No. 22-5119

IN THE

Supreme Court of the United States

CHRISTOPHER HASSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government attempts to downplay the lower courts' division over whether a trio of this Court's recent cases—*Johnson v. United States*, 576 U.S. 591 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019)—abrogated the "own-conduct principle" previously applicable to facial void-for-vagueness challenges. But it concedes that at least two state courts of last resort have split from the federal circuits by concluding the principle no longer applies. And it acknowledges that several federal circuits, like the Fourth Circuit in this case, have fashioned an ad hoc categorical-statute exception to that rule that this Court has never recognized, and that has no basis in the Court's cases. The government, in short, does not dispute that the vagueness doctrine is plagued by confusion and uncertainty. Nor does it dispute that the own-conduct principle is conceptually at odds with other aspects of the Court's separation-of-powers case law.

Instead, the government principally attempts to reframe the question presented, arguing 18 U.S.C. § 922(g)(3) is not facially vague. But the Fourth Circuit did not decide that question, and this Court need not address it to resolve the question in Hasson's petition, i.e., whether the own-conduct principle remains good law.

ARGUMENT

I. The lower courts are divided over the meaning of this Court's recent vagueness cases.

The government seeks to minimize the extent of the lower courts' confusion about whether, and how, *Johnson-Dimaya-Davis* altered the rules for facial vagueness challenges. Its arguments are unpersuasive.

First, the government dismisses "two decisions of state courts of last resort" that have rejected the own-conduct principle in the wake of *Johnson*. BIO.13 (citing *Commonwealth v. Curry*, 607 S.W.3d 618 (Ky. 2020), and *State v. Harris*, 467 P.3d 504 (Kan. 2020)). The government is of course correct that "[s]tate courts need not interpret state constitutional provisions to be coextensive with similar provisions in the U.S. Constitution." BIO.13. But that is irrelevant here, where both *Curry* and *Harris* treat state and federal vagueness doctrine as equivalent.

In *Curry*, which concerned whether a state statute "violate[d] the due process provisions of the United States and Kentucky Constitutions," the court analyzed the two parts of that question in parallel. 607 S.W.3d at 620. It began its analysis by quoting the Fourteenth Amendment (not the analogous provision of the Kentucky Constitution), and throughout the opinion it cited both federal and Kentucky cases alongside one another. *Id.* at 622-24 & nn.20-29. When addressing the own-conduct principle, *Curry* noted that recent cases from not only the Kentucky Supreme Court, but also this Court, had declined to apply that principle. *Id.* at 623-24 & nn.22-29. And at no point did the court indicate that any daylight existed between the Kentucky and federal vagueness doctrines. Treating the two doctrines as co-

extensive in this way is consistent with prior Kentucky Supreme Court opinions. *See, e.g.*, *Curd v. Ky. State Bd. of Licensure for Prof'l Eng'rs & Land Surveyors*, 433 S.W.3d 291, 304 (Ky. 2014).

Similarly, the Kansas Supreme Court in *Harris* explained that when a statute is challenged for vagueness, it "must clear two . . . hurdles"—one of which (fair notice) "is grounded in the due process requirements of the Fourteenth Amendment," and the other of which (non-arbitrary enforcement) is rooted "in the doctrine of separation of powers emanating from both our federal and state constitutions." 467 P.3d at 507. *Harris*, like *Curry*, laid out the vagueness doctrine by citing both federal and state cases in tandem, and its renunciation of the own-conduct principle relied solely on *Johnson*. *Id.* at 507-09. And like *Curry*, *Harris* gave no hint that the vagueness doctrine varied in breadth under federal and state law. This treatment, too, was consistent with prior Kansas Supreme Court cases. *See, e.g.*, *State v. Kirby*, 563 P.2d 408, 410 (Kan. 1977).

Curry and *Harris*, therefore, establish that the Fourth Circuit (and other federal circuits) "ha[ve] decided an important federal question in a way that conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a). And as Hasson's petition notes, at least one state intermediate appellate court has deepened the split. *See* Pet.19 (citing *State v. Gutierrez*, 472 P.3d 1260 (N.M. Ct. App. 2020)).

