No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JESUS PEREZ-GARCIA, JOHN FENCL,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

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

KATIE HURRELBRINK
Appellate Attorney
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Katie_Hurrelbrink@fd.org

Counsel for Petitioners

QUESTION PRESENTED

Petitioners raised as-applied Second Amendment challenges to firearms-related conditions of pretrial release. After their cases mooted, but before this Court issued a decision in *United States v. Rahimi*, 602 U.S. 680 (2024), the Ninth Circuit published an opinion rejecting that challenge. Since *Rahimi*, this Court has granted at least 19 certiorari petitions raising diverse Second Amendment issues, vacated the opinions below, and remanded. The questions presented are:

(1) Whether this Court should grant this petition, vacate the Second Amendment opinion below, and remand with instructions to dismiss the case as moot.

(2) Whether courts have Article III jurisdiction to issue a reasoned judicial opinion after a case becomes moot, so long as they announce the case's disposition before the case moots.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioners Jesus Perez-Garcia and John Fencl and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Perez-Garcia*, No. 22-cr-01581-GPC, U.S. Magistrate Court for the Southern District of California, opinion issued September 18, 2022.
- *United States v. Fencl*, No. 21-cr-03101-JLS, U.S. Magistrate Court for the Southern District of California, opinion issued October 19, 2022.
- *United States v. Perez-Garcia*, No. 22-cr-01581-GPC, U.S. District Court for the Southern District of California, opinion issued December 6, 2022.
- *United States v. Fencl*, No. 21-cr-03101-JLS, U.S. District Court for the Southern District of California, opinion issued December 7, 2022.
- *United States v. Perez-Garcia*, Nos. 22-50314, 22-50316, U.S. Court of Appeals for the Ninth Circuit. Published opinion issued March 18, 2024.
- *United States v. Perez-Garcia*, Nos. 22-50314, 22-50316, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for panel rehearing and rehearing en banc, and concurrence and dissent in the denial, issued September 4, 2024.

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IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners Jesus Perez-Garcia and John Fencl respectfully pray that the Court issue a writ of certiorari, vacate the opinion of the United States Court of Appeals for the Ninth Circuit entered on March 18, 2024, and remand with instructions to dismiss the case as moot.

INTRODUCTION

In this case, petitioners raised as-applied Second Amendment challenges to firearms-related pretrial release conditions. The Ninth Circuit rejected their claims, in part, by holding that legislatures may disarm whoever is not a "law-abiding, responsible citizen," including those "deemed dangerous." *United States v. Perez-Garcia*, 96 F.4th 1166, 1186, 1192 (9th Cir. 2024).

This Court's opinion in *United States v. Rahimi*, 602 U.S. 680 (2024), issued shortly after. *Rahimi* rejected the government's proffered "responsible citizen" standard and corrected lower courts' "misunderst[andings]" about "the methodology

of [the Court's] recent Second Amendment cases." *Id.* at 691, 701. The Court then vacated and remanded at least 19 Second Amendment decisions covering a variety of statutes, outcomes, and methods. *See infra*, Section I (collecting cases).

Those 19 cases are comparable to petitioners' in all respects but one: Petitioners' cases are moot. Mootness arose in unusual circumstances. Petitioners' appeal reached the Ninth Circuit in January 2023. The day of oral argument, the panel affirmed the conditions and stated that an opinion would follow. But that opinion still had not issued by the time both cases mooted nine months later. Four months after that—nearly 14 months after oral argument—the panel finally published a 43-page decision.

The panel initially ruled on a narrow basis: that historical pretrial detention practices validate temporarily disarming those accused of "serious" crimes. *Perez-Garcia*, 96 F.4th at 1182-1186. Only as a second, independent ground did the court hold that legislatures could disarm anyone deemed dangerous or not law-abiding or responsible—a holding with "the potential to affect countless other, unrelated cases." *United States v. Perez-Garcia*, 115 F.4th 1002, 1008 (9th Cir. 2024) (Vandyke, J., dissenting from denial of rehearing en banc). Few of the sources cited to support that second holding appear in this case's briefs. Nearly all appear the government's filings in *Rahimi*. But rather than wait for this Court to pass on the government's arguments, the panel issued its decision in mid-March 2024, shortly before this Court's June *Rahimi* opinion. Afterward, panel members opined that mootness prevented the en banc Ninth Circuit from reconsidering or vacating the

opinion. *Id*. at 1003-08 (Sanchez, J., concurring in denial of rehearing en banc). Judge Vandyke dissented, disagreeing on the merits and criticizing the procedural irregularities. *Id*. at 1008 (Vandyke, J., dissenting from denial of rehearing en banc)

In these circumstances, vacatur—either under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), or for other equitable reasons—is the appropriate course. But alternatively, this Court should review the panel's conclusion that it retained Article III jurisdiction to issue an opinion after the case mooted. Courts undoubtedly have the prerogative not to *withdraw* decisions published *before* a case moots. But the Second, Ninth, and D.C. Circuits have split on whether courts may *issue* an opinion *after* a case moots. That question has implications for many controversial and far-reaching matters susceptible to mootness, like administrative actions or executive orders. And this case well illustrates the issue's stakes: Here, the panel passed on one of the most hotly debated Second Amendment questions, as an unnecessary alternative holding, using sources not briefed by the parties, after the case ceased to affect the parties, and with a guarantee that the decision would not face further merits review. Whether the panel had the power to do so is an issue of great importance.

OPINION BELOW

The Ninth Circuit Court of Appeals affirmed petitioners' pretrial release orders in a published opinion. *United States v. Perez-Garcia*, 96 F.4th 1166 (9th Cir. 2024) (attached here as Appendix A). The Ninth Circuit then denied a petition for rehearing en banc. Judge Sanchez concurred in the denial, while Judge Vandyke

dissented. *United States v. Perez-Garcia*, 115 F.4th 1002 (9th Cir. 2024) (attached here as Appendix B).

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on December 20, 2021. It denied a petition for rehearing or rehearing en banc on September 4, 2024. On November 27, 2024, Justice Kagan extended the time to file this petition until January 2, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* 18 U.S.C. § 3145(c) (noting that bail appeals are governed by 18 U.S.C. § 1291); *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (reviewing bail). Though this case is moot, the Court has jurisdiction to review the Ninth Circuit's conclusion that it had jurisdiction to issue the opinion below, *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541 (1986), or to vacate that opinion, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21-22 (1994).

