No. 24-5744

IN THE
Supreme Court of the United States

ANDRE MICHAEL DUBOIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

NICOLE M. KAPLAN
Counsel of Record
FEDERAL DEFENDER PROGRAM, INC.
101 Marietta Street, NW, Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Nicole_Kaplan@FD.org

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The government asks this Court to remand this case in light of *United States v. Rahimi*, 602 U.S. 680 (2024). Memorandum in Opposition at 2. That is an exercise in futility, as the government is well aware. Post-*Rahimi*, the split among the circuits has only hardened. Judges within circuits vehemently disagree. This Court should grant certiorari to resolve the split and restore national harmony in resolution of Second Amendment challenges to the constitutionality of 18 U.S.C. § 922(g)(1).

The split is deep and the confusion and uncertainty widens. The Fourth, Eighth, Tenth and Eleventh Circuits reject any argument that *Rahimi* and *New York State Rifle & Pistol Assn. Inc. v. Bruen*, 597 U.S. 1 (2022) abrogate prior precedent. The Sixth Circuit acknowledges that *Bruen* and *Rahimi* abrogate prior precedent and permits as-applied challenges. The Fifth Circuit also recognizes precedent was abrogated, and permits as-applied challenges, but relied on the "going armed" laws to find historical analogues to defeat such a challenge. The Ninth Circuit also found its precedent to be abrogated and sustained an as-applied challenge to a § 922(g)(1) conviction. But its en banc court may reverse. The Third Circuit's same pre-*Rahimi* opinion is now pending after post-*Rahimi* remand. *See Garland v. Range*, 144 S. Ct. 2706 (2024), argued on remand, No. 21-2835 (3d. Cir. Oct. 9, 2024).

If this Court remands in light of *Rahimi*, the Eleventh Circuit will continue to follow its pre-*Rahimi* and *Bruen* precedent. The court will summarily affirm and Mr. Dubois

will be right back here within the year. *See e.g.; United States v. Pierre*, No. 23-11604, 2024 WL 5055533, at *4 (11th Cir. Dec. 10, 2024) (unpublished) ("*Rozier* binds us because neither *Bruen* nor *Rahimi* can fairly be read to reject, abrogate, or even call into question the portion of *Heller* which we relied on in *Rozier*."); *United States v. Whitaker*, No. 24-10693, 2024 WL 3812277, at *3 (11th Cir. Aug. 14, 2024) (unpublished), petition fir cert. filed, 24-5997 (U.S. Nov. 12, 2024) (same); *United States v. Young*, No. 23-10464, 2024 WL 3466607, at *8 (11th Cir. July 19, 2024) (unpublished), petition for cert. filed, 24-6006 (U.S. Oct. 4, 2024) (plain error review foreclosed by *Rozier*).

The Fourth, Eighth and Tenth Circuits have held the same.

> [W]e hold that neither *Bruen* nor *Rahimi* meets this Court's stringent test for abrogating otherwise-controlling circuit precedent and that our precedent on as-applied challenges thus remains binding. In addition—and in the alternative—we hold that Section 922(g)(1) would survive Second Amendment scrutiny even if we had the authority to decide the issue anew. Having concluded "there is no need for felony-by-felony litigation regarding the constitutionality of" Section 922(g)(1), *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024), we reject appellant Matthew Hunt's as-applied challenge without regard to the specific conviction that established his inability to lawfully possess firearms.

United States v. Hunt, No. 22-4525, 2024 WL 5149611, at *1 (4th Cir. Dec. 18, 2024) (quoting *Jackson*, 110 F.4th at 1125). *See also United States v. Curry*, No. 23-1047, 2024

WL 3219693, at *4, n. 7 (10th Cir. June 28, 2024) (finding that Rahimi does not "indisputably and pellucidly abrogate" prior precedent); *United States v. Langston*, 110 F.4th 408, 419–20 (1st Cir. 2024), *cert. denied*, No. 24-5795, 2024 WL 4805963 (U.S. Nov. 18, 2024) (applying plain error standard to find no abrogation of precedent and denying as applied Second Amendment violation post-*Rahimi*).

But not even all judges in those circuits are in agreement.

> *Jackson II* packs a double whammy. It deprives tens of millions of Americans of their right "to keep and bear Arms" for the rest of their lives, at least while they are in this circuit. U.S. Const. amend. II; *see* Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 *Demography* 1795, 1808 (2017). And it does so without a finding of "a credible threat to the physical safety" of others, *Rahimi*, 144 S. Ct. at 1903, or a way to prove that a dispossessed felon no longer poses a danger, *see United States v. Jackson*, 85 F.4th 468, 478 (8th Cir. 2023) (Stras, J., dissenting from denial of reh'g en banc). There is no Founding-era analogue for such a sweeping and undiscriminating rule.

