No. 23-6278

In the

Supreme Court of the United States

Devontae Nykel Racliff,

Petitioner,

v.

United States of America,

Respondent.

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

PETITIONER'S REPLY BRIEF

Maria Gabriela Vega
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 South Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
gabriela_vega@fd.org

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REPLY BRIEF

I. Amendment 822's enactment warrants a GVR.

The government does not dispute that Amendment 822 may be clarifying. Instead, it argues that even so, Amendment 822 would not alter the outcome below. This position does not withstand scrutiny.

A. Amendment 822 alters the 2021 Guidelines if clarifying.

Racliff agrees that under U.S. SENT'G COMM'N, GUIDELINES MANUAL §1B1.11(a) (Nov. 2021) (hereinafter "USSG"), the district court properly applied the 2021 Guidelines to Racliff's offense. *See* ROA.22-10409.179. But he disagrees that Amendment 822 would have no effect on the 2021 Guidelines on direct appeal. "[A]n appellate court must apply the law in effect at the time it renders its decision." *Henderson v. United States*, 568 U.S. 266, 271 (2013) (quoting *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 281 (1969)). If deemed clarifying, Amendment 822's robbery definition undoubtedly would inform how to interpret the enumerated "robbery" offense in USSG §4B1.2. *United States v. Palacios*, 756 F.3d 325, 326 & n.1 (5th Cir. 2014) (citing *United States v. Anderson*, 5 F.3d 795, 802 (5th Cir. 1993)) (amendment that became effective "after [the defendant] was sentenced but while th[e] appeal was pending" applies). Indeed, the government previously admitted as much. Br. for the United States, *Tax-Garcia v. United States*, 572 U.S. 1112 (2014) (No. 13-8627), 2014 WL 2090004, at *8, 12 ("petitioners are entitled to the benefit of [an] amendment" "that was enacted after their respective sentencings" where the amendment "is properly understood as clarifying [the relevant guideline], rather than substantively altering it.").

B. Amendment 822 confirms that the Fifth Circuit erroneously defined "robbery."

Racliff urged the Fifth Circuit to eschew the generic, contemporary meaning of "robbery" adopted in *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006), and reaffirmed in *United States v. Adair*, 16 F.4th 469, 470–71 (5th Cir. 2021). Appellant's Initial Br. at 11–25. *Santiesteban-Hernandez* held that "the elements of the Texas [robbery] statute substantially correspond to the basic elements of the generic offense" of robbery in USSG §2L1.2. *Santiesteban-Hernandez*, 469 F.3d at 378, 381; *see also Adair*, 16 F.4th at 470 ("a prior conviction that would qualify for the 'crime of violence' enhancement under § 2L1.2 would also qualify for the enhancement under § 4B1.2" (quoting *United States v. Flores-Vasquez*, 641 F.3d 667, 671 n.1 (5th Cir. 2011))). But to reach that conclusion, *Santiesteban-Hernandez* posed an antecedent question: "whether the use or threat of force is part of the generic, contemporary meaning of 'robbery.'" *Id.* at 379. Amendment 822 answers that in the affirmative:

> 'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, **by means of actual or threatened force**, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

USSG App. C amend. 822 (emphasis added). But *Santiesteban-Hernandez* answered it in the negative. *Santiesteban-Hernandez*, 469 F.3d at 380–81. Instead, *Santiesteban-Hernandez* extrapolated from the use or threat of force a more general prin-

ciple that robbery involves a "misappropriation of property under circumstances involving [immediate] danger to the person." *Id.* at 380 (quoting WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3 intro., (d)(2) (2d ed. 2003)). And according to *Santiesteban-Hernandez*, that "immediate danger element is what makes robbery," well, robbery. *Id.* at 380. So, rather than keeping it as a defining feature of generic robbery, *Santiesteban-Hernandez* downgraded the requirement that "property to be taken from a person or a person's presence by means of force or putting in fear" as a mere means of implementing the "immediate danger element." *Id.* Amendment 822 confirms that the opposite approach is correct.

C. Texas robbery falls outside the scope of Amendment 822's definition.

Texas robbery departs from Amendment 822's robbery definition in at least two critical respects: (1) it has no presence requirement for the victim, and (2) it has no nexus requirement for the force employed to relate to the theft's commission. *Smith v. State*, No. 14-11-00920-CR, 2013 WL 476820 (Tex. App. Feb. 7, 2013), and *Craver v. State*, No. 02-14-00076-CR, 2015 WL 3918057 (Tex. App. June 25, 2015), illustrate well these departures. *Smith* sustained a robbery conviction against a shoplifter who caused bodily injury to a loss-prevention employee after the defendant discarded the stolen property and was in immediate flight from the theft. *Smith*, 2013 WL 476820, at *1–3. The facts recited in the opinion establish that the defendant accomplished the theft without the use of any actual or threated force, violence, or fear of injury — he walked into the store, put a TV in his cart, and walked out. *Id.* at *1. The defendant threatened force only *after* he pushed the cart with the TV away.

