No. 25-5510

IN THE SUPREME COURT OF THE UNITED STATES

MONTE BARRY,
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

ELISA A. LONG
Federal Public Defender

RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender
Counsel of Record

FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF PENNSYLVANIA
1001 Liberty Avenue Suite 1500
Pittsburgh, PA 15222
(412) 644-6565
renee_pietropaolo@fd.org

TABLE OF CONTENTS

Table of Authorities iii

Reply Brief

I. The nascent § 925(c) program does not affect either the split or the merits. 3

II. The Decision Below Is Egregiously Wrong, and this Court's intervention is needed. 6

Conclusion 8

TABLE OF AUTHORITIES

CASES:

Ex parte Parker,
131 U.S. 221 (1889) 4

Forsyth Cnty. v. Nationalist Movement,
505 U.S. 123 (1992) 5

N.Y. State Rifle & Pistol Ass'n v. Bruen,
597 U.S. 1 (2022) 2, 4, 7

United States v. Bean,
537 U.S. 71 (2002) 5

United States v. Bost,
No. 24-1719 (3d Cir., Oct. 31, 2025) 2

United States v. Gay,
98 F.4th 843 (7th Cir. 2024) 7

United States v. Giglio,
126 F.4th 1039 (5th Cir. 2025) 7

United States v. Goins,
118 F.4th 794 (6th Cir. 2024) 7

United States v. Moore,
111 F.4th 266 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 2849 (June 30, 2025) 7

United States v. Morton,
123 F.4th 492 (6th Cir. 2024) 8

United States v. Neal,
715 F. Supp. 3d 1085 (N.D. Ill. 2024) 2

United States v. Prince,
700 F. Supp. 3d 663 (N.D. Ill 2023) 2

United States v. Quailes,
126 F.4th 215 (3d Cir. 2025), *cert. denied*, 2025 WL 2823870 (Oct. 06, 2025) 7

United States v. Stevens,
559 U.S. 460 (2010) 5

United States v. Williams,
___ F. Supp. 3d ___, 2025 WL 2969670 (S.D. Ill. 2025) 2

Williams v. Att'y Gen'l,
No. 24-1091 (3d Cir., Oct. 31, 2025) 2

STATUTES AND CONSTITUTIONAL PROVISIONS:

18 U.S.C. § 922(g)(1) 1, 2, 3, 4, 6, 7, 8

18 U.S.C. § 925(c) 2, 3, 4, 5, 6

U.S. Const. amend I 4

U.S. Const. amend. II 1, 2, 5, 6, 7, 8

OTHER:

Andrew Willinger, *DOJ's Proposed Gun Restoration Program Raises Automation Questions while Mirroring Felon-in-Possession Standard*, Duke Center for Firearms Law (Apr. 9, 2025) 5

REPLY BRIEF

The government's brief in opposition confirms the need for this Court's intervention. The government does not meaningfully address the core problem with the decision below: that the court affirmed Barry's § 922(g)(1) conviction and sentence without addressing whether the Second Amendment permits sending someone to prison for possessing a firearm after being convicted of his predicate crimes. The government instead merely observes that three other circuits have used the same faulty logic to pretermit as-applied challenges to § 922(g)(1) brought by defendants on supervised release, probation, or parole. BIO at 2-3. But two of those circuits simply followed the deeply flawed reasoning of the Third Circuit in the decision below—reasoning that squarely contravenes this Court's precedent. The fact that the decision below is emblematic of (and has spurred) a common misapplication of the as-applied framework to Second Amendment challenges to § 922(g)(1) is a mark in favor of *certiorari*, not against it.

Indeed, the courts of appeals are all over the map when it comes to the proper methodology for addressing as-applied challenges to § 922(g)(1). As the government reluctantly acknowledges, the courts of appeals are split over whether to permit as-applied challenges at all, and—in circuits where such challenges are permitted—what facts to consider.[1] The lower courts desperately need this Court's guidance.

[1] Indeed, the Third Circuit recently *sua sponte* ordered rehearing *en banc* in two appeals to consider "whether, when evaluating Second Amendment as-applied challenges to criminal conviction(s) that serve as a basis for a charge under 18 U.S.C. § 922(g)(1), courts may consider evidence beyond defendants' predicate convictions, including, for example, other criminal convictions or conduct post-

Notably, the government does not dispute that Barry's case presents an effective vehicle to address these important questions. *See* Pet. 19-20. *See also* BIO at 1 (acknowledging that Barry preserved facial and as-applied Second Amendment challenges to 18 U.S.C. § 922(g)(1)).[2]

The government's only real argument against review is that the Department of Justice "recently revitalized an administrative process under 18 U.S.C. [§] 925(c) through which convicted felons can regain their ability to possess firearms." BIO at 2 (incorporating by reference Brief in Opposition, *Vincent v. Bondi*, No. 24-1155 at 3 (Aug. 11, 2025)). But even assuming the government can successfully revive an agency program that Congress has deliberately killed every year since 1992, it makes no effort to show a historical analogue for its new scheme, as *Bruen* requires. It also ignores that *Bruen* struck down a regime giving government officials broad discretion to decide whether individual applicants are suitable gun owners—exactly what § 925(c) contemplates. And more broadly, the possibility of discretionary relief from a government functionary does not save an otherwise unconstitutional law. In short,

---

dating the predicate conviction." *United States v. Bost*, No. 24-1719 (3d Cir., Oct. 31, 2025); *Williams v. Att'y Gen'l*, No. 24-1091 (3d Cir., Oct. 31, 2025).

