

Nos. 23-374, 23-683, 23-6170, 23-6602, and 23-6842

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

BRYAN DAVID RANGE

MELYNDA VINCENT, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

EDELL JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

SYLVESTER CUNNINGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

REGINALD CRESHAWN DOSS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD, TENTH, AND EIGHTH CIRCUITS*

SUPPLEMENTAL BRIEF FOR THE FEDERAL PARTIES

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These five cases present the question whether 18 U.S.C. 922(g)(1), the statute prohibiting a person from possessing a firearm if he has been convicted of “a crime punishable by imprisonment for a term exceeding one year,” *ibid.*, violates the Second Amendment. In each case, we asked this Court to hold the petition for a writ of certiorari pending its decision in *United States v. Rahimi*, No. 22-915 (June 21, 2024). Now that the Court has decided *Rahimi*, we believe that it should grant plenary review to resolve Section 922(g)(1)’s constitutionality. In particular, the Court should grant the petitions in *Doss*, *Jackson*, and either *Range* or *Vincent*; consolidate the granted cases for briefing and argument; and hold the remaining petitions pending the resolution of the granted cases. If the Court chooses not to take that course, it should grant, vacate, and remand (GVR) in *Range* and deny certiorari in the remaining cases.

A. The Court Should Grant Plenary Review To Decide Section 922(g)(1)’s Constitutionality

This Court often issues a GVR order if an intervening decision clarifies the legal principles governing the resolution of the question presented in a pending petition. See *Lawrence v. Chater*, 516 U.S. 163, 167-168 (1996) (per curiam). But “a GVR order is inappropriate” if “the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court.” *Id.* at 168. In our view, that is the case here. Section 922(g)(1)’s constitutionality has divided courts of appeals and district courts. Although this Court’s decision in *Rahimi* corrects some of the methodological errors made by courts that have held Section 922(g)(1) invalid, it is unlikely to fully resolve the existing conflict. And given the frequency with which the government brings criminal cases under

Section 922(g)(1), the substantial costs of prolonging uncertainty about the statute’s constitutionality outweigh any benefits of further percolation. Under these circumstances, the better course would be to grant plenary review now.

1. Our petition in *Range* explained (at 22-24) that, since *NYSRPA v. Bruen*, 597 U.S. 1 (2022), courts of appeals have reached conflicting results when confronted with as-applied Second Amendment challenges to Section 922(g)(1). The Eighth Circuit (in *Jackson* and *Cunningham*) and Tenth Circuit (in *Vincent*) upheld Section 922(g)(1), rejecting felony-by-felony and person-by-person litigation about the statute’s constitutionality. See *Jackson* Pet. App. A12; *Cunningham* Pet. App. 87; *Vincent* Pet. App. 8a. But the Third Circuit held in *Range* that Section 922(g)(1) violated the Second Amendment as applied to “people like Range.” *Range* Pet. App. 19a.

That circuit conflict has since deepened. In *Dubois v. United States*, 94 F.4th 1284 (2024), the Eleventh Circuit held that “felons are categorically ‘disqualified’ from exercising their Second Amendment right.” *Id.* at 1293 (citation omitted). By contrast, the Ninth Circuit held in *United States v. Duarte*, 101 F.4th 657 (2024), that Section 922(g)(1) violated the Second Amendment as applied to a person with five previous felony convictions, including for possessing drugs for sale, evading a police officer, and possessing a firearm as a felon. *Id.* at 662-663. The government has filed a petition for rehearing en banc, see 22-50048 C.A. Doc. 72-1 (9th Cir. May 14, 2024), but the court has not yet acted on the rehearing request and the panel decision is deeply problematic. The panel required the government to show that the conduct underlying the defendant’s predicate

felonies “would have been punishable either with execution, with life in prison, or [with] permanent forfeiture of the offender’s estate” at the Founding. *Duarte*, 101 F.4th at 690. And the court determined that modern drug crimes lack such a Founding-era analogue because substances such as “opium and cocaine” were lawful at the Founding. *Id.* at 691 n.16.

The question presented has also deeply divided district courts. The vast majority of district courts have upheld Section 922(g)(1), but many others have issued decisions striking the statute down. Some of those decisions have involved felons with convictions for violent crimes, such as murder, manslaughter, armed robbery, and carjacking.¹ Some have involved felons with convic-

