NO. 24-6107

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

MARCUS RAMBO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO THE GOVERNMENT'S MEMORANDUM

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QUESTIONS PRESENTED

(1) Whether after *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022) and *United States v. Rahimi*, 602 U.S. 680 (2024), a criminal defendant may raise an as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(1).

(2) If so, whether under the *Bruen/Rahimi* methodology, the Second Amendment is unconstitutional as applied to a defendant like Petitioner with only non-violent priors.

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REPLY TO THE GOVERNMENT'S MEMORANDUM

The government has not disputed the correctness of any of the key points made in the Petition. Notably, it has not disputed that after *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022) *and United States v. Rahimi*, 602 U.S. 680 (2024) the circuits are intractably divided on the threshold issue of whether as-applied Second Amendment challenges to 18 U.S.C. § 922(g)(1) are cognizable at all, as well as on whether § 922(g)(1) is unconstitutional as applied to a defendant like Petitioner with non-violent priors. Nor has the government disputed that this case is an ideal vehicle to resolve both circuit conflicts, because (1) both issues raised herein and currently dividing the courts were pressed and passed on at both levels below; (2) Petitioner sought—and the Eleventh Circuit denied—rehearing en banc on these issues (adhering to its pre-*Bruen* approach post-*Rahimi*, without a single dissenter on the en banc court); and (3) given Petitioner's prior record, § 922(g)(1) would be held unconstitutional as applied to him in either the Fifth or Sixth Circuits post-*Rahimi* even though these circuits employ different as-applied tests. In both the Fifth and Sixth Circuits, unlike the Eighth and Eleventh Circuits, the indictment against Petitioner would have been dismissed.

Unable to contest any of these points, the government baselessly suggests in the final paragraph of its Memorandum that the Court should treat this case like *United States v. Dubois*, No. 24-5744, where it sought a GVR to the Eleventh Circuit for further consideration in light of *Rahimi*. Memorandum at 2. Such a disposition makes no sense here. Petitioner's case and *Dubois* are procedurally dissimilar. *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024) was rendered prior to *Rahimi*; rehearing en banc was *not* sought in *Dubois* on the Second Amendment issue; the government rightly therefore asked this Court to vacate and remand for consideration in light of

Rahimi; and the Court did so on January 10th. *See Dubois v. United States*, ___ S.Ct. ___, 2025 WL 76413 (U.S. Jan. 13, 2024).

But such a disposition would serve no purpose and be wasteful of judicial resources here. As the government even acknowledges, "[t]he court of appeals issued its decision in this case **after *Rahimi***." Memorandum at 2 (emphasis added). And, although the government fails to acknowledge this, not only did Petitioner's Eleventh Circuit panel specifically find *Rahimi* did not undermine the Eleventh Circuit's pre-*Bruen* Second Amendment approach in *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010), followed in *Dubois*; but indeed, as emphasized in the Petition at 5 and noted above, when Petitioner sought rehearing en banc urging the full Eleventh Circuit to hold the approach of *Rozier/Dubois* did not control after *Rahimi*, the full court refused to do so. *See* Appellant's Petition for Rehearing En Banc, *United States v. Rambo*, No. 23-13772, DE 42 (11th Cir. Aug. 15, 2024). Plainly, in refusing to reconsider the panel's conclusion that neither *Bruen* nor *Rahimi* required a different Second Amendment approach than that in *Rozier*, the en banc Eleventh Circuit was aware that it was ***not*** bound by either *Rozier* or *Dubois*, and was free to consider the Second Amendment challenge to § 922(g)(1) Petitioner raised *de novo* in light of both *Bruen* and *Rahimi*. By denying rehearing en banc without any dissent, the full Eleventh Circuit was clearly in agreement as the appropriateness of continued application of its pre-*Bruen* approach in § 922(g)(1) cases even post-*Rahimi*.

The government, in its Memorandum, has inexplicably ignored these very different procedural facts that warrant a different resolution of this Petition than the one in *Dubois*. And indeed, the government has also inexplicably ignored that since the filing of the Petition in this case—but prior to the filing of its own Memorandum on January 10th—the intractable circuit

conflicts Petitioner identified have deepened with two additional circuit courts weighing in with their own conflicting decisions on the viability of as-applied challenges post-*Rahimi*.

