No. 25_____

In the

Supreme Court of the United States

FREDRICK JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

When a criminal defendant in the middle of a direct appeal seeks relief that first becomes available as a result of an intervening decision from this Court, he gets the benefit of the new analytical framework; "the failure to raise the claim in an opening brief reflects not a lack of diligence, but merely a want of clairvoyance." *Joseph v. United States*, 574 U.S. 1038, 1039. (2014) (Kagan, J., concurring in denial of certiorari); *see also Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *United States v. Smithers*, 92 F.4th 237, 247 (4th Cir. 2024). But the United States Court of Appeals for the Sixth Circuit summarily refused to consider Petitioner Fredrick Johnson's as-applied Second Amendment challenge to his convictions, which he raised after his opening brief to that court on the strength of this Court's intervening decision in *United States v. Rahimi*, 602 U.S. 680 (2024), and the Sixth Circuit's application of *Rahimi* in *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024). So the question presented is:

> Must a federal circuit court address the merits of a defendant's Second Amendment as-applied challenge to a firearm-possession charge under *Rahimi* and intervening circuit precedent when those precedents first became available while the defendant's federal appeal was in the pipeline?

RELATED CASES

Both the United States and the State of Ohio prosecuted Mr. Johnson for possessing the same firearms.

Federal Proceedings
(the Subject of this Petition)

Mr. Johnson was convicted for firearm possession in the United States District Court for the Northern District of Ohio in *United States v. Johnson*, No. 1:21-cr-00596-SO (N.D. Ohio June 14, 2023). The United States Court of Appeals for the Sixth Circuit affirmed his convictions in *United States v. Johnson*, No. 23- 3535, 2025 WL 720930 (6th Cir. Mar. 6, 2025), *en banc rev'w denied*, No. 23-3535 (6th Cir. Apr. 8, 2025).

Parallel Ohio Proceedings
(the Subject of a Separate, Concurrent Petition)

Mr. Johnson was also convicted for firearm possession in the Common Pleas Court of Cuyahoga County, Ohio, in *State v. Johnson*, CR-23-677865-A (Ct. C.P. Cuyahoga Cty. June 29, 2023). The Ohio Court of Appeals for the Eighth Appellate District affirmed his convictions in *State v. Johnson*, 239 N.E.3d 475 (Ohio App. 8th Dist. 2024), *en banc rev'w denied*, No. 113034 (Ohio App. 8th Dist. Sept. 27, 2024). The Supreme Court of Ohio denied review in *State v. Johnson*, 250 N.E.3d 122 (Ohio 2025). Mr. Johnson has filed a petition for writ of certiorari to the Supreme Court of Ohio that raises the same issues as this petition from his federal proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Fredrick Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished but available at 2025 WL 720930. The denial of Mr. Johnson's application for en banc review in that court is unpublished.

JURISDICTION

The United States District Court for the Northern District of Ohio had jurisdiction over Mr. Johnson's case under 18 U.S.C. § 3231, which confers jurisdiction over offenses against the laws of the United States. The United States Court of Appeals for the Sixth Circuit had jurisdiction over Mr. Johnson's appeal under 28 U.S.C. § 1291. That court denied Mr. Johnson's application for en banc review on April 8, 2025; this Court has jurisdiction over this timely petition under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Second Amendment to the U.S. Constitution provides, in relevant part, "the right of the people to keep and bear Arms, shall not be infringed."

INTRODUCTION

Mr. Johnson has now been convicted twice for possessing the same firearms—first by the United States, then by the State of Ohio—and on neither occasion was he afforded the opportunity to argue that his convictions fail constitutional scrutiny

under *United States v. Rahimi*, 602 U.S. 680 (2024), and *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024).

