1118-19 (holding that because Heller does not apply to felons, circuit still bound by Lewis v. United States, 445 U.S. 55 (1980), which rejected equal protection challenge to felon-in-possession statute, even though Lewis applied rational basis test because it found right to bear arms not a fundamental right).[2/]

[2/] Vongxay recognized that felons were expressly excluded from Heller's holding, because laws banning felons from possessing firearms were among the court's non-exhaustive list of "presumptively lawful regulatory measures." Vongxay, 594 F.3d at 1115. Other circuits have held that 18 U.S.C. § 922(g)(9) is a similarly "presumptively lawful regulatory measure." See United States v. White, 593 F.3d 1199 (11th Cir. 2010) ("[Section 922(g)(9)] warrants inclusion on Heller's list of presumptively lawful longstanding prohibitions"); see also In re United States, 578 F.3d 1195, 1200 (10th Cir. 2009) (order) ("Nothing suggests that the Heller dictum, which we must follow, is not inclusive of § 922(g)(9) involving those convicted of

(continued...)

a. Hancock's Equal Protection Holding Had Alternative Bases – One of Which Is Untouched by Heller and McDonald

But more important still, Hancock's holding – that the "civil rights restored" provision in 18 U.S.C. § 921(a)(33)(B)(ii) does not violate equal protection – does not solely depend either (1) on the view that the Second Amendment confers a right on the states only, or (2) on rational basis review. For this basic reason, Hancock's equal protection holding does not conflict with the Supreme Court's analysis in Heller and McDonald.

In Hancock, the supposed inequality of treatment turned on the argument that "in Arizona, misdemeanants do not lose their civil rights and, accordingly, may not have those rights 'restored'" under § 921(a)(33)(B)(ii), whereas "Arizona's felons do lose their civil rights and, accordingly may have those rights 'restored'" under § 921(a)(20). Hancock, 231 F.3d at 566. Thus, "it is possible that an Arizona domestic-violence felon might have his civil rights restored and, therefore, be allowed to own a gun . . . but that possibility does not exist for Arizona's domestic-violence

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[2/](...continued)
misdemeanor domestic violence.").

Further, even if 18 U.S.C. § 922(g)(9) is subject to heightened scrutiny under the Second Amendment, an intermediate level of scrutiny should be applied. See, e.g., United States v. Chester, 628 F.3d 673, 680-83 (4th Cir. 2010). And for all the reasons given in the United States' prior briefing, 18 U.S.C. § 922(g)(9) survives intermediate scrutiny. See also United States v. Booker, 641 F.3d 12, 22-26 (1st Cir. 2011); United States v. Staten, 666 F.3d 154, 161-68 (4th Cir. 2011); United States v. Skoien, 614 F.3d 638, 641-45 (7th Cir. 2010) (en banc).

misdemeanants." Id. The defendant in Hancock concluded from this that 18 U.S.C. § 922(g)(9) "might treat some misdemeanants more harshly than the federal felon-in-possession statute treats some felons" and that "there is no conceivable rational basis for that disparity in treatment." Id.

The Hancock Court rejected this argument. It began by noting that the only other circuit court to consider this precise equal protection argument had rejected it. See id. at 566-67 (citing United States v. Smith, 171 F.3d 617, 625-26 (8th Cir. 1999) (noting that Congress was aware of the discrepancies in state procedures for revoking and restoring civil rights; nonetheless, disparate treatment of some offenders was the inevitable result of Congress' decision to "look to state law to define the restoration exception"; in addition, restoration was only one of several procedures – pardon, expungement, and setting aside of convictions being the others – through which an offender could regain the right to possess firearms)).

And for the same reasons that the Smith Court gave, the Hancock Court also rejected Hancock's equal protection argument – in the process giving alternative bases for its holding. To quote directly:

> [1] Defendant had, and has, several adequate legal mechanisms at his disposal for regaining his right to possess firearms: pardon, expungement, and setting aside of convictions. "Restoration of civil rights" is not one of those mechanisms, as it might be for some felons. But that minor distinction between felons and misdemeanants is not sufficient to constitute a violation of equal protection.
>
> [2] Even if it were sufficient, the distinction is at least minimally rational. Congress reasonably could conclude that felons who had been through a state's restoration process and had regained their civil rights (without any restriction on their possession of firearms) were more fit to

> own firearms than domestic-violence misdemeanants who had not had their convictions expunged or been pardoned. Reasonable people might argue whether that distinction is good public policy; but it is not irrational.

Id. at 567 (emphasis and numbers added). Thus, only the second part of Hancock's equal protection analysis applied the rational basis test. The first part, by contrast, reasoned that there was not enough unequal treatment for there to be an equal protection problem in the first place. And this former line of reasoning – there is no invidious discrimination to begin with – is precisely the ultimate basis for the identical equal protection holding in Smith, the case upon which Hancock expressly relied: "We hold that, because Smith can receive a pardon from the governor . . . similar to a felon who can receive restoration of his civil rights, § 921(a)(33) does not invidiously discriminate against him." Smith, 171 F.3d at 626.