Id. If that fact pattern suffices for a Texas robbery conviction, then evidently Texas robbery does not require the "the unlawful taking or obtaining of personal property" "by means of actual or threatened force." Like *Smith*, *Craver* also addressed a shoplifter's robbery conviction. *Craver*, 2015 WL 3918057, at *1–3. This time, the defendant accomplished the theft in much the same manner as in *Smith*: he left a Sears store at the mall without paying for certain items he had secreted in a bag. *Id.* at *1–2. Loss prevention officers confronted the defendant outside of the store. *Id.* at *1–2. The defendant then lunged over the railing and landed on a woman on the first floor of the mall. *Id.* at *1–2. The court affirmed Craver's robbery conviction. *Id.* at *4–5. "Despite the presence of" "people on the lower level" of the mall, "Craver attempted to avoid Sears's loss-prevention employees by jumping over the railing of the second floor down onto the first floor." *Id.* at *5. Thus, *Craver* concluded that "the jury could have reasonably inferred that Craver consciously disregarded a known risk that he would injure another person when he leaped over the railing to the first floor of the mall…." *Id.* Again, Craver caused injury — but the injury was not the "means" used for his "unlawful taking or obtaining of personal property." Indeed, the theft in *Craver* did not even occur in the injured victim's presence.

D. This Court should not decline a GVR based on harmlessness when the Fifth Circuit did not decide harmlessness.

The Fifth Circuit held that *Adair* foreclosed Racliff's argument that Texas robbery is not a "crime of violence" under USSG §4B1.2. Pet. App. 3a. It did not engage in a harmlessness inquiry. The government's invitation nonetheless to decline a GVR based on harmlessness is unsound.

First, it runs contrary to this Court's prior practice of not deciding issues not fully developed below. *See Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 515 (1982) (declining to address Eleventh Amendment immunity argument that was briefed but not passed on below); *Tapia v. United States*, 564 U.S. 319, 322–23, 335 (2011) (citing *United States v. Marcus*, 560 U.S. 258, 266–67 (2010)) (reversing appellate court's finding of no error and remanding for appellate court to conduct plain error analysis in the first instance). Second, the government places undue weight on the district court's statement that it would have imposed the same sentence regardless of the guidelines. To prove harmlessness, "it is not enough for the district court to say the same sentence would have been imposed but for the error." *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir.), *supplemented*, 854 F.3d 284 (5th Cir. 2017). The Fifth Circuit repeatedly has remanded for resentencing even where such statements appeared in the record. *See Tanksley*, 848 F.3d at 353; *United States v. Martinez-Romero*, 817 F.3d 917, 924–26 (5th Cir. 2016); *United States v. Rico-Mejia*, 859 F.3d 318, 323–25 (5th Cir. 2017), *overruled on other grounds by United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018); *United States v. Walters*, No. 22-50774, 2024 WL 512555, at *2 (5th Cir. Feb. 9, 2024). This Court cannot conclude, based solely on this statement, that a GVR would not change the outcome of the proceedings below.

II. The government should agree that the issues presented in *Rahimi* substantially overlap with Racliff's challenge to his 18 U.S.C. § 922(g)(1) conviction.

The government firmly advocated in *Garland v. Range*, Case No. 23-374, that *Garland* "substantially overlaps with *Rahimi*." Pet. for a Writ of Certiorari at 25–26,