Second, the government insists Hasson erroneously "assert[s] a circuit conflict" over the own-conduct principle's continuing validity. BIO.11. By this, the government apparently means that no federal circuit has held the own-conduct principle inapplicable in *all* cases. Putting aside that a Ninth Circuit panel has concluded

just that, *see* Pet.18-19, the government's argument misses the forest for the trees. Hasson's petition argued—and the government does not dispute—that the federal circuits are badly fractured over the effect of *Johnson-Dimaya-Davis*. Some circuits have held the own-conduct principle still applies to all statutes, while others, like the Fourth Circuit in Hasson's case, have created a de facto exception for categorical-approach statutes. *Compare, e.g.*, *United States v. Westbrooks*, 858 F.3d 317, 325-26 (5th Cir. 2017) (holding own-conduct principle applies across the board, notwithstanding *Johnson* line of cases) *and United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016) (per curiam) (same), *with, e.g.*, *United States v. Hasson*, 26 F.4th 610, 619-21 (4th Cir. 2022) (exempting categorical-approach statutes from own-conduct principle) *and United States v. Cook*, 970 F.3d 866, 876 (7th Cir. 2020) (same).

Likewise, one federal circuit has held the own-conduct principle applies to challenges brought under the vagueness doctrine's fair-notice prong, but not those under the arbitrary-enforcement prong—a conclusion that it appears no other federal circuit has reached. *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391, 409-10 (D.C. Cir. 2017).[1] Other courts, struggling to

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[1] The government discounts *Act Now* because that case "involved the regulation of speech, which is subject to distinct rules." BIO.12. But whether in the First Amendment context or not, this Court has never adopted different rules for fair-notice and arbitrary-enforcement challenges. *Act Now* is therefore emblematic of the doctrinal innovations to which courts have resorted to make sense of this Court's cases. *See also, e.g.*, *United States v. Stupka*, 418 F. Supp. 3d 402, 409-11 (N.D. Iowa 2019) (hypothesiz-

synthesize the (likely irreconcilable) case law, have recognized that this Court has not "definitively resolved whether facial vagueness challenges not based on the First Amendment may proceed against statutes that can constitutionally be applied to the challenger's *own* conduct." *United States v. Requena*, 980 F.3d 30, 40 (2d Cir. 2020) (emphasis in original). In sum, the lower federal courts have not settled on a consistent, coherent interpretation of *Johnson-Dimaya-Davis*. *See also* Pet.15-21 (describing similar disarray among state courts).

Third, the government contends *Johnson-Dimaya-Davis* cannot have repudiated the own-conduct principle because the Court recently "reaffirm[ed]" that principle in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). BIO.10. But that case only highlights the confusion surrounding current vagueness doctrine—and the need for this Court to step in and provide clarity. To begin, the petitioners in *Expressions Hair Design* raised solely an as-applied vagueness challenge; they expressly "disclaimed a facial challenge." 137 S. Ct. at 1149; *see also id.* at n.1. So any statements the Court made about facial vagueness claims were dicta, and it is unclear how those dicta interact with the holdings and analysis of cases where the petitioners did bring facial challenges, as in *Johnson*, *Dimaya*, and *Davis*.

Moreover, *Expressions Hair Design* said the own-conduct principle applies even when a challenged statute implicates the First Amendment. *See id.* at 1151-52 ("A plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim."). That statement,

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ing that *Johnson* supports treating fair-notice and arbitrary-enforcement challenges differently).

however, conflicts with numerous previous opinions from this Court holding the own-conduct principle does *not* apply when a statute regulates speech. *See, e.g.*, *United States v. Nat'l Dairy Prod. Corp.*, 372 U.S. 29, 36 (1963) ("[T]he approach to vagueness governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute on its face because such vagueness may in itself deter constitutionally protected and socially desirable conduct."); *United States v. Mazurie*, 419 U.S. 544, 550 (1975) (similar); *United States v. Powell*, 423 U.S. 87, 92 (1975) (similar); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 n.7 (1982) (similar); *Kolender v. Lawson*, 461 U.S. 352, 357-58 & n.8 (1983) (similar); *Chapman v. United States*, 500 U.S. 453, 467 (1991) (similar). Even Justice Alito's *Johnson* dissent and Justice Thomas' *Dimaya* dissent, which criticized the majority for disregarding the own-conduct principle, acknowledged that the principle has no application in the First Amendment context. 576 U.S. at 636 (Alito, J., dissenting) ("'It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined' on an as-applied basis." (quoting *Mazurie*, 419 U.S. at 550)); 138 S. Ct. at 1250 (Thomas, J., dissenting) ("This Court's precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as applied to him.").

