NO. 25-5220

In the Supreme Court of the United States

JONATHAN R. HOWARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. THIS COURT SHOULD GRANT THE INSTANT PETITION FOR HEMANI V. UNITED STATES.

If this Court is not inclined to award a plenary grant of certiorari in this case, addressing the constitutionality of 18 U.S.C. §922(g)(1), it should at a minimum retain the case until the outcome of *Hemani v. United States*, 24-1234, which will decide the constitutionality of 18 U.S.C. §922(g)(3), a closely related statute. *Hemani* may provide guidance on one or

more dispositive issues in the case in this case, including:

1. The significance, if any, of the fact that drug use was lawful at founding; *see* Petition for Certiorari in *Hemani v. United States*, 24-1234, 2025 WL 1593262, at *14-15 (Filed June 2, 2025)("*Hemani* Petition");

2. The significance of a firearm restriction's ***permanence*** in assessing its constitutionality under the Second Amendment; *see Hemani* Petition, at *2 (stressing that §922(g)(3) effects only "a limited, inherently temporary restriction-one which the individual can remove at any time simply by ceasing his unlawful drug use.");

3. The kinds of laws that may be understood as comparable to founding era surety laws; *see id.* at *12;

4. The significance of laws at founding that imposed punishment other than disarmament for conduct committed by the defendant; *see id.* at *14;

5. The limits of Congressional authority to disarm people Congress believes to be dangerous; *see id.* at *17-18 (arguing that drug traffickers may be disarmed because Congress reasonably believed them to be dangerous);

6. Whether "a law with a historical analogue could still amount to an unconstitutional infringement of the right if (among other reasons) it … burdens the right to bear arms more severely than necessary to serve a valid purpose, or broadly negates the right."; *id*. at *19 (answering the question affirmatively);

7. Which party must show that a citizen may be disarmed; *id*. at **20-22 (arguing that Congress may shift the burden to citizens to prove non-dangerousness through mechanisms such as 18 U.S.C. §925(c).

These are critical questions for the resolution of the instant case. First, Petitioner's only prior felony convictions are for possession of methamphetamine and THC with intent to distribute those substances. *See* (Record in the Court of Appeals, at 219-225). Accordingly, the significance of drug crimes for a defendant's Second Amendment rights, and the choice of the founding generation to leave drugs entirely unregulated by the criminal law, conceded by the government in *Hemani*, *see Hemani* Petition, at **14-15, lie at the center of the case.

Second, §922(g)(1), unlike §922(g)(3), effects a presumptively permanent ban on firearm possession. If §922(g)(3) is upheld primarily because it is temporary – an argument already pressed by the government in *Hemani*, *see Hemani* Petition, at *2 -- this will tend to show that the government has a more difficult task in defending a §922(g)(1) conviction.

Third, the government's Petition in Hemani attempts to analogize §922(g)(3) to founding era surety laws. *See Hemani* Petition, at *12. A similar rationale has been mustered in defense of §922(g)(1), *see United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024). This Court's decision will likely shed important light on the strength or limits of this analogy.

Fourth, in the *Hemani* Petition, the government seeks to defend §922(g)(3) on the ground that drunkards could be civilly committed at founding. *See Hemani* Petition, at *14. It reasons that if drunkards (and, by analogy, drug users) can be constitutionally confined to a hospital, they can be disarmed. *See id*. Similarly, it and the Fifth Circuit have argued that if felons could be executed at founding, they can be disarmed. *See Diaz*, 116 F.4th at 467-468. This

Court in *Hemani* may thus decide when this manner of "greater includes the lesser" argument may be used to justify disarmament.

Fifth, the government in *Hemani* has argued that legislatures may disarm those people they reasonably regard as dangerous. *See Hemani* Petition, at **-17-18. Similar reasoning has been used to defend §922(g)(1) as applied to people with prior drug trafficking convictions. *See United States v. Williams*, 113 F.4th 637, 663 (6th Cir. 2024). This Court's decision could thus affirm or undermine a justification for Petitioner's conviction.

Sixth, the government in *Hemani* has, to its credit, affirmatively argued that firearms restrictions may come into conflict with the Second Amendment if they simply affect too many people. *See Hemani* Petition, at *19. Section 922(g)(1) is a massive disarmament measure, so if this Court passes on that question, it will provide significant guidance on the treatment of challenges to that statute.

Seventh, the government contends that measures like §922(g)(3) may be affirmed because persons affected can seek to prove their suitability for firearms' possession through §925(c). *See Hemani* Petition, at **20-22. This raises the question of when, if at all, a citizen may be compelled to prove that he is factually eligible for Second Amendment rights. If this Court rejects this argument, it will hold significant implications for the government's argument here, that defendants must affirmatively raise as applied challenges, *see* (Brief in Opposition, at 3-4)("BIO"), and that the government need not allege or prove disqualifying conditions like parole in order to defeat a Second Amendment claim, *see* (BIO, at 5).

"Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation," this Court may grant certiorari, vacate the judgment below, and remand for redetermination in light of the intervening event. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). As shown above, the opinion in *Hemani* may be one such development, for many reasons. This Court should hold the instant Petition until that case is decided.

II. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO RESOLVE THE PROFOUND UNCERTAINTY, INCLUDING AN ACKNOWLEDGED CIRCUIT SPLIT, REGARDING THE CONSTITUTIONALITY OF 18 U.S.C. §922(G)(1) UNDER THE SECOND AMENDMENT.

