No. 23-374

In the
Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

BRYAN DAVID RANGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

Michael P. Gottlieb
PA BAR NO. 36678
VANGROSSI & RECCHUITI
319 Swede Street
Norristown, PA 19401
(610) 279-4200

David H. Thompson
Counsel of Record
Peter A. Patterson
William V. Bergstrom
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Respondent

June 26, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In *United States v. Rahimi*, this Court "conclude[d] only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." No. 22-915, slip op. at 17 (June 21, 2024). That holding does nothing to undermine the en banc Third Circuit's holding that the Second Amendment does not permit the Government to disarm Bryan Range for a decades-old offense based on his exclusion of lawnmowing income from a food stamp application. This case is distinct from *Rahimi* in every relevant respect: Section 922(g)(1) disarms Range *permanently* despite the fact that the Government *admits* that he "has never engaged in violence, nor has he ever threatened anyone with violence." JA 171, Doc. 17 (3d Cir. Dec. 21, 2021). Indeed, if anything *Rahimi* undermines the rationale of the *dissenters* in the court below by rejecting the Government's "responsible-citizen" theory of the Second Amendment. For these reasons, there are only two plausible resolutions of the Government's petition for certiorari—outright denial or grant for plenary review. In no circumstance should this Court GVR.

I. The Court should not GVR.

This Court has previously explained that GVR is appropriate if there is "a reasonable probability" that the lower court's view of the case will change in light of "intervening developments." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001). Although the Government makes a tepid claim that this Court's decision in *Rahimi* could have that impact here (more on that below), *see* Gov't Suppl. Br. 8, the primary assertion in its supplemental brief is that *Rahimi*'s narrow holding—that "[a]n individual found by a court to pose a credible

threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment," slip op. 17—is "unlikely" to change existing caselaw regarding the constitutionality of Section 922(g)(1), Gov't Suppl. Br. 2. That is plainly true in the case of someone like Range, whose disarmament was not like Rahimi's in either of the two relevant respects identified by this Court: Where Rahimi's was temporary and based on a credible finding of dangerousness in a court proceeding, Range's was permanent and based on the nonviolent offense of making a false statement on an application for food stamps. Pet.App.8a. Because the holding of *Rahimi* does not in any way intersect with the facts of Range's case, a GVR would undoubtedly be futile.

The Government briefly makes an alternative argument that, of the five cases that are the subject of its supplemental brief, *only this one* should potentially be GVR'd. But a GVR would be inappropriate here where *Rahimi* did nothing to undermine the Third Circuit's controlling reasoning. The Government argues otherwise because, borrowing from Judge Krause's dissent below, it claims the Third Circuit's reasoning "tracks precisely the Fifth Circuit's deeply disturbing decision in … *Rahimi*." Gov't Suppl. Br. 8 (quoting *Range* Pet.App.71a (Krause, J., dissenting)).

This claim does not hold up to scrutiny. In *Rahimi* this Court criticized the Fifth Circuit for "requir[ing] a 'historical twin rather than a 'historical analogue' " and for failing to "correctly apply [its] precedents governing facial challenges." *Rahimi*, slip op. 16. The second criticism is inapplicable here because Range has brought (and the Third Circuit properly adjudicated) an as-applied challenge. And the first is no more valid.

In *Rahimi*, the Fifth Circuit, reviewing the historical record, acknowledged that "the *why* behind historical surety laws analogously aligns with that underlying § 922(g)(8)," and that "[a]spects of *how* the surety laws worked resemble certain of the mechanics of § 922(g)(8) as well," but nevertheless held that the law was unconstitutional because the fit was not precise enough. *United States v. Rahimi*, 61 F.4th 443, 460 (5th Cir. 2023). This Court, in reversing that decision (and relying in part on those same surety laws) cautioned that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition," slip op. 7, which the Fifth Circuit had failed to adequately do.

The Third Circuit's analysis below is in the same mode as this Court's in *Rahimi*. At no point did the majority suggest that the Government had identified laws that were similar, but not similar enough, to Section 922(g)(1)'s modern restriction on the Second Amendment right. Rather, the Third Circuit rejected entirely the Government's very broad purported justification for applying Section 922(g)(1) against people "like Range"—namely "that only 'law-abiding, responsible citizens,' are protected by the Second Amendment," Pet.App.12a—as unsupported by *any* analogous historical restriction that was similar either as to the "how" or the "why" it restricted the right, *see, e.g., id.* at 17a–18a (noting that Range's crime was entirely unlike the Founding era laws that would deprive a felon of firearm rights to any (even lesser) degree).