RELEVANT CONSTITUTIONAL PROVISIONS

The Second Amendment to the U.S. Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Article III, section 2, of the U.S. Constitution provides, in relevant part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to

Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

STATEMENT OF THE CASE

This Second Amendment appeal centered on a standard pretrial release condition in the Southern District of California: that releasees not "possess a firearm" and "legally transfer all firearms" already owned. This "Standard Condition #4," preprinted on every release order, "applies, unless stricken." The condition is redundant for statutorily prohibited possessors, as release is always conditioned on following the law. *See* 18 U.S.C. § 3142(c)(1)(A). But in the Southern District of California, where most defendants have little or no criminal history, many may otherwise lawfully bear arms. Yet Southern District judges virtually never strike the condition, even for charges like stealing mail, smuggling counterfeit Levi's, or committing misdemeanor Social Security fraud.

Mr. Perez-Garcia was among those subject to the condition. A U.S. citizen with a concealed-carry license, Mr. Perez-Garcia previously worked as an armed security guard. He had no criminal history. In June 2022, Mr. Perez-Garcia was riding in the passenger seat of a friend's car when Customs and Border Patrol officers found drugs hidden in the car's bumper. Neither man had a gun. Mr. Perez-

Garcia was charged with drug importation, and a magistrate judge imposed Standard Condition #4.

Mr. Fencl was also subject to that condition. Mr. Fencl is a 60-year-old mechanic and gun collector. Until a few years ago, he had no criminal history. But in 2019 and 2021, police officers found handguns in his car during routine traffic stops, resulting in a misdemeanor concealed-carry conviction. (At the time, applicants for public-carry licenses had to show good cause, a prerequisite struck down in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022).) Shortly after his second arrest, a SWAT team raided his home and took his gun collection. Federal prosecutors then charged that three of the guns were unregistered short-barreled rifles and four tubes found in the home were unregistered suppressors. The magistrate judge released him pretrial but imposed Standard Condition #4.

Mr. Perez-Garcia and Mr. Fencl raised as-applied Second Amendment challenges to Standard Condition #4, then appealed them. In the Ninth Circuit, briefs for bail appeals are capped at 5,600 words, with a 2,800-word reply. The government primarily argued that *United States v. Salerno*, 481 U.S. 739 (1987), foreclosed the challenge and that pretrial detention practices validated gun conditions during pretrial release. Ninth Circuit Case Number No. 22-50314, Docket Number ("Doc.") 14 at 5-15, 17-26. But the brief also devoted about three pages to arguing that legislatures may "bar[] guns to people or groups deemed dangerous or untrustworthy." *Id*. at 15-17.

The case went to oral argument. That same day, the panel issued an order stating, "We affirm the district court's orders. An opinion explaining this disposition will follow." *Perez-Garcia*, 96 F.4th at 1172.

Months passed. No opinion issued. Mr. Perez-Garcia failed to appear at court hearings, and his bond was forfeited. Mr. Fencl went to trial and was sentenced to six months in custody. Accordingly, about nine months after oral argument, petitioners moved to dismiss the cases as moot. The defense argued that the panel could not issue a post-mootness opinion under *Environmental Protection Information Center, Inc. v. Pacific Lumber Co.*, which held that to "render an opinion in spite of knowing [a] cause was moot" would be "to flout the dictates of Article III." 257 F.3d 1077 (9th Cir. 2001) (hereinafter, "EPIC").

Four months later—14 months after oral argument—the Ninth Circuit published a 43-page opinion denying the motion to dismiss and rejecting petitioners' as-applied challenge. *See* Appendix A. The court denied that *EPIC* controlled and held that it retained jurisdiction to "explain" its January order. *Perez-Garcia*, 96 F.4th at 1172-74.

The panel then gave two reasons for approving the condition. First, the panel held that historical pretrial detention practices in capital cases validate disarming anyone facing "serious charges" today. *Id.* at 1182-86. Second, as a "separate ground" for approving the conditions, the court held that the conditions fell under a "lengthy and extensive Anglo-American tradition of disarming individuals who are not law-abiding, responsible citizens." *Id.* at 1186.

To support the second tradition, the court relied on a diverse array of historical sources, about 20 in all. *Id.* at 1186-91. Only four of these appeared in the government's briefs. Ninth Circuit Case Number No. 22-50314, Doc. 14, at 15-17. But 18 appeared in a different set of filings: the Solicitor General's petition for certiorari and merits brief in *Rahimi*. Brief of the United States, *United States v. Rahimi*, No. 22-915 (Aug. 14, 2023) (hereinafter, *Rahimi Merits Brief*); Petition for Certiorari, *Rahimi* (Mar. 17, 2023) (hereinafter, *Rahimi Certiorari Petition*).

In these filings, the government asked this Court to reverse a Fifth Circuit opinion striking down 18 U.S.C. § 922(g)(8), which temporarily disarms persons subject to domestic violence restraining orders. *Rahimi Merits Brief* at 5. The government defended that law by advocating for the same historical traditions identified in *Perez-Garcia*. The government contended that "[t]he Second Amendment allows Congress to disarm persons who are not law-abiding, responsible citizens," and it urged that Congress may disarm the "dangerous" and those who "threaten public safety." *Rahimi Merits Brief* at 10, 28. Though this Court was set to decide *Rahimi* and evaluate these arguments by the term's end in July 2023, the Ninth Circuit issued *Perez-Garcia* shortly before in mid-March.

When this Court did publish its opinion in *Rahimi*, the Court reversed the Fifth Circuit's decision and held that § 922(g)(8) was constitutional as applied to Mr. Rahimi. *Rahimi*, 602 U.S. at 701. But the Court declined to adopt the government's proposed test, reasoning that a "responsibility" standard was too "vague." *Id.*

Meanwhile, petitioners asked the en banc Ninth Circuit to vacate the *Perez-Garcia* opinion. The petition was denied. *Perez-Garcia*, 115 F.4th at 1003. Dissenting from the denial, Judge Vandyke wrote that he would have "wipe[d] the slate clean" for future panels "to resolve the historical analogy analysis and determine how *Rahimi* affects our existing caselaw." *Id.* at 1015 (Vandyke, J., dissenting from the denial of rehearing en banc). He also thought that equitable considerations favored vacatur in light of "the panel's overreach, supplementation of the government's historical justification, and egregious jurisprudential errors." *Id.* at 1012.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. This Court should grant, vacate, and remand with instructions to dismiss as moot.

