NO. 24-6451

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

DEVON GRAY,

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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QUESTION PRESENTED

Whether under the Second Amendment methodology set forth in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), as clarified in *United States v. Rahimi*, 602 U.S. 680 (2024), 18 U.S.C. § 922(g)(1) is unconstitutional.

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The government has not disputed the correctness of any of the key points made in the Petition including that this case is an excellent vehicle for certiorari to resolve a preserved facial challenge under the Second Amendment to 18 U.S.C. § 922(g)(1). Instead, 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, 2025 WL 76413 (Jan. 13, 2025) and *Rambo v. United States*, No. 24-6107, 2025 WL 581574 (Feb. 24, 2025) where the Court granted certiorari, vacated the opinion below, and remanded to the Eleventh Circuit for further consideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024); Memorandum at 2.

But a GVR disposition makes no sense here. Petitioner's case is procedurally dissimilar to both *Dubois* and *Rambo* in that the Court below entertained full adversarial briefing on *Rahimi*—and, after full consideration, concluded that *Rahimi* had no impact on the required Second Amendment analysis for § 922(g)(1). That was not the case in either *Dubois* or *Rambo*.

The panel decision in *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024) was rendered prior to *Rahimi*. And, although Dubois sought rehearing en banc, he did so ***prior to*** *Rahimi*; he did *not* ask the en banc Court to find the pre-*Bruen* analysis applied in *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010), to be abrogated; nor did Dubois ask the en banc Court to hold his petition until this Court rendered its decision in *Rahimi*. In fact, the en banc court denied rehearing en banc approximately two weeks prior to the issuance of *Rahimi*. *See United States v. Dubois*, No. 22-10829, DE 69 (11th Cir. June 10, 2024). As such, the Eleventh Circuit did not have any opportunity in *Dubois* to consider (or reconsider) its analysis in light of *Rahimi.* But that is not true here.

In *Rambo*, by contrast to *Dubois*, the Eleventh Circuit panel issued its decision after *Rahimi*. But unlike this case, the *Rambo* panel did not issue that decision after full merits briefing;

instead, it granted the government's motion for summary affirmance based on *Dubois*. *United States v. Rambo,* 2024 WL 3534730,at *2 (11th Cir. July 25, 2024). Here, by contrast, the Eleventh Circuit stayed the briefing in Petitioner's case pending *Rahimi*. Petitioner fully addressed the impact of *Rahimi* in his Reply Brief. And thereafter, the government filed a Rule 28(j) letter urging the panel to follow the pre-*Rahimi* decision in *Dubois*—which it did. *United States v. Gray,* 2024 WL 4647991, at *2 (11th Cir. Nov. 1, 2024) (finding that "[n]othing in *Rahimi* conflicts with" the Court's "prior decision in *Dubois* and *Rozier*").

There is no further consideration in light of *Rahimi* that can change the result in a case where the panel already had a full opportunity to consider *Rahimi*. That *Dubois* has been vacated for reconsideration makes no difference to this case, given the finding of Petitioner's panel that it continued to be bound by its pre-*Bruen* mode of analysis ***in Rozier***. Notably, after a GVR from this Court for reconsideration of a circuit precedent analogous to *Dubois*, which had continued to follow the mode of analysis in a pre-*Bruen* circuit precedent analogous to *Rozier*, the Tenth Circuit affirmed in a published opinion that its pre-*Bruen* mode of analysis continued to control post-*Rahimi*. *See Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025).

With that decision in *Vincent*, whether the Eleventh Circuit in *Dubois* and *Rambo* continues to follow its pre-*Bruen* precedent in *Rozier,* or agrees with the other circuits that *Bruen* indeed requires the new text-and-historical tradition mode of Second Amendment analysis, that will not lessen the need for certiorari at this juncture. Now that the Tenth Circuit has made clear that it will *not* conduct any textual *or* historical analysis post-*Rahimi*, but will simply continue to follow the dicta-based approach of its pre-*Bruen* precedent, as of this writing there is a fully-entrenched circuit conflict as to whether pre-*Bruen* precedents continue to control Second Amendment analysis. *See Diaz v. United States*, pet. for cert. filed Feb. 18, 2024 (No. 24-6625), at 25.

And indeed, with the recently-filed petition for writ of certiorari in *Diaz*, the question of facial constitutionality of § 922(g)(1) under *Bruen/Rahimi* is now before this Court for review in two separate cases. Both are ideal vehicles for certiorari, without any preservation issues. And there is no possible reason to delay decision of this far-reaching issue, by an unnecessary remand for further consideration in light of *Rahimi*, here. The *Diaz* petition squarely presents both a facial challenge and the as-applied conflict which has intractably divided the courts. If the Court is inclined to resolved both issues in a single case like *Diaz*, Petitioner asks that his case be held pending its decision there. Alternatively, if the Court wishes to grant certiorari in several, separate as-applied cases together with a facial case, Petitioner reaffirms that his is an ideal vehicle in which to resolve the facial challenge.

CONCLUSION

Based on the foregoing, the petition for certiorari should be granted. Alternatively, the Court should hold this petition pending its decision in *Diaz* or any other case(s) that will resolve the facial challenge to § 922(g)(1) presented herein.

Respectfully submitted,

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