No. 25-5417

IN THE

# Supreme Court of the United States

SHALIK RASHEEM MITCHELL,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## PETITIONER'S REPLY BRIEF


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## PETITIONER'S REPLY BRIEF

The lifetime prohibition on firearm possession by people with prior felony convictions, 18 U.S.C. § 922(g)(1), is an unconstitutional infringement on Second Amendment rights. Petitioner Shalik Mitchell urges this Court to resolve a clear dispute among the circuits over whether § 922(g)(1) is subject to as-applied challenges. The government's response should not dissuade the Court from stepping in now. The government concedes that "there is some disagreement among the courts of appeals regarding whether Section 922(g)(1) is susceptible to individualized as-applied challenges." Opp. 2. But contrary to the government's assertion, the split is not "shallow." Nine circuits have addressed the question, including two en banc decisions reaching opposite conclusions. The issue is ready for this Court's review.

Nor should the Court be deterred by the government's invocation of its new guidance under 18 U.S.C. § 925(c), a program through which convicted felons can petition the government to regain the right to possess firearms. Opp. 2 (citing Opp. 8–11, *Vincent v. Bondi*, No. 24-1115). The § 925(c) proposal does not conduct the kind of historical inquiry required by *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). And the possibility of obtaining relief from a statutory prohibition by a government official—akin to prosecutorial discretion—does not render the statute constitutional. The § 925(c) guidance cannot resolve the underlying question.

Finally, neither the nature of Petitioner's prior convictions nor the fact that he was on supervised release when he committed this offense preclude review. The Fourth Circuit's per se ban on as-applied challenges prevented him from raising his claim *at all*; any specific analysis of his claim is best left for remand. And the

government cannot argue that Mr. Mitchell's actual conviction is valid on the basis that he could have been convicted on some other theory that the government never pursued and which would have only amounted to a supervised release violation in the first place. The Court should grant this petition.

## I. The government admits that the circuits are divided, but it wrongly portrays the split as "shallow."

Mr. Mitchell concurs with the government that there is "disagreement" among the circuits over whether to permit as-applied challenges to § 922(g)(1). Opp. 2. But the government calls the division "shallow." That claim is simply wrong. The six-to-three split is deeply entrenched and offers no hope of resolution without this Court's intervention. Pet. 6–14.

Moreover, the split is not limited to the yes/no question of whether as-applied challenges to § 922(g)(1) are available in any case, which is certainly sufficient to merit this Court's review. Courts that allow as-applied challenges differ on the contours of their tests. They do generally have in common that the challenger's prior convictions must establish that the person "poses a physical danger to others." *Range v. Att'y Gen.*, 124 F.4th 218, 230 (3d Cir. 2024) (en banc); *see also United States v. Williams*, 113 F.4th 637, 659 (6th Cir. 2024); *United States v. Diaz*, 116 F.4th 458, 470 (5th Cir. 2024). But they do not align on what facts to consider in making that determination. And millions of people with non-violent felony convictions are not even able to get out of the starting gate, depending on where they live and want to exercise their Second Amendment rights.

No additional percolation is necessary; the varying positions are well-developed. This Court should weigh in on whether as-applied challenges are avail-

able as well as the proper methodology for assessing such a claim. *See United States v. Jackson*, 121 F.4th 656, 660 (8th Cir. 2024) (Stras, J., dissenting from the denial of rehearing en banc) (noting need for this Court's intervention).

## II. The government's reliance on its new § 925(c) program as a substitute for constitutional analysis of § 922(g)(1) is misplaced.

The government suggests that "any disagreement among the circuits may evaporate given the Department of Justice's recent reestablishment of the administrative process under 18 U.S.C. 925(c) for granting relief from federal firearms disabilities." Opp. 2. This argument is wrong and misguided.

First, it is the § 925(c) program itself that "may evaporate." Since 1992, Congress has barred the ATF from spending any money to act on § 925(c) applications. *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007). The Attorney General's new guidance attempts to get around this ban by rescinding the delegation to ATF to handle the claims. But Congress could easily re-enact its prohibition by extending its ban to the Justice Department as a whole, or to any other Executive Branch agency. This Court should not be swayed by the government's promise that the problem will go away if the Court puts it in the government's hands. And even if the new § 925(c) program survives, it does nothing for the thousands of Americans, like Mr. Mitchell, who have already been prosecuted and incarcerated under § 922(g)(1).