Following *Rahimi*, this Court has consistently granted certiorari petitions presenting Second Amendment questions, vacated the opinion below, and remanded. This Court has granted, vacated, and remanded ("GVR") in at least 19 cases challenging a variety of statutes. *See, e.g.*, *Antonyuk v. James*, 144 S. Ct. 2709 (2024) (concealed carry law); *United States v. Daniels*, 144 S. Ct. 2707 (2024) (18 U.S.C. § 922(g)(3)); Hoeft v. United States, No. 24-5406 (18 U.S.C. §§ 922(g)(1), (9)).[1]

[1] *See also* Canada v. United States, No. 24-5391; Talbot v. United States, No. 24-5258; Jones v. United States, No. 24-5315; Kirby v. United States, No. 24-5453; Lindsey v. United States, No. 24-5328; Mayfield v. United States, No. 24-5488; Pierre v. United States, No. 24-37; Borne v. United States, No. 23-7293; Willis v. United States, No. 23-7776; Farris v. United States, No. 23-7501; *Vincent v. Garland*, 144 S. Ct. 2708 (2024); *Garland v. Range*, 144 S. Ct. 2706 (2024); *United States v. Perez-*

It has done so even when both parties agreed that certiorari should be granted. *See Range*, 144 S. Ct. 2706. And it has vacated opinions reaching opposite conclusions about the same law or applying significantly different versions of the *Bruen* test. *Compare Range v. Att'y Gen.*, 69 F.4th 96, 98 (3d Cir. 2023) (en banc) (accepting an as-applied challenge to § 922(g)(1)), *with United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023) (foreclosing as-applied challenges to § 922(g)(1)). That practice reflects a recognition that *Rahimi* "clarified the methodology for determining whether a firearm regulation complies with the Second Amendment," as well as a desire for lower courts to implement those clarifications. Memorandum for the United States, *Canada*, No. 24-5391, at 2.

This Court should do the same here, even though this case is moot. Both the decision's substance and equitable considerations favor vacatur.

A. Vacatur in light of *Rahimi* is appropriate because the opinion below adopted the now-rejected "law-abiding, responsible citizens" tradition, and it lacked the benefit of *Rahimi*'s methodological clarifications.

Two substantive considerations weigh in favor of vacating this opinion in light of *Rahimi*. Vacatur is appropriate, first, because the panel relied on a standard that *Rahimi* explicitly rejected. The government in *Rahimi* asked this Court to hold that the Second Amendment permitted disarming all who are not "law-abiding, responsible citizens." *Rahimi*, 602 U.S. at 1944 (Thomas, J., dissenting) (quoting

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Gallan, 144 S. Ct. 2707 (2024); *Doss v. United States*, 144 S. Ct. 2712 (2024); *Jackson v. United States*, 144 S. Ct. 2710 (2024); *Cunningham v. United States*, 144 S. Ct. 2713 (2024)

Brief for United States 6, 11–12). But the Court declined to hold "that Rahimi may be disarmed simply because he is not 'responsible.'" *Id.* at 1903 (majority opinion).

The Court gave two reasons. First, "'[r]esponsible' is a vague term." *Id.* "It is unclear what such a rule would entail." *Id.* Second, "such a line [does not] derive from [this Court's] case law." *Id.* Though *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Bruen* used the phrase, the opinions were merely "describ[ing] the class of ordinary citizens who undoubtedly enjoy the Second Amendment right." *Id.* at 701-702.

This rejection was unanimous. Though several justices wrote separately, "[n]ot a single Member of the Court adopt[ed] the Government's theory." *Id.* at 1944 (Thomas, J., dissenting).

Here, in contrast, the Ninth Circuit embraced the "law-abiding, responsible citizens" standard. The Ninth Circuit misread the Court's precedents just as the Solicitor General had: The panel thought that this Court had "recognized a historical tradition of disarming individuals who are not 'law-abiding, responsible citizens.'" *Perez-Garcia*, 96 F.4th at 1177. The Ninth Circuit therefore "agree[d]" with the government that petitioners' firearm conditions were "consistent with how and why our nation has historically disarmed . . . those who are not law-abiding, responsible citizens." *Id.* at 1181.

The Ninth Circuit also carried the "law-abiding, responsible citizens" standard into its historical review. Relying on the same sources cited in the government's *Rahimi* briefs, the panel identified "a lengthy and extensive Anglo-

American tradition of disarming individuals who are not law-abiding, responsible citizens." *Id.* at 1186. It found that English tradition supported Congress's authority "to authorize the disarming of individuals who are not law-abiding, responsible citizens." *Id.* at 1187. And it concluded that "regulations that authorize disarmament only after individualized findings of dangerousness by public officials are within the heartland of legislative power to disarm those who are not law-abiding, responsible citizens." *Id.* at 1190.

After *Rahimi*, Judge Sanchez denied that *Perez-Garcia* had relied on a "law-abiding, responsible citizens" tradition. *Perez-Garcia*, 115 F.4th at 1007 n.4 (Sanchez, J., concurring in denial of rehearing en banc). As shown above, the opinion does not bear that out. But it is true that, alongside the "law-abiding, responsible citizens" phrasing, the Ninth Circuit offered several other articulations of the tradition in question. Per the court, history supported disarming "individuals whose possession of firearms would pose an unusual danger, beyond the ordinary citizen, to themselves or others." *Perez-Garcia*, 96 F.4th at 1186. It also permitted "temporarily disarming . . . those deemed dangerous or unwilling to follow the law." *Id.* at 1192. That standard was "similar[]" to the government's proposal, which would allow disarming "people or groups deemed dangerous or unlikely to respect the sovereign's authority." *Id.* at 1186. And these traditions gave the government regulatory authority to "disarm[] both Fencl and Perez-Garcia after individualized findings of dangerousness." *Id.* at 1190.

These differing articulations suffer from the same vagueness problem that caused the Court to reject the "responsible" line. Does the tradition identified in *Perez-Garcia* cover dangerous "groups" or apply only after "individualized findings of dangerousness"? *Id.* at 1186, 1190. Does it extend to anyone "*deemed* dangerous," or only to those who objectively "pose an unusual danger, beyond the ordinary citizen, to themselves or others"? *Id.* at 1186, 1192. Does one have to be "unwilling to follow the law," or is it enough to prove "unlikely to respect the sovereign's authority"? *Id.* at 1186, 1192. And how do these standards relate to the "legislative power to disarm those who are not law-abiding, responsible citizens"? *Id.* at 1190. The same concerns apply to the panel's holding that legislatures may disarm those accused of "serious" crimes, in that the court did not explain how to decide whether a crime is sufficiently "serious." *Id.* at 1181.

In short, "[i]t is unclear what [the Ninth Circuit's] rule would entail." *Rahimi*, 602 U.S. at 701. And a Ninth Circuit panel with the benefit of *Rahimi* would have known not to rely on "vague" traditions in general or the "law-abiding, responsible citizens" tradition in particular. *Id.* That warrants vacatur in light of *Rahimi*.