First, in *United States v. Hunt*, 123 F.4th 697 (4th Cir. Dec. 18, 2024), the Fourth Circuit issued an opinion whose initial merits discussion (Part III.A) was not only consistent with *Dubois*, but even cited *Dubois*, 94 F.4th at 1293, in following pre-*Bruen* Fourth Circuit precedent that had relied upon the "longstanding" and "presumptively lawful" prohibitions dicta in *District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n. 26 (2008), to foreclose all as-applied challenges to § 922(g)(1). *Id.* at 700, 702-704 ("Consistent with the Eleventh Circuit's decision," "concluding that neither *Bruen* nor *Rahimi* abrogates this Court's precedent foreclosing as-applied challenges to Section 922(g)(1) and those decisions thus remain binding").

But notably, the Fourth Circuit—unlike the Eleventh—did not stop its analysis at its pre-*Bruen* precedent. Instead, it ruled in the alternative (in Part III.B) that even if were unconstrained by circuit precedent, § 922(g)(1) would not "pass constitutional muster" because it would fail "both parts" of the *Bruen* test. *Id.* at 702, 704. As to *Bruen* Step One, the *Hunt* court noted that the Fourth Circuit had already ruled en banc after *Rahimi* that "'the limitations on the scope of the Second Amendment right identified in *Heller*' [which purportedly protect only "law-abiding citizens"] are properly assessed as part of *Bruen*'s first step because those limitations 'are inherent in the text of the amendment.'" *Id.* at 705 (citing *United States v. Price*, 111 F.4th 392, 401 (4th Cir. 2024) (en banc), *pet. for cert. filed* Nov. 4, 2024 (U.S. No. 24-5937)). And in the *Hunt* court's view, "nothing in *Bruen* or *Rahimi* alters this reading of *Heller*," pursuant to which § 922(g)(1) "regulates activity" that "fall[s] outside the scope of the [Second Amendment] right as originally understood." *Hunt*, 123 F.4th at 705 (citing *Bruen*, 597 U.S. at 18).

But "[e]ven if Section 922(g)(1) did regulate activity within the scope of the Second Amendment," the Fourth Circuit held in *Hunt*, it "would reach the same conclusion at the second step of the *Bruen* analysis" for the reasons the Eighth Circuit articulated post-*Rahimi* in *United States v. Jackson*, 110 F.4th 1120 (8th Cir. 2024) (*Jackson II*). *See Hunt*, 123 F.4th at 705-708 (citing certain "assurances" in *Rahimi*, in agreeing with the Eighth Circuit that "history" showed "categorical disarmament of people 'who have demonstrated disrespect for legal norms of society'"—even if not violent; concluding that since § 922(g)(1) was similarly justified as "an effort to address a risk of dangerousness," "there is no need for felony-by-felony litigation;" citing *Jackson II*, 110 F.4th at 1125-1129).

Thereafter, in *Range v. Att'y Gen.*, 124 F.4th 218 (3d Cir. Dec. 23, 2024) (en banc) (*Range II*), upon remand from this Court to consider its post-*Bruen* as-applied ruling in *Range v. Att'y Gen.*, 69 F.4th 96 (3rd Cir. 2023) (en banc) (*Range I*) light of *Rahimi*, the en banc Third Circuit reached the opposite conclusion from the Eleventh, Fourth, and Eighth Circuits. First, after considering *Rahimi*, the 10-judge *Range II* majority reaffirmed its prior rulings that *Bruen* had abrogated its post-*Heller* Second Amendment jurisprudence; *Bruen* dictated an entirely new analysis; and under the "plain text" analysis for *Bruen* Step One, felons and those with felon-equivalents like Range were part of "the people" protected by the Second Amendment. 124 F.4th at 225-28. On the latter point, the *Range II* majority—as it had before, but now with additional support from *Rahimi*—squarely rejected the government's contention (accepted by the Eleventh Circuit even post-*Rahimi*) that any type of criminal conduct removes citizens from "the people" protected by the Second Amendment because that right had only belonged to "law-abiding responsible citizens." *Id.* at 226-28. Instead, the majority articulated four reasons for its agreement with Range that the references to "law-abiding citizens" in *Heller* "should not be read as rejecting

Heller's interpretation of 'the people,'" which "presumptively 'belongs to all Americans," 554 U.S. at 580-81: (1) the criminal histories of the plaintiffs in *Heller* and *Bruen* "were not at issue," so the references to "law-abiding citizens" in those cases were dicta which should not be over-read; (2) there was no reason to adopt a reading of "the people" that excluded Americans only from the Second Amendment when other constitutional provisions refer to "the people" and felons "retain their constitutional rights in other contexts," (3) even if all citizens had a right to keep and bear arms, that would not prohibit legislatures from constitutionally stripping certain people of that right (the view of then-Judge Barrett in *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019)); and (4) as the government even conceded in its en banc brief, *Rahimi* "makes clear that citizens are not excluded from Second Amendment protections just because they are not "responsible," because "responsible" was too vague a term that did not "derive from [Supreme Court] case law," and the same was true for the phrase "law-abiding." 124 F.4th at 226-27 (citing *Rahimi*, 602 U.S. at 701).

