

In the Supreme Court of the United States

JOSE ANTONIO HERNANDEZ, *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 PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
I. The courts of appeals are deeply divided over the scope of a fundamental constitutional right.	3
II. The Court should decide this critically important question now despite the Attorney General’s recent revival of a discretionary avenue for restoring gun rights.	10
III. The government’s vehicle objections are baseless.	14
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases

<i>Curtis v. United States</i> , 511 U.S. 485 (1994)	15
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	4
<i>Garland v. Range</i> , 144 S. Ct. 2706 (2024).....	8
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008)	15
<i>Jackson v. United States</i> , 144 S. Ct. 2710 (2024).....	8
<i>Logan v. United States</i> , 552 U.S. 23 (2007).....	11
<i>NYSRPA v. Bruen</i> , 597 U.S. 1 (2022)	3, 13
<i>Pitsilides v. Barr</i> , 128 F.4th 203 (3d Cir. 2025)	7
<i>Range v. Attorney General</i> , 124 F.4th 218 (3d Cir. 2024) (en banc)	3, 5, 6, 7, 9
<i>See United States v. Jackson</i> , 121 F.4th 656 (8th Cir. 2024).....	1
<i>TikTok v. Garland</i> , 604 U.S. 56 (2025).....	8
<i>United States v. Bean</i> , 537 U.S. 71 (2002)	12
<i>United States v. Cole</i> , No. 24-10877, 2025 WL 339894 (11th Cir. Jan. 30, 2025)	4

<i>United States v. Connelly</i> , 117 F.4th 269 (5th Cir. 2024)	6
<i>United States v. Diaz</i> , 116 F.4th 458 (5th Cir. 2024)	3, 5, 6
<i>United States v. Duarte</i> , 108 F.4th 786 (9th Cir. 2024)	2, 9
<i>United States v. Duarte</i> , 137 F.4th 743 (9th Cir. 2025) (en banc)	4, 5, 6
<i>United States v. Eichman</i> , 496 U.S. 310 (1990)	8
<i>United States v. Grace</i> , 461 U.S. 171 (1983)	8
<i>United States v. Hemani</i> , No. 24-1234 (U.S.)	9
<i>United States v. Hunt</i> , 123 F.4th 697 (4th Cir. 2024)	3, 4, 6
<i>United States v. Jackson</i> , 110 F.4th 1120 (8th Cir. 2024)	4, 6, 9
<i>United States v. Moore</i> , 111 F.4th 266 (3d Cir. 2024)	8
<i>United States v. Patino</i> , 758 F. Supp. 3d 664 (W.D. Tex. 2024)	9
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024)	8, 13
<i>United States v. Williams</i> , 113 F.4th 637 (6th Cir. 2024)	3, 5, 6, 7
<i>United States v. Willis</i> , 563 F.3d 168 (5th Cir. 2009)	15

<i>Vincent v. Bondi</i> , 127 F.4th 1263 (10th Cir. 2025).....	4, 9
<i>Vincent v. Garland</i> , 144 S. Ct. 2708 (2024).....	9
<i>Williams v. Illinois</i> , 399 U.S. 235 (1970).....	8
Statutes	
18 U.S.C. § 925(c)	10
Other Authorities	
<i>Granting of Relief; Federal Firearms Privileges</i> , 90 Fed. Reg. 17,835 (Apr. 29, 2025).....	11
S. Rep. 102-353 (1992).....	14
U.S. SENT. COMM’N, Quick Facts 18 U.S.C. § 922(g) Firearms Offenses (2024)	10
<i>Withdrawing the Attorney General’s Delegation of Authority</i> , 90 Fed. Reg. 13,080 (Mar. 20, 2025).....	11

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INTRODUCTION

The government cannot dispute that the question presented—whether the federal felon-in-possession statute violates the Second Amendment—is “exceptionally important.” *See United States v. Jackson*, 121 F.4th 656, 660 (8th Cir. 2024) (Stras, J., dissenting from denial of rehearing en banc). The government also concedes that the courts of appeals are divided over how to analyze constitutional challenges to the statute. After all, “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.” *United States v.*

Duarte, 108 F.4th 786, 787 (9th Cir. 2024) (VanDyke, J., dissenting from grant of rehearing en banc). And the government musters no defense of the Fifth Circuit’s decision below, which conflicts with this Court’s precedent and demotes the Second Amendment to a second-class right. *See* Pet. 27–31.