Vacatur is also appropriate so future Ninth Circuit panels can write on clean slate, with the full benefit of *Rahimi*'s methodological clarifications. Before *Rahimi*, courts "struggled with [*Bruen*'s] use of history." *Rahimi*, 144 S. Ct. at 739 (Barrett, J., concurring). The "level of generality" posed particular challenges: "Must the government produce a founding-era relative of the challenged regulation—if not a

twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right?" *Id.*

Rahimi answered that question by charting a middle course. The Court identified a "principle" instead of a direct analogue, but it insisted that that principle not be too "vague." *Id.* at 692, 701 (majority opinion). Further, the Court did not rely on the diverse array sources—for example, rejected constitutional convention proposals, newspaper articles, firearm storage laws, and laws punishing treason—from which the government derived its own vague "responsibility" principle. *See id.* at 753-767 (Thomas, J., dissenting) (describing some of these sources). Instead, the Court grounded its narrow holding on "two distinct legal regimes" that "specifically addressed firearms violence," and it drew particularized parallels between the historical laws' features and those of § 922(g)(8). *Id.* at 694-999 (majority opinion). In Justice Barrett's view, this analysis "settle[d] on just the right level of generality." *Id.* at 1926 (Barrett, J., concurring).

After *Rahimi*, this Court vacated opinions on both sides of the level-of-generality spectrum. That included Fifth Circuit decisions that relied on the overruled *Rahimi* decision's methodology. *See, e.g.*, *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). But it also encompassed cases like the Eighth Circuit's *Jackson* decision, which—reminiscent of both the Solicitor General's approach in *Rahimi* and the Ninth Circuit's analysis in *Perez-Garcia*—relied on a large and diverse array of sources to hold that legislatures may disarm whomever "deviates

from legal norms" or "presents an unacceptable risk of dangerousness." 69 F.4th at 505. If *Jackson* is appropriate for vacatur in light of *Rahimi*, this case is too.

B. Equitable considerations warrant vacatur.

Though, in substance, this case closely tracks other recently vacated Second Amendment opinions, it comes to this Court in a different procedural posture. The case is moot, and it therefore cannot receive further merits review.

By statute, however, the Court retains power to vacate the opinion below. 28 U.S.C. § 2106. "Applying this statute, [the Court] normally do[es] vacate the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Alvarez v. Smith*, 558 U.S. 87, 94 (2009) (quoting *Munsingwear*, 340 U.S. at 40). But vacatur is not guaranteed; case-specific equities determine the proper course. Ultimately, the Court "dispose[s] of moot cases in the manner most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot." *Bancorp*, 513 U.S. at 24 (cleaned up).

Whether under *Munsingwear* or for broader equitable reasons, justice favors vacating the opinion below.

1. Vacatur is warranted under *Munsingwear*.

First, this case should be vacated using the *Munsingwear* procedure.[2] That procedure recognizes that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Bancorp*, 513 U.S. at 25.

This Court has identified three scenarios in which *Munsingwear* plainly does or does not apply. On the one hand, a "clear example where vacatur is in order is when mootness occurs through the unilateral action of the party who prevailed in the lower court." *Azar v. Garza*, 584 U.S. 726, 729 (2018). So too "when mootness occurs through happenstance—circumstances not attributable to the parties[.]" *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997). On the other hand, "[w]here mootness results from settlement," the losing party has "voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." *Bancorp,* 513 U.S. at 25. "These end points"—unilateral action and happenstance on one side, voluntary settlement on the other—"mark the extremes." *Kerkhof v. MCI WorldCom, Inc.,* 282 F.3d 44, 54 (1st Cir. 2002) (punctuation altered). "[F]or gray-area cases" falling in

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[2] It is unsettled whether "the interest in preserving [criminal] conviction[s]" prevents *Munsingwear*'s application to certain criminal appeals. Charles A. Wright & Arthur R. Miller, Cases Moot on Appeal, 13C Fed. Prac. & Proc. Juris. § 3533.10 (3d ed.). But several courts have applied *Munsingwear* to matters ancillary to the conviction itself, *see United States v. Tapia-Marquez*, 361 F.3d 535, 538 n.2 (9th Cir. 2004) (collecting cases); *United States v. Krane*, 625 F.3d 568, 574 (9th Cir. 2010) (same), including in at least one moot bail appeal, *see In re Ghandtchi*, 705 F.2d 1315 (11th Cir. 1983). Alternatively, this Court can equitably vacate the opinion without relying on *Munsingwear*. *See infra*, Section I.B.2.

neither category, "the result depends on particular circumstances." *Id.*; *accord Hassoun v. Searls*, 976 F.3d 121, 131 (2d Cir. 2020).

Here, Mr. Fencl's case mooted due to happenstance, as his case went to trial in the ordinary course. Mr. Fencl did not decide when trial would occur. The Speedy Trial Act and the trial court did. *See* 18 U.S.C. § 3161. And his trial took place on a normal and even extended timeline, about two years after indictment and nine months after oral argument. Like other cases that moot due to a regular court process or a statutory time table, his case qualifies for *Munsingwear* vacatur. *See, e.g.*, *Alvarez*, 558 U.S. at 96 (vacating under *Munsingwear* where cases "terminated on substantive grounds in the ordinary course of such state proceedings"); *Anderson v. Green*, 513 U.S. 557, 559-60 (1995) (same, where mootness resulted from a court decision in a different case); *Hassoun*, 976 F.3d at 131 (same, where mootness resulted from immigration officials' compliance with statutory removal timeline).

Mr. Perez-Garcia is differently situated, because his case became moot after he absconded. But "conduct that is voluntary in the sense of being non-accidental, but which is entirely unrelated to the lawsuit, should not preclude [courts from] vacating the decision below." *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 122 (2d Cir. 2001).

In *Alvarez*, for example, this Court granted a State's petition for certiorari in consolidated federal cases challenging state forfeiture practices. 558 U.S. at 89. But before the Court could decide the cases, State-employed attorneys mooted four of

the underlying forfeiture proceedings by settling one and voluntarily dismissing three others. *Id*. at 94.

Though the State's voluntary action caused the mootness, context convinced this Court that the circumstances "more closely resemble[d] mootness through 'happenstance' than through 'settlement.'" *Id*. The state forfeiture proceedings took place independent of the federal civil action, and state dockets suggested that the state cases "terminated on substantive grounds in the ordinary course of such state proceedings." *Id*. at 95-96. Additionally, the dismissals' diverse circumstances suggested that the "State's Attorney did not coordinate the resolution of plaintiffs' state-court cases." *Id*. at 96.

In short, "the presence of this federal case played no significant role in the termination of the separate state-court proceedings"; "a desire to avoid review in th[e] case played no role at all in producing the state case terminations." *Id*. at 96-97. "And if the presence of this federal case played no role in causing the termination of those state cases," the Court reasoned, "there is not present here the kind of 'voluntary forfeit[ture]' of a legal remedy that led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur." *Id*. at 97. Accordingly, this Court invoked the *Musingwear* procedure and vacated the opinion below. *Id*.

