No. 20-5579

IN THE
SUPREME COURT OF THE UNITED STATES

ISRAEL TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government does not dispute Mr. Torres' showing that the question presented in his petition is an exceptionally important one that directly implicates the fundamental constitutional rights of millions of Americans. Nor does the government dispute Mr. Torres' demonstration that this question is the subject of a deeply entrenched conflict between federal circuit courts, state courts of last resort, and in two instances, federal and state appellate courts covering the same geographic area. Instead, the government seeks to redirect this Court's attention toward alternative questions, and inaccurately describes the substance of the court of appeals' holding below. These strategies do not obscure the existence or significance of the question presented in Mr. Torres' petition, nor do they undermine this case's appropriateness as a vehicle for this Court to address it. The Court should grant the petition.

I. The government does not dispute Mr. Torres' showing that the question presented is exceptionally important and is the subject of entrenched conflicts among federal and state appellate courts.

In his petition, Mr. Torres demonstrated that the question presented is exceptionally important, affecting the fundamental constitutional rights of millions of Americans, as well as one of the most frequently charged offenses in the federal and state criminal justice systems. Pet. 7-10. The government does not dispute the importance of this question.

Mr. Torres also showed that this question is the subject of entrenched conflicts between federal circuit courts, state courts of last resort, and in two

instances, federal circuit and state last-resort courts covering the same geographic area. *Id*. 11-17. The government acknowledges that some federal circuit courts "have held that Section 922(g)(1) is not subject to individualized as-applied Second Amendment challenges," whereas "other courts of appeals and some state supreme courts have 'held the door open to as-applied challenges.'" BIO 8-9. At other points, however, the government seeks to obscure the nature of this conflict.

The government posits that Mr. Torres "does not contend that any court of appeals or state supreme court has held that Section 922(g)(1) violates the Constitution as applied to an individual with [his] criminal history." *Id*. 8. But the question presented in Mr. Torres' petition is not whether Section 922(g)(1) violates the Constitution as applied to an individual with his criminal history, or to anyone else; it is whether "an individual charged with violating a law barring the possession of firearms by felons [may] bring an as-applied Second Amendment challenge to his prosecution." Pet. (Question Presented). The government's assertion is in any case a tautology, because Mr. Torres is the *only* person "with [his] criminal history." It is in the nature of an as-applied challenge that it looks to the facts of the individual case, not merely to the case's broad similarity to other decided cases. *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007). It follows that a court's willingness or refusal to entertain an as-applied challenge may lead to opposite outcomes even in broadly similar cases.

II. The government's suggestion that this case does not present an appropriate vehicle for resolving this conflict is unconvincing.

When the government accurately characterizes the question presented – "whether as-applied challenges to Section 922(g)(1) may ever proceed" – it concedes the existence of a conflict, but maintains that this case does not "implicate" it because "the court of appeals here did not categorically foreclose as-applied challenges to Section 922(g)(1)." BIO 8.

The record begs to differ. Mr. Torres' counsel *argued* that court of appeals precedent did not categorically bar as-applied Second Amendment challenges to Section 922(g)(1) – but the government consistently argued that it did, and the district court and court of appeals unequivocally agreed with the government's position. In response to Mr. Torres' motion to dismiss in the district court, the government asserted that court of appeals precedent categorically established "that the Second Amendment does not apply to felons." D. Ct. Doc. 30 3-4 (citing *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); and *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016)). The district court agreed, holding that "current Ninth Circuit precedent prevents this Court from entertaining an as-applied challenge to 18 U.S.C. § 922(g)(1) at this time." Pet. App. B 4 (citing *Vongxay* and *Phillips*). In its court of appeals brief, the government asserted that the district court "correctly applied [the court of appeals'] precedent." Ct. App. Ans. Br. 10-13 (citing *Vongxay* and *Phillips*). At the outset of its court of appeals oral argument, the government asserted: "This court squarely rejected as-applied challenges in *Vongxay* because felons are categorically different from people who have a fundamental right to bear

arms." Ct. App. Oral Arg.[1] The court of appeals agreed with the government's assertion, holding that it was "bound under *Vongxay* and [*District of Columbia v.*] *Heller*[, 554 U.S. 570 (2008)] to assume the propriety of felon firearm bans." Pet. App. A 4.

