

No. \_\_\_\_\_

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In the Supreme Court of the United States

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VALENTE BRITO, JR.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the  
Fifth Circuit at New Orleans, Louisiana

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PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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### **Question Presented for Review**

Did the Fifth Circuit err in denying petitioner's argument that his federal firearms-related conviction violated the Second Amendment under plain error review, even after the issuance of recent Second Amendment opinions from this Court that substantially altered this area of law, and considering that there are seven other certiorari petitions pending in this Court on this issue?

## **List of Parties**

The names of the parties are listed in the caption of this case. The Judgment in a Criminal Case was imposed by the Hon. David Counts, United States District Judge for the Western District of Texas, Midland-Odessa Division. The panel of the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, which considered petitioner's appeal and issued an unpublished *per curiam* opinion, consisted of Fifth Circuit Judges James E. Graves, Jr., Don R. Willett, and Cory T. Wilson.

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Opinion Below

The opinion sought to be reviewed was issued on April 2, 2025 by the United States Court of Appeals for the Fifth Circuit sitting in New Orleans, Louisiana, and is included in the Appendix at Tab A.

Statement of Jurisdiction

This is an appeal of petitioner Valente Brito, Jr.’s conviction and 168 months sentence for being a convicted felon in possession of a firearm, arising from the April 9, 2024 Judgment in a Criminal Case entered by the U.S. District Court for the



Western District of Texas, Midland-Odessa Division, which is attached as Appendix Tab B. *See also* Fifth Cir. ROA.24-50321.62-68. The Fifth Circuit affirmed the judgment and sentence, holding that its decisions in *United States v. Diaz*, 116 F. 4<sup>th</sup> 458 (5<sup>th</sup> Cir. 2024), *cert. filed* Feb. 18, 2025 as Sup. Ct. No. 24-6625 (response due by April 25, 2025), and *United States v. Jones*, 88 F.4<sup>th</sup> 571, 573-574 (5<sup>th</sup> Cir. 2023), *cert. denied*, 144 S.Ct. 1081 (2024), foreclosed whether petitioner Brito’s firearms-related conviction violated the Second Amendment on its face and applied to him under the test set forth in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022), which was raised for the first time on appeal. Appendix Tab A, pp. 1-2.

This certiorari petition will be due within 90 days after the Fifth Circuit’s April 2, 2025 opinion, or by July 1, 2025. Sup. Ct. Rule 13.1.

#### Relevant Constitutional Provision and Statute

The constitutional right to bear arms is contained in the Second Amendment of the U.S. Constitution: “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.”

18 U.S.C. § 922(g)(1) provides:

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

### Statement of the Case

Petitioner Valente Brito, Jr. seeks review of the unpublished opinion of the Fifth Circuit, attached as Appendix Tab A, which affirmed the trial court's judgment of conviction and sentence contained in the Judgment in a Criminal Case. Appendix Tab B.

### Statement of Procedural History

The Fifth Circuit affirmed the judgment and sentence in its April 2, 2025 unpublished opinion, attached at Appendix Tab A.

### Question Presented for Review (Restated)

Did the Fifth Circuit err in denying petitioner's argument that his federal firearms-related conviction violated the Second Amendment under plain error review, even after the issuance of recent Second Amendment opinions from this Court that substantially altered this area of law, and considering that there are seven other certiorari petitions pending in this Court on this issue?

### Argument Amplifying Reasons for Granting the Writ

Certiorari should be granted because the Second Amendment issue presented in this case, whether petitioner's firearms-related conviction is barred by the Second Amendment under plain error review, is likely to recur in future criminal prosecutions. It is also being raised in at least seven other certiorari petitions recently filed in this Court, although only one of those seven petitions is based on plain error review, with the other six petitions concerning with preserved Second Amendment challenges. Alternatively, this Court should hold Brito's certiorari petition pending a resolution

