No. 24-37

IN THE

Supreme Court of the United States

LORENZO GAROD PIERRE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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September 30, 2024

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I. This Court Should Grant Plenary Review To Resolve This Intractable Split Of Significant Importance

The Court should grant review and resolve the threshold, legal question presented by this Petition: Whether a criminal defendant may raise an as-applied Second Amendment challenge to a criminal charge brought under 18 U.S.C. 922(g)(1)—or whether there is no room for as-applied challenges, because the Government may, consistent with the Second Amendment, permanently disarm any individual who has ever been convicted of any felony.

Although the Government agrees that a grant is appropriate, it suggests vacating and remanding to the Eleventh Circuit. But there is no need for a GVR. This straightforward and critically important question continues to divide the circuits. And rather than resolve the split, *United States* v. *Rahimi*, --- U.S. ---, 144 S. Ct. 1889 (2024) has only further sharpened the disagreement among the lower courts.

A. Courts Remain Split Post-*Rahimi*

1. On the one hand, multiple Circuits since *Rahimi* have held in published opinions that the Second Amendment does not permit permanent disarmament of all felons.

a. This summer, the Sixth Circuit, in *United States* v. *Williams*, 113 F.4th 637 (6th Cir. 2024), held

that "history shows that § 922(g)(1)" could be "susceptible to an as-applied challenge in certain circumstances cases" because "historical study reveals that governments in England and colonial America . . . disarmed groups that they deemed to be *dangerous*," and therefore a conviction under Section 922(g)(1) "must focus on each individual's specific characteristics" in order to be consistent with the Second Amendment. *Id.* at 657 (emphasis added); see also *id.* (explaining that "in England and colonial America . . . individuals could demonstrate that their particular possession of a weapon posed no danger to peace").

In so concluding, the Sixth Circuit explained that accepting that all felons could be permanently disarmed—without a finding of dangerousness—would be incompatible with at least three strands of this Court's jurisprudence. *First*, it would be "inconsistent with *Heller*" because "[i]f courts uncritically deferred to Congress's class-wide dangerousness determinations, disarmament laws would most often be subject to rational-basis review," contrary to express statements in *Heller*. *Id.* at 660; compare *District of Columbia* v. *Heller*, 554 U.S. 570, 628 n.27 (2008) ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

Second, "history cuts in the opposite direction," as "English laws" and common-law "disarmament

legislation" showed that, traditionally, "individuals had the opportunity to demonstrate that they weren't dangerous" and therefore it would be "mistaken" to "let the elected branches"—Congress—"make the dangerousness call" *vel non* without any space for as-applied exceptions. *Id*. at 660.

Third, "complete deference to legislative line-drawing would allow legislatures to define away a fundamental right," which clashes with "[t]he very premise of constitutional rights" which "don't spring into being at the legislature's grace." *Id*. at 661; see *Kilbourn* v. *Thompson*, 103 U.S. 168, 199 (1880) ("[L]iving under a written constitution . . . it is the province and duty of the judicial department to determine. . . whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution[.]"). Thus, *Williams* held that "as-applied challenges provide a mechanism for courts to make individualized dangerousness determinations." 113 F.4th 661.

This view, the court of appeals explained, was "differen[t] than" the view held by "some of our sister circuits" including the "Eleventh Circuit," which the court criticized as "hav[ing] read too much into the Supreme Court's repeated invocation of 'law-abiding, responsible citizens.'" *Id*. at 646. Accordingly, "[t]he relevant principle from our tradition of firearms regulation is that, when the legislature disarms on a class-wide basis, individuals must have a reasonable opportunity to prove that they don't fit the class-wide

generalization" and thus proscribing "resort to the courts through as-applied challenges . . . would abridge non-dangerous felons' Second Amendment rights." *Id*. at 662.

b. Other circuits, post-*Rahimi*, have similarly reasoned that the Second Amendment, properly interpreted, leaves room for as-applied challenges to a Section 922(g)(1) charge. The Fifth Circuit, in rejecting the proposition that "status-based gun restrictions" such as 922(g)(1) "foreclose Second Amendment challenges," explained that "history and tradition" must be analyzed to "identify the scope of the legislature's power to take [the right] away," *United States* v. *Diaz*, --- F.4th ---, 2024 WL 4223684, at *4–5 (5th Cir. Sept. 18, 2024) (quoting *Kanter* v. *Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting)), and undertook an individualized assessment of that appellant's criminal history and proclivity for dangerous, noting that the analysis would be different for "as-applied challenges by defendants with different predicate convictions," *id*. at n.4. The reasoning behind the Fifth Circuit's opinion was, in substance, the same as the Sixth Circuit's in *Williams*: "Simply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny. . . . [N]ot all felons today would have been considered felons at the Founding. Further, Congress may decide to change that definition in the future. Such a shifting benchmark should not define the limits of the Second Amendment[.]" *Id*. at *7.