United States v. Jackson, 121 F.4th 656, 657 (8th Cir. 2024) (Stras, Erickson, Grasz and Kobes, dissenting from denial of rehearing en banc).

In contrast, the Sixth Circuit concluded it must revisit prior precedent after *Bruen*. *United States v. Williams*, 113

F.4th 637, 645 (6th Cir. 2024). The court noted that law-abidingness wasn't an issue in either *District of Columbia v. Heller*, 554 U.S. 570 (2008) or *Bruen*.

> The [Rahimi] Court acknowledged that *Heller* and *Bruen* used the term "responsible" to describe "the class of ordinary citizens who undoubtedly enjoy the Second Amendment right." *Rahimi*, 144 S. Ct. at 1903. But those cases had nothing to say about other citizens. *Id.*

Williams, 113 F.4th at 647. "The law-abiding-citizens-only theory also fails as a matter of history and tradition." *Id*. It fails because the right to bear arms is a preexisting right, declared in the Second Amendment and belonging to "the people," and felons are among the people. *Id*. at 648-49.

The Sixth Circuit conducted the historical analysis required by *Bruen* and concluded:

> The relevant principle from our tradition of firearms regulation is that, when the legislature disarms on a class-wide basis, individuals must have a reasonable opportunity to prove that they don't fit the class-wide generalization. That principle is satisfied whether the official is an executive agent or a court addressing an as-applied challenge.

Id. at 661.

The Fifth Circuit similarly found its prior precedent abrogated. *United States v. Diaz*, 116 F.4th 458, 465 (5th Cir. 2024). And it also rejected outright the government's argument that felons are not among "the people." *Id.* at

466. However, it concluded that Mr. Diaz's as-applied challenge failed, because one of his prior convictions was for theft, punishable by death in colonial times, thus justifying the lesser punishment of permanent disarmament. *Id*. at 469-470. It also relied on the "going armed" laws to justify the lifetime disarmament. *Id*. at 470-71.

This is an important issue with a deep circuit split that demands resolution. Mr. Dubois noted in his petition that over 8,000 § 922(g) cases are prosecuted each year in federal court alone. Cert. Petition at 3. The Seventh Circuit has stayed all of its cases pending resolution of its post-*Rahimi* case, *United States v. Prince*, 23-3155 (7th Cir.) (argued Dec. 11, 2024).[1] At least 39 cases remain pending resolution in *Prince* from the Northern District of Illinois alone.[2]

The Courts of Appeal are looking for guidance from this Court to answer whether § 922(g)(1) is constitutional, whether as-applied challenges can be made, and if so, what the rules of the road for such challenges are. In the meantime, chaos reigns in the lower courts. Judge VanDyke of the Ninth Circuit explains the crisis plainly if harshly and at length.

> [After *Rahimi*], the federal government acquiesced in certiorari in a handful of cases pending before the

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[1] Argument audio recording available at media.ca7.uscourts.gov/sound/external/gw.23-3155.23-3155_12_11_2024.mp3 (last visited December 19, 2024).

[2] *Id*. at 19:28 – 20:10.

> Court and presenting the same question addressed in this case.[2] The Supreme Court should have granted one or more of those cases, and this case illustrates why. After [*Bruen*], perhaps no single Second Amendment issue has divided the lower courts more than the constitutionality of the 18 U.S.C. § 922(g)(1) felon-disarmament rule's application to certain nonviolent felons.
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> The Supreme Court's docket this next term is no doubt full of important issues to decide, and this delay-the-inevitable approach to pressing Second Amendment questions would be just fine if the circuit courts were populated with judges committed to faithfully applying the considerable instruction already provided to us by the Court. But that is clearly not the case.

United States v. Duarte, 108 F.4th 786, 787–88 (9th Cir. 2024) (VanDyke, J., dissenting from grant of rehearing en banc).

CONCLUSION

The Court should end the chaos and grant the petition for a writ of certiorari so that the lower courts and litigants may know the rules of the road for the thousands of "the people" facing prosecution under 18 U.S.C. § 922(g)(1) and similar state statutes every year.

Respectfully Submitted,

NICOLE M. KAPLAN
Counsel of Record
FEDERAL DEFENDER PROGRAM
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Nicole_Kaplan@FD.org

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