3. The Provisions Defining the Reach of the Federal Firearms Prohibitions Are Equal on Their Face

Here, similarly, any equal protection challenge must also fail.[3/] First, it must fail because the federal provisions that define who is prohibited from possessing firearms are equal on their face. Structurally, both §§ 922(g)(1) and 922(g)(9) prohibit certain classes of persons from possessing firearms – felons and domestic violence misdemeanants, respectively. Then, by defining the term "felon," § 921(a)(20) limits the reach of § 922(g)(1), the federal felon-in-possession statute,

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[3/] In fact, Chovan himself has expressly disavowed that he is raising an equal protection challenge on appeal to any potential that § 922(g)(9) has to treat some domestic violence misdemeanants more harshly than felons. See Chovan's Reply Brief at 10. Thus, Chovan has waived any equal protection challenge here.

while § 921(a)(33)(B)(ii) – also by definition – similarly limits the reach of § 922(g)(9), the domestic violence misdemeanant-in-possession statute. Further, both §§ 921(a)(20) and 921(a)(33)(B)(ii) limit who is prohibited from possessing firearms in the very same way: they say that a conviction – whether a felony or misdemeanor – that has been expunged or set aside, or a conviction where the person has been pardoned or has had his civil rights restored, will not prevent the person from legally possessing firearms under federal law – unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not possess firearms. In short, there is nothing on the face of the federal statutes that treats felons and misdemeanants unequally.

In addition, domestic violence misdemeanants can be considered to pose at least as serious a risk to public safety as felons generally – for by necessity the former have already been convicted of a violent offense. See United States v. Hayes, 555 U.S. 415, 421 (2009) (Congress defined "a misdemeanor crime of domestic violence" to require "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," (quoting § 921(a)(33)(A)). For this reason too, it is no violation of equal protection for felons and domestic violence misdemeanants to confront facially-equal federal provisions regarding possibly regaining their rights to possess firearms.

4. As in Hancock, There Is No Inequality in Treatment as Between California Felons and Domestic Violence Misdemeanants

In Hancock, in apparent recognition that the federal statutes were equal on their face, the defendant contended that the interaction of Arizona law with the federal

scheme resulted in Arizona domestic violence misdemeanants being treated more harshly than felons from the same state. Hancock rejected that argument. Here, similarly, as applied to the interaction of California with federal law, the argument is also meritless. In particular, despite the fact that California felons lose some of their core civil rights, and California domestic violence misdemeanants do not, both classes of persons are equally able to use the provisions of §§ 921(a)(20) and 921(a)(33)(B)(ii), respectively, to attempt to regain their rights to possess firearms.

Federal courts must look to the law of the state or jurisdiction where the defendant's conviction was obtained to determine whether the defendant's civil rights have been restored, and whether such action has nullified the conviction's incidental prohibition on firearms possession. See United States v. Dahms, 938 F.2d 131, 133-35 (9th Cir. 1991) (court must first determine whether defendant's civil rights were substantially restored under state law; if so, then court must determine whether that law nonetheless expressly restricts right to possess firearms). Courts must look to the whole of state law, in the state where the defendant was convicted, in order to do this. See United States v. Valerio, 441 F.3d 837, 842 (9th Cir. 2006); Dahms, 938 F.2d at 133.

In order to have "civil rights" restored under § 921(a)(20), the felon must possess the right to vote, to serve on a jury, and to seek and hold public office. United States v. Horodner, 91 F.3d 1317, 1319 (9th Cir. 1996). And in order to meet the test of § 921(a)(20), each of the three core civil rights must be substantially restored. Id.

So, even if state law restores a felon's firearms rights, if the law of the state does not also restore core civil rights, the felon is nonetheless subject to federal prosecution under § 922(g)(1). See Valerio, 441 F.3d at 843 (citing and quoting United States v. Thomas, 991 F.2d 206, 215 (5th Cir. 1993), which states: "[t]he isolated right to possess firearms, in the absence of restoration of . . . core civil rights as well does not immunize convicted felons from § 922 guilt. If the felon has not had 'civil rights restored,' it simply does not matter what the state law provides concerning possession of firearms."). The same rule applies to domestic violence misdemeanants. See United States v. Brailey, 408 F.3d 609, 612 (9th Cir. 2005) (citing Caron v. United States, 524 U.S. 308, 313-14 (1998)).

