No. 24-1328

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KESHON DAVEON BAXTER

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

REPLY BRIEF FOR THE PETITIONER

D. JOHN SAUER
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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This case presents the question whether 18 U.S.C. 922(g)(3), the federal statute prohibiting the possession of firearms by habitual users of unlawful drugs, violates the Second Amendment as applied to respondent. In our petition for a writ of certiorari, we asked this Court to hold the petition pending the resolution of *United States* v. *Hemani*, No. 24-1234 (filed June 2, 2025), which also involves an as-applied challenge to Section 922(g)(3). Later developments confirm that this Court should grant review in *Hemani* but render it unnecessary to hold the petition in this case. The Court should therefore deny the petition.

In its reply brief in *Hemani*, the government explained that the question presented had generated a multi-sided circuit conflict: The Seventh Circuit had upheld Section 922(g)(3) in a decision that predated *NYSRPA* v. *Bruen*, 597 U.S. 1 (2022), but the Third,

Fifth, and Eighth Circuits, each applying different tests, had issued decisions since *Bruen* concluding that the statute violates the Second Amendment in many of its applications. See Cert. Reply Br. at 7-8, *Hemani*, *supra* (No. 24-1234). Since then, the Seventh Circuit has rejected the government's contention that its pre-*Bruen* decision upholding Section 922(g)(3) remains good law. See *United States* v. *Seiwert*, No. 23-2553, 2025 WL 2627468, at *4 & n.1 (Sept. 12, 2025). Taking a fresh look at the relevant history, however, the court determined that "historical laws that kept guns out of the hands of the intoxicated and the mentally ill are sufficiently analogous to § 922(g)(3)'s proscription of firearms possession by active and persistent drug users." *Id.* at *12.

Other courts of appeals, too, have issued decisions concerning as-applied challenges to Section 922(g)(3):

- In *United States* v. *VanOchten*, No. 23-1901, 2025 WL 2268042 (Aug. 8, 2025), the Sixth Circuit held that Section 922(g)(3) "is constitutional in its application to dangerous individuals," but left "for another day" questions about how to determine which individuals are "dangerous." *Id.* at *8.
- In *United States* v. *Harrison*, No. 23-6028, 2025 WL 2452293 (Aug. 26, 2025), the Tenth Circuit determined that "historical tradition supports a principle that legislatures may disarm those believed to pose a risk of future danger" but remanded the case to the district court to "inquire into the government's assertion that non-intoxicated marijuana users pose a risk of danger." *Id.* at *26.

- In *Florida Commissioner of Agriculture* v. *Attorney General*, No. 22-13893, 2025 WL 2408432 (Aug. 20, 2025), the Eleventh Circuit held that Section 922(g)(3) violates the Second Amendment "as applied to medical marijuana users." *Id.* at *8.

In short, seven courts of appeals—the Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits—have recently issued decisions concerning as-applied Second Amendment challenges to Section 922(g)(3), and each court has resolved that challenge by applying a somewhat different constitutional test. Those decisions confirm that the question presented recurs frequently, has generated significant disagreement in the courts of appeals, and warrants this Court's review.

Given developments in this case since the filing of the petition for a writ of certiorari, however, this Court no longer need hold the petition pending the resolution of *Hemani*. As we explained in the petition (at 3), the Eighth Circuit vacated petitioner's Section 922(g)(3) conviction and remanded the case to the district court to apply a new Second Amendment test. On remand, after the filing of the petition, the district court applied that test and reinstated the conviction. See 2025 WL 2058888. If the Eighth Circuit affirms that decision, the vacatur of petitioner's original conviction would be harmless. And if the court reverses, the government could, if appropriate, file a new petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.").

This Court should accordingly grant the petition for a writ of certiorari in *Hemani*. The Court should also hold other pending petitions concerning as-applied challenges to Section 922(g)(3). See *United States* v. *Cooper*, No. 24-1247 (filed June 5, 2025); *United States* v. *Daniels*, No. 24-1248 (filed June 5, 2025); *United States* v. *Sam*, No. 24-1249 (filed June 5, 2025). But the Court need not hold the petition in this case.

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The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

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