Finding that Range and his proposed conduct (possessing a shogun at home for self-defense) were protected by the Second Amendment for the above reasons, the *Range II* majority then found—under the Step Two methodology clarified in *Rahimi*—that the government had not met its burden of showing that "the principles underlying the Nation's historical tradition of firearms regulation support depriving Range of his Second Amendment right to possess a firearm." *Id.* at 232. The majority acknowledged that under *Bruen* the government did not need to establish a "historical twin," but simply a "relevantly similar" *analogue*. *Id.* at 228. However, it found, since "why and how the regulation burdens the right are central to this inquiry,'" 124 F.4th at 228 (citing *Bruen*, 597 U.S. at 29), the government could not meet that burden with the 1938 Federal Firearms Act because "Range would not have been a prohibited person under that law" "which only applied to *violent* criminals." *Id.* at 299. Nor, the *Range II* majority held, could the

government meet its Step Two burden with any of its proffered "older historical analogues"—namely, Founding era laws imposing status-based restrictions on groups like Blacks, Native Americans, Catholics, and Loyalists distrusted by the government. Beyond the unconstitutionality of certain of those restrictions, the majority emphasized that Range was not part of any of these groups. And in any event, not only would any such analogy be "'far too broad,'" *id.* at 229 (citing *Bruen*, 597 U.S. at 31), but indeed, the government's attempt to "stretch dangerousness to cover all felonies and even misdemeanors that federal law equates with felonies" by arguing that "'those 'convicted of serious crimes, as a class, can be expected to misuse firearms,'" failed because it operated "at such a high level of generality that it waters down the right." *Id.* at 230 (citing *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring)). Notably, while expressing approval of the Sixth Circuit's decision in *United States v. Williams*, 113 F.4th 637, 658-61 (6th Cir. 2024) because it drew a clear distinction for as-applied challenges between persons with dangerous and non-dangerous priors, the *Range II* majority squarely rejected the contrary, "categorical" approach of the Eighth Circuit in *Jackson II*, which refused all as-applied challenges to § 922(g)(1) on the overbroad and wrong assumption that anyone convicted of a "serious crime" "can be expected to misuse firearms." 124 F.4th at 230.

Moving on from *Bruen*'s "why" question to the equally-important "how" in analogical reasoning, the *Range II* majority also squarely rejected the government's contention that permanent disarmament under § 922(g)(1) was "relevantly similar" to Founding-era laws that (1) imposed the death penalty for *some* nonviolent crimes (like forgery or counterfeiting) but not for crimes like false statement or embezzlement, or (2) required forfeiture of felons' weapons or estates. *Id.* at 230-31. Neither type of law was a sufficient analogue to uphold § 922(g)(1) as applied to Range, the majority explained, because:

> [T]he Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here—de facto lifetime disarmament for all felonies and felony-equivalent misdemeanors—is rooted in our Nation's history and tradition. Though our dissenting colleagues read *Rahimi* as blessing disarmament as a lesser punishment generally, the Court did not do that. Instead, it authorized temporary disarmament as a sufficient analogue to historic temporary imprisonment *only* to "respond to the use of guns to threaten the physical safety of others." *Compare Rahimi*, [602 U.S. at 699], *with United States v. Diaz*, 116 F.4th 458, 469-70 (5th Cir. 2024) (similarly broad reasoning).
>
> For similar reasons, Founding-era laws that forfeited felons' weapons or estates are not sufficient analogues either. Such laws often prescribed the forfeiture of the specific weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally. ... [I]n the Founding era, a felon could acquire arms after completing his sentence and reintegrating into society.
>
> Against this backdrop, it's important to remember that Range's crime—making a false statement on an application for food stamps—did not involve a firearm, so there was no criminal instrument to forfeit. And even if there were, government confiscation of the instruments of a crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession.