of the Second Amendment issues that are also presented in: (1) *Collette v. United States*, Sup. Ct. No. 24-6497 (cert. filed Feb. 3, 2025, response due May 9, 2025); (2) *Diaz v. United States*, Sup. Ct. No. 24-6625 (cert. filed Feb. 18, 2025, response due March 26, 2025); (3) *French v. United States*, Sup. Ct. No. 24-6623 (cert. filed Feb. 18, 2025, response filed April 11, 2025); (4) *Thompson v. United States*, Sup. Ct. No. 24-6693 (cert. filed Feb. 26, 2025, response due May 5, 2025); (5) *Linan v. United States*, Sup. Ct. No. 24-6879 (cert. filed March 24, 2025, waiver of response filed March 31, 2025, distributed for April 17, 2025 conference) (plain error review); (6) *Martinez v. United States*, Sup. Ct. No. 24-6759 (cert. filed March 10, 2025, response filed April 11, 2025); and (7) *Barber v. United States*, Sup. Ct. No. 24-6789 (cert. filed March 15, 2025, response due May 19, 2025). If review is granted and a decision reached in any of those cases, then this Court should grant, vacate and remand this case for further proceedings consistent with the opinion issued in any of those cases.

Discussion of Facts Related to this Ground: Petitioner Valente Brito, Jr. was indicted for possessing a firearm after knowing that he had been convicted of a felony, Fifth Cir. ROA.24-50321.30-31. Brito pleaded guilty without a plea agreement, Fifth Cir. ROA.24-50321.156, ¶ 154, and was sentenced to 168 months imprisonment and a three years supervised release term. Fifth Cir. ROA.24-50321.63, and Appendix Tab B, pp. 2-3.

Petitioner appealed to the Fifth Circuit, arguing that his firearms-related conviction was barred by the Second Amendment, either facially or as applied to him. Since this argument was raised for the first time on appeal, the plain error standard of review had to be met, but the Fifth Circuit has ruled that plain error review cannot be met under these circumstances. *United States v. Jones*, 88 F.4th 571, 572-573 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1081 (2024). The government moved for summary affirmance, and the Fifth Circuit agreed that petitioner's arguments were foreclosed under both *Jones*, *supra*, and *United States v. Diaz*, 116 F. 4<sup>th</sup> 458, 471-472 (5<sup>th</sup> Cir. 2024), *cert. filed* Feb. 18, 2025 as Sup. Ct. No. 24-6625 (response due by April 25, 2025), and affirmed petitioner's conviction and sentence. Appendix Tab A, p. 2.

Petitioner Brito now seeks review in this Court.

Why Certiorari Should be Granted: Certiorari should be granted because this Court's recent Second Amendment decisions have greatly altered the legal standard on whether firearms-related convictions violate the constitutional right to bear arms for self-defense. There are seven other pending certiorari petitions from the Fifth Circuit raising this same issue, with six concerning preserved Second Amendment challenges, and one concerning an unpreserved challenge subject to plain error review. These pending petitions show the importance of clarifying this recurring issue of whether the Second Amendment bars convictions under 18 U.S.C. § 922(g)(1). One of those petitions seeks review of the Fifth Circuit's *Diaz* opinion, which the Fifth

Circuit held was one of the opinions that foreclosed petitioner Brito's challenge that the Second Amendment barred his conviction in the case at bar.

Alternatively, this Court should hold Brito's certiorari petition pending a resolution of the Second Amendment issues that are also presented in these seven certiorari petitions filed in this Court in February and March 2025: (1) *Collette v. United States*, Sup. Ct. No. 24-6497 (cert. filed Feb. 3, 2025, response due May 9, 2025); (2) *Diaz v. United States*, Sup. Ct. No. 24-6625 (cert. filed Feb. 18, 2025, response due March 26, 2025); (3) *French v. United States*, Sup. Ct. No. 24-6623 (cert. filed Feb. 18, 2025, response filed April 11, 2025); (4) *Thompson v. United States*, Sup. Ct. No. 24-6693 (cert. filed Feb. 26, 2025, response due May 5, 2025); (5) *Linan v. United States*, Sup. Ct. No. 24-6879 (cert. filed March 24, 2025, waiver of response filed March 31, 2025, distributed for April 17, 2025 conference) (plain error review); (6) *Martinez v. United States*, Sup. Ct. No. 24-6759 (cert. filed March 10, 2025, response filed April 11, 2025); and (7) *Barber v. United States*, Sup. Ct. No. 24-6789 (cert. filed March 15, 2025, response due May 19, 2025) . If review is granted and a decision reached in any of those cases, then this Court should grant, vacate and remand this case for further proceedings consistent with the case that is granted and decided.

