No. 25-935

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

KEVIN LAMARCUS MITCHELL,

Respondent.

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

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Mitchell's conviction under 18 U.S.C. § 922(g)(1) violated his Second Amendment rights where the government failed to present adequate evidence to justify his permanent dispossession under § 922(g)(1), which prohibits the possession of firearms by a person previously convicted of a crime punishable by a term of imprisonment exceeding one year, based on his sole predicate felony conviction under 18 U.S.C. § 922(g)(3) for possession of a firearm by "an unlawful user" of a controlled substance.

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INTRODUCTION

The government does not argue that the decision below is wrong. Nor does it ask the Court to review the court of appeals' § 922(g)(1) analysis of Mitchell's as-applied challenge. Instead, it asks this Court to hold its petition for a writ of certiorari pending the resolution in *United States v. Hemani*, No. 24-40137, 2025 WL 354982 (5th Cir. Jan. 31, 2025) (per curiam), *cert. granted*, No. 24-1234 (oral argument heard Mar. 2, 2026) and if appropriate, grant its petition, vacate the judgment of the court of appeals, and remand the case for further consideration. App. 4, 6. The government contends that "the decision below rests on the premise that Section 922(g)(3)—and, by extension, a Section 922(g)(1) charge based on a Section 922(g)(3) predicate—is constitutional only as applied to someone who was 'intoxicated at the time' of the offense." App. 4-5. It thus urges that "there is a 'reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration' in light of *Hemani*." App. 4 (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)). The government's contentions lack merit.

The Fifth Circuit was aware of *Hemani* and acknowledged that the question presented—"[w]hether 18 U.S.C. § 922(g)(3) . . . violates the Second Amendment as applied to respondent"—would not affect its § 922(g)(1) analysis or the outcome here given the differences in the legal framework. App. 42a n.10. Section 922(g)(1), which permanently dispossesses an individual previously convicted of a crime punishable by a term of imprisonment exceeding one year, is categorically different from the temporary ban in § 922(g)(3), and it thus requires the application of a different legal

framework and analysis. Moreover, Mitchell's as-applied challenge turns on key facts not at issue in the as-applied § 922(g)(3) challenge before the Court in *Hemani*. The Court should deny the petition and the government's request to hold the case pending the resolution of *Hemani*.

STATEMENT

1. Kevin LaMarcus Mitchell has one prior felony conviction, a violation of § 922(g)(3), which prohibits an individual from possessing a firearm if he is "an unlawful user" of a controlled substance. App. 1a-2a, 29a. Mitchell's § 922(g)(3) conviction served as the predicate felony supporting his indictment under § 922(g)(1), for possessing a firearm after previously having been convicted of a crime punishable by a term of imprisonment exceeding one year. App. 1a, 3a.

2. Mitchell moved to dismiss the indictment against him, arguing that § 922(g)(1) violated the Second Amendment as applied to him, and raising several other constitutional challenges. App. 4a-5a. The district court denied his motion. App. 4a. Mitchell pleaded guilty subject to a conditional plea agreement, reserving his right to appeal the district court's denial of his motion to dismiss the indictment. App. 4a. He was sentenced to a 64-month term of imprisonment and three years of supervised release. App. 4a.

3. Mitchell appealed the denial of his motion to dismiss the indictment. App. 4a-5a. "His main argument on appeal [was] that the government failed to proffer relevantly similar historical analogues to justify permanent disarmament under § 922(g)(1) as applied to Mitchell's § 922(g)(3) predicate offense." App. 8a.

4. Applying *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), *United States v. Rahimi*, 602 U.S. 680 (2024), and governing circuit precedent, the Court of Appeals for the Fifth Circuit determined that the government failed to satisfy its burden of identifying a sufficient history and tradition supporting his permanent disarmament under § 922(g)(1). App. 34a-42a, 45a Each of the government's proffered analogues "fail[ed] under *Bruen*." App. 35a. The court of appeals reversed his conviction and vacated the judgment of conviction and sentence against him, determining that, "[a]s applied to Mitchell, § 922(g)(1) limits his Second Amendment rights more than our Nation's historical tradition would allow under these facts." App. 42a, 46a. Judge Haynes filed a dissenting opinion. App. 47a-50a.