Since *Rahimi*, the Third Circuit has also assessed as-applied challenges to Section 922(g)(1) charges. In *United States* v. *Moore*, 111 F.4th 266 (3d Cir. 2024), that court undertook an individualized assessment of the circumstances of the appellant—which, like *Williams*, included considering "facts beyond the predicate offenses alleged in the indictment," *id.* at 273—in issuing a narrow ruling that the as-applied challenge in that appeal must fail because possession of the firearm occurred during the appellant's term of supervised release and history supported the view that a convict "could be *temporarily* disarmed as part of his sentence," *id.* at 272 (emphasis added); compare *Folajtar* v. *Att'y Gen.*, 980 F.3d 897, 923 (3d Cir. 2020) (Bibas, J., dissenting) ("[W]e should be slow to bless permanent restrictions divorced from legitimate needs" because "in the colonial era, most punishments were temporary[.]"); *Kanter*, 919 F.3d at 468 n.18 (Barrett, J., dissenting) (distinguishing "the total ban[] that Congress . . . enacted" with "the constitutionality of a more limited measure . . . for example, a temporary ban").

2. On the other hand, the Eleventh Circuit and other circuits, post-*Rahimi*, continue to bar as-applied challenges to Section 922(g)(1) because they have concluded that Congress can categorically and permanently disarm all convicted felons.

a. In a number of opinions this summer, the Eleventh Circuit has reaffirmed *United States* v. *Dubois*, 94 F.4th 1284 (11th Cir. 2024), which, in rejecting a Second Amendment challenge to 922(g)(1),

explained "[w]e interpreted *Heller* as limiting the right to 'law-abiding and qualified individuals' and as clearly excluding felons from those categories by referring to felon-in-possession bans as presumptively lawful," *id*. at 1293—and so "felons are categorically 'disqualified' from exercising their Second Amendment right" in the Eleventh Circuit. *Ibid*. (quoting *United States* v. *Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010)).

That holding continues to be good law in the Eleventh Circuit: "The Supreme Court's recent decision in *United States* v. *Rahimi* does not change [the] analysis" because "in *Rahimi*, the Court . . . once again declared that the prohibition on 'the possession of firearms by 'felons' is 'presumptively lawful.'" *United States* v. *Johnson*, 2024 WL 3371414, at *3 (11th Cir. July 11, 2024) (citations and alterations omitted) (quoting *Rahimi*, 144 S.Ct. at 1902); see *United States* v. *Hester*, 2024 WL 4100901, at *1 (11th Cir. Sept. 6, 2024) ("Our binding precedents also foreclose Hester's argument that section 922(g)(1) violates the Second Amendment"); *United States* v. *Thomas*, 2024 WL 3874142, at *3 (11th Cir. Aug. 20, 2024) (same); *United States* v. *Bass*, 2024 WL 3861611, at *3 (11th Cir. Aug. 19, 2024) (same); *United States* v. *Whitaker*, 2024 WL 3812277, at *2 (11th Cir. Aug. 14, 2024) (same, and rejecting as-applied challenge).

b. The Eighth Circuit also has since held in two appeals—after this Court granted, vacated, and remanded those cases to the Eighth Circuit for further

consideration in light of *Rahimi*—that there is no room for as-applied Second Amendment challenges to Section 922(g)(1) charges, because "history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society." *United States* v. *Jackson*, 110 F.4th 1120, 1127 (8th Cir. 2024). In so holding, the court explained that status as a felon was sufficient to permanently disarm an individual, because "legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms," *id.* at 1129; the circuit chalked up contrary opinions, including then-Judge Barrett's dissent in *Kanter*, as relying on a "a very strong public-interest justification and a close means-end fit," *ibid.* (citing *Kanter*, 919 F.3d at 465 (Barrett, J., dissenting)). Thus, in the Eighth Circuit, post-*Rahimi*, "there is no need for felony-by-felony determinations regarding the constitutionality of § 922(g)(1) as applied to a particular defendant." *United States* v. *Cunningham*, 114 F.4th 671, 675 (8th Cir. 2024).

c. Finally, the Tenth Circuit, which previously held that there is "no basis to draw constitutional distinctions based on the type of felony involved," *Vincent* v. *Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023), cert. granted, judgment vacated, 144 S. Ct. 2708 (2024), stated this summer that it will adhere to that precedent, see *United States* v. *Curry*, 2024 WL 3219693, at *4 n.7 (10th Cir. June 28, 2024) ("The Supreme Court's recent holding in *United States* v.

