No. 20-3065

In the United States Court of Appeals for the Third Circuit

VAHAN KELERCHIAN,
Plaintiff–Appellant,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, REGINA LOMBARDO, WILLIAM BARR, AND UNITED STATES OF AMERICA,
Defendants–Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2-20-cv-00253

REPLY BRIEF OF THE APPELLANT

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ARGUMENT

As Appellant already addressed in his Principal Brief the arguments raised by the Government in its brief, for brevity, he will only respond to correct some of the misstatements by the Government.

1. Appellant is Not Seeking Judicial Review of His Application for Federal Firearms Relief.

Contrary to the Government's initial contention (Appellees' Brief at 20, 24), as Appellant addressed *ad nauseum* in his Principal Brief (Appellant's Brief at 12-16, 25-26) and which the Government at the end of its brief concedes (Appellees' Brief at 58),[1] he is *not* seeking judicial review of his application for federal firearms relief, nor has he ever contended that he is seeking judicial review of his application for federal firearms relief. Rather, Appellant merely seeks to enforce the provisions of 18 U.S.C. § 925(c) and 27 C.F.R. § 478.144, which provide that a federal firearms licensee, who makes a timely application for relief from federal firearms disability, may continue operations under that license pending a final

[1] Contrary to the Government's contention that "the relief he seeks is the same [as if the court decide his § 925(c) application]" (Appellees' Brief at 58), as further discussed *infra*, the relief sought would only limitedly allow him to continue on his business, during the pendency of his relief application, *as the Congress determined was appropriate* in enacting § 925(c). If the Congress believes that a licensee, who timely makes an application, should be barred – for any reason, including for, as the Government contends, "potential for dangerousness" – from continuing in operations, it is free to repeal that portion or all of § 925(c) at any time. Undermining the entirety of the Government's position is the fact that the *Congress* decided that in relation to licensees, regardless of their potential for dangerousness, they may continue in operation, until such time as the ATF makes a final determination on the relief application.

action by ATF on the application for relief.

a. The Practical Effect of the Appellant Prevailing in this Action Would Not be the Relief of his Federal Firearm Disability

Pursuant to *his undisputed compliance with* Sections 925(c) and 478.144(i)(1) (Appellant's Brief at 8, 12, 16; Appellees' Brief at 14-16), Appellant only seeks declaratory and injunctive relief that his federal firearms license remains valid, as a result of his timely "making" and "filing" of his relief application. As addressed extensively in Appellant's Principal Brief, pgs. 10-16, Sections 925(c) and 478.144(i)(1) only require that an individual "make" or "file" an application with ATF in order to invoke the statutory and regulatory protections afforded by the Congress. Once an applicant timely makes or files an application with ATF, Section 925(c) merely allows the operations of the business to continue, until such time as ATF makes a final decision on the application – which *the Congress deemed appropriate* in enacting Section 925(c). Contrary to the Government's contention (Appellees' Brief at 24), during the pendency of review, the applicant it *not* alleviated of his/her prohibited person status under 18 U.S.C. § 922(g)(1). Rather, the applicant is only relieved of his/her prohibited person status, *if* ATF issues a final determination in the applicant's favor.

Specifically, as Section 925(c) declares in pertinent part, a licensee who "makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending

final action on an application for relief filed pursuant to this section." Contrary to the Government's argument (Appellees' Brief at 24), nowhere within the confines of Section 925(c) is any language that would relieve Appellant's federal firearms disability, in the absence of ATF issuing a final determination on his relief application, where it finds that Appellant "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." Furthermore, and again directly contrary to the Government's contention (Appellees' Brief at 27-28), the Congress' enactment of Section 925(c) reflects its intent to permit those who *are* prohibited pursuant to Section 922(g),[2] to continue in operation of their licensed business, until such time as that final determination is issued.

Stated in a slightly different way, the sole effect of the requested declaratory and injunctive relief would not be to alleviate Appellant's disability under Section 922(g); but rather, to merely allow – as the Congress deemed appropriate – the Appellant to retain his federal firearms license and continue operations, until such time as the ATF issues a final determination.

[2] There can be no dispute that the Congress was acutely aware of the prohibited status of the licensee, as the statutory text of Section 925(c) explicitly states that the licensee "shall not be barred *by such disability* from further operations under his license pending final action on an application for relief filed." (emphasis added)

The Government also attempts to portray 18 U.S.C. § 925(b) as voiding Appellant's license by operation of law once his conviction became final,[3] but that also is not true, when read in conjunction with Section 925(c), as otherwise, Section 925(c) would be completely eviscerated by Section 925(b). Specifically, Section 925(b) provides that a licensee "may… continue operation pursuant to his existing license … during the term of such indictment and until any conviction pursuant to the indictment becomes final." Rather than automatically voiding the license upon the person becoming prohibited under Sections 922(d) or (g), Section 925(b)'s effect is to *delay the voiding* of the license until a triggering event occurs. Section 925(c), when properly applied for, extends the exact same protection beyond the finality of the conviction, up until a final determination is made on the application for relief.