The court of appeals' understanding of its precedent was consistent with its routine treatment of Second Amendment challenges to Section 922(g)(1) over the past decade. Following its 2010 opinion in *Vongxay*, the court of appeals has summarily rejected both facial and as-applied Second Amendment challenges to Section 922(g)(1), generally by means of cursory rulings in brief unpublished decisions. *United States v. Parker*, 371 F. App'x 749, 750 (9th Cir. 2010); *United States v. Schwindt*, 378 F. App'x 721, 722-23 (9th Cir. 2010); *United States v. Small*, 494 F. App'x 789, 791 (9th Cir. 2012); *United States v. Johnson*, 534 F. App'x 592, 594 (9th Cir. 2013); *United States v. Kyle*, 565 F. App'x 672, 673 (9th Cir. 2014); *Van der Hule v. Holder*, 759 F.3d 1043, 1050-51 (9th Cir. 2014); *United States v. Mendez*, 584 F. App'x 679, 679 (9th Cir. 2014); *United States v. Leaming*, 596 F. App'x 535, 536 (9th Cir. 2015); *Michaels v. Sessions*, 700 F. App'x 757, 758 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 936 (2019).

In *United States v. Duckett*, 406 F. App'x 185 (9th Cir. 2010), the appellant "concede[d]" that his as-applied Second Amendment challenge to Section 922(g)(1) was "foreclosed by [*Vongxay*]," and the panel accepted the appellant's "conce[ssion]." *Id*. at 186. In a concurring opinion, Judge Ikuta stated that, were she not "bound by

[1] https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016538.

[*Vongxay*]," she would "examine whether, notwithstanding th[is Court's] dicta in [*Heller*], the government has a substantial interest in limiting a non-violent felon's constitutional right to bear arms." *Id*. at 187 (Ikuta, J., concurring). And in *Phillips*, the court held that *Vongxay* "foreclose[d]" the appellant's argument that his non-violent misprision of felony conviction could not constitutionally justify his being stripped of his Second Amendment right pursuant to Section 922(g)(1). 827 F.3d at 1174.

In short, the record confirms that the court of appeals found as-applied Second Amendment challenges to Section 922(g)(1) "categorically foreclose[d]" by its precedent (BIO 8), and that conclusion was consistent with the approach that the court of appeals has taken to such challenges for a decade.

The government's contrary assertion rests on (1) Judge Lee's concurring opinion below, and (2) a footnote in Judge Lee's panel majority opinion in *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). BIO 10-11. But Judge Lee's view of circuit precedent was not accepted by the panel majority below – which is precisely why he wrote the concurrence, explaining: "I write separately [] because I do not believe either the Supreme Court or the Ninth Circuit has explicitly held that felons are categorically barred from bringing as-applied Second Amendment challenges to § 922(g)(1)." Pet. App. A 5. And while Judge Lee's opinion for the panel majority in *Duncan* includes a footnote positing that the court of appeals "has not directly addressed" whether *Heller*'s "presumptively lawful" restrictions are rebuttable (970 F.3d at 1149 n.9), that assertion is dictum: The measure at issue in *Duncan* – a

California statute banning the possession of "large capacity magazines" – was not among the "presumptively lawful" restrictions enumerated in *Heller*, and the panel concluded that the restriction was neither "longstanding" nor "presumptively lawful." *Duncan*, 970 F.3d at 1149-51. Notably, Judge Lee's opinion attracted the support of only one other member of the panel, and there is a substantial possibility that the case will be reheard en banc. Ct. App. Docket in No. 19-55376, Doc. 101 (directing Plaintiffs-Appellees to respond to petition for rehearing).

