No. 25-269

In the Supreme Court of the United States

SELIM ZHERKA,

Petitioner,

v.

PAMELA BONDI, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Just last year, the Government told this Court that the "courts of appeals have reached conflicting results when confronted with as-applied Second Amendment challenges to Section 922(g)(1)," that this split was "deepen[ing]," and that the Court "should . . . grant plenary review now" and resolve the split. Supplemental Brief for the Federal Parties at 3, 6, *Garland v. Range*, No. 23-374 (U.S. June 24, 2024). The circuit conflict has only deepened further since the Government urged the Court to take it up, with the Second Circuit panel below and three other courts of appeals joining the fray. Yet now, suddenly, the Government says the split is "shallow," "narrow," and unimportant, and that the Court should deny review as it has in other recent Second Amendment challenges (including, ironically, the very as-applied challenge to Section 922(g)(1) the Government last year urged the Court to take). BIO.3, 10–11. The Government was right the first time, and this Court should grant the writ.

The Government cannot dispute the existence of the split on the question presented, and its attempt to show that this case does not "implicate" the split is unpersuasive. *Id.* at 3. The Government principally bases that contention on Petitioner's assertion that Section 922(g)(1) is "never valid to begin with" as applied to individuals who pose no threat of violence, Pet.33, which the Government reads as making a claim about *when in an individual's life* disarmament becomes unconstitutional: whether immediately upon his return to society or "decades after he was convicted," BIO.12. But that is not Petitioner's argument;

the argument is that *whatever point in time* a non-violent ex-felon cannot be shown to pose any risk of dangerousness, the application of Section 922(g)(1) to that individual immediately becomes unconstitutional—and forcing him to come, hat in hand, asking the government to restore his Second Amendment rights as a matter of executive grace and discretion is no substitute for a constitutional, as-applied challenge before a neutral Article III court. That is precisely the interpretation of the Second Amendment that three courts of appeals have embraced but that the Second Circuit below, and five other circuits, have rejected.

The real reason for the Government's change of heart over whether the question presented "warrant[s] this Court's review," *id.* at 8, appears to be the existence of its new-and-improved process for seeking the restoration of firearm rights under the long-moribund 18 U.S.C. § 925(c). But while that rights-restoration scheme serves a valuable role in its own place, it is a poor substitute for plenary judicial review in an as-applied Second Amendment challenge. In the place of an actual determination by a neutral, Article III judge whether the Government can satisfy its burden of establishing current dangerousness, Section 925(c) supplies a wholly discretionary decision by a politically appointed law enforcement official whether doling out restored firearm rights is in "the public interest." 18 U.S.C. § 925(c). That falls far short of what our constitutional system of equal justice under the law promises. The current Administration's newly revitalized Section 925(c) process thus most assuredly does not "address[ ] any constitutional concerns about . . . Section 922(g)(1)," BIO.7—even assuming it survives beyond the next three years—and it remains

more important now than ever for this Court to "grant plenary review to resolve Section 922(g)(1)'s constitutionality," Supplemental Brief at 2, *Garland*, *supra*.

ARGUMENT

I. The circuit courts of appeals are closely divided over the question presented, with the Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits, along with the Second Circuit below, holding that non-violent felons may not challenge their lifetime disarmament under Section 922(g)(1) on an as-applied basis, but the Third, Fifth, and Sixth Circuits holding that such an as-applied challenge must be available under the Second Amendment. *See* Pet.7–13. The Government itself acknowledged this "circuit conflict" just last year, and asked this Court to grant plenary review and resolve it, Supplemental Brief at 2–4, *Garland*, *supra*, so it cannot with a straight face deny that the split exists and merits this Court's review. Indeed, while the Government now paints this disagreement between the lower courts as "narrow" and "shallow," last year it noted that the split had "deepened" in the preceding year, *id.*, and since then the decisions of the Fourth, Sixth, and Tenth Circuits, as well as the Second Circuit's decision below, have deepened it still further. None of the Government's arguments against resolving that important and enduring circuit conflict here and now are persuasive.