[2] The government observes that there is as yet no circuit court opinion deeming § 922(g)(1)'s lifetime disarmament of felons facially unconstitutional. BIO at 1-2. But several district courts have so held and some of those cases are pending on appeal. *See, e.g., United States v. Williams*, ___ F. Supp. 3d ___, 2025 WL 2969670, at *5 (S.D. Ill. 2025); *United States v. Neal*, 715 F. Supp. 3d 1085 (N.D. Ill. 2024), *appeal filed*, No. 24-1220; *United States v. Prince,* 700 F. Supp. 3d 663 (N.D. Ill 2023), *appeal filed*, No. 23-3155 (holding that § 922(g)(1)'s permanent divestiture of the right to keep and bear arms lies beyond the historical tradition that delimits the outer bounds of the right to keep and bear arms). This Court may elect to hold Barry's petition pending final resolution of one of those cases.

nothing about § 925(c) either changes the merits analysis or obviates the circuit split. Review is warranted.

I. The nascent § 925(c) program does not affect either the split or the merits.

The government acknowledges the open "disagreement in the courts of appeals" about whether 18 U.S.C. § 922(g)(1) is susceptible to as-applied challenges but minimizes as "shallow," BIO at 2, a disagreement it described in the wake of *Rahimi* as "unlikely to resolve itself without [this Court's] intervention." *See, e.g.*, Supplemental Brief for the Federal Parties, *Jackson v. United States*, Nos. 23-374, 23-683, 23-6170, 23-6602, 23-6842 (June 24, 2024). The government now suggests that the split in the circuits regarding whether 18 U.S.C. § 922(g)(1) is susceptible to as-applied challenges—and, in circuits where such challenges are permitted, what facts may be considered—may simply disappear now that it has revived the Department of Justice's administrative process under 18 U.S.C. § 925(c) for seeking discretionary-relief from § 922(g)(1)'s lifetime disarmament. This argument lacks merit.

First, § 925(c)'s discretionary-relief program was not operative between 1992 until 2025 (and may not be meaningfully available to ordinary citizens even now). Barry was charged by indictment in December 2018, long before DOJ's attempted revival. The *possibility* of a future administrative remedy provides no relief for those like Barry who have been indicted and convicted under Section 922(g)(1).

Regardless, an application under Section 925(c) has no bearing on whether § 922(g)(1) is constitutional as applied to Barry, nor would it prevent prosecution under the same statute.

Under *Bruen*, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 19 (2022). Thus, to show that § 925(c) has any bearing on this petition, the government would have to show historical support—a "well-established and representative historical analogue," *Bruen*, 597 U.S. at 30—for the combination of § 922(g)(1) and § 925(c): A blanket, lifetime ban on gun possession for anyone convicted of any felony, limited only by the possibility of discretionary relief from a government official. Yet it makes no effort to do so. The government's silence on this score is all the more striking because *Bruen* itself invalidated a regime that "grant[ed] licensing officials discretion to deny [firearms] licenses based on a perceived lack of need or suitability." *Id*. at 13. Since the government has not tried to show that it could carry its burden under *Bruen* even with a revived § 925(c) program, that program's existence does not affect the merits of Barry's case.

A statute that bars a person from exercising a core constitutional right does not become permissible simply because the government might, in its discretion, grant an exception. This Court has long emphasized that "[r]ights under our system of law and procedure do not rest in the discretionary authority of any officer." *Ex parte Parker*, 131 U.S. 221, 225 (1889). For example, in the First Amendment context,

"broad licensing discretion [by] a government official" is a vice, not a virtue. *E.g., Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (prior restraints subject to such discretion are invalid). And the Second Amendment, no less than the First, "protects against the Government; it does not leave us at the mercy of noblesse oblige. We 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). That principle applies fully here. Under § 925(c), the Attorney General "*may*" lift a firearms ban "if it is established *to [her] 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*." 18 U.S.C. § 925(c) (emphasis added). This language confers "broad discretion" to grant or deny relief—"even when the statutory prerequisites are satisfied"—reviewable only under an arbitrary-and-capricious standard. *United States v. Bean*, 537 U.S. 71, 75-77 & n.2 (2002). And by incorporating concepts as nebulous as a person's "reputation" and "the public interest" (as distinct from "dangerous[ness]"), the statute practically invites selective and inconsistent application.[3]

[3] *See, e.g.,* Andrew Willinger, *DOJ's Proposed Gun Restoration Program Raises Automation Questions while Mirroring Felon-in-Possession Standard*, Duke Center for Firearms Law (Apr. 9, 2025) (reporting that the Pardon Attorney was fired for questioning whether actor Mel Gibson should have his firearm rights restored despite his conviction for domestic battery), https://tinyurl.com/cmv8xdef; *Granting of Relief; Federal Firearms Privileges*, 90 Fed. Reg. 17,835 (Apr. 29, 2025) (granting relief to Gibson and others with only boilerplate explanation).