Here, to the extent that the argument is that California domestic violence misdemeanants are treated more harshly under §§ 922(g)(9) and 921(a)(33)(B)(ii) than California felons under §§ 922(g)(1) and 921(a)(20), that argument is misplaced. For this argument mistakenly assumes that just because California felons lose some of their civil rights under California law, they can have those civil rights restored under California law, and thereby regain their rights to possess firearms under federal law, in ways that California domestic violence misdemeanants cannot. And it also mistakenly assumes that this contrasts invidiously with California domestic violence misdemeanants, who – since they do not lose their civil rights under California law in the first place – cannot even in theory have them restored, at least under the "civil rights restored" aspect of § 921(a)(33)(B)(ii). See Logan v. United States, 552 U.S. 23, 26 (2007) (the term "restored" cannot be said to apply when the felon never loses

his or her civil rights upon conviction, under the applicable state law: "[W]e hold that the words 'civil rights restored' do not cover the case of an offender who lost no civil rights."); see also Brailey, 408 F.3d at 611-12 (same with respect to convictions that qualify as misdemeanor crimes of domestic violence under §§ 921(a)(33) and 922(g)(9): misdemeanor convictions that do not result in the loss of civil rights cannot be restored).

In fact, California misdemeanants and California felons must restore their civil rights – or, more to the point, their rights to possess firearms – in the same way: by seeking a pardon from the California governor. Under California law, while felons are barred from voting only while in prison or on parole, and while felons have not generally been barred from seeking or holding public office, they are barred from serving on juries. See Cal. Civ. P. Code § 203(a)(5); see also United States v. Horodner, 91 F.3d 1317, 1319 (9th Cir. 1996) (convicted felon had right to vote and hold public office, but not to serve on jury). So, while California felons lose one of their core civil rights – voting – only temporarily, and have it restored by operation of law, they also lose another of their core civil rights, their right to serve on juries, which right is not restored by operation of law. See Horodner, 91 F.3d at 1319. And since all three core civil rights must be restored to fall within the "restoration of civil rights" provision of § 921(a)(20), the bar on jury service alone disqualifies California felons from availing themselves of the "restoration of civil rights" clause of that provision to regain their rights to possess firearms under federal law. Id.; see also Valerio, 441 F.3d at 843.

But to have their rights to jury service in California and therefore their rights to possess firearms under federal law restored, California felons have to employ the very same legal process that Chovan or any other California domestic violence misdemeanant would have to – obtain a pardon from the Governor. See Horodner, 91 F.3d at 1319 and n.2.

For example, even if expungement under Cal. Penal Code § 1203.4 would seem to enable California felons to regain their right to serve on juries, it will not result in restoration of their right to possess firearms under either California or federal law. Instead, the California expungement statute expressly states that it will not operate to restore the right to possess firearms under state law. See Cal. Penal Code § 1203.4. And for this reason the "unless" clause of § 921(a)(20) operates to deny any federal right to firearms possession, even if a California felon has had his conviction expunged and – presumably – his right to jury service restored.

Notably, this limitation of the California expungement statute is exactly the same bar about which Chovan complains. See Chovan's Opening Brief at 43. But again, this bar applies equally to misdemeanants and felons.

In short, to have their California felony convictions expunged, or set aside or pardoned, or even to have their civil rights restored, so as to avail themselves of § 921(a)(20), and thus regain their right to possess firearms under federal law, California felons must navigate the same legal landscape that California domestic violence misdemeanants must: the practical reality is that they must seek pardon from the California governor. See Horodner, 91 F.3d at 1319 and n.2. At bottom, then,

just as in Hancock, here any "minor distinction between felons and misdemeanants is not sufficient to constitute a violation of equal protection." Id. at 567. The limiting definition of "§ 921(a)(33) does not invidiously discriminate" against Chovan, or any other California domestic violence misdemeanant. Smith, 171 F.3d at 626.

5. It Does Not Violate Equal Protection if California Misdemeanants Are Treated Differently Than Felons in Other States

In the district court, Chovan argued that it violated equal protection for a California domestic violence misdemeanant to be unable to regain a federal right to possess firearms, if felons in other states might be able to do so. [See ER 21-24.][4/] Of course, this is not the equal protection argument that was at issue in Hancock – and so for this reason too, Chovan's case does not call for revisiting or overruling Hancock's equal protection holding, either by the current panel or by an en banc court.