This Court's decision in *Rahimi* came after Mr. Johnson filed his opening brief in the Sixth Circuit, so his first chance to invoke the new Second Amendment framework was in his reply brief, which he did. The Sixth Circuit released its decision in *Williams* after he submitted his reply brief but while his appeal was still pending, so his first chance to raise the decision was in a supplemental letter to the court under Fed. R. App. P. 26(j). But the Sixth Circuit declined to address Mr. Johnson's as-applied challenge under *Rahimi* and *Williams* because he had not included the argument in his opening brief, even though Mr. Johnson could not at that point have relied on a framework that did not yet exist. The Sixth Circuit therefore left Mr. Johnson no opportunity—as the United States was required to afford him—to challenge the constitutionality of the firearm-possession statute as applied to him, a non-dangerous citizen.

This Court has long required lower courts to apply its decisions articulating new constitutional rules (like *Rahimi*) to cases in the direct-review pipeline (like Mr. Johnson's). *See Griffith v. Kentucky*, 479 U.S. 314, 322 (1987*); see also Joseph v. United States*, 574 U.S. 1038, 1040 (2014) (Kagan, J., concurring in denial of certiorari.). The Sixth Circuit and the Supreme Court of Ohio both ignored the *Griffith* directive, raising the specter that Mr. Johnson and similarly situated defendants will never have their *Rahimi* day in court.

Indeed, Mr. Johnson is not dangerous and therefore cannot be constitutionally disarmed. His minimal violent criminal history is over a decade old, and his rehabilitation (including mental-health treatment for anxiety and depression) renders him less prone to violence than many gun owners with no criminal record. But no court has given Mr. Johnson the opportunity to invoke his lack of dangerousness to challenge the firearm charges against him under *Rahimi* and *Williams*. The Court should therefore grant certiorari, vacate the judgments below, and remand with instructions to give him that opportunity; alternatively, the Court should grant certiorari and proceed to briefing and oral argument.

STATEMENT OF THE CASE

I. MR. JOHNSON'S FIREARM-POSSESSION CONVICTION

Mr. Johnson is in no fashion a dangerous person or an ongoing violent offender. His past transgressions are largely over a decade old, demonstrate no pattern of violence, and involve no discharge of firearms. Mr. Johnson was nevertheless convicted for firearm possession under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (*See* 6/14/23 Judgment in a Criminal Case, attached as Appendix D.) He appealed his conviction to the United States Court of Appeals for the Sixth Circuit, which affirmed it on March 6, 2025 (*see* 3/6/2025 Opinion and Judgment, attached as Appendix B), and denied en banc consideration on April 8, 2025 (*see* 4/8/25 Order, attached as Appendix A.).

II. THE SIXTH CIRCUIT'S REFUSAL TO CONSIDER INTERVENING CASES

After Mr. Johnson filed his opening brief in the Sixth Circuit but before he filed his reply brief, this Court decided *Rahimi* (June 21, 2024). And after he filed his reply

brief but before oral argument, the Sixth Circuit decided *Williams* (August 23, 2024). The *Rahimi* and *Williams* opinions fundamentally altered the Second Amendment framework for firearm-possession convictions, adding a dangerousness requirement that Mr. Johnson had not previously known to challenge in the trial or appellate court. Mr. Johnson raised an as-applied challenge under *Rahimi* in his reply brief, and he filed a Fed. R. App. P. 28(j) letter bringing the Court's attention to *Williams*. (*See* 10/28/24 letter, attached as Appendix C.) But the Sixth Circuit declined to consider it. (*See* 3/6/2025 Opinion and Judgment, attached as Appendix B, at 9 n.2.)

III. MR. JOHNSON'S PARALLEL STATE APPEAL

The firearm-possession offense underlying Mr. Johnson's federal convictions was also the subject of a state indictment under Ohio Rev. Code §§ 2923.13(A)(2) and (A)(3). Mr. Johnson was convicted by the Ohio Court of Common Pleas for Cuyahoga County and appealed to the Ohio Court of Appeals for the Eighth Appellate District, raising Second Amendment, freedom-to-marry, and sufficiency arguments. The Ohio appellate court affirmed the conviction and denied Mr. Johnson's post-decision petition for en banc review. *See State v. Johnson,* 239 N.E.3d 475 (Ohio App. 8th Dist. 2024), *en banc rev'w denied,* No. 113034 (Ohio App. 8th Dist. Sept. 27, 2024). Mr. Johnson sought discretionary review from the Supreme Court of Ohio, raising an as-applied challenge under *Rahimi* and *Williams*, which were published while his en banc petition was pending in the Ohio appellate court. The Ohio Supreme Court declined to review Mr. Johnson's appeal or address his as-applied challenge.