Other appellate courts have likewise invoked *Munsingwear* when the losing party acts voluntarily, but for reasons unrelated to the litigation. That includes, for instance, withdrawal from school after receiving a desired degree, *Russman*, 260

F.3d at 123; transfer of a prisoner for administrative reasons, *Dilley v. Gunn*, 64 F.3d 1365, 1372 (9th Cir. 1995); renewed efforts to comply with a binding settlement agreement, *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 (10th Cir. 1996); and legislative amendments to a challenged statute, *Khodara Env't, Inc. ex rel. Eagle Env't L.P. v. Beckman*, 237 F.3d 186, 195 (3d Cir. 2001) (collecting cases). So long as such actions are "wholly unrelated to th[e] lawsuit and would have occurred in the absence of th[e] litigation," *Munsingwear* may apply. *Dilley*, 64 F.3d at 1372.

Here, Mr. Perez-Garcia did not abscond to moot this pretrial release conditions appeal. On the one hand, Mr. Perez-Garcia had nothing to gain by mooting this case. By absconding, he virtually guaranteed that his pretrial release would be revoked. Thus, no pretrial release opinion—whether favorable or unfavorable—could affect him going forward. On the other hand, absconding severely harmed Mr. Perez-Garcia's interests. His release was revoked, his bond was forfeited, and if found guilty, he will likely receive an increased sentence. Because mooting this case by absconding could not have helped Mr. Perez-Garcia, but could only have harmed him, it is not plausible that he absconded to manipulate the court's jurisdiction.

2. The public interest favors vacatur, given this Court's consistent policy of clearing the path for post-*Rahimi* relitigation and the Ninth Circuit's departures from judicial norms.

Even where *Munsingwear* does not apply, vacatur may still be appropriate in a case's unique circumstances. The statute allowing this Court to vacate lower court

opinions is "flexible," *Alvarez*, 558 U.S. at 94, empowering the Court to do whatever is "just under the circumstances." 28 U.S.C. § 2106. *Munsingwear* is therefore just one "species of vacatur"; it does not cover the field. *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 15 (2023) (Jackson, J., concurring). Indeed, even the archetypical *Munsingwear*-disqualifying event—voluntary settlement—does not foreclose equitable vacatur in "extraordinary circumstances." *Bancorp*, 513 U.S. at 29. Ultimately, because vacatur "is rooted in equity, the decision whether to vacate turns on the conditions and circumstances of the particular case." *Azar*, 584 U.S. at 729.

In addition to considering the equitable factors instantiated in *Munsingwear*—namely, fairness to the parties—this Court weighs the public interest. *Bancorp*, 513 U.S. at 26. The public interest ordinarily warrants preserving precedents, as they are "presumptively correct and valuable to the legal community as a whole" and indiscriminate vacatur "disturb[s] the orderly operation of the federal judicial system." *Id*. (cleaned up).

In some cases, however, the public interest instead favors "clear[ing] the path for future relitigation." *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (quoting *Munsingwear,* 340 U.S., at 40). Vacating a lower court's Fourth Amendment opinion in *Camreta*, for instance, the Court observed that "a constitutional ruling in a qualified immunity case is a legally consequential decision." *Id*. Vacatur appropriately "prevent[ed] [that] unreviewable decision 'from spawning any legal consequences.'" *Id*. (quoting *Munsingwear,* 340 U.S., at 40).

This Court's post-*Rahimi* GVR practice in Second Amendment cases reflects a decisive policy of clearing the path. In vacating at least 19 opinions covering a wide variety of Second Amendment questions and approaches, *see supra*, Section I, this Court indicated that decisions rendered before *Rahimi* are less likely to prove "correct" or "valuable to the legal community," *Bancorp*, 513 U.S. at 26, compared to decisions made with *Rahimi*'s guidance. The "orderly operation of the federal judicial system," *id.*, favors giving all circuits the opportunity to implement *Rahimi*'s clarifications, rather than exempting the Ninth Circuit because of this case's unusual procedural posture.

Beyond substance, equity favors vacatur because of the Ninth Circuit's troubling departures from the norms and expectations governing the "orderly operation of the federal judicial system," *id.*—departures that largely created this case's unusual features. As noted, the *Perez-Garcia* decision held that governments may disarm those who are not "law-abiding" and "responsible," including those "deemed dangerous" (among other descriptors, *see supra*, Section I.A). 96 F.4th at 1186. That holding has ramifications far beyond the pretrial context, as it tracks the government's key defenses for a host of gun laws. *See, e.g.*, *United States v. Daniels*, 77 F.4th 337, 350 (5th Cir. 2023) (§ 922(g)(3)); *United States v. Nutter*, 624 F. Supp. 3d 636, 645 (S.D.W. Va. 2022) (§ 922(g)(9)); *United States v. Hicks*, 649 F. Supp. 3d 357, 360 (W.D. Tex. 2023) (§ 922(n)); *United States v. Price*, 635 F. Supp. 3d 455, 459 (S.D.W. Va. 2022) (§ 922(k)). That includes § 922(g)(1), the most commonly charged gun crime in the federal system. *See, e.g.*, *Jackson*, 110 F.4th at 1129

(foreclosing all challenges to § 922(g)(1) because felons pose an "unacceptable risk of dangerousness"); *United States v. Williams*, 113 F.4th 637, 663 (6th Cir. 2024) (holding that § 922(g)(1) is unconstitutional "as applied to dangerous people"). But the process of coming to that crucial holding was marked by "overreach"—what Judge Vandyke called "Second Amendment shenanigans." *Perez-Garcia*, 115 F.4th at 1008, 1012 (Vandyke, J., dissenting from denial of rehearing en banc).

First, it is "an established part of [federal] constitutional jurisprudence that [courts] do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999). Here, the panel initially decided the case on a narrow ground: that historical detention practices in capital cases validate disarming anyone facing "serious charges" today. *Perez-Garcia*, 96 F.4th at 1182-86. That was enough to affirm. But the panel did not stop there. Instead, the panel offered its far broader non-law-abiding/irresponsible/dangerous tradition as a "separate ground" for affirmance. *Id*. at 1186, 1188.

Second, the Ninth Circuit issued this sweeping opinion despite knowing the case was moot.[3] This was a problem of the court's own creation. Mr. Fencl's case was live for nine months after oral argument, plenty of time to issue a decision. *Compare Range v. Att'y Gen. United States of Am.,* 69 F.4th 96, 98 (3d Cir. 2023) (en banc) (4

[3] As explained *infra*, Section II.A, issuing that opinion contravened the Ninth Circuit's own precedent.

months); *United States v. Jackson*, 69 F.4th 495, 500 (8th Cir. 2023) (1 month); *United States v. Alaniz*, 69 F.4th 1124, 1127 (9th Cir. 2023) (3 months). And the panel expected this pretrial-release appeal to moot more quickly than others. *Perez-Garcia*, 96 F.4th at 1174. Yet the panel did not act for 14 months, making mootness inevitable.

