No. 24-968

In the
Supreme Court of the United States

DIONTAI MOORE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF

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The government's brief in opposition confirms the need for this Court's intervention. The government does not meaningfully address the core problem with the decision below—namely, that it affirmed Moore's §922(g)(1) conviction and seven-year sentence without addressing whether the Second Amendment permits sending someone to prison for possessing a firearm after having been convicted of his predicate crimes. The government instead merely notes that three other circuits have used the same faulty logic to pretermit as-applied challenges to §922(g)(1) brought by defendants on supervised release, probation, or parole. BIO.5. But two of those circuits simply followed the deeply flawed reasoning of the Third Circuit in the decision below—reasoning that squarely contravenes this Court's precedent. The fact that the decision below is emblematic of (and has spurred) a common misapplication of the as-applied framework to Second Amendment challenges to §922(g)(1) is a mark in favor of certiorari, not against it.

Indeed, the courts of appeals are all over the map when it comes to the proper methodology for addressing as-applies challenges to §922(g)(1). As the government reluctantly acknowledges, the courts of appeals are split over whether to permit as-applied challenges at all, and—in circuits where such challenges are permitted—what facts to consider. The lower courts desperately need this Court's guidance. And while the government claims that this is a poor vehicle because (it says) Moore's §922(g)(1) conviction would be upheld under the proper analysis, BIO.6-7, that is both wrong and irrelevant, as that issue was

never resolved by the Third Circuit owing to the court's use of his supervised-release status to skirt it. That is both why Moore seeks this Court's review and why his petition is an effective vehicle for addressing the predicate methodological question. The Court should grant certiorari to correct the growing confusion and division over the proper analysis for as-applied Second Amendment challenges to §922(g)(1). At the very least, the Court should summarily reverse with instructions for the Third Circuit to assess the constitutionality of §922(g)(1) as applied to the conduct that actually gave rise to Moore's conviction.

I. The Decision Below Is Egregiously Wrong.

The Third Circuit's decision to affirm Moore's conviction and reject his as-applied challenge based on characteristics not proscribed by 18 U.S.C. §922(g)(1) is indefensible in both methodology and application. The upshot of that approach is to empower the government to defend a conviction against Second Amendment challenge without ever having to defend the constitutionality of the law under which the defendant was convicted. The fundamental error and miscarriage of justice in that (il)logic is palpable and cries out for course correction.

Section 922(g)(1) renders it unlawful for a felon—a person "convicted … of[] a crime punishable by imprisonment for a term exceeding one year"—to possess a firearm. 18 U.S.C. §922(g)(1). So when Moore argued that the government could not punish him under §922(g)(1) consistent with the Second Amendment, the government should have been required to defend his conviction by showing that the prohibition on *that* conduct is consistent with "the

Nation's historical tradition of firearm regulation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). That, in turn, means it needed to identify historical regulations imposing analogous restrictions on firearm possession by individuals with comparable criminal records. *See* Pet.16-17.

But that is not what happened. Rather than put the government to its constitutional burden, the Third Circuit decided that it can sustain a conviction under §922(g)(1) against a Second Amendment challenge so long as *any* potential characteristics of the defendant could supply a valid historical basis for dispossession. App.13. The court thus proceeded to ignore that Moore was charged, convicted, and sentenced to 84 months in prison under §922(g)(1) because of his *felon* status, and sustained that conviction and sentence against Second Amendment attack for a different reason entirely—namely, because Moore was on supervised release at the time of the §922(g)(1) offense. App.6-11. The Third Circuit accordingly affirmed a conviction and seven-year sentence for one crime on the theory that the defendant could constitutionally have been convicted of another.[1]

Remarkably, the government claims that the decision below "does not conflict with any decision of this Court." BIO.4. But its paltry two-and-a-half page

[1] The decision below is particularly problematic because the government succeeded in extending Moore's sentence by another 12 months via a separate conviction *for possessing a firearm while on supervised release*. Pet.19. Had Moore appealed *that* judgment, the question the Third Circuit chose to analyze would have been properly presented. *See Greenlaw v. United States*, 554 U.S. 237, 252-53 (2008). But Moore did not.

substantive response to Moore's petition, *see* BIO.4-7, does not engage with *any* of the (several) cases from this Court cited in the petition that directly reject the Third Circuit's approach, *see* Pet.14-17. Most striking, the government does not bother to address *Williams v. Illinois*, 399 U.S. 235 (1970)—even though *Williams* is the lead argument in the petition. *See* Pet.14-16.

Perhaps that is because there is nothing the government could say. *Williams* makes plain as day that the government cannot defend a conviction by arguing that it could have deprived someone of their liberty for some reason other than the one underlying the conviction. As the Court there explained, the fact that "the legislature could have achieved the same result by some other means" "does not resolve" the question whether the statute that was actually enforced is constitutional (or has been applied constitutionally). 399 U.S. at 238-39. After all, it is black-letter law that "[a]n unconstitutional statute does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so." *People v. Burns*, 79 N.E.3d 159, 165-66 (Ill. 2015). Just so here. The government cannot send Moore to prison for seven years *for violating §922(g)(1)* just because it claims that it could have punished him (albeit not nearly to the same extent) for the *separate* reason that he was on supervised release.