More importantly, even a robust § 925(c) mechanism is not a substitute for as-applied challenges to § 922(g)(1). The Attorney General is not required to conduct *Bruen*'s historical analysis, and § 925(c) would put the burden on the applicant, rather than the government. It is also difficult to square a § 925(c) backstop with

*Bruen* itself, which invalidated a statutory scheme giving state officials discretion to grant licenses based on the applicant's "suitability." *Bruen*, 597 U.S. at 13.

The central flaw in the government's argument, however, is the notion that the executive alone can determine whether and in what circumstances the application of a federal statute is permissible. This Court has already rejected the premise that constitutional rights are not dependent on governmental discretion. *See, e.g.*, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). As the Court has stated, "[w]e would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010).

The government's § 925(c) guidance makes just such a promise, and it is equally insufficient to protect constitutional rights. The Attorney General reserves to herself the discretion to allow an applicant to possess firearms if she is convinced to her satisfaction that the applicant's "record and reputation" shows that the person will not be a danger to the public. 18 U.S.C. § 925(c). The proposed guidelines for the program largely list situations where the applicant is presumptively *disqualified* from relief, and would easily allow the government to reject applicants with non-violent convictions. *See Application for Relief From Disabilities Imposed by Federal Laws With Respect to the Acquisition, Receipt, Transfer, Shipment, Transportation, or Possession of Firearms*, 90 Fed. Reg. 34,394, 34,402 (July 22, 2025). And, of course, the government's regulations could become even more stringent under a future administration.

The government's proposed § 925(c) scheme does not undertake the historical analysis required by *Bruen*, and it would allow the disarmament of at least some

people with non-violent prior convictions. The Third, Fifth, and Sixth Circuits have held that some of those people maintain their Second Amendment rights, and they do not have to ask the government's permission before exercising those rights. Section 925(c)'s process for restoring Second Amendment rights is not a substitute for this Court's definitive ruling on when they may be taken away. The government's proposed guidance should not prevent the Court from granting the petition.

## III. Neither Mr. Mitchell's status on supervised release nor the nature of his prior convictions should preclude review or relief.

Finally, the government argues that Mr. Mitchell's case is a poor vehicle for this Court's review because of the nature of his prior convictions and the fact that he was on supervised release at the time of this offense. Opp. 2–3. The concerns the government raises are instead best left for remand, since the Fourth Circuit did not reach those issues due to its total bar on as-applied challenges. This Court should clarify when such claims are available, and then remand the case to the court of appeals for application of the Court's methodology.

On the merits, the government's arguments are not persuasive. Mr. Mitchell's prior convictions for malicious wounding, use of a firearm during the commission of a felony, and possessing a firearm as a felon do not show that Mr. Mitchell would currently present a danger to the public. His malicious wounding and use-of-a-firearm convictions are a decade old, and occurred when Mr. Mitchell was just 20 years old. There is no evidence that Mr. Mitchell poses a danger to society today. Thus, the government would not be able to show that permanent disarmament for someone with Mr. Mitchell's criminal history comports with the Nation's historical tradition of firearm regulation. *See* Pet. 14–24.

The government's invocation of Mr. Mitchell's supervised release status fares no better. Mr. Mitchell was convicted of this offense because of his prior felony convictions, not because he was still on supervised release. It is *that* application of § 922(g)(1) that he is challenging. Mr. Mitchell's supervised release status is not relevant to either the "why" or the "how" of the way § 922(g)(1) infringes on his Second Amendment rights. Supervised release is simply a red herring. And again, the Fourth Circuit did not address that issue because as-applied challenges are not viable in that circuit for *any* defendant. If this Court believes that supervised release is part of the analysis for some defendants, it can say so and then remand the case to address that fact in the first instance.

There are no impediments to this Court's review, and that review cannot wait any longer. The Court should grant the petition.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted. In the alternative, the case should be held until the Court rules on similar cases presenting the issues raised here and considered at that time. Counsel notes in particular *United States v. Hemani*, No. 24-1234 (*cert. granted* Oct. 20, 2025). That case concerns 18 U.S.C. § 922(g)(3) instead of (g)(1), but the Court's decision in *Hemani* could have a bearing on whether or when people deemed "dangerous" may be disarmed consistent with the Second Amendment.

Respectfully submitted,

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