Not only did this ensure that the panel's decision would not affect the parties. It also blocked further merits review, whether en banc or in this Court. Yet the panel neither exercised discretion not to issue an opinion nor decided the case narrowly. To the contrary, the panel "announc[ed] as much new law as possible in a moot case where it was wholly unnecessary to do so, and then use[d] mootness as a shield to argue against en banc review." *Perez-Garcia*, 115 F.4th at 1008 (Vandyke, J., dissenting in denial of rehearing en banc).

Third, in reaching that broad holding, the Ninth Circuit did not rely on the history cited in the government's filing—the only history to which the defense had a chance to respond. Federal courts follow the "party presentation principle," the "premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). Under *Bruen*, that means "decid[ing] a case based on the historical record compiled by the parties." 597 U.S. at 25 n.6 (citing *Sineneng-Smith*).

But here, of approximately 20 historical sources cited by the panel, only four appear in the government's three pages' worth of briefing on the non-law-

abiding/irresponsible/dangerous tradition. Ninth Circuit Case Number No. 22-50314, Doc. 14, at 15-17. Instead, the panel seems to have adopted the sources cited in the Solicitor General's *Rahimi* briefing, filed weeks after the *Perez-Garcia* court issued its order affirming. *See Rahimi Merits Brief*; *Rahimi Certiorari Petition*. Not only did 18 of 20-odd sources appear in the *Rahimi* materials. The overlap includes obscure sources like a Rhode Island newspaper from 1842, Convention of the Suffrage men of Rhode Island, Vermont Gazette, Dec. 13, 1842; an 1840 legal treatise, John Holmes, *The Statesman, or Principles of Legislation and Law* (1840); and a list of eighteenth-century justice-of-the-peace manuals, *e.g.*, The Compleat Constable 68 (3d ed. 1708). That move was particularly troubling because it suggests that the panel inverted the normal order of operations for reasoned judicial decision-making. In implementing *Bruen*, courts are supposed to start with the historical record, then derive appropriate traditions, and only then apply them to the case at hand. 597 U.S. at 26-31. But here, the panel began by issuing an order declaring the outcome, and then compiled its own historical evidence to support that outcome.

To justify this approach, Judge Sanchez opined that a statute's consistency with historical tradition is a "question of law," and judges are entitled to answer that question using their own historical evidence. *Perez-Garcia*, 115 F.4th at 1005 (Sanchez, J., concurring in denial of rehearing en banc). It is not at all clear that that is true, given this Court's admonitions that "the Government . . . bears the burden to justify its regulation," *Rahimi*, 602 U.S. at 691 (cleaned up), by

"affirmatively prov[ing] that its firearms regulation is part of the [Second Amendment's] historical tradition." *Bruen*, 597 U.S. at 19. But regardless, that justification "rings hollow" here. *Perez-Garcia*, 115 F.4th at 1033 (Vandyke, J., dissenting in denial of rehearing en banc). As "none of these issues *needed* to be addressed in an opinion at all," it is hardly the case that "the panel was forced to do its own research to help the government meet its burden to develop the historical record in order to get the law right." *Id*. Yet, "the panel here went out of its way to decide issues it clearly did not need to decide, and then helped the government in deciding those issues." *Id*.

Fourth, despite adopting the Solicitor General's sources and arguments in *Rahimi*, the Ninth Circuit did not wait to hear what this Court had to say about those very sources and arguments. Instead, having already delayed for over a year until this Court's term was almost over, the Ninth Circuit still issued its opinion without the benefit of *Rahimi*. The panel therefore "needlessly analyzed our tradition of disarming 'dangerous' individuals shortly before *Rahimi* was poised to do the same." *Id.* at 1015.

That has serious implications for how the Ninth Circuit will treat *Rahimi* going forward. In cases vacated and remanded in light of *Rahimi*, lower courts will be able to revisit Second Amendment challenges with new guidance and fresh eyes. But if *Perez-Garcia* stays in place, Ninth Circuit panels will not have that opportunity in the many cases where the government cites one of *Perez-Garcia*'s broadly worded traditions. Instead, *Perez-Garcia* will bind future panels unless its

adoption of those various standards is "clearly irreconcilable" with *Rahimi*. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003). The seven judges who concurred in the denial of en banc rehearing have already opined that *Perez-Garcia* and *Rahimi* can be reconciled. *Perez-Garcia*, 115 F.4th at 1006-07 (Sanchez, J., concurring in the denial of rehearing en banc); *but see supra*, Section I.A. If they are right, then *Perez-Garcia*—not Ninth Circuit judges' best reading of *Rahimi*—will control.

In sum, the panel weighed in on a central question in a host of *Bruen* appeals. It did so as a second, independent, and unnecessary alternative holding. It waited to issue that opinion until after the case was moot. It relied on historical arguments and sources that the government did not cite and to which the defense had no opportunity to respond. And though it is apparent that the Ninth Circuit found these sources in the Solicitor General's briefing in *Rahimi*, it issued the opinion just a few months before this Court expressed its views on those very arguments. As a result, this case cannot receive further merits review, and absent vacatur, future panels may very well have to follow *Perez-Garcia* over their best understanding of *Rahimi*. These factors warrant equitable vacatur.

II. Alternatively, this Court should grant certiorari to resolve whether courts can issue a judicial opinion after a case becomes moot.

Alternatively, this Court should grant certiorari to resolve the circuit-splitting jurisdictional question squarely presented in this case: May courts issue an opinion after a case moots, so long as they provide the disposition beforehand?

A. The circuits are split on this question, and this case squarely presents the issue.

"Article III of the Constitution limits federal-court jurisdiction to 'cases' and 'controversies.'" *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016) (quoting U.S. Const., Art. III, § 2). When a case becomes "moot," it is "no longer a 'Case' or 'Controversy' for purposes of Article III." *Already, LLC v. Nike, Inc.,* 568 U.S. 85, 91 (2013). Accordingly, "[i]f a judgment has become moot while awaiting review, [a] [c]ourt may not consider its merits." *Bancorp*, 513 U.S. at 21.

In *Bancorp*, however, this Court held that mootness does not prescribe complete judicial "paralysis." *Id*. True, appellate courts may not "decide the merits of a legal question not posed in an Article III case or controversy." *Id*. at 21. But "reason and authority refute[d] the quite different notion that a federal appellate court may not take any action with regard to a piece of litigation once it has been determined that the requirements of Article III no longer are (or indeed never were) met." *Id*. If that were true, an appellate court could never "hold[] that a district court lacked Article III jurisdiction in the first instance, vacate[] the decision, and remand[] with directions to dismiss." *Id*. Courts would be equally "powerless to award costs, or even to enter an order of dismissal." *Id*. (cleaned up).