Still, the government asks this Court to kick the can down the road. But the government dramatically understates the severity of the circuit split, which has deepened and is firmly entrenched. The government also misplaces reliance on the recently revived administrative process for restoring firearm rights. That process was unavailable to Hernandez—as well as countless Americans prosecuted under § 922(g)(1)—and cannot cure the statute’s constitutional defects. And the government’s vehicle objections are unfounded. This is an ideal case to decide whether § 922(g)(1) is constitutional as applied to nonviolent offenders like Hernandez.

Delaying review perpetuates the current state of disarray in the lower courts while a fundamental right hangs in the balance. And the need for certainty is especially urgent because § 922(g)(1) is one of the most commonly charged federal crimes and challenges to the statute are congesting the lower courts’ dockets. This Court should answer this critically important question now.

ARGUMENT

I. The courts of appeals are deeply divided over the scope of a fundamental constitutional right.

The government concedes that the courts of appeals are split but deems the disagreement “shallow.” BIO 2. Not so. The courts of appeals are deeply divided over how to analyze Second Amendment challenges to § 922(g)(1). The split will not go away and requires this Court’s intervention.

1. The courts of appeals are hopelessly fractured over a fundamental issue: whether § 922(g)(1) is vulnerable to as-applied Second Amendment challenges. *See* Pet. 15–25. The Third, Fifth, and Sixth Circuits all recognize that the statute may be unconstitutional as applied to individuals convicted of certain offenses under the text-and-history test laid out in *NYSRPA v. Bruen*, 597 U.S. 1 (2022). *See Range v. Attorney General*, 124 F.4th 218, 232 (3d Cir. 2024) (en banc); *United States v. Diaz*, 116 F.4th 458, 470 n.4 (5th Cir. 2024); *United States v. Williams*, 113 F.4th 637, 657, 661 (6th Cir. 2024). In other words, “[s]imply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny.” *Diaz*, 116 F.4th at 469. By contrast, the Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have categorically upheld § 922(g)(1), no matter the underlying crime. *See United States v. Hunt*, 123 F.4th 697, 700 (4th Cir. 2024); *United*

States v. Jackson, 110 F.4th 1120, 1125 (8th Cir. 2024); *United States v. Duarte*, 137 F.4th 743 (9th Cir. 2025) (en banc), *pet. for writ of cert. filed*, No. 25-425 (U.S. Oct. 6, 2025); *Vincent v. Bondi*, 127 F.4th 1263, 1266 (10th Cir. 2025); *United States v. Cole*, No. 24-10877, 2025 WL 339894, at *4 (11th Cir. Jan. 30, 2025) (per curiam).

And the courts of appeals are divided over important underlying issues relevant to the Second Amendment analysis. *See* Pet. 22–24.

First, the courts disagree about how much weight to give this Court’s statements in *District of Columbia v. Heller* that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons” and that such laws are “presumptively lawful.” 554 U.S. 570, 626, 627 n.26 (2008). The Tenth and Eleventh Circuits have foregone any historical analysis based on pre-*Bruen* circuit precedent that, in turn, relied on *Heller*. *Vincent*, 127 F.4th at 1265–66; *Cole*, 2025 WL 339894, at *4. The Fourth Circuit also held that it was bound by pre-*Bruen* precedent relying on *Heller*. *Hunt*, 123 F.4th at 700, 703–04. The Eighth and Ninth Circuits have conducted a historical analysis to either “support[]” or “confirm[]” *Heller*’s statements. *Jackson*, 110 F.4th at 1125; *Duarte*, 137 F.4th at 752. By contrast, the Third, Fifth, and Sixth Circuits have held that *Heller*’s statements are dicta because this Court did not provide any historical justifications

for felon-in-possession laws, so these courts conducted an independent historical inquiry. *Range*, 124 F.4th at 228–29 & n.8; *Diaz*, 116 F.4th at 466; *Williams*, 113 F.4th at 643–44, 648.