To support extending the own-conduct principle to statutes touching on First Amendment freedoms, *Expressions Hair Design* cited *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010). 137 S. Ct. at 1152. But that case, too, involved only an as-applied challenge, not a facial challenge. *See* 561 U.S. at 14, 18. Its discus-

sion of the own-conduct principle was therefore dicta just as much as *Expressions Hair Design*'s.

Humanitarian Law Project, moreover, did not substantiate its claim that the own-conduct principle "makes no exception" for speech. *Id.* at 20. The only case the Court cited for that proposition was *Parker v. Levy*, 417 U.S. 733 (1974), which did recite the own-conduct principle in the First Amendment context, but which did not attempt to justify a departure from previous cases, such as *National Dairy Products Corp.*, that treated speech-regulating statutes differently for vagueness purposes. 417 U.S. at 755-56. Nor did *Humanitarian Law Project* explain how *Parker*'s (possible?) overruling of those cases could be harmonized with subsequent cases that exempted speech-regulating statutes from the own-conduct principle, such as *Mazurie*, *Powell*, *Village of Hoffman Estates*, *Kolender*, and *Chapman*.

The upshot of all this is that the Court's vagueness cases are riddled with inconsistency about when the own-conduct principle applies. Granting certiorari and holding that the principle is never applicable, as Hasson asks, would eliminate the uncertainty once and for all.

Fourth, the government suggests *Johnson-Dimaya-Davis* is consistent with previous vagueness cases because, in the former, the Court actually did find the residual clauses vague as applied. BIO.9. That is not a credible reading of the Court's opinions. This Court knows how to write clearly; it knows how to say "the ACCA residual clause is vague as applied to petitioner's prior conviction" or "the 18 U.S.C. § 16(b) residual clause does not provide fair notice that California burglary is a crime of violence." But the Court said nothing of the sort in *Johnson*, *Dimaya*, or *Davis*.

The government points to a question *Johnson* posed about the "uncertainty" arising from the residual clause: "When deciding whether unlawful possession of a short-barreled shotgun is a violent felony, do we confine our attention to the risk that the shotgun will go off by accident while in someone's possession? Or do we also consider the possibility that the person possessing the shotgun will later use it to commit a crime?" 576 U.S. at 600. And it cites a footnote in *Dimaya* in which the Court mused that applying § 16(b)'s residual clause to the respondent's prior conviction "might not be so easy after all." 138 S. Ct. at 1214 n.3. It is simply not plausible that these tentative, passing observations represent holdings on a point essential to the cases' outcomes, especially in the face of the dissents' vigorous objections that the Court was "reject[ing]" the own-conduct principle. *E.g.*, *Johnson*, 576 U.S. at 638 (Alito, J., dissenting). As to *Davis*, the government does not cite any language that can even arguably be construed as holding that 18 U.S.C. § 924(c)'s residual clause is vague as applied to conspiracy to commit Hobbs Act robbery.

Regardless, even if the government's revisionist reading of *Johnson-Dimaya-Davis* were correct, lower courts have not interpreted those cases that way. *See, e.g.*, *Cook*, 970 F.3d at 874 ("*Johnson* declared the (now defunct) residual clause . . . to be impermissibly vague without requiring the defendant to first show that the clause was vague as applied to him."); *Henry v. Spearman*, 899 F.3d 703, 709 (9th Cir. 2018) (similar); *United States v. Crow*, No. 19-20057-01-DDC, 2020 WL 4335004, at *2 (D. Kan. July 28, 2020) (similar). This Court's intervention is therefore required to help the lower courts make sense of *Johnson-Dimaya-Davis*.

II. Consistent with its usual practice, this Court should decide the question presented and remand for consideration of whether § 922(g)(3) is facially vague.

The government also urges the Court to deny certiorari because, it argues, § 922(g)(3) is not vague on its face and the circuits are not divided on that question. BIO.6-11.