This Court held that Article III does not require that result. It prevents courts only from considering a case's "merits." *Id*. Courts may still "make such disposition of the whole case as justice may require." *Id*. (cleaned up). "As with other matters of judicial administration and practice reasonably ancillary to the primary, dispute-deciding function of the federal courts, Congress may authorize [courts] to

enter orders necessary and appropriate to the final disposition of a suit that is before [the court] for review." *Id.* at 22 (cleaned up).

After *Bancorp*, then, it is uncontroversial that when courts publish a reasoned judicial opinion *before* a case moots, they may decide whether or not to vacate that decision. But the circuits have split on a related question: May the court publish a reasoned judicial opinion *after* the case moots, so long as the court provides the case's disposition while the case is still live?

The Second Circuit has held that courts do have that authority. In *In re Grand Jury Investigation*, a district court ordered a chief legal counsel to testify before a grand jury about private conversations she had with Connecticut's governor. 399 F.3d 527, 528 (2d Cir. 2005). On appeal, the Second Circuit issued an order reversing and stating that an opinion would follow. *Id.* Before the opinion issued, however, the case mooted. *Id.* at 528 n.1.

The Second Circuit nevertheless published the opinion, holding that "the mootness doctrine does not require either that we vacate our prior order or refrain from issuing this opinion." *Id.* Citing *Bancorp*, the Second Circuit noted that it was not required to vacate the original reversal order, issued while the case was still live. *Id.* "If this is true," the court reasoned, "it follows that we may explain the reasons behind that previously-issued decision, especially where such an explanation was contemplated in the original order." *Id.*

The Ninth Circuit panel in *Perez-Garcia* adopted the same reasoning. "By publishing the reasoning underlying our prior order," the court said, "we merely

explain the basis for our decision and do not take further action on the merits of Appellants' claims." *Perez-Garcia*, 96 F.4th at 1173. "Our decision to publish this opinion to explain a prior order that fully adjudicated the merits of Appellants' claims does not render the opinion advisory." *Id.*

A prior panel of the Ninth Circuit, however, had reached the opposite conclusion. In *EPIC*, a district court issued a preliminary injunction in September. 257 F.3d at 1073. It learned the following February that the case was moot. *Id.* at 1074. In March, it issued an opinion supporting the September injunction. *Id.* In May, it dismissed the case as moot and entered judgment. *Id.* It declined to vacate the March opinion, however, stating that that opinion "adjudicated the issues raised by the parties" in September. *Id.* On appeal, the enjoined party—who had ultimately won dismissal—argued that it was nevertheless "aggrieved" by the district court's refusal to vacate the March opinion. *Id.* at 1075.

The Ninth Circuit held that the party was aggrieved, on account of "the district court's decision to flout the dictates of Article III and render an opinion in spite of knowing the cause was moot." *Id.* at 1077. "Article III of the Constitution prohibits federal courts from taking further action on the merits in moot cases," the court explained. *Id.* at 1076. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 882 (1998)). The court accordingly vacated the "order, filed after the case had become

moot, outlining the district court's reasons for granting [the] preliminary injunction," instructing that the district court "vacate its statements on the merits of EPIC's case made after there was no longer an Article III case or controversy." *Id.* at 1073. Though decided in a different procedural posture, then, *EPIC* holds that courts lack Article III authority to "outlin[e] . . . reasons" for issuing a prior order or make "statements on the merits" after a case moots, *id.*—the practice approved in *In re Grand Jury Investigation* and *Perez-Garcia*.[4]

The D.C. Circuit took a position falling between the Second Circuit's stance and—until *Perez-Garcia* created an intra-circuit split—the Ninth Circuit's view. It held that courts do have Article III authority to issue opinions in these circumstances, but that they must refrain for prudential reasons. *Coal. to End Permanent Cong. v. Runyon*, 979 F.2d 219 (D.C. Cir. 1992); *cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (distinguishing "Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction" (cleaned up)); *but see Lexmark Int'l, Inc. v. Static Control Components,*

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[4] The *Perez-Garcia* panel distinguished *EPIC* on the sole ground that the district judge there made the challenged statements "after it entered judgment dismissing the case as moot," while the *Perez-Garcia* panel explained its order before rendering judgment. *Perez-Garcia*, 96 F.4th at 1173 n.6. That is factually wrong. The court in *EPIC* issued the aggrieving opinion in March, *before* dismissing the case as moot and entering judgment in May. 257 F.3d at 1073-74. Thus, the courts in *EPIC* and *Perez-Garcia* each issued the opinion after mootness but before judgment.

Inc., 572 U.S. 118, 125-128 & n.3 (2014) (questioning concept of "prudential" standing).

In *Runyon*, a split D.C. Circuit panel declared a statute unconstitutional and stated that expanded opinions would follow. *Id.* at 219. Before the opinions issued, however, Congress repealed the statute. *Id.* at 219-20.

The majority held that the development "render[ed] it imprudent for [the court] to issue expanded opinions." *Id.* The majority believed that it had "'jurisdiction' to do so, because [the court] reserved this in [the] judgment." *Id.* at 220. But "[p]rudence" led the court "to refrain." *Id.* The majority feared making "pronouncements about the constitutionality of a repealed provision in a moot case with no possibility of Supreme Court review," thereby "creating circuit precedent regarding questions of constitutional law." *Id.* In the majority's view, "several of the reasons behind the mootness doctrine and the bar against rendering advisory opinions—concern with the need to avoid unnecessary judicial lawmaking, and the fear that courts may be more prone to improvident decision when nothing immediate seems to be at stake—counsel strongly in favor of restraint." *Id.* (cleaned up).

Judge Silberman dissented on the ground that "the single most important restraint on the decisions of judges is the tradition that we explain our decisions in writing." *Id.* at 220 (Silberman, J., dissenting). His own commitment to that principle led him to publish what he would have said in dissent. *Id.* In so doing, he mused about what would have happened if one of his colleagues had changed their

mind after reading that dissent and joined him in upholding the statute. *Id.* at 221. "Can we, in other words, add to the legal significance of our prior judgment after the case is (arguably) moot?" he asked. *Id.* But he did not venture an answer.

Finally, the Eighth Circuit and the Court have each previously issued an opinion after a case mooted. *Ex parte Quirin*, 317 U.S. 1, 23, *modified sub nom. U.S. ex rel. Quirin v. Cox,* 63 S. Ct. 22 (1942); *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 839 F.2d 1296, 1299 (8th Cir. 1988). In neither case, however, did the opinion address the jurisdictional question. These decisions do not deepen the split, as "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Gann v. United States*, 142 S. Ct. 1, 2 (2021) (cleaned up). But they still serve to illustrate that, without further clarification, courts may unwittingly issue decisions of at least questionable constitutional validity.