In any case, Chovan's particular equal protection argument should be rejected on the merits. See Vongxay, 594 F.3d at 1118 (in felon-in-possession case, rejecting argument that equal protection was violated because status of felon is determined differently state by state, thereby limiting the rights of criminals differently depending on the state in which they live). As observed in Hancock, "the discrepancy in treatment of which the defendant complained is the inevitable result of Congress' reference to state law." Id. at 567 (citation omitted); see also Skoien, 614 F.3d at 644-45 (in post-Heller case challenging constitutionality of § 922(g)(9), noting that different outcomes regarding expungement, pardon or restorations of civil rights may

[4/] Again, Chovan has expressly disavowed that he is making an equal protection challenge on appeal. See n.4 above.

occur for persons convicted in different states; nonetheless, "The Justices held in Logan that this variability does not call into question federal firearms limits based on state convictions that have been left in place under the states' widely disparate approaches for restoring civil rights.") (citing Logan, 554 U.S. 23). Further, if it is no violation of equal protection for a person's Second Amendment rights to be differently defined into and out of existence, depending on how a state defines a felony, Vongxay, 594 F.3d at 1118, similarly, it is not a violation of equal protection for domestic violence misdemeanants from different states to face differing prospects for regaining a federal right to possess firearms, based on differences in state law.

B. THE PRESENT CASE SHOULD NOT BE REHEARD EN BANC

1. The Present Case Does Not Meet the Criteria for En Banc Review

The present case should not be reheard en banc. Federal Rule of Appellate Procedure 35 provides that:

> A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

Fed. R. App. P. 35. Further, this Circuit's rules specify what can count as a "question of exceptional importance":

> When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity,

> the existence of such conflict is an appropriate ground for petitioning for rehearing en banc.

9th Cir. R. 35-1.

Here, the present case does not meet any of the criteria for en banc rehearing. En banc rehearings are disfavored. Further, en banc consideration is not necessary to secure or maintain uniformity of (1) this Court's decision in the present case with (2) its decisions in prior cases, because a panel decision sustaining the conviction would not conflict with a decision of the United States Supreme Court, or of this Court. In addition, the proceeding does not involve a question of exceptional importance, in the sense suggested by this Circuit's rules – i.e., an inter-circuit conflict, because a decision sustaining the conviction would not conflict with authoritative decisions of other United States Courts of Appeals that have addressed the issue, or substantially affect a rule of national application.

Finally, for the substantive reasons given in the argument section above, the panel should rule in the first instance that the holding of Hancock is not "clearly irreconcilable" with Heller and McDonald, and that the panel is bound by Hancock's holding. This Court need not call for en banc review to do these things.

First, this panel should find that Hancock has not been overruled. A panel can overrule a prior panel's decision based on intervening higher authority only where the holding of the prior case is "clearly irreconcilable" with that intervening higher authority: "while the issues decided by the higher court need not be identical in order to be controlling . . . the relevant court of last resort must have undercut the theory or

reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." Miller v. Gamie, 335 F.3d 889, 900 (9th Cir. 2003).

Here, for all the substantive reasons given in the argument section above, Heller and McDonald do not undercut the theory or reasoning of Hancock in such a way that a panel decision that followed Hancock would be "clearly irreconcilable" with Heller and McDonald.

Second, this panel should also find that Hancock's holding remains binding. The rule is that if prior circuit precedent is not "clearly irreconcilable" with intervening higher authority, one panel of this Circuit is still bound by a prior panel's holding – even where intervening Supreme Court authority has invalidated certain reasoning upon which the prior case was based. See Vongxay, 594 F.3d at 1116.

A similar situation was faced in Vongxay. On appeal, Vongxay made the same argument that a prior appellant (Younger) had made: that § 922(g)(1) unconstitutionally limits "firearm possession by categories of people who have not been deemed dangerous." And in this Circuit's prior, pre-Heller case of Younger, a panel of this Court had declined to make a distinction between violent and non-violent felons, and held that § 922(g)(1), which prohibits all felons from possessing firearms, was constitutional. See Vongxay, 594 F.3d at 1116 (discussing United States v. Younger, 398 F.3d 1179 (9th Cir. 2005)).

Just as here, however, "the reasoning upon which Younger was based – that the Second Amendment does not give individuals a right to bear arms – was invalidated by Heller." Id. Nonetheless, this Court held that "we are still bound by Younger."

Id. (citing In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996) (holding that "[f]irst, a panel of this court may not overrule a decision of a previous panel; only a court in banc has such authority" and "[s]econd, the doctrine of stare decisis concerns the holdings of previous cases, not the rationales" (internal citations omitted)).

Here, as in Vongxay, Heller and McDonald have overruled the view that the Second Amendment does not recognize an individual right, and may also – in certain contexts – call into question employment of a mere rational basis test. See Vongxay, 594 F.3d at 1118-19. Nonetheless, Hancock's equal protection holding does not solely depend on either or both of those premises. Therefore, Hancock still binds this panel.

VI

CONCLUSION

For all the reasons given above, and in the United States' prior briefing, Chovan's conviction should be affirmed.

Dated: January 23, 2013. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

This **Supplemental Brief** complies with a page or size-volume limitation established by separate court Order dated December 24, 2012, and is

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Date: January 23, 2013.

s/Kyle W. Hoffman
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