124 F.4th at 231. As such, and because there was no evidence in the record indicating that Range currently posed a physical danger to anyone, the majority enjoined the enforcement of § 922(g)(1) against him. *Id.* at 232.

Notably, Judge Krause joined in part by Judge Roth, concurred in the majority's determination that § 922(g)(1) could not be constitutionally enforced against Range. These two judges wrote separately, however, to clarify that while they agreed with the majority's approval of the Sixth Circuit's opinion in *Williams* to the extent the Sixth Circuit rejected permanent disarmament of all felons since the "relevant principle" from "historical analogues" confirmed that individuals "must have a reasonable opportunity to prove that they don't fit [a] class-wide generalization," and held "the burden rests on [the felon] to show he's not dangerous," 124 F.4th at 280 (citing *Williams*, 113 F.4th at 662), they disagreed with the Fifth and Sixth Circuit's permitting defendants to challenge the constitutionality of § 922(g)(1) *after* they violated the law.

In these judges' view, as-applied challenges should only be cognizable if non-dangerous persons like Range raised a pre-enforcement challenge seeking permission to possess firearms through a declaratory judgment. *See id.* at 280-85 (Krause, J., concurring in the judgment) (opining that defendants should not be able to challenge § 922(g)(1) after violating the law, but rather only prospectively). While admittedly, Petitioner would not prevail under the "prospective only" approach of Judges Krause and Roth, as noted in the Petition he would easily prevail under the Fifth and Sixth Circuit approaches. And he would as well under the reasoning of the *Range II* majority.

At the conclusion of her separate concurrence, Judge Krause noted that "[t]he Supreme Court had the opportunity to take *Range I* and instead remanded," which not only "resurrect[ed] a circuit split," but also—in her view—"a tower of uncertainty." 2025 WL at *51. Because Judge Krause believed the *Range II* majority opinion "create[d] more questions than it answers" by attempting to narrowly limit its holding to persons "like Range," she expressed the hope that this Court would soon "provide clarity." *Id.* But the Court need not and should not await a petition for certiorari in *Range II* to provide that clarity. Because of Petitioner's unique record of diverse priors, the instant case is a ready and better vehicle for certiorari that will permit the Court to resolve the resurrected and now-even-more fractured post-*Rahimi* circuit conflict in a single case.

There is no reason to await any further input on the impact of *Rahimi* from the Eleventh or any other circuit at this juncture. That is because, as of this writing, the Fourth Circuit has clearly aligned itself with the post-*Rahimi* analysis of the Eighth Circuit, and a 10-judge majority of the Third Circuit has aligned itself with the post-*Rahimi* analysis of the Sixth and rejected that of the Fifth. The Eleventh Circuit has clearly dug in to its pre-*Bruen* approach, which it has refused to reconsider en banc despite *Rahimi.* And whether the en banc Ninth Circuit adopts or rejects the

approach of the panel in *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024), *vacated pending reh'g en banc*, 108 F.4th 786 (9th Cir. July 17, 2024), or resolves that case differently under the plain error standard, the Fifth Circuit in *Diaz* has already effectively adopted the *Duarte* panel's merits approach. With the current array of circuit decisions, the Court now has before it a full panoply of approaches to consider. And because of Petitioner's unique record of diverse priors—none of which were either categorically or factually violent—the Court will be able to use this single case as a comprehensive vehicle to provide clarity to the lower courts on the many sub-issues impacting the post-*Rahimi* as-applied analysis in § 922(g)(1) cases, so that justice will no longer vary by locale.

CONCLUSION

Although the government "waive[d] any further response" to the Petition in this case "unless the Court requests otherwise," Memorandum at 2, n*, based on the foregoing argument and authority the Court should request otherwise. Without the intervention of this Court, the already protracted circuit conflicts identified herein will not disappear, but simply deepen further. In order to choose the best vehicle in which to resolve those conflicts, the Court should know the new administration's view of the merits of these conflicts, the as-applied tests suggested in the six circuit decisions discussed above, and the appropriateness of Petitioner's case as a vehicle to resolve the multitude of sub-issues that currently divide the lower courts on the constitutionality of § 922(g)(1) as applied to defendants with diverse, but non-violent criminal histories. With the benefit of such a response and any reply thereto that Petitioner may file, the Court will have before it all the information necessary to choose a vehicle for certiorari that will afford it the opportunity to announce a decision that will have the maximum impact in guiding the lower courts going forward.

Respectfully submitted,

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