In short, if the Second Amendment bars lifetime firearms bans for people with felony convictions, then nothing about the fledgling § 925(c) process cures the constitutional problem. And the government does not even try to show that its proposed scheme has any historical analogue that might avoid the constitutional defect in the first place. Section 925(c) is thus a red herring.

II. The Decision Below Is Egregiously Wrong, and this Court's intervention is needed.

The government defends the lower court's application of § 922(g)(1) to Barry by pointing to a fact that has nothing to do with any element of § 922(g)(1): that Barry was on parole. BIO at 2. That only highlights the problem with the court's methodology.

The Third Circuit's decision to affirm Barry's conviction and reject his as-applied challenge based on characteristics not proscribed by 18 U.S.C. § 922(g)(1) is indefensible in both methodology and application. The upshot of that approach is to empower the government to defend a conviction against Second Amendment challenge without ever having to defend the constitutionality of the law under which the defendant was convicted. The fundamental error and miscarriage of justice in that (il)logic is palpable and cries out for course correction.

Section 922(g)(1) renders it unlawful for a felon— a person "convicted … of[] a crime punishable by imprisonment for a term exceeding one year"—to possess a firearm. 18 U.S.C. § 922(g)(1). So when Barry argued that the government could not punish him under § 922(g)(1) consistent with the Second Amendment, the government should have been required to defend his conviction by showing that the

prohibition on that conduct is consistent with "the Nation's historical tradition of firearm regulation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). That, in turn, means it needed to identify historical regulations imposing analogous restrictions on firearm possession by individuals with comparable criminal records. *See* Pet.10-12.

But that is not what happened. Rather than put the government to its constitutional burden, the Third Circuit decided that it can sustain a conviction under § 922(g)(1) against a Second Amendment challenge so long as any potential characteristics of the defendant could supply a valid historical basis for dispossession. App.5a & n.2. The court thus proceeded to ignore that Barry was charged, convicted, and sentenced to incarceration under § 922(g)(1) because of his felon status, and sustained that conviction and sentence against Second Amendment attack for a different reason entirely—namely, because Barry was on parole at the time of the § 922(g)(1) offense. App. 5a & n.2 (relying on *United States v. Moore*, 111 F.4th 266 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 2849 (June 30, 2025) and *United States v. Quailes*, 126 F.4th 215 (3d Cir. 2025), *cert. denied*, 2025 WL 2823870 (Oct. 06, 2025)).

Offering no defense of the Third Circuit's approach, the government simply observes that several courts of appeals have employed the same (faulty) reasoning. BIO at 2-3 (citing *United States v. Giglio*, 126 F.4th 1039 (5th Cir. 2025); *United States v. Goins*, 118 F.4th 794 (6th Cir. 2024); *United States v. Gay*, 98 F.4th 843 (7th 6 Cir. 2024)). But an egregious error does not become more tolerable with repetition. To the contrary, the fact that multiple courts have been led astray in this manner in

Second Amendment cases, despite the mountain of precedent from this Court rejecting that approach in every other conceivable context, *see* Pet. 9-11, is a clarion call for this Court to provide direction on how to resolve as-applied challenges to §922(g)(1) convictions. *See United States v. Morton*, 123 F.4th 492, 498 n.2 (6th Cir. 2024).

Finally, the government fleetingly suggests that Barry's as-applied challenge would fail even under a proper analysis. BIO at 3. *See* Pet. at 5 (noting that the prior offenses identified as the disqualifying felonies were committed by Barry with another juvenile when he was just 16 years old). But this Court is a Court of review, not first view, and the Third Circuit did not engage with that argument at all, App.5a & n.2—which is the core problem with its decision, and the core reason why this Court should not let it stand. Barry should not be deprived of an appellate forum in which to have his as-applied challenge resolved in an appropriate manner just because the government now claims it might have prevailed on an issue that it persuaded the Third Circuit not to address. If anything, the government's argument reinforces the virtue of this case as a vehicle for resolving the methodological split: The Court can resolve that split without wading into the ultimate merits question. Pet. 20.

CONCLUSION

The petition for a writ of certiorari should be granted, or else held pending the grant of certiorari in another case raising one or more of the questions presented. Alternatively, the petition should be granted, the judgment below vacated, and the

matter remanded with instructions to address the Second Amendment challenge that petitioner raised in the district court and court of appeals.

Respectfully submitted,

ELISA A. LONG
FEDERAL PUBLIC DEFENDER

/s/ Renee Domenique Pietropaolo
RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender
Counsel of Record

FEDERAL PUBLIC DEFENDER FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
1001 Liberty Avenue, Suite 1500
Pittsburgh, PA 15222
(412) 644-6565
renee_pietropaolo@fd.org

Counsel for Petitioner

November 4, 2025