The Government first argues that "this case does not implicate" the split between the Circuits because Petitioner purportedly contends "only that his disarmament was invalid from the beginning, not that the Second Amendment entitles him to an opportunity to regain his ability to possess a firearm," and no

Court of Appeals "has held that the disarmament of a nonviolent felon under Section 922(g)(1) is never valid to begin with." BIO.3, 12 (quotation marks omitted). But Petitioner's Second Amendment challenge does not turn on *when in a former felon's life* he no longer poses a threat of violence—whether immediately upon his return to society or after several years have granted the greater wisdom that comes with greater age. Rather, Petitioner's argument is that *whenever* the government wishes to strip a person of the "right . . . to . . . bear Arms," U.S. CONST. amend. II, it *at that point* bears the burden of establishing that the person poses a sufficient risk of danger. In some cases, the mere fact of a recent conviction for a sufficiently violent offense may alone satisfy that burden, but the Government must make the showing in one way or another. And if the Government does not affirmatively make such an individualized showing, then its application of the law to that person has violated the Second Amendment, and he must be able to seek judicial relief through an as-applied constitutional challenge. That is *precisely* the interpretation of the Second Amendment that the Third, Fifth, and Sixth Circuits have embraced. *See* Pet.10–13.

The Government also argues that this case does not implicate the acknowledged circuit split because Petitioner "has a history of violence" and thus supposedly "cannot show that his as-applied challenge to Section 922(g)(1) would prevail" even if such a challenge were available. BIO.3, 12. But Petitioner has maintained that he poses no risk of danger at every stage of this proceeding—including in his complaint—and since this case comes on a motion to dismiss, it is those allegations that must be taken as true. That is

why both courts below assumed that Petitioner is not dangerous. *See* Pet.App.11a n.8, 72a–73a. In any event, the point is irrelevant here—and certainly does not show that this petition "does not implicate" the circuit split, BIO.3—since that split is not over *whether Petitioner* poses a threat of dangerousness. The split is over whether the Government must make such a showing to begin with. Having persuaded the lower courts that it need not make any individualized showing of dangerousness—and that Petitioner has no Second-Amendment right to demand such a showing—the Government cannot now be heard to argue "never mind, we probably could have shown that Petitioner is dangerous anyway." Whether Petitioner's as-applied challenge ultimately succeeds on the merits is a question for the lower courts to answer, after applying a constitutionally sound standard; it is not a reason for this Court to deny review altogether.

At the very least, if this Court does harbor doubts about the suitability of this case as a vehicle to resolve the question presented, it should grant certiorari in another case presenting that question, such as the pending petition in *Vincent v. Bondi*, No. 24-1155, and hold this case pending the decision.

II. Review is also warranted because the Second Circuit's decision below conflicts with this Court's precedent in numerous respects. *See* Pet.13–30. Respondent makes only a halfhearted attempt to justify the Second Circuit's conclusion that no as-applied challenge is available, and it does not succeed.

The Government invokes this Court's oft-repeated assumption that "prohibitions on the possession of firearms by felons" likely pass constitutional

muster, BIO.3–4 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)), and surely such prohibitions are constitutional, as applied to many felons. But this Court has never purported to resolve whether Section 922(g)(1)'s blanket disarmament rule is constitutional in *every* application.

Nor does the fact that in early-seventeenth-century common law "[d]eath was the standard penalty for all serious crimes," BIO.4 (quotation marks omitted), show that all felons may today be disarmed for life. As an initial matter, even if true that penalty was not grounded in concerns about firearm misuse, so the Government's greater-includes-the-lesser argument fails at the starting gate. *Cf. United States v. Rahimi*, 602 U.S. 680, 699 (2024) ("[I]f imprisonment was permissible *to respond to the use of guns to threaten the physical safety of others*, then the lesser restriction of temporary disarmament that Section 922(g)(8) provides is also permissible." (emphasis added)). Furthermore, as the panel below acknowledged, by the time of ratification and over the next few decades, "penal reform mobilized in states across the nation" and "often resulted in the passage of laws that imposed imprisonment for crimes that had formerly been capital crimes." Pet.App.31a. Indeed, that is why a slew of States during this period expressly stripped former felons of the right to vote, *see Kanter v. Barr*, 919 F.3d 437, 463 (7th Cir. 2019) (Barrett, J., dissenting)—a measure that would have been not only unnecessary but nonsensical if, as the Government contends, all felons were executed as a matter of course. The Government never explains how permanent disarmament of non-violent felons under Section 922(g)(1) can even conceivably be consistent "with history and tradition,"

BIO.4, when the founding generation expressly chose to strip former felons of the franchise *but not* the right to keep and bear arms.

The Government also highlights a smattering of early-American laws disarming individuals based on "conviction even for certain non-capital crimes." *Id.* at 5. But all the cited laws targeted loyalists who joined, or gave succor to, the hostile British army that occupied American soil during the Revolution. Wartime measures disarming the supporters of a hostile military force during a period of foreign invasion are totally disanalogous to Section 922(g)(1). *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 63 n.26 (2022) (discounting "military dictates" not "designed to align with the Constitution's usual application during times of peace").