Alternatively, this Court should grant certiorari in this case and decide whether and under what circumstances §922(g)(1) comports with the Second Amendment. There is a circuit split on a momentous question of constitutional law, namely whether and under what circumstances felons retain their Second Amendment rights. ***Compare*** *United States v. Duarte*, 137 F.4th 743, 747 (9th Cir. May 9, 2025)(en banc)(citing *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024); *United States v. Jackson*, 110

F.4th 1120, 1129 (8th Cir. 2024); *Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th Cir. 2025); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, 145 S.Ct. 1041 (2025)), ***with*** *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024); *United States v. Williams*, 113 F.4th 637, 661–62 (6th Cir. 2024); *Range v. Att'y Gen.*, 124 F.4th 218, 222–23 (3d Cir. 2024)(en banc); ***see also*** *Duarte*, 137 F.4th at 747, 761 (acknowledging split); Supplemental Brief for the Federal Parties in Nos. 23-374, *Garland v. Range* 23-683, at 2 (June 24, 2024), *available at https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf , last visited October 31, 2025* (same); Brief in Opposition ("BIO"), at 6)(acknowledging "some disagreement").

Deep or "shallow," (BIO, at 4), a circuit split on this question is intolerable: the law should make clear precisely when the exercise of an enumerated constitutional right becomes a felony. And as a federal constitutional guarantee, the Second Amendment does not depend on a citizen's state of residence. Uncertainty in this area tends to chill the exercise of fundamental rights, may lure citizens into committing felonies when they misjudge the scope of their constitutional protections, and may discourage lawful prosecutions. The circuit split here, moreover, is reasonably balanced, and entrenched by *en banc* decisions on either side, *see Duarte*, 137 F.4th at 762; *Range v. Att'y Gen.*, 124 F.4th at 222–23, a fact that demonstrates both that it merits discretionary review and that it will not resolve without intervention of this Court. And as noted above, this split has been

repeatedly acknowledged both by the judiciary and the government.

The government characterizes the split as "shallow," referencing its Brief in Opposition in *Vincent v. Bondi*, No. 24-1155 (Aug. 11, 2025) ("*Vincent* BIO"). Based on a review of that document, it appears that the government means to say that only one circuit has actually invalidated §922(g)(1) as applied to a particular felon. *See Vincent* BIO, at 13 (citing *Range*). One circuit would be intolerable, given the significance of the issue, but there are at least two more courts, *see Diaz*, 116 F.4th at 471; *Williams*, 113 F.4th at 661–62, that recognize a constitutional right to bear arms for some felons, though they have not yet clearly identified which ones. As argued above, this state of the law either chills the exercise of fundamental rights, lures people into the commission of felonies, deters lawful prosecutions, or possibly all three. Further, a district court in the Seventh Circuit recently dismissed a 18 U.S.C. §922(g)(1) indictment on Second Amendment grounds because the government failed to muster valid historical analogues to the statute. *See United States v. Glass*, No. 24-CR-30124-SMY, ___F.Supp. 3d___, 2025 WL 2771011, at *5 (S.D. Ill. Sept. 29, 2025). Its analysis did not depend on the nature of the defendant's prior convictions, making it, essentially, a facial invalidation of the statute. *See id.*

The government heavily presses the current administration's use of 18 U.S.C. §925(c), which permits felons to apply for relief from firearm disabilities. *See* (*Vincent* BIO, at 8-11). As the government acknowledges, *see* (*Vincent* BIO, at 8), Congress forbids the use of any money by the ATF process applications

under this provision, *see United States v. Bean*, 537 U.S. 71, 74 (2002). The current administration has circumvented this ban by processing applications through other agencies. *See* 90 Fed.Reg. 13,080 (Mar. 20, 2025). This process demonstrates in stark terms the difference between a constitutional guarantee and an act of grace provided by an unstable political process. Should the current administration change its mind, lose power, or encounter resistance from Congress, this process to restore a fundamental right will evaporate.

The standards used by the Attorney General under §925(c), moreover, are not necessarily the same as those announced by this Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Under §925(c), a felon bears an affirmative burden to show, based on his "record and reputation[,] … that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. §925(c). This manner of interest balancing is foresworn by *Bruen*, 597 U.S. at 19, which burdens the government, not the citizen, with the duty to produce evidence of a historical analogue to the disability, *see id.* at 24.

In any case, §925(c) does not likely override state firearms disabilities. An applicant who receives a favorable decision (of whom there are now just ten, *see Vincent* BIO, at 8-9), from the Attorney General may avoid federal prosecution, but continues to take his or her chances with statutes like Tex. Penal Code §46.04(a), which makes a felony of firearm possession for five years after the expiration of sentence.

Finally, the government points to purported vehicle problems in the current case. These include Petitioner's prior conviction for drug possession with intent to distribute and his parole status. *See* BIO, at 5-6. These arguments are addressed in pages 12-13 of the Petition; the Brief in Opposition contains no response. They also include the contention of the court of appeals that Petitioner failed to preserve an as-applied challenge. *See* BIO, at 3-4. Again, the BIO fails to address the argument in the Petition. In district court, Petitioner argued, consistent with *Bruen*, that the government had the burden to demonstrate a historical analogue to §922(g)(1) considered valid by the founding generation. The government was free at that point to identify any historical gun restriction analogous to §922(g)(1) as applied to the defendant. Instead, it identified only two analogues – the English Bill of Rights, and failed proposals in the constitutional ratifying conventions – that did not distinguish among §922(g)(1) defendants. By invoking the government's burden under *Bruen* to justifying the disarmament, the defendant effectively challenged the constitutionality of the statute in light of any facts about the defendant the government wished to identify. It is not Petitioner's fault that the government chose to address only the bare fact of his prior felony conviction.

Respectfully submitted,

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