Nothing in *Bruen* or *Rahimi* provides any basis to depart from that long-settled rule in the Second Amendment context. Those decisions require courts to compare the "how and why" of historical regulations *and the challenged law* to determine whether they

"impose a comparable burden" on the arms-bearing right. *Bruen*, 597 U.S. at 29; *United States v. Rahimi*, 602 U.S. 680, 692 (2024). That instruction in no way empowers courts to strike out on their own in search of hypothetical grounds for the loss of Second Amendment rights that are not relevant to the law being challenged—especially in a criminal case where the defendant is challenging not just the loss of Second Amendment rights, but also the deprivation of liberty for exercising them.

The government claims, in conclusory fashion, that the Third Circuit appropriately considered Moore's supervised-release status because as-applied challenges require courts to assess the circumstances surrounding a statute's contested application. BIO.6. But "whether a statute's 'application to a particular person under particular circumstances deprived that person of a constitutional right,'" BIO.6, turns on how *the challenged law* applies to the defendant. A prohibition on felon firearm possession affects Moore because of his *felony* record, not because of any other characteristics of his background. So even under the government's logic, the Third Circuit's decision cannot stand. The only relevant characteristic that should have been addressed was Moore's felon status.

With little to say in defense of the Third Circuit's approach, the government notes that several courts of appeals have employed the same (faulty) reasoning. BIO.5 (citing *United States v. Giglio*, 126 F.4th 1039 (5th Cir. 2025); *United States v. Goins*, 118 F.4th 794 (6th Cir. 2024); *United States v. Gay*, 98 F.4th 843 (7th

Cir. 2024)).[2] But an egregious error does not become more tolerable with repetition. To the contrary, the fact that multiple courts have been led astray in this manner in Second Amendment cases, despite the mountain of precedent from this Court rejecting that approach in every other conceivable context, *see* Pet.14-17, is a clarion call for this Court to provide direction on how to resolve as-applied challenges to §922(g)(1) convictions. *See United States v. Morton*, 123 F.4th 492, 498 n.2 (6th Cir. 2024). The Court should not allow individuals to continue to face lengthy prison sentences for constitutionally dubious convictions under §922(g)(1) on the theory that they could constitutionally have been convicted of a lesser crime that carries a lesser sentence.

II. As The Government Acknowledges, Courts Of Appeals Have Hopelessly Fractured Over How To Address As-Applied Challenges To §922(g)(1).

Given the glaring conflict between the Third Circuit's approach here and this Court's precedent, the Court should, at a minimum, vacate and remand for the Third Circuit to address whether §922(g)(1)—not some hypothetical statute that applies only to those on supervised release—is constitutional, both facially and as applied to Moore based on his felony record. But as the petition explained, and the government agrees, courts are squarely divided on whether defendants can ban bring as-applied Second Amendment challenges to §922(g)(1) *at all*. Pet.22-28.

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[2] *Giglio* and *Goins* both just followed the decision below.

That conflict readily warrants the Court's review, and this is an appropriate case in which to resolve it.

The government forthrightly acknowledges the "disagreement among the courts of appeals regarding the availability of individualized as-applied challenges to Section 922(g)(1)." BIO.4. And rightly so, as the Third, Fifth, and Sixth Circuits allow individuals to bring as-applied challenges to §922(g)(1), Pet.23-26, whereas the Fourth, Eighth, Tenth, and Eleventh Circuits have held that felon dispossession is categorically permissible, Pet.26-28. The Ninth Circuit likewise recently joined the latter ranks, *see United States v. Duarte*, 137 F.4th 743, 761-62 (9th Cir. 2025) (en banc), even though that approach inexplicably diverges from its earlier decision in *United States v. Perez-Garcia*, 96 F.4th 1166, 1182-84 (9th Cir. 2024), where the court (correctly) compared how the challenged statute restricted the defendant's Second Amendment rights to how analogous historical firearm regulations operated.

Contra BIO.4, this is therefore not some "shallow," short-lived methodological disagreement. Courts have long divided on this issue and continue to do so—even though this Court has vacated several judgments from the Eleventh Circuit rejecting defendants' as-applied challenges to §922(g)(1) out-of-hand. *See, e.g.*, *Williams v. United States*, 2025 WL 1603600 (U.S. June 6, 2025); *Dial v. United States*, 2025 WL 1426660 (U.S. May 19, 2025); *Gray v. United States*, 2025 WL 1020352 (U.S. Apr. 7, 2025); *Morrissette v. United States*, 2025 WL 951148 (U.S. Mar. 31, 2025). The government has tried to downplay

the split by alluding to disagreement in the courts that *do* permit as-applied challenges about *which* felonies can justify disarmament consistent with the Second Amendment. *See* BIO 13-14, *Jackson v. United States*, No. 24-6517 (U.S. May 19, 2025). But that has nothing to do with the methodological split Moore asks this Court to review, as *no* application of §922(g)(1) will be held unconstitutional in circuits that have categorically foreclosed as-applied challenges.