REASONS FOR GRANTING THE WRIT

Longstanding authority requires lower courts to apply a newly announced constitutional framework to every defendant whose case was in the direct-appeal pipeline when the Court announced it. "Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. And there can be no question that *Rahimi* announced a new constitutional framework. So the Court should grant certiorari, vacate the Sixth Circuit's judgment, and remand with instructions to permit Mr. Johnson to pursue his *Rahimi* challenge. Alternatively, the Court should grant certiorari and proceed to full briefing and decision.

I. THE SIXTH CIRCUIT WRONGLY SHUT DOWN MR. JOHNSON'S *RAHIMI* CHALLENGE.

The Court has long recognized that its cases outlining new constitutional rules apply to all criminal proceedings pending on direct review. *Griffith*, 479 U.S. 314. The Court's function is not to "promulgate new rules" like a legislature but rather decide individual cases and controversies. *Id.* at 322 (citing U.S. Const., Art. III, § 2). The judiciary then applies each new rule "to all similar cases pending on direct review." *Id.* at 323. As Justice Harlan explained, "[i]f we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all." *Williams v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in part and dissenting in part). The Court therefore fulfills its "judicial responsibility by instructing the lower

courts to apply the new rule retroactively to cases not yet final." *Griffith*, 479 U.S. at 323.

Applying newly promulgated rules to cases pending on direct appeal also helps ensure that similarly situated defendants are treated the same. *Ibid.* Otherwise, the Court would be "simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." *Williams*, 401 U.S. at 679 (Harlan, J., concurring in part and dissenting in part).

Circuit courts likewise allow parties to raise issues "when change in precedent makes the previously foreclosed argument available." *Smithers*, 92 F.4th at 247 (citing *Joseph*, 574 U.S. 1038). Every circuit allows parties to submit supplemental or substitute briefs when the Supreme Court "issues a decision that upsets precedent relevant to a pending case and thereby provides an appellant with a new theory or claim." *Joseph* at 1039 (collecting cases).[1]

Here, the Sixth Circuit deprived Mr. Johnson of his right to invoke *Rahimi* and the Sixth Circuit's decision in *Williams* even though Mr. Johnson's case was in the direct-appeal pipeline; the first opportunity Mr. Johnson had to raise an as-applied challenge to his firearm-possession convictions based on these cases was in his reply brief and Fed. R. App. P. 28(j) letter, respectively. Mr. Johnson urged the Court to

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[1] At the time the Court released *Joseph*, the Eleventh Circuit was the only federal court of appeals that did not allow supplemental briefs for intervening Supreme Court precedent. *Joseph*, 574 U.S. at 1039. But the Eleventh Circuit has since updated its procedural rules to accept such filings. *Smithers*, 92 F.4th at 247.

allow him the opportunity to show that he does not fit within the category of dangerous individuals who may be constitutionally disarmed. But that Court denied his request because he had not developed the argument in his opening brief when it would have been impossible to do so.

At the time Mr. Johnson filed his opening brief in the Sixth Circuit, neither *Rahimi* nor *Williams* was on the books. But it is now clear that defendants charged with firearm-possession offenses should have an opportunity to defend against the charges by demonstrating that they pose no "clear threat of physical violence to another." *See Rahimi*, 144 S. Ct. at 1901. That opportunity must be "individualized"—that is, specific to the individual in question. *See Williams*, 113 F.4th at 663.[2] So the Sixth Circuit wrongly deprived Mr. Johnson of the due process right to invoke a brand-new argument that would have disrupted the United States' ability to sustain its conviction against him.