Second, the courts that have undertaken a historical analysis diverge in how they interpret the government’s proposed historical analogues. For example, the Fifth and Ninth Circuits have each relied on capital punishment and permanent estate forfeiture to support § 922(g)(1). *Diaz*, 116 F.4th at 467–71; *Duarte*, 137 F.4th at 756–62. But the Third Circuit has rejected those analogues. *Range*, 124 F.4th at 231. And although it acknowledged that the question was “unsettled,” the Sixth Circuit identified a pitfall of relying on capital punishment: “Felons ... don’t lose other rights guaranteed in the Bill of Rights even though an offender who committed the same act in 1790 would have faced capital punishment.” *Williams*, 113 F.4th at 658. The courts also disagree about the tradition to be gleaned from historical laws prohibiting religious minorities, Native Americans, Blacks, and loyalists from possessing guns. The Fourth, Sixth, Eighth, and Ninth Circuits have interpreted these historical laws as supporting a broad tradition allowing a legislature to

disarm any group it deems dangerous.¹ *Hunt*, 123 F.4th at 707–08; *Williams*, 113 F.4th at 657; *Jackson*, 110 F.4th at 1127–28; *Duarte*, 137 F.4th at 761. By contrast, the Third and Fifth Circuits have interpreted these laws as supporting a far narrower tradition: disarming political traitors or potential insurrectionists who pose a threat of armed rebellion. *Range*, 124 F.4th at 229–30; *United States v. Connelly*, 117 F.4th 269, 277–78 (5th Cir. 2024).

Third, the courts that permit as-applied challenges disagree about how to conduct the analysis. The Fifth Circuit first held that an as-applied challenge turns on whether a defendant’s underlying conviction was subject to “serious and permanent punishment” at the founding. *Diaz*, 116 F.4th at 470 & n.4. And when conducting that analysis, courts may consider only convictions punishable by more than a year in prison—other conduct is “not relevant.” *Id.* at 467. In the Sixth Circuit, however, an as-applied challenge turns on

¹ And these circuits disagree about the scope of this tradition. The Sixth Circuit found that history requires an opportunity for “individuals [to] demonstrate that their particular possession of a weapon posed no danger to peace.” *Williams*, 113 F.4th at 657. But the Fourth, Eighth, and Ninth Circuits determined that “[n]ot all persons disarmed under [these] historical precedents ... were violent or dangerous persons,” so “there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons.” *Jackson*, 110 F.4th at 1128; see *Hunt*, 123 F.4th at 707; *Duarte*, 137 F.4th at 760–61.

whether someone can show that they are “not dangerous.” *Williams*, 113 F.4th at 657. And a court evaluating dangerousness “may consider a defendant’s entire criminal record—not just the specific felony underlying his § 922(g)(1) conviction.” *Id.* at 659–60. The Third Circuit has adopted yet another standard, holding that § 922(g)(1) is unconstitutional as applied to someone “who did not “pose[] a physical danger to others.” *Range*, 124 F.4th at 232. Although the court emphasized that its decision was “narrow,” *id.*, the court’s reasoning “rejects all historical support for disarming non-violent felons,” *id.* at 294 (Shwartz, J., dissenting). And the Third Circuit allows courts to consider not only an individual’s “entire criminal history,” but also “post-conviction conduct.” *Pitsilides v. Barr*, 128 F.4th 203, 212 (3d Cir. 2025).

And the government does not meaningfully address the deepening analytical fracture illustrated by the decision below—that the Fifth Circuit affirmed Hernandez’s § 922(g)(1) conviction without addressing whether the Second Amendment permits imprisonment and disarmament based on Hernandez’s predicate *convictions*. Instead, it affirmed because Hernandez was on supervised release. Pet. 14–15, 2a. The government merely notes that three other circuits are in agreement. BIO 3. But the Fifth Circuit simply joins two of those circuits in the deeply flawed

reasoning of the Third Circuit. *See* BIO 3; *United States v. Moore*, 111 F.4th 266, 272 (3d Cir. 2024).

The government fails to engage with any of this Court’s cases that directly reject upholding the constitutionality of a statute based on conduct outside of what the challenged statute regulates. Pet. 33–34; *see, e.g., TikTok v. Garland*, 604 U.S. 56, 71–72 (2025); *United States v. Eichman*, 496 U.S. 310, 313 n.1, 316 n.5 (1990); *United States v. Grace*, 461 U.S. 171, 183–84 (1983); *Williams v. Illinois*, 399 U.S. 235, 238–40 (1970).

In short, the fractures among the courts of appeals at every stage of the Second Amendment analysis are far from shallow.

2. The government suggests that the Court’s recent denial of plenary review in several § 922(g)(1) cases when faced with a similar split supports denying review again. BIO 2. Just the opposite. The deepening division since this Court denied review shows that this entrenched split will not go away without this Court’s intervention.