To the extent *Rahimi* bears on the Third Circuit's reasoning, it only serves to support it. Indeed, *Rahimi*

eviscerates the Government's central argument in favor of a GVR by rejecting the idea that "Rahimi may be disarmed simply because he is not 'responsible.' " *Rahimi* slip op. 17. As this Court explained, "[i]t is unclear what such a rule would entail," and no such distinction can be "derive[d] from [this Court's] case law." *Id.* Range agrees with those criticisms, having made essentially the same objections in his response to the Government's petition for certiorari, *see* Respondent's Br. 26–27, because the Government has relied on exactly that theory in this case, both here and below. *See* Pet. 11 ("The Second Amendment has historically been understood to protect only responsible individuals, and felons, as a category, are not responsible."); *see* Gov't En Banc Br. 2, *Range v. Att'y Gen. of the United States*, No. 21-2835 (3d Cir. Jan. 25, 2023) ("The right to bear arms has historically extended to the political community of law-abiding, responsible citizens."). With the core of the Government's support for its justification of Section 922(g)(1)'s constitutionality hollowed out by *Rahimi*, there is no basis to GVR this case.

In any event, the Government's argument in favor of GVR is an alternative to its primary contention (with which Range agrees) that GVR is inappropriate in this context. The Government stresses its important interests in certainty regarding the constitutionality of one of the most-often enforced federal criminal statutes, which can only be provided by this Court resolving the question. Gov't Suppl. Br. 5–6. To that concern, Range would add another: For nearly thirty years, he has been denied one of the "fundamental rights necessary to our system of ordered liberty," *McDonald v. Chicago*, 561 U.S. 742, 778 (2010), on

account of a nonviolent misdemeanor. As a result of the decision below he finally has had his rights reinstated. *See* Order, Doc. 30, *Range v. Lombardo*, No. 5:20-cv-3488 (E.D. Penn. Aug. 8, 2023). It would be particularly inappropriate to issue a "GVR-in-light-of-nothing" order in this case, *Youngblood v. West Virginia*, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting), because even if (as is most likely) the Third Circuit eventually reaches the same result after *Rahimi* as it did before, the Third Circuit's prior judgment was the basis for the district court granting Range declaratory and injunctive relief. Vacating the Third Circuit's judgment therefore could lead to vacatur of the district court judgment in favor of Range during the Third Circuit's deliberations on remand. If that were to occur, in the interim period before the Third Circuit could reinstate its judgment, Range would face the needless deprivation of his constitutional right to own firearms for lawful purposes even though *nothing* in *Rahimi* suggests such a restriction is constitutional. As this Court previously has cautioned, the decision whether to GVR depends "upon the equities of the case," and "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *See Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167–68 (1996) (per curiam). Range has been deprived of his rights long enough, and he should not have to risk being forced to go without them again. If the Court is not inclined to grant certiorari, it should deny the Government's petition, not GVR.

II. If the Court grants any petition regarding Section 922(g)(1)'s application to non-violent offenders, it should grant this one.

The Government's primary proposal is that this Court should grant certiorari in multiple Section 922(g)(1) cases, covering a variety of "as-applied" circumstances with "different types of predicate felonies." *See* Gov't Suppl. Br. 6. If this Court decides to follow that path with respect to individuals who have been convicted of a non-violent offense, then it should grant the petition in this case.

The Government points to this case and *Vincent v. Garland*, No. 23-683, as raising the constitutionality of Section 922(g)(1) as applied to individuals who have been convicted of "non-drug, non-violent crimes." Gov't Suppl. Br. 7. This case presents the question of the constitutionality of Section 922(g)(1) under those circumstances as cleanly as any possibly could. The Government has expressly "admit[ted]" that "Range has never engaged in violence, nor has he ever threatened anyone with violence." JA 171. This case therefore presents the question in the starkest possible light. The parties in *Vincent* have not pointed to any similar concession in that case. What is more, this case involved an in-depth examination under *Bruen* by the en banc Third Circuit of the question whether the Second Amendment permits the Government to permanently disarm an individual based on a non-violent criminal offense like Range's. In *Vincent*, by contrast, a panel of the Tenth Circuit simply held that *Bruen* did not abrogate prior circuit precedent holding that Section 922(g)(1) is constitutional with respect to all felons and therefore not subject to as-applied

challenge by non-violent offenders. *See Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023). Unlike the Third Circuit, therefore, the Tenth Circuit in *Vincent* did not engage in the textual and historical analysis that will be required to resolve the issue in this Court. For these reasons, if the Court does decide to grant certiorari in either *Range* or *Vincent*, it should do so in *Range*.

CONCLUSION

For the foregoing reasons, this Court should not GVR this case. Rather, the Court should either deny certiorari or, if the Court decides to consider the constitutionality of Section 922(g)(1) as applied to non-violent offenders, it should grant certiorari. In no circumstance should the Court GVR.

Respectfully submitted,

Michael P. Gottlieb
PA BAR NO. 36678
VANGROSSI & RECCHUITI
319 Swede Street
Norristown, PA 19401
(610) 279-4200

David H. Thompson
Counsel of Record
David H. Thompson
Peter A. Patterson
William V. Bergstrom
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Respondent