¹ See, e.g., *United States v. Williams*, No. 23-cr-20201, 2024 WL 731932, at *1 n.2 (E.D. Mich. Feb. 22, 2024) (“first and second-degree murder”) (citation omitted); *United States v. Bullock*, 679 F. Supp. 3d 501, 506 (S.D. Miss. 2023) (“aggravated assault and manslaughter”); *United States v. Brunner*, No. 23-cr-30088, 2024 WL 1406190, at *1 n.1 (S.D. Ill. Apr. 2, 2024) (“possession of a stolen firearm, carjacking, and use of a firearm” during and in furtherance of a crime of violence) (capitalization omitted); *United States v. Cherry*, No. 23-cr-30112, 2024 WL 379999, at *1 n.1 (S.D. Ill. Feb. 1, 2024) (“aggravated robbery and attempted vehicular hijacking”) (capitalization omitted); *United States v. Harper*, 689 F. Supp. 3d 16, 20 (M.D. Pa. 2023) (“multiple armed robberies”); *United States v. Leblanc*, No. 23-cr-45, 2023 WL 8756694, at *2 (M.D. La. Dec. 19, 2023) (“armed robbery”); *United States v. Anderson*, No. 23-cr-594, 2023 WL 7531169, at *1 (N.D. Ill. Nov. 13, 2023) (“aggravated robbery with a firearm”); *United States v. Griffin*, No. 21-cr-693, 2023 WL 8281564, at *1 (N.D. Ill. Nov. 30, 2023) (“robbery”); *United States v. Salme-Negrete*, No. 22-cr-637, 2023 WL 7325888, at *1 (N.D. Ill. Nov. 7, 2023) (“robbery, aggravated battery/use of a deadly weapon, and aggravated unlawful use of a weapon”); *United States v. Diaz*, No. 20-cr-597, 2023 WL 8019691, at *1 (N.D. Ill. Nov. 20, 2023) (“aggravated discharge of a firearm, aggravated battery, and domestic battery”); *United States v. Delaney*, No. 22-cr-463,

tions for drug crimes.² And some have involved felons with convictions for other types of offenses.³

2. Although *Rahimi* undermines the reasoning of the decisions holding Section 922(g)(1) invalid, the present conflict is unlikely to resolve itself without further intervention by this Court. And the costs of deferring this Court’s review would be substantial: Disagreement about Section 922(g)(1)’s constitutionality has already had widespread and disruptive effects. Out of the approximately 64,000 criminal cases reported to the Sentencing Commission in Fiscal Year 2022, more than 7600 involved convictions under Section 922(g)(1). See U.S. Sentencing Comm’n, *Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses* 1. Those convictions accounted for nearly 12% of all federal criminal cases. See *ibid.* Uncertainty about the statute’s constitutionality thus affects a significant proportion of the federal criminal docket.

The conflict in the courts of appeals and district courts about Section 922(g)(1)’s constitutionality also is

2023 WL 7325932, at *1 (N.D. Ill. Nov. 7, 2023) (“aggravated battery”); *United States v. Crisp*, No. 23-cr-30006, 2024 WL 664462, at *1 n.1 (S.D. Ill. Feb. 16, 2024) (“aggravated discharge of a firearm”).

² See, e.g., *United States v. Hostettler*, No. 23-cr-654, 2024 WL 1548982, at *1-*2 (N.D. Ohio Apr. 10, 2024); *United States v. Taylor*, No. 23-cr-40001, 2024 WL 245557, at *1 n.1 (S.D. Ill. Jan. 22, 2024); *United States v. Jones*, No. 23-cr-74, 2024 WL 86491, at *2 (S.D. Miss. Jan. 8, 2024); *United States v. Daniel*, No. 20-cr-2, 2023 WL 7325930, at *1 (N.D. Ill. Nov. 7, 2023); *United States v. Quales*, 688 F. Supp. 3d 184, 187-188 (M.D. Pa. 2023).

³ See, e.g., *United States v. Martin*, No. 23-cr-40048, 2024 WL 728571, at *1 n.1 (S.D. Ill. Feb. 22, 2024) (“obstructing justice”) (capitalization omitted); *Williams v. Garland*, No. 17-cv-2641, 2023 WL 7646490, at *1 (E.D. Pa. Nov. 14, 2023) (recidivist “DUI at the highest rate of intoxication”).

undermining public safety. Congress enacted Section 922(g) “in order to keep firearms away from potentially dangerous persons,” *Lewis v. United States*, 445 U.S. 55, 67 (1980), and the statute “probably does more to combat gun violence than any other federal law,” *Rehaif v. United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting). Yet district courts have struck down Section 922(g)(1) even as applied to exceptionally dangerous felons, including murderers, carjackers, and drug traffickers—and in some cases have ordered that the defendants be released pending appeal. See p. 4, *supra*; see also, *e.g.*, 21-cr-236 D. Ct. Doc. 83 (M.D. Pa. Sept. 1, 2023) (releasing defendant with convictions for robbery and drug trafficking), stay denied, No. 23-2604 C.A. Doc. 33, (3d Cir. Oct. 30, 2023); No. 21-cr-176 D. Ct. Doc. 83 (M.D. Pa. Aug. 22, 2023) (releasing defendant with convictions for drug trafficking), stay denied, No. 23-2533 C.A. Doc. 37 (3d Cir. Oct. 30, 2023).

Postponing review of the question presented would prolong the disruption and heighten the risks to public safety that have already resulted from the conflict over Section 922(g)(1)’s constitutionality. This Court should accordingly grant plenary review now to ensure that it can decide the question presented next Term.