Although this Court has not granted plenary review in a § 922(g)(1) case, the Court issued GVRs in several cases “for further consideration in light of” *United States v. Rahimi*, 602 U.S. 680 (2024). *See Garland v. Range*, 144 S. Ct. 2706 (2024); *Jackson v. United States*, 144 S. Ct. 2710 (2024); *Vincent v. Garland*, 144 S. Ct.

2708 (2024). But *Rahimi* did not resolve the split. None of those courts altered their pre-*Rahimi* decisions—which reached drastically divergent results—based on *Rahimi*. See *Vincent*, 127 F.4th at 1264 (“*Rahimi* doesn’t undermine the panel’s earlier reasoning or result” that § 922(g)(1) is constitutional in all applications based on pre-*Rahimi*, pre-*Bruen* precedent); *Jackson*, 110 F.4th at 1122 (“*Rahimi* does not change our conclusion” that history supports § 922(g)(1) in every application); *Range*, 124 F.4th at 232 (again holding that § 922(g)(1) is unconstitutional as applied to a nonviolent individual after considering *Rahimi*).

Indeed, “[n]othing in the Supreme Court’s recent *Rahimi* decision controls or even provides much new guidance” for analyzing Second Amendment challenges to § 922(g)(1). *Duarte*, 108 F.4th at 787 (VanDyke, J., dissenting from grant of rehearing en banc). “While *Rahimi* likely issued to clarify the confusion left by *Bruen*, lower courts have remained confused.” *United States v. Patino*, 758 F. Supp. 3d 664, 669 (W.D. Tex. 2024).

Now the Court has granted review in *United States v. Hemani*, No. 24-1234 (U.S.), to answer the question of whether 18 U.S.C. § 922(g)(3) violates the Second Amendment as applied to a marijuana user. But *Hemani* will not resolve the ultimate question Hernandez asks. Although this Court’s measured approach may

have been warranted to allow further percolation following *Rahimi*, the Court should grant review now to resolve the intractable split over the constitutionality of a statute used to prosecute thousands more individuals than § 922(g)(3).²

II. The Court should decide this critically important question now despite the Attorney General’s recent revival of a discretionary avenue for restoring gun rights.

The government suggests that this circuit split may “evaporate” because of a recently reestablished administrative process for restoring firearm rights. BIO 2. Under 18 U.S.C. § 925(c), an individual who is prohibited from possessing firearms may have his or her firearm rights restored “if it is established to [the Attorney General’s] satisfaction that the circumstances regarding the disability, and the applicant’s record and reputation, are such 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.” But this relief provision is

² Of the 7,419 convictions under 18 U.S.C. § 922(g) in fiscal year 2024, 90.4% were under 18 U.S.C. § 922(g)(1). *See* U.S. SENT. COMM’N, Quick Facts 18 U.S.C. § 922(g) Firearms Offenses (2024), available at <https://www.ussc.gov/research/quick-facts/section-922g-firearms#:~:text=Population%20Snapshot,handout%20or%20learn%20more%20below>.

irrelevant to thousands of individuals—including Hernandez—who could not take advantage of it to restore their right to keep and bear arms before this change in policy. And § 925(c) cannot cure the constitutional concerns with § 922(g)(1).

1. Section 925(c) is irrelevant here because it was unavailable to Hernandez. Beginning in 1992—decades before any of Hernandez’s underlying convictions—§ 925(c) was “rendered inoperative” because Congress prohibited using appropriated funds to investigate or act on relief applications. *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007). Only recently has the Attorney General reestablished the process and begun granting relief from federal firearm disabilities. See *Withdrawing the Attorney General’s Delegation of Authority*, 90 Fed. Reg. 13,080 (Mar. 20, 2025) (explaining that the Department of Justice “anticipates future actions, including rulemaking consistent with applicable law, to give full effect to 18 U.S.C. 925(c)”; *Granting of Relief; Federal Firearms Privileges*, 90 Fed. Reg. 17,835 (Apr. 29, 2025) (granting 10 individuals relief under § 925(c)).

In other words, Hernandez could not have used § 925(c) to restore his firearm rights. Neither could other individuals—perhaps numbering in the thousands—whose Second Amendment challenges to § 922(g)(1) are winding their way through the lower

courts. Even if the relief provision has some impact on the Second Amendment analysis moving forward, the current circuit split affects countless § 922(g)(1) convictions and warrants this Court’s review.