In sum, the circuits are split on this question, and this case squarely presents it. This Court should grant certiorari to resolve this disagreement about whether courts must refrain from issuing decisions in moot cases, either for jurisdictional or for prudential reasons.

B. The opinion below is wrong, and this case illustrates both the imprudence of that view and the importance of this question.

Certiorari is especially appropriate in this case because the panel's Article III holding was wrong, and in adopting it, the panel illustrated the truth behind the D.C. Circuit's prudential concerns.

Courts' authority to act in moot cases is limited by Article III, which confines exercises of the "judicial power" to live cases and controversies. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). That is why courts may not "decide the merits of a legal question" after a case moots, *Bancorp*, 513 U.S. at 21: To do so would be an unauthorized exercise of judicial power. To accept the Second Circuit's and *Perez-Garcia* panel's position, then, one would have to conclude that exercising the judicial power on appeal exclusively entails announcing whether the decision below is affirmed or reversed. On this view, "explain[ing] the basis" for that disposition—even in a lengthy, published decision that interprets the Constitution—does not constitute "tak[ing] further action on the merits." *Perez-Garcia*, 96 F.4th at 1173.

That narrow view of the judicial power contradicts fundamental conceptions of Article III. "[T]he Framers' understanding of the judicial function" assumed that "the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (quoting The Federalist No. 78, at 525 (A. Hamilton)). In line with that view, *Marbury v. Madison* held that judicial power encompassed the authority not just to say what a case's *outcome* is, but to "say what the *law* is." 1 Cranch 137, 177 (1803).

Marbury made clear that that power involved both the disposition and the underlying legal reasoning. "As [Chief Justice] Marshall explained, '[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-41 (2006) (quoting *Marbury*, 1 Cranch at 177).

Marbury therefore "grounded the Federal Judiciary's authority to exercise judicial review *and interpret the Constitution* on the necessity to do so in the course of carrying out the judicial function of deciding cases." *Id.* at 340 (emphasis added). Accordingly, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, *or expounding the law in the course of doing so*." *Id.* at 341 (emphasis added). It follows that in moot cases, courts may not issue judicial opinions that expound the law and interpret the Constitution.

This theoretical point has a practical side. Ordinarily, appellate courts exercise their most far-reaching powers not by disposing of individual cases, but by enunciating legal principles that control all future cases. Here, the pre-mootness order affirming petitioners' pretrial release conditions affected only them. But the 43-page post-mootness opinion has the potential to shape every Second Amendment case that comes after. That was the panel's express goal: to give "the legal community as a whole . . . the benefit of an appellate court decision that adjudicated properly presented questions concerning specific constitutional rights." *Perez-Garcia*, 96 F.4th at 1174 (cleaned up). It makes little sense to say that affirming two

orders is an exercise of the judicial power, but settling constitutional questions for an entire legal community is not.

The Second Circuit's and the *Perez-Garcia* panel's contrary reasoning fails to persuade. Both observed that they had the power to issue their original orders affirming or reversing. *In re Grand Jury*, 399 F.3d at 528 n.1; *Perez-Garcia*, 96 F.4th at 1173. Both further noted that they had discretion not to vacate that order after the case mooted. *In re Grand Jury*, 399 F.3d at 528 n.1; *Perez-Garcia*, 96 F.4th at 1173. Because they properly issued the order and properly exercised their discretion to preserve it, the courts reasoned, they must also have the power to "explain" it. *In re Grand Jury*, 399 F.3d at 528 n.1; *Perez-Garcia*, 96 F.4th at 1173.

But that does not follow. The *Perez-Garcia* panel had authority to issue the order affirming because, at the time, the appeal presented a case or controversy. *See Bancorp*, 513 U.S. at 21. The panel had discretion over whether to vacate the order after the case mooted because—similar to awarding costs, remanding to a lower court, or issuing the mandate—vacatur is "ancillary to the primary, dispute-deciding function of the federal courts." *Id*. at 21-22 (cleaned up). But neither justification applied to the panel's 43-page reasoned decision. At that point, no case or controversy existed. And issuing a reasoned decision is not "ancillary" to courts "primary, dispute-deciding function." *Id*. Like any judicial opinion, the *Perez-Garcia* opinion was devoted entirely to deciding the parties' disputes.

It also bears noting that, at least in this case, the *Perez-Garcia* opinion did not merely explain what the court was thinking in January 2023, when it affirmed

the pretrial release orders. Instead, in the months following oral argument, the panel did extensive independent research to unearth sources not known to the panel in January. *See Perez-Garcia*, 115 F.4th at 1005-06 (Sanchez, J., concurring in denial of rehearing en banc). That included an apparent review of the government's briefs in *Rahimi*, the earliest of which became available weeks after the panel affirmed. *See Rahimi Certiorari Petition*. Thus, the panel was not merely committing to paper reasons already in mind. It was actively accumulating new information, constructing new legal arguments, and reaching new conclusions. There is little reason to suppose that that process stopped when the case became moot, as the panel took another four months to issue the opinion. Any future court that uses this procedure will face the temptation, and even the practical necessity, to do the same.

This reality highlights a significant prudential problem with the Second Circuit's and *Perez-Garcia* panel's view. This procedure encourages courts to rush to a disposition before the case moots, and only then develop their reasoning. Putting the explanation first not only assures the parties that "the judge's ruling is based on the facts and the law" rather than policy preferences, but also "allows the judge to confirm that his ruling is correct." *United States v. Hernandez-Meza*, 720 F.3d 760, 767–68 (9th Cir. 2013). "If he is unable to articulate a plausible rationale for his ruling, he may think better of it." *Id.* But if the case moots in between the disposition and the opinion, it is not clear that a judge retains the power to change their mind during the opinion-writing process. Consider Judge Silberman's query in

Runyon: What would have happened if his colleagues read his post-mootness dissenting opinion—and found that they agreed? *Runyon*, 979 F.2d at 221.

Finally, the D.C. Circuit was right to fear that courts might be "more prone to improvident decision" when using this procedure. *Id.* at 220 (majority opinion). Among other things, courts secure in the knowledge that their decision cannot receive further merits review may act with less restraint. Many far-reaching and controversial cases have a high probability of mooting, including those involving executive orders, administrative actions, and abortion. *See, e.g.*, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021); *Trump v. Hawaii*, 583 U.S. 941 (2017); *Garza*, 584 U.S. at 729. A court applying this mootness procedure will, at worst, see its opinion vacated. At best, the opinion will serve as unassailable precedent until another case reaches the en banc or certiorari stage. In these circumstances, the temptation to issue a sweeping opinion may exert a stronger pull than the more modest virtues of judicial restraint. This Court should reaffirm that this imprudent procedure is not available in the federal courts.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

s/ Katie Hurrelbrink

Dated: December 20, 2024

KATIE HURRELBRINK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Attorneys for Defendant-Appellant