Finally, the Government briefly cites the proposal of the Dissent of the Minority from the Pennsylvania Ratifying Convention, which suggested a constitutional amendment expressly prohibiting "disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 598 (Merrill Jensen ed., 1976). But the Government places little weight on this piece of evidence, and for good reason. The relevant language from the Pennsylvania Dissent's proposal never "made its way into the Second Amendment," and the proposal did not even "carr[y] a majority of its convention." *Kanter*, 919 F.3d at 455 (Barrett, J., dissenting). In any event, the best reading of the proposal—and "the one that is more consistent with the Second Amendment's command," *Bruen*, 597 U.S. at 44

n.11—is that its language was designed to allow disarmament of "one group: those who pose a danger to public safety, whether or not they have committed a crime," *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting).

III. In the end, the Government's principal basis for resisting review appears to be the current Administration's reinvigoration of the "administrative process under 18 U.S.C. 925(c) through which convicted felons can regain their ability to possess firearms"—a process which, the Government suggests, now "addresses any constitutional concerns about the breadth and duration of the restriction imposed by Section 922(g)(1)." BIO.3, 7. But as explained in the Petition, the possibility that Petitioner might convince a government functionary to grant a discretionary "restoration" of his Second Amendment rights quite plainly does not "address[ ] any constitutional concerns" with the Government's decision to strip him of the right to keep and bear arms, without any showing of actual dangerousness, in the first place. *Id.* at 7.

While Section 925(c)'s discretionary restoration process is laudable in its place, *see* Pet.32–33, it is no adequate substitute for an as-applied Second Amendment challenge for multiple reasons. To begin, an exfelon seeking the restoration of his Second Amendment rights bears the burden of establishing that he meets the standard for rights restoration, *see* 18 U.S.C. § 925(c)—unlike in a Second Amendment challenge, where "the Government bears the burden of proving the constitutionality of its actions," *Bruen*, 597 U.S. at 24 (quotation omitted); *see* Pet.App.13a–17a. Further, restoration is not a legal entitlement; it

is ultimately a discretionary matter of executive grace—entrusted to the nation's top, politically appointed law-enforcement officer. It is easy to see how institutional and political incentives may make it quite unattractive for the Attorney General to restore an ex-felon's firearm rights. And further still, since Section 925(c) directs the Attorney General to consider whether restoration would "not be contrary to the public interest," the statute does not even focus her discretion exclusively on the constitutionally relevant consideration: current dangerousness. Finally, the fact that the entire process was moribund for over 30 years and began to be reinvigorated only months ago starkly illustrates the politically unstable nature of the process. While the current Administration appears committed to its robust use, the next Administration could eliminate it with a flick of the pen. A discretionary, politically charged restoration process that flits in and out every four years or so simply cannot be said to "address[ ] any constitutional concerns about the breadth and duration of the restriction imposed by Section 922(g)(1)." BIO.7.

The Government does not address any of these obvious objections. It does note that the Attorney General's discretionary determination is subject to limited judicial review, *id.*, but that is no panacea. For courts review the determination only for abuse of discretion, *see* Pet.31—as befits a statutory scheme that entrusts a politically appointed officer to determine whether "it is established to [her] satisfaction" that restoration "would not be contrary to the public interest," 18 U.S.C. § 925(c). At the end of the day, Section 925(c) thus simply does not guarantee a non-violent ex-felon challenging the denial of his right to keep arms that

any neutral officer will *ever* actually determine that the denial is justified by the tradition of disarming those who pose a present risk of violence. That is not what our constitutional traditions promise.

The Government, finally, attempts to make lemonade out of all these lemons. The discretionary rights-restoration scheme, it says, in fact "provides a more workable process for restoring firearms rights than would a court-administered regime of as-applied challenges" because assessing an individual's dangerousness is "a function best performed by the Executive, which, unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation." BIO.7–8 (cleaned up). But the criminal law entrusts courts with determining an individual's dangerousness for multiple purposes—from setting bail to fixing a sentence—and it is unclear why they would suddenly become institutionally ill-equipped for the task when Second Amendment rights are on the line. In any event, the Government is free to use all of the investigative tools with which it is equipped to gather and present evidence of dangerousness *to the court* in defense against an as-applied challenge. The only difference is that the ultimate call is entrusted to a *truly* "neutral" Article III judge, *id.*—not the politically appointed executive official responsible for prosecuting the individual in the first place.

CONCLUSION

The Court should grant the writ.

November 24, 2025 Respectfully submitted,

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