2. Section 925(c) will not, as the government suggests, “address[] any constitutional concerns about the breadth and duration of the restriction imposed by Section 922(g)(1).”³ BIO 9, *Vincent v. Bondi*, No. 24-1155 (Aug. 11, 2025). In fact, the relief provision has features that this Court has held are inconsistent with the Second Amendment.

Section 925(c) grants the Attorney General “broad discretion” to grant or deny relief—“even when the statutory prerequisites are satisfied”—that is reviewable only under an arbitrary and capricious standard. *United States v. Bean*, 537 U.S. 71, 75–77 & n.2 (2002). In that way, the statute mirrors New York’s “may issue” licensing law, which gave authorities “discretion to deny concealed-

³ The government claims that “Congress has addressed [constitutional] concerns through 18 U.S.C. § 925(c).” BIO 8, *Vincent, supra* (No. 24-1155). But Congress could not have intended the statute to address constitutional concerns with federal firearm prohibitions because Congress had no concerns about the Second Amendment when it enacted the first version of § 925(c) alongside the modern felon-in-possession statute in 1968. *See* Pet. 6–8.

carry licenses even when the applicant satisfies the statutory criteria,” subject only to arbitrary-and-capricious review. *See Bruen*, 597 U.S. at 14. This Court held that the New York law was inconsistent with the Second Amendment. *Id.* at 71. So too is a regime that would allow Congress to pass a sweeping law disarming millions of Americans and then gives the Attorney General broad and essentially unreviewable discretion to determine who among them may recover their fundamental right to keep and bear arms.

And § 925(c) incorporates a “dangerousness” standard that this Court rejected in *Rahimi*. There, the government argued that Congress may disarm individuals who are not “responsible.” Gov’t Br. 27, *United States v. Rahimi*, No. 22-915 (U.S. Aug. 14, 2023). And according to the government, “a person is not ‘responsible’ if his possession of a firearm would pose a danger of harm to himself or others.” *Id.* In other words, the government used “‘responsible’ as a placeholder for dangerous.” Tr. of Oral Arg. 10–12, *United States v. Rahimi*, No. 22-915 (U.S. Nov. 7, 2023). But this Court unanimously rejected that theory. *Rahimi*, 602 U.S. at 701–02; *id.* at 772–73 (Thomas, J., dissenting). The Court explained that “responsible” is a “vague term” and that it is “unclear what such a rule would entail.” *Id.* at 701 (maj. op.). And by deeming the term “responsible”

vague, the Court necessarily rejected the government’s proposed definition: dangerous. Congress expressed a similar concern when it defunded § 925(c), explaining that determining whether someone is dangerous is a “subjective task.” S. Rep. 102-353 (1992). After *Rahimi*, dangerousness is not the touchstone for deciding who can and cannot possess a firearm.

This Court needs to determine, first, whether there is a historical tradition of disarming nonviolent felons— notwithstanding § 925(c). If there is no such tradition, then an administrative process that gives the executive branch nearly unbridled discretion to restore firearm rights based on a vague and subjective standard cannot salvage the statute’s constitutional defects.

III. The government’s vehicle objections are baseless.

The government’s vehicle objections ring hollow. Its reasons for arguing that Hernandez’s as-applied challenge would fail only reinforce the need for this Court to resolve the question presented. Neither Hernandez’s supervised release on a separate case, nor

uncharged conduct, nor his prior conviction for § 922(g)(1),⁴ BIO 3, fall within *Bruen* and *Rahimi*'s analytical framework for testing whether the government can show an analogous tradition of firearms dispossession under § 922(g)(1). What the government argues is a vehicle problem is actually a merits argument. The government cannot dispute that if this Court grants review, it will reach the question presented and resolve the intractable conflict in the courts of appeals. This case presents a clean vehicle for deciding the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

⁴ Whether Hernandez could have challenged his possession of a firearm as the basis for revoking his term of supervised release is a separate question that was not presented to the Fifth Circuit. *See Greenlaw v. United States*, 554 U.S. 237, 252–53 (2008). Nor could he have collaterally challenged his previous § 922(g)(1) conviction on direct appeal of the revocation of his term of supervised release. *See Curtis v. United States*, 511 U.S. 485, 487 (1994); *United States v. Willis*, 563 F.3d 168, 170 (5th Cir. 2009).

16

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