Indeed, Sections 925(b) and 925(c), when taken together, protect a federal firearms license from being voided or revoked from the time an indictment is filed, up until there is a final action on a properly made application for relief. Any action against the license during that time, is a government action that is reviewable as discussed in Appellant's Principal Brief, and *infra*, as either a violation of the protections of Section 925(b) or the protections of Section 925(c), depending on

[3] "§ 925(b) provides that Kelerchian's license became void by operation of law once the felony conviction became final." Appellees' Brief at 30.

whether the conviction has become final and if so, whether a timely application for relief was "made" or "filed".

As discussed *supra*, there is no dispute that the Appellant timely complied with the requirements of Section 925(c) and therefore, "shall not be barred by such disability from further operations under his license pending final action on an application for relief."

b. Judicial Review Here is not Based upon an Actual or Constructive Denial of Relief; thus, Subject Matter Jurisdiction is not Negated by the Appropriation Proviso or *Bean* and its Progeny

As addressed exhaustively in his Principal Brief, pgs. 16-19, 25, Appellant is not seeking review of a denial or constructive denial – or any form of review – of his application for relief and as such, jurisdiction of this matter is not based on the jurisdictional grant of Section 925(c) in relation to *denials* by ATF of relief applications. Thus, the Government's continued reliance on *United States v. Bean*, 537 U.S. 71, 74-75 (2002) and its progeny – even after Appellant addressed this issue extensively in his Principal Brief, pgs. 16-19 – is at best misplaced or at worst, an attempt to deceive this Court as to the actual issue before it.

Rather, as discussed in Appellant's Principal Brief, pgs. 10-12, 25-27, jurisdiction is appropriately founded on 5 U.S.C. §§ 552, 702, 703, 704 and 28 U.S.C. §§ 1331, 1346, 2201 and 2202, the later of which provide the district court

with jurisdiction to "declare the rights and legal relations of any interested party" and grant "[f]urther necessary or proper relief."

2. Repeals by Appropriation are Disfavored and Must be Strictly Construed

Contrary to Appellees' assertion (Appellees' Brief at 36), Appellant has never argued that Congress lacked the ability to change substantive law through the appropriations process. However, Congress cannot use the appropriations process to subvert the usual requirements to repeal substantive law. "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible." *U.S. v. Borden*, 308 U.S. 188, 198 (1939). Further, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v United States*, 446 U.S. 16, 23 (1983). *See also Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 166 (3d Cir. 2015)(declaring, "[W]e have concluded the 'we must read the statute as written,' giving meaning to distinctions between statutory provisions, rather than rely on implicit assumptions of intent").

In this case, the language Congress has chosen to use prevents ATF from performing certain limited actions in connection to applications for federal firearms relief. However, the language Congress chose to use: "…none of the

funds appropriated herein shall be available to *investigate* or *act* upon applications for relief from Federal firearms disabilities…," is not sufficiently broad to preclude Appellant from applying for relief or continuing to operate under his license. Nor is it sufficiently broad to render Section 925(c) inoperative as a whole.[4] Pursuant to the U.S. Supreme Court decisions *supra*, the Courts are required to read the statute as written and give meaning to the distinctive language Congress enacted. Congress chose to preclude ATF from "investigat[ing]" and "act[ing]," not to repeal the entirety of Section 925(c) or the protections afforded to licensees who timely "make" or "file" a relief application.

What appears lost on Appellees is that the Congress can, at any time, amend, modify, or repeal Section 925(c), but unless and until it does so, the statutory protections afforded licensees remain in effect and Appellant's license remains valid.

CONCLUSION

For the foregoing reasons, the Order of the district court should be vacated and the case remanded to the district court for further proceedings, consistent with

[4] Disconcertingly, while stating that "congress effectively repealed § 925(c), properly, unequivocally, and completely," Appellees shortly thereafter admit that this statement is false and that appropriation language only prohibits ATF from *"investigat[ing]"* relief applications of individuals, not corporations. Appellees' Brief at 37, 40. If the Congress had repealed Section 925(c) as Appellees claim, there would be no process nor basis for relief to be granted to corporations; yet, as addressed in Appellant's Principal Brief, pgs. 23-24, Appellees recently granted relief, pursuant to Section 925(c) to Xisico USA, Inc. *See also*, 84 Fed. Reg. 1491-02.

this Court's holding.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit set forth in Fed. R. App. P. 32(a)(7)(B)(ii) because, according to the word-count feature of Microsoft Word, it contains 1,789 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(4) and the type style requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14 point font.

The text of the electronic brief as well as the hard copies of the brief are identical.

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I hereby certify that I am admitted to practice in the Third Circuit Court of Appeals. I further certify that I am a member in good standing.

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CERTIFICATE OF SERVICE

I, Joshua Prince, Esq., of Prince Law Offices, P.C. hereby certify that I served a copy of the *REPLY BRIEF OF THE APPELLANT*, through the Court's ECF system, as follows:

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