REASONS TO DENY THE PETITION

The government has not shown a "reasonable probability" that the Court's decision in *Hemani* would affect the court of appeals' analysis in Mitchell's as-applied Second Amendment challenge to his permanent dispossession under § 922(g)(1). The question presented in *Hemani* is "[w]hether 18 U.S.C. § 922(g)(3) . . . violates the Second Amendment as applied to respondent." Petition for Writ of Certiorari at I, *United States v. Hemani*, No. 24-1234 (June 2, 2025); App. 42a n.10. The government has argued and maintained that § 922(g)(3) imposes only a "temporary" ban. App. 5; *see* Gov't Br. at 10-12, 25, 37, *Hemani*, *supra* (No. 24-1234). "While both laws involve a form of disarmament, § 922(g)(1) imposes a far more severe restriction because it involves *permanent disarmament*." App. 42a (internal quotation marks and citation omitted) (emphasis added). Thus, the legal framework governing the Second Amendment analysis is different.

Further, as the government acknowledges, the court of appeals was aware that this Court had granted certiorari in *Hemani*. App. 5; App. 42a n.10. The Fifth Circuit explained that the question of whether § 922(g)(3) violated the Second Amendment as applied to Hemani was not dispositive to its analysis as applied to Mitchell: "Even if *Hemani* disagrees with our interpretation of § 922(g)(3), that would not affect the outcome here, which is related to permanent disarmament under § 922(g)(1)." App. 42a n.10. The government disputes the Fifth Circuit's view of the impact of *Hemani*. App. 5. It contends that the issue in *Hemani* "is not the 'interpretation' of Section 922(g)(3); it is the statute's constitutionality as applied to individuals who were not under the influence of drugs while possessing firearms." App. 5. Regardless, the as-applied challenge in *Hemani* is distinct from that in *Mitchell*, and the Court's decision in *Hemani* will not "determine the ultimate outcome" here. *Lawrence*, 516 U.S. at 167.

To start, the government never advanced the intoxication laws it challenges in *Hemani*. App. 38a-39a; *see* Gov't Br. at 17-23, *Hemani*, *supra* (No. 24-1234). Unlike in *Hemani*, the government only later raised Mitchell's marijuana use—in relation to its "dangerousness" argument—in a Rule 28(j) letter. App. 39a. The only analogues proffered by the government to support Mitchell's § 922(g)(1) conviction were "going armed laws and so-called recidivism laws." App. 39a; *see* App. 35a. "Each fail[ed] under *Bruen*." App. 35a. The Fifth Circuit explained that "[a]s a matter of party presentation, [it] could limit [its] analysis to the history and tradition before us . . . and call it a day." App. 39a (internal quotation marks and citation omitted) (citing

Bruen, 597 U.S. at 25 n.6). Although the court did consider the intoxication laws not submitted by the government, the primary basis for its decision was its rejection of the proffered analogues the government actually raised. App. 40a ("[T]he government's proposed historical analogues are too broad as applied to Mitchell"). The portions of the opinion addressing intoxication laws were simply additional justification for the court's decision.

Next, to the extent the government claims that the Fifth Circuit's view of "dangerousness" would be affected by the Court's resolution of *Hemani*, App. 5, this argument also lacks merit. The Fifth Circuit recognized that "[o]f course, a defendant's dangerousness can be viewed as a factor in an as-applied challenge under § 922(g)(1)." App. 32a n.5. The government, however, did not prove that Mitchell was dangerous. There was no evidence underlying Mitchell's § 922(g)(3) conviction "that he was 'found to threaten the physical safety of another,'" App. 36a (quoting *Rahimi*, 602 U.S. at 698), and the government failed to establish how Mitchell could "be reasonably analogized to have menaced others with firearms, or disrupted the public order through acts likely to lead to actual violence," App. 36a (internal quotation marks and citation omitted).

Finally, whether the evidence is sufficient to constitutionally convict Hemani under § 922(g)(3) will not resolve whether § 922(g)(1) is constitutional as applied to Mitchell. The government presented minimal evidence regarding how often Mitchell had used marijuana. *See* App. 43a. Such evidence "pale[d] in comparison to the evidence of active intoxication" in other cases. App. 43a. "Under *Bruen*, our Nation's

historical tradition of using intoxication laws to prohibit carrying firearms while presently intoxicated does not support permanent disarmament of a marijuana user who was not presently intoxicated while in possession of a firearm." App. 44a. The lack of evidence presented was a key fact in Mitchell's as-applied challenge wholly outside the facts at issue in *Hemani*. The as-applied challenge raised by Hemani is necessarily different than that applied to Mitchell's § 922(g)(1) challenge.

The government has not shown a "reasonable probability" that the Court's resolution of *Hemani*, addressing whether historical intoxication laws support temporary disarmament under § 922(g)(3) as applied to Hemani, would affect the analysis or "determine the ultimate outcome" here. *Lawrence*, 516 U.S. at 167. There is accordingly no reason to hold this petition pending the resolution of *Hemani*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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