Garland v. Range, Case No. 23-374 (U.S. Oct. 5, 2023) (hereinafter "Range Pet."). "Both cases concern Congress's authority to prohibit a category of individuals from possessing firearms." Range Pet. at 25. "Each case also raises similar methodological questions about how to apply the historical test set forth in *Bruen*." Range Pet. at 25. Because plainness of an error is judged at the time of appellate review, the governing law post-*Rahimi* will be the same for plain-error and non-plain-error cases. *Henderson v. United States*, 568 U.S. 266, 279 (2013). And the fact that *Rahimi* will address the constitutionality of 18 U.S.C. § 922(g)(8) and not 18 U.S.C. § 922(g)(1) is not dispositive. "To prove that any error was 'clear or obvious,' a defendant need not identify a past decision of this court directly holding in the defendant's favor on the exact same issue." *United States v. Pierre*, No. 20-30728, 2022 WL 1198222, at *3 (5th Cir. Apr. 22, 2022). "The fact that the particular factual and legal scenario here presented does not appear to have been addressed in any other reported opinion does not preclude the asserted error…from being sufficiently clear or plain to authorize vacation of the conviction on direct appeal." *United States v. Spruill*, 292 F.3d 207, 215 n.10 (5th Cir. 2002). Instead, a defendant need only "show that the 'error is clear under existing law.'" *Id.* (quoting *United States v. Dunigan*, 555 F.3d 501, 506 (5th Cir. 2009)). "'[S]traightforward applications of case law'" suffice. *United States v. Vargas-Soto*, 700 F.3d 180, 182 (5th Cir. 2012) (quoting *United States v. Ellis*, 564 F.3d 370, 377 (5th Cir. 2009)).

III. *Range* may make it clear or obvious that Racliff's 18 U.S.C. § 9229(g)(1) conviction cannot stand despite its as-applied status.

True enough that the Third Circuit issued an as-applied constitutional decision in *Range*. But *Range*'s status as an as-applied decision means little for its potential to make clear or obvious other applications of 18 U.S.C. § 922(g)(1). "[T]he ruling is not cabined in any way and, in fact, rejects all historical support for disarming any felon." *See Range v. Att'y Gen. United States of Am.*, 69 F.4th 96, 116 (3d Cir. 2023) (Shwartz, J., dissenting).

If this Court grants certiorari in *Range*, it likewise may announce broadly applicable principles that make clear or obvious the unconstitutionality of other 18 U.S.C. § 922(g)(1) applications. Indeed, several district courts already relied on *Range* to conclude that 18 U.S.C. § 922(g)(1) unconstitutionally infringes on numerous defendants' rights, despite disparate criminal histories. *See generally United States v. Williams*, --- F.Supp.3d ----, No. 23-CR-20201, 2024 WL 731932, (E.D. Mich. Feb. 22, 2024) ("the felonies underlying his § 922(g)(1) charge stem from his 1987 convictions for first and second-degree murder" (cleaned up)); *United States v. Leblanc*, --- F. Supp. 3d --- , No. CR 23-00045-BAJ-RLB, 2023 WL 8756694 (M.D. La. Dec. 19, 2023) ("Mr. Leblanc has…a 2004 felony conviction for theft in excess of $500, …[and] a 2008 felony conviction for armed robbery"); *United States v. Griffin*, --- F.Supp.3d ----, No. 21-CR-00693, 2023 WL 8281564 (N.D. Ill. Nov. 30, 2023) ("Griffin's criminal record reflects multiple felony convictions…, including robbery and possession of a controlled substance"); *United States v. Harper*, --- F.Supp.3d ----, No. 1:21-CR-0236, 2023 WL 5672311 (M.D. Pa. Sept. 1, 2023) ("Harper has at least thirteen prior felony

and eight misdemeanor convictions," including "multiple armed robberies and drug trafficking convictions"). And other district courts — again citing to *Range* — have gone so far as to conclude that 18 U.S.C. § 922(g)(1) *facially* violates the Second Amendment. *See generally United States v. Neal*, --- F.Supp.3d ----, No. 20 CR 335, 2024 WL 833607 (N.D. Ill. Feb. 7, 2024); *United States v. Taylor*, No. 23-CR-40001-SMY, 2024 WL 245557, at *5 (S.D. Ill. Jan. 22, 2024); *United States v. Prince*, --- F.Supp.3d ----, No. 22 CR 240, 2023 WL 7220127 (N.D. Ill. Nov. 2, 2023). These decisions illustrate that, as-applied or not, the constitutional decision in *Range* directly implicates the Second Amendment issue Racliff presents for review.

CONCLUSION

Petitioner Devontae Nykel Racliff asks this Court to grant *certiorari*, vacate the judgment below, and remand for reconsideration in light of Amendment 822 to the United States Court of Appeals for the Fifth Circuit. In the alternative, Racliff asks that the Court to hold the case pending *United States v. Rahimi*, No. 22-915 (argued Nov. 7, 2023) and *Garland v. Range*, No. 23-374 (filed Oct. 5, 2023).

Respectfully submitted this 11th day of March, 2024.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ *Maria Gabriela Vega*
Maria Gabriela Vega
Assistant Federal Public Defender
Federal Public Defender's Office
525 South Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
gabriela_vega@fd.org

Attorney for Petitioner
Devontae Nykel Racliff