Rahimi does not 'indisputably and pellucidly abrogate' *Vincent*[.]" (citations omitted)).

B. It Is Critical That This Court Resolve The Split

The Petition explained why the question presented here is one of exceptional importance that warrants this Court's full review. Pet. 15-16. The need for this Court's review has not waned. For example, the Ninth Circuit vacated its opinion in *United States* v. *Duarte*, 101 F.4th 657 (9th Cir. 2024) (discussed Pet. 6–9, 18) and has decided to rehear that case *en banc*; in dissenting from the grant of denial of rehearing *en banc*, Judge Van Dyke explained that "perhaps no single Second Amendment issue has divided the lower courts more than the constitutionality of the 18 U.S.C. § 922(g)(1) felon-disarmament rule[]." *United States* v. *Duarte*, 108 F.4th 786, 787 (9th Cir. 2024) (Van Dyke, J., dissenting from the grant of rehearing en banc) (discussing split).[1]

Moreover, although this Court in July 2024 "GVR[ed] all the pending Section 922(g)(1) decisions and instruct[ed] the lower courts to take another look at them in light of *Rahimi*," *ibid.*, the Eighth, Tenth, and Eleventh Circuits have all held that their prior precedents—which categorically foreclose all as-applied Second Amendment challenges to Section 922(g)(1)—are operative and binding. Thus, while the

[1] The as-applied challenge in *Duarte* was not preserved and therefore is potentially subject to plain-error review. See 101 F.4th at 663.

GVRs gave those circuits the opportunity to revisit their precedents and permit as-applied challenges to Section 922(g)(1)—which is required in order to be consistent with longstanding history, see Pet. 11–15—those courts have declined to do so. Having now digested *Rahimi* and refused to change course, the split is ripe for this Court's review.

Finally, although the Government has now taken the position that a GVR is appropriate in this appeal, it previously—post-*Rahimi*—urged this Court to grant review in cases presenting the same issue presented here. See generally Supp. Br. for United States, No. 23-374, *Garland* v. *Range* (June 24, 2024). Recent history has proven right the position advanced by the Government in that supplemental filing in *Range*. The Government suggested in its supplemental brief that "this Court's decision in *Rahimi* . . . . is unlikely to fully resolve the existing conflict." *Id*. at 2. That prediction has been borne out by the decisions discussed *supra*. The Government also explained that "the substantial costs of prolonging uncertainty about the statute's constitutionality outweigh any benefits of further percolation." *Id*. at 3. That substantial cost continues to run, see Pet. 15 (noting that about 12.5% of all criminal convictions nationwide fall under 922(g)), and the "widespread and disruptive effects," Supp. Br., *supra*, at 5, of the split therefore continue to be felt. At bottom, the Government's brief was, and continues to be, right on this: "[T]he present conflict is unlikely to resolve itself without further intervention by this Court." *Id*. at 5.

The Government's Memorandum filed in this appeal does not explain why the circumstances initially warranting a plenary grant a few months ago—which have only hardened—merely support a GVR now. This case is an ideal vehicle to resolve the substantial legal issue dividing the circuits (Pet. 16-18). The Court should resolve the split, particularly given that it sits at the intersection of constitutional rights and criminal law. See *Gilliard* v. *Mississippi*, 464 U.S. 867, 873 (1983) (Marshall, J., dissenting from denial of certiorari) ("Although the issue has arisen repeatedly" failure to grant review means "criminal defendants in Mississippi and numerous other states have no legal remedy for what . . . may well be a constitutional defect.").

II. Alternatively, This Court Should Grant, Vacate, And Remand In Light Of *Rahimi*

If the Court does not grant plenary review, rather than deny the Petition, it should grant the petition, vacate the judgment below, and remand for consideration in light of *Rahimi*, for the reasons given in the Petition (Pet. 18–19) and in the Government's Memorandum.

CONCLUSION

For all these reasons, this Court should grant the petition for a writ of certiorari. Alternatively, it should grant the petition, vacate the judgment below, and remand for consideration in light of *Rahimi*.

Respectfully submitted,

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