Whether § 922(g)(3) is facially vague is beyond the scope of Hasson's certiorari petition, which is limited to the status of the own-conduct principle. This Court can and should take up that latter question without getting embroiled in the former, which the Fourth Circuit did not address. Because it is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), this Court routinely decides a threshold question and remands for resolution of a secondary question that the lower court did not decide. *E.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1524, 1531 (2018) (holding non-listed driver of rental car has legitimate expectation of privacy in vehicle, and remanding to decide whether denial of suppression motion should nevertheless be affirmed because police had probable cause to support search); *Ruan v. United States*, 142 S. Ct. 2370, 2382 (2022) (holding lower courts misinterpreted statute's mens rea requirement, and remanding "to decide in the first instance whether the [jury] instructions complied with the standard we have set forth today" and whether any error was harmless). The Court should take the same approach here.

Besides, the government's substantive arguments about the vagueness of § 922(g)(3) are misplaced.

The government asserts Hasson erroneously argues that the Fourth Circuit's decision "conflicts with"

Johnson-Dimaya-Davis. BIO. 7. According to the government, the residual clauses in those cases suffered from a "peculiar double-indeterminacy" because they "required a court to apply a qualitative standard ('serious' or 'substantial' risk), not to the conduct in which the defendant actually engaged, but to an 'idealized ordinary case of the crime.'" BIO.7, 9. And, the government insists, "no comparable indeterminacy exists here" because § 922(g)(3) looks to a defendant's real-world conduct, not "a judge-imagined abstraction." BIO.8-9. This argument is a red herring. *Johnson-Dimaya-Davis* did not hold a statute can be facially vague *only* if it combines "an imprecise 'serious potential risk' standard" with consideration of "a judicially imagined 'ordinary case' of a crime." *Johnson*, 576 U.S. at 598. Put differently, those cases did not hold that as long as a statutory proscription governs real-world conduct, it cannot be vague on its face. Accordingly, it is irrelevant that liability under § 922(g)(3) turns on real-world conduct.

The Fourth Circuit's opinion does conflict with *Johnson-Dimaya-Davis* in a different way, however: it held that those cases except categorical-approach statutes from the own-conduct principle because of their "peculiar double-indeterminacy." App.19a; *see* Pet.18. As Hasson argued below, this conclusion confuses (1) the threshold question of *who* can challenge a statute as facially vague, with (2) the substantive question of *whether* the statute is in fact vague. C.A. Def. Reply Br. 8 n.1. The former question is essentially a matter of standing (i.e., has this litigant suffered an injury such that he can raise a facial claim?), whereas the latter is a merits matter (is the litigant correct that the statute is facially vague?). In *Johnson*, this Court wrote that "[t]wo features of the residual clause conspire[d] to

make it *unconstitutionally vague*"—not that they conspired to render the residual clause *susceptible to a facial challenge*. 576 U.S. at 597. The government does not deny that the Fourth Circuit conflated these distinct questions, thereby distorting this Court's holdings in *Johnson-Dimaya-Davis*. Absent intervention from this Court, other lower courts are liable to misread *Johnson-Dimaya-Davis* in the same way.

Finally, the government argues § 922(g)(3) is not vague because it "uses plain-language terms" that "make it reasonably clear what the statute forbids." BIO.6. But numerous courts considering similar statutes have found them void for vagueness. *See, e.g.*, *Weissman v. United States*, 373 F.2d 799, 802-04 (9th Cir. 1967) (someone who "uses narcotic drugs"); *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 268-86 (4th Cir. 2019) (en banc) ("habitual drunkard"); *State v. Pugh*, 369 So.2d 1308, 1308-10 (La. 1979) (same); *Ex parte Newbern*, 53 Cal.2d 786, 792-96 (1960) ("common drunk").

III. The government does not defend the own-conduct principle.

Hasson's petition asked this Court to grant certiorari not only because the lower courts are splintered over the own-conduct principle's validity post-*Johnson*, but also because that principle is "theoretically unsound" and "in tension with other aspects of this Court's case law." Pet.3. The government does not respond to the latter argument at all. It does not deny that vagueness challenges are separation-of-powers/non-delegation challenges, or that separation-of-powers/non-delegation challenges are inherently facial. Nor does the government attempt to explain why vagueness claims,

uniquely among all separation-of-powers claims, should not be considered on their face as a matter of course.

The government's silence underscores the latent contradiction in this Court's vagueness doctrine. The integrity of the Court's case law requires resolving that contradiction.

CONCLUSION

The Court should grant certiorari, vacate the Fourth Circuit's judgment, and remand for consideration of whether § 922(g)(3) is facially void for vagueness.

Respectfully submitted,

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