In short, there is an open and acknowledged split on the appropriate methodological approach for resolving as-applied challenges to §922(g)(1). And courts and jurists have implored this Court to resolve that split, emphasizing its incredible practical importance. *See Morton*, 123 F.4th at 498 n.2; *United States v. Jackson*, 121 F.4th 656, 660 (8th Cir. 2024) (Stras, J., dissenting from the denial of rehearing en banc). It is high time the Court does so.

III. This Case Is An Appropriate Vehicle To Address This Exceptionally Important Question.

The government does not dispute that the proper analysis of Second Amendment challenges to §922(g)(1) is an exceptionally important issue that affects the rights of millions of Americans. Nor could it. *See* Pet.29-30. Instead, the government claims that this case is a poor vehicle because the Department of Justice "may" in its discretion start removing firearm disabilities under 18 U.S.C. §925(c) for *some* categories of individuals, BIO.4-5, and because (it thinks) Moore's as-applied challenge would fail under the proper framework, BIO.6-7. Far from being

reasons to deny certiorari, both contentions confirm that this case is well-suited for this Court's review.[3]

First, the government's §925(c) argument is a red herring. Section 925(c) allows individuals with felony convictions to apply to the Attorney General, who "may" remove the firearm disability under §922(g)(1) if the applicant establishes to her "satisfaction" that the disability is unwarranted. 18 U.S.C. §925(c). That purely discretionary provision is of no help to individuals who, like Moore, have already been convicted under §922(g)(1). After all, Moore did not appeal to the Third Circuit to get back his Second Amendment rights; he appealed to get back his liberty. It is thus exceedingly cold comfort to him and the many other similarly situated criminal defendants that they may be able to apply for reinstatement of their Second Amendment rights after they serve their lengthy §922(g)(1) sentences.

As for the government's claim that permitting discretionary reinstatement of Second Amendment rights is likely to stem the tide of §922(g)(1) *convictions*, that claim is belied by the government's own arguments. After all, the government contends that "Section 922(g)(1) is constitutional as applied to petitioner even putting aside the fact that he was on supervised release." BIO.6. Yet the felonies underlying Moore's conviction—non-violent drug offenses and an earlier §922(g)(1) conviction—are common §922(g)(1) predicates. *See, e.g.*, *United States*

[3] The government's oblique reference to the severability clause in 18 U.S.C. §928, *see* BIO.6, does not help it either. That is just a dispute about the appropriate scope of relief should a challenge to §922(g)(1) succeed.

v. Peck, 131 F.4th 629, 632 (8th Cir. 2025) ("prior conviction for marijuana possession"); *United States v. Moore*, 2025 WL 711119, at *3 (5th Cir. Mar. 5, 2025) ("possession with intent to distribute"); *United States v. Diaz*, 116 F.4th 458, 467 (5th Cir. 2024) ("car theft, evading arrest, and possessing a firearm as a felon"). In fact, the government previously told this Court that "non-violent drug crimes" are "one of the most common and most important contexts in which the government seeks to enforce Section 922(g)(1)." U.S. Supp. Br. 7, *Garland v. Range*, Nos. 23-374, 23-683, 23-6170, 23-6602, & 23-684 (U.S. June 24, 2024). It strains credulity to suggest that as-applied challenges to §922(g)(1) will subside any time soon. In all events, the notion that this Court should decline to resolve a constitutional dispute that is having widespread real-world impact *right now* because of how the government might choose to exercise its discretion *in the future* violates the bedrock principle that "[r]ights under our system of law and procedure do not rest in the discretionary authority of any officer." *Ex parte Parker*, 131 U.S. 221, 225 (1889).

That leaves the government's (erroneous) argument that Moore's as-applied challenge would fail even under a proper analysis. BIO.6-7. But this Court is a Court of review, not first view, and the Third Circuit did not engage with that argument *at all*, App.14-15—which is the core problem with its decision, and the core reason why this Court should not let it stand. Moore should not be deprived of an appellate forum in which to have his as-applied challenge resolved in an appropriate manner just because the government now insists that it was right about an issue that it persuaded the Third Circuit not

to address. If anything, the government's argument reinforces the virtue of this case as a vehicle for resolving the methodological split: The Court can resolve that split without wading into the ultimate merits question. Pet.30. But in all events, if the government is now keen to defend Moore's conviction under the proper as-applied framework, then at the very least it should be compelled to do just that—on remand.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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