Moreover, if the *Duncan* opinion's statement is not dictum, and the government's characterization of the Court's prior precedent (*see supra* 3-4) is accurate, *Duncan* creates an intracircuit conflict – which raises an additional factor supporting the grant of certiorari. *See*, *e.g.*, *Inyo Cty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 709 n.5 (2003) (certiorari granted to address question on which Ninth Circuit panels had "expressed divergent views"); *Comm'r of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 457 (1967) (certiorari granted to address intracircuit conflict on question implicating "widespread conflict among the circuits").

The government at some points appears to suggest that the Third Circuit stands alone on its side of the circuit conflict, because "only the Third Circuit has actually *accepted* an as-applied challenge to Section 922(g)(1)." BIO 8 (emphasis added); *see also id*. at 10 (referring to "the circuit conflict created by *Binderup* [*v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016)]"). The relevance of this assertion is unclear,

because even if acceptance of an as-applied challenge were the proper criterion, a circuit conflict would still exist. Sup. Ct. R. 10(a).

In any case, this is not the proper criterion. The question presented in Mr. Torres' petition is whether an individual may *bring* an as-applied Second Amendment challenge to Section 922(g)(1), not whether his challenge must prevail. This court commonly grants certiorari to decide whether individuals may bring particular legal claims. *See*, *e.g.*, *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111 (2014) ("This Court granted certiorari to consider whether a private party may bring a Lanham Act claim challenging a food label that is regulated by the [Federal Food, Drug, and Cosmetic Act]."); *Douglas v. Independent Living Ctr. of S. California, Inc.*, 565 U.S. 606, 610 (2012) ("We granted certiorari in these cases to decide whether Medicaid providers and recipients may maintain a cause of action under the Supremacy Clause to enforce a federal Medicaid law[.]"). Such grants of review recognize that the importance of these questions supersedes the significance of the outcomes in individual cases.

Finally, the government posits that Mr. Torres' "as-applied challenge [] would fail even under the Third Circuit's standard" in *Binderup*, because "[t]he predicate crimes in *Binderup* were corrupting a minor and carrying a handgun without a license – not driving under the influence." BIO 11. This assertion is immaterial, because this Court's decision to grant certiorari "depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review" (*Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974)), and because the Court's "traditional practice

has been to leave fact-bound questions of possible prejudicial error to the lower courts on remand." *United States v. Young*, 470 U.S. 1, 34 (1985) (Brennan, J., concurring in part and dissenting in part).

Moreover, it cannot be assumed that the form of as-applied review that would emerge from this Court's resolution of the question presented would precisely mirror the protocol set forth in *Binderup* – which is itself the product of overlapping pluralities reaching the same conclusions for substantially different reasons. *Binderup*, 836 F.3d at 339-57 (Op. of Ambro. J.) (adopting "virtuous citizenry" model for defining scope of Second Amendment right); *id.* at 357-80 (Hardiman, J., concurring in part and concurring in the judgments) (rejecting "virtuous citizenry" model as relating to civic, rather than individual rights); *see also Kanter v. Barr*, 919 F.3d 437, 451-69 (7th Cir. 2019) (Barrett, J., dissenting) (opining that felons are not categorically excluded from scope of Second Amendment right, and rejecting "virtuous citizenry" model for determining whether right may be curtailed). Moreover, nothing in these *Binderup* opinions suggests that the Second Amendment applies *only* to persons convicted of the specific crimes involved in those cases – and in fact, the Third Circuit recently extended as-applied review to an individual convicted of a DUI offense. *Holloway v. Att'y Gen.*, 948 F.3d 164, 167-78 (3d Cir. 2020). The government notes that the court rejected that individual's Second Amendment challenge (BIO 11), but one judge filed a lengthy dissent, finding that it had merit. *Id.* at 178-94 (Fisher, J., dissenting). This disagreement further

illuminates the complexity of the issues surrounding the question presented, and the need for this Court to address it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted on November 23, 2020.

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