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[2] There is now a circuit split over the availability of as-applied challenges under *Rahimi*. *Compare Pitsilides v. Barr,* 128 F.4th 203 (3d Cir. 2025) (allowing as-applied challenges); *United States v. Betancourt*, 139 F.4th 480 (5th Cir. 2025) (same); *Williams*, 113 F.4th 637 (6th Cir. 2024) (same) *with Zherka v. Bondi,* No. 22-1108-CV, 2025 WL 1618440 (2d Cir. June 9, 2025) (categorically rejecting as-applied challenges); *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024) (same); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024) (same); *United States v. Duarte*, 137 F.4th 743 (9th Cir. 2025) (same); *Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th Cir. 2025) (same); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024). *See also United States v. Gay*, 98 F.4th 843 (7th Cir. 2024) ("We may assume for the sake of argument that there is some room for as-applied challenges[.]"). While the Court may ultimately be called upon to resolve that split, the Court need not weigh in on the split to resolve the simple question posed by this petition.

II. THIS IS AN IMPORTANT ISSUE, AND THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING IT.

It is hard to conceive of a more basic principle in our judicial system than the *stare decisis* effect of this Court's decisions. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) ("*stare decisis* is a foundation stone of the rule of law"). When the Court construes the Constitution, lower courts (federal and state) must follow suit immediately, not just in subsequently filed cases. Mr. Johnson's twin petitions—one here and the other related to the state conviction for possessing the same firearms—provide the Court a perfect vehicle to confirm that its constitutional decisions apply, from the minute they are released, to all proceedings pending before federal and state trial and appellate courts.

Mr. Johnson's parallel proceedings also make him uniquely qualified to pursue the many post-*Rahimi* Second Amendment issues that lower courts still need to tease out—such as what goes into the dangerousness determination and who gets to make it.[3] On remand he can consistently develop the arguments in both state and federal

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[3] Trial and appellate courts still have many post-*Rahimi* questions to answer in addition to the fundamental question whether an as-applied challenge is available. For example, what type of evidence is relevant to prove or disprove a defendant's dangerousness? *See, e.g., United States v. Poe*, No. 24-6014, 2025 WL 1342340, at *2 n.3 (6th Cir. May 8, 2025) (declining to opine on the type of evidence because the defendant had not identified any); *see also Williams*, 113 F.4th at 658 n.12 ("we leave the question of what information is relevant for another day"). Does the date of former offenses fit into the analysis? What about mitigating factors like mental-health treatment or anger management? And what standard of review should appellate courts use to review these as-applied challenges to cases in the pipeline when *Rahimi* was decided? *See, e.g., United States v. Black*, No. 23-1622, 2025 WL 1356614, at *2 (6th Cir. May 9, 2025) (declining to answer whether to review for plain error or not review at all). Moreover, can an intermediate appellate court determine in the first

court, providing both jurisdictions the opportunity to further develop the contours of the post-*Rahimi* landscape.

Applying the *Rahimi* as-applied standard in the Second Amendment context would ensure defendants like Mr. Johnson, whose cases are seismically altered during the appeals process, are provided the opportunity to benefit from newly handed-down Supreme Court decisions. The Court should grant certiorari, vacate the decision below, and remand without deciding the case on the merits to reiterate the applicability of Supreme Court decisions on cases in the direct-review pipeline.

CONCLUSION

The Court should grant certiorari, vacate the lower-court judgments, and remand with instructions to permit Mr. Johnson to pursue his *Rahimi* challenge. Alternatively, the Court should grant certiorari and proceed to full briefing and decision.

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instance that a defendant is dangerous, or must it remand to the trial court to develop a record? Although the Sixth Circuit has held, without much discussion, that a remand is not required "when a defendant's criminal history makes clear that he's dangerous," *Poe*, 2025 WL 1342340, at *3, this conclusion requires appellate courts to engage in factfinding better suited to trial courts. And if a panel of appellate judges is not the best suited to determine whether a defendant is dangerous, who should get to decide, a trial-court judge or a jury?

Respectfully submitted,

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