No. 25-372

In the
Supreme Court of the United States

ERIK HARRIS,

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 agrees that the constitutionality of 18 U.S.C. § 922(g)(3) is a question that warrants this Court's review. *See* Memorandum for the United States, *Harris v. United States*, No. 25-371. The question is how that review should proceed. Although the government suggests holding this petition for *United States v. Hemani*, No. 24-1234, Hemani's unusual facts, potential vehicle problems, and posture underscore why the Court would benefit from granting Harris' petition as well and resolving both cases this Term. Proceeding with *Hemani* alone would require the Court to construe § 922(g)(3) for the first time under atypical factual circumstances, risking an incomplete opinion that may not provide the lower courts with much-needed guidance in cases more like this one. Harris supplies what *Hemani* may not: a clean vehicle presenting both vagueness and Second Amendment challenges to the application of § 922(g)(3) to one of the millions of ordinary Americans who engage in responsible marijuana use—which is legal to some extent in most states—and own firearms.

The Court should grant this petition and schedule it for argument this Term, which will ensure that the Court can give full consideration to the constitutional and statutory issues that § 922(g)(3) presents, and can provide fulsome guidance to lower courts and citizens alike.

I. Granting this petition would ensure that the Court can address the serious vagueness problems with 18 U.S.C. § 922(g)(3).

This case cleanly presents an independently certiorari-worthy question that the government did not present in its petition in *Hemani*: whether 18 U.S.C. § 922(g)(3) is void for vagueness.

Before considering whether § 922(g)(3) can be applied consistent with the Second Amendment, this Court must first construe the statutory text prohibiting anyone "who is an unlawful user of or addicted to any controlled substance" from possessing a firearm. 18 U.S.C. § 922(g)(3). Indeed, the government's brief in *Hemani* begins with its construction of the statutory text. *See* Brief of Petitioner (Hemani Br.), *United States v. Hemani*, No. 24-1234, at 3, 24-25. Yet given the unusual procedural posture of *Hemani*—an appeal resolved without an opinion through the government's motion for summary affirmance of the order dismissing the indictment—the court below did not have any opportunity to consider any vagueness issues there.

Here, by contrast, there is no question that vagueness was both pressed and passed upon below. Granting this case with *Hemani* thus would ensure that there is no risk of any obstacle preventing this Court from addressing the vagueness issue alongside the Second Amendment issue that the government has asked the Court to resolve.

II. Granting this petition would ensure that the Court can address the full range of Second Amendment concerns that 18 U.S.C. § 922(g)(3) presents.

Hemani presents a single question: "Whether 18 U.S.C. 922(g)(3), the federal statute that prohibits the possession of firearms by a person who 'is an unlawful user of or addicted to any controlled substance,' violates the Second Amendment as applied to respondent." Respondent, in turn, is a highly unusual defendant: The government contends that he has ties to terrorist causes, used cocaine, promethazine and marijuana, engaged in drug dealing, and possessed quantities of marijuana exceeding those associated with personal use. Indeed, in its merits brief, the government highlights a variety of extra-offense allegations, including alleged ties to Iranian terrorist causes and drug dealing: Hemani "is a drug dealer who admittedly used illegal drugs routinely before his arrest.… [H]e used and sold promethazine and … found that substance addictive." Hemani Br. 7. The government also highlights facts underlying the § 922(g)(3) charge, specifically that Hemani admitted to law enforcement using cocaine and marijuana and that law enforcement seized more than a user amount of marijuana (60 grams) and 4.7 grams of cocaine. *Id.*

If this Court sticks with resolving the as-applied question that the government's petition in *Hemani* presents, then the highly unusual facts of the case may lead the Court to issue only a narrow opinion that does not give lower courts and citizens the guidance that they desperately need. *See, generally,* Brief of Amici Curiae Second Amendment Foundation et al.,

in Support of Petitioner Erik Harris, No. 25-372 at 9-11 (noting various contexts in which § 922(g)(3) may be highly susceptible to an as-applied challenge).

This case, by contrast, presents a fact pattern that is much more common—and especially troubling: applying § 922(g)(3) to disarm the millions of adult Americans who engage in responsible use of marijuana, a substance that is legal to some extent in most states. And it arises in the context of an individual who was not intoxicated when he purchased or carried the firearms or was arrested, who is not accused of having engaged in any other criminal activity, and who responsibly brought to law enforcement's attention the fact that his firearm may have been stolen. This case thus much more squarely implicates the circuit conflict that has formed around whether Congress can suspend the fundamental constitutional right to own firearms of ordinary Americans who are regular or intermittent marijuana users. Granting this case would ensure that this Court can address the § 922(g)(3) issues that matter most.

To be sure, it is relatively unusual for this Court to grant two petitions that present the same legal issue on different facts. But it is certainly not unprecedented. In *Riley v. California*, for instance, this Court granted two petitions in cases raising a common question—over the government's opposition. 573 U.S. 373 (2014). In *Wurie,* the government was petitioner; in *Riley*, a criminal defendant was petitioner. The government, as here, agreed that the question presented warranted this Court's review, but it argued that its chosen case, which involved a "flip phone," presented the better vehicle. *See* Reply Brief

for Petitioner, *United States v. Wurie*, No. 13-212, 2013 WL 6115808, *3, *5 n.1 (Nov. 20, 2013). The petitioner in *Riley*, by contrast, countered that a grant in *both* cases would ensure a ruling that would give sufficient guidance for future cases since *Riley* involved a "smart phone." *See* Reply Brief for Petitioner, *Riley v. California*, No. 13-132, 2013 WL 5666548, *4-*5 (Oct. 16, 2013). The Court followed that advice and granted both petitions, thus ensuring that it could address both of the common fact patterns in which the constitutional question arose.

As in *Riley*, this Court would benefit from having this case to consider alongside *Hemani*, as that would ensure that the Court can both appreciate and address the even more pronounced constitutional concerns that arise in cases with facts more like the common facts presented here. Holding this case for *Hemani*, by contrast, risks both leaving unresolved whether § 922(g)(3) is unconstitutionally vague and producing a decision shaped by extreme facts rather than the ordinary cases now confronting the lower courts.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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