The relevant portion of 18 U.S.C. § 922(g)(1) provides, "It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable by

imprisonment for a term exceeding one year; . . . to . . . possess in or affecting commerce, any firearm or ammunition. . . .” Additionally, the government must prove both that the defendant knew he possessed a firearm, and that he knew he belonged to the relevant category of persons barred from possessing a firearm. *Rehaif v. United States*, 139 S.Ct. 2191, 2194, 2200 (2019).

The Second Amendment to the United States Constitution states, “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.” This Court held in *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S.Ct. 2111, 2122 (U.S. 2022), that the Second Amendment protects an individual’s right to carry a handgun for self-defense outside the home. *Bruen* also enumerated a new standard for courts to follow to determine whether a statute regulating firearms possession violates the Second Amendment:

[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

*Bruen*, 142 S.Ct. 2111, 2129-2130.

This Court’s recent opinions interpreting the Second Amendment have created a “sea change” in determining whether firearms-related convictions violate the constitutional right to bear arms, particularly when self-defense is involved. The Fifth Circuit held that petitioner Brito’s Second Amendment facial challenge to his

conviction was foreclosed by its opinion in *United States v. Diaz*, *supra*, and *United States v. Jones*, *supra*. But if this Court grants certiorari and then reverses or vacates the Fifth Circuit's *Diaz* opinion, then this Court should also grant, vacate and remand the Fifth Circuit's opinion in this petition holding that *Diaz* foreclosed Brito's Second Amendment challenge to his conviction, and remand for further proceedings.

Alternatively, this Court should hold Brito's certiorari petition pending a resolution of whether review will be granted in one of the seven pending certiorari petitions discussed herein. If review is granted in any of those cases, then this Court should grant, vacate, and remand this case for further proceedings consistent with the opinion issued in the case that is granted and decided.

#### Conclusion and Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, petitioner VALENTE BRITO, JR. respectfully prays that this Court grant this petition for a writ of certiorari, set this cause for oral argument and for briefing on the merits, reverse the April 2, 2025 opinion of the Fifth Circuit affirming appellant's conviction and sentence, and render judgment that petitioner's firearms-related conviction is barred by the Second Amendment, either facially or as applied to him.

Alternatively, this Court should hold Brito's certiorari petition pending a resolution of the Second Amendment issues that are also presented in these seven certiorari petitions filed in this Court in February and March 2025: (1) *Collette v. United States*, Sup. Ct. No. 24-6497 (cert. filed Feb. 3, 2025, response due May 9,

2025); (2) *Diaz v. United States*, Sup. Ct. No. 24-6625 (cert. filed Feb. 18, 2025, response due April 25, 2025); (3) *French v. United States*, Sup. Ct. No. 24-6623 (cert. filed Feb. 18, 2025, response filed April 11, 2025); (4) *Thompson v. United States*, Sup. Ct. No. 24-6693 (cert. filed Feb. 26, 2025, response due May 5, 2025); (5) *Linan v. United States*, Sup. Ct. No. 24-6879 (cert. filed March 24, 2025, waiver of response filed March 31, 2025, distributed for April 17, 2025 conference) (plain error review); (6) *Martinez v. United States*, Sup. Ct. No. 24-6759 (cert. filed March 10, 2025, response filed April 11, 2025); and (7) *Barber v. United States*, Sup. Ct. No. 24-6789 (cert. filed March 15, 2025, response due May 19, 2025). If review is granted and a decision reached in any of those cases, then this Court should grant, vacate and remand this case for further proceedings consistent with the case that is granted and decided.

Respectfully submitted,

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