**B. If This Court Chooses To Grant Plenary Review, It
Should Grant Multiple Petitions Involving Different
Felonies**

If this Court opts to take up the question presented, it should grant review in cases involving different types of predicate felonies. Doing so would enable the Court to consider Section 922(g)(1)’s constitutionality across a range of circumstances that are fully representative of the statute’s applications.

To begin, the Court should grant the petition for a writ of certiorari in *Doss*. The petitioner in that case has “a lengthy criminal record” that “includes over 20 convictions, many of them violent.” *Doss* Pet. App. 15 n.2. As discussed above, multiple courts have held that Section 922(g)(1) violates the Second Amendment even as applied to violent felons. See p. 4, *supra*. Granting review in *Doss* would enable this Court to address those holdings.

This Court should also grant the petition for a writ of certiorari in *Jackson*. The petitioner in that case has previous felony convictions for non-violent drug crimes. See *Jackson* Gov’t Br. 2-3. As discussed above, the Ninth Circuit and multiple district courts have struck down Section 922(g)(1) in cases involving drug offenders. See pp. 4-5, *supra*. Granting review in *Jackson* would enable this Court to review those holdings—and to address one of the most common and most important contexts in which the government seeks to enforce Section 922(g)(1).

Finally, this Court should grant review in *Range* or *Vincent*. Granting review in one of those cases would enable this Court to consider Section 922(g)(1)’s application to non-drug, non-violent crimes: The petitioner in *Vincent* has a conviction for bank fraud, see *Vincent* Gov’t Br. 1-2, while the respondent in *Range* has a conviction for making a false statement to obtain food stamps, see *Range* Pet. 3.⁴

⁴ A dissenting judge in *Range* stated that the respondent lacked Article III standing because he had failed to plead that the specific firearms he wishes to possess satisfy Section 922(g)(1)’s interstate-commerce element. See *Range* App. 88a-98a (Roth, J., dissenting). The petitioner in *Vincent* likewise did not include such an allegation in her complaint. See 20-cv-883 Compl. ¶¶ 27-31 (D. Utah Dec. 15,

In the remaining case, *Cunningham*, petitioner was convicted not only of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), but also of possessing a firearm during and in relation to drug trafficking, in violation of 18 U.S.C. 924(c)(1). See *Cunningham* Gov’t Br. 2. Because the Second Amendment protects the right to possess arms only for *lawful* purposes such as self-defense, see *District of Columbia v. Heller*, 554 U.S. 570, 620 (2008), and because the Section 924(c)(1) conviction demonstrates that petitioner possessed a firearm for an *unlawful* purpose, *Cunningham* would be a suboptimal vehicle for considering Section 922(g)(1)’s constitutionality.

C. If This Court Chooses Not To Grant Plenary Review, It Should GVR In *Range*

If this Court chooses not to grant plenary review, it should GVR in *Range* and deny the remaining petitions. The Third Circuit’s approach in *Range*—under which “*any* difference between a historical law and contemporary regulation defeats an otherwise-compelling analogy”—“tracks precisely the Fifth Circuit’s deeply disturbing decision in * * * *Rahimi*.” *Range* Pet. App. 46a, 71a (Krause, J., dissenting); see *Range* Pet. 26. This Court emphatically rejected that approach in *Rahimi*, explaining that, although a modern firearms law “must comport with the principles underlying the Second Amendment,” “it need not be a ‘dead ringer’ or ‘historical twin.’” Slip op. 7-8 (citation omitted).

At the same time, *Rahimi* casts no doubt on the Eighth and Tenth Circuits’ decisions upholding Section

2020). But as we have explained, we disagree that such an allegation is necessary and accept that *Range* and *Vincent* have standing. See *Range* Pet. 27.

922(g)(1) in *Doss*, *Jackson*, *Cunningham*, and *Vincent*. The Eighth Circuit’s decisions rested on the premise that legislatures may disarm “categories of persons based on a conclusion that the category as a whole present[s] an unacceptable risk of danger if armed,” *Jackson* Pet. App. A18, and *Rahimi* expressly reserved the question whether that premise is correct, see slip op. 14. The Tenth Circuit’s decision, in turn, rested on “language from *Heller*” approving felon-in-possession laws, *Vincent* Pet. App. 6a—language that *Rahimi* repeated, see slip op. 15. There is thus no “reasonable probability,” *Lawrence*, 516 U.S. at 167, that the Eighth and Tenth Circuits would reach a different result in light of this Court’s intervening decision.

* * * * *

This Court should grant the petitions for writs of certiorari in *Doss*, *Jackson*, and either *Range* or *Vincent*; consolidate the granted cases for briefing and argument; and hold the remaining petitions pending the resolution of the granted cases. If the Court chooses not to grant plenary review, it should GVR in *Range* and deny the petitions in the remaining cases.⁵

Respectfully submitted.

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⁵ The government also has filed petitions for writs of certiorari in *United States v. Daniels*, No. 23-376 (filed Oct. 5, 2023) (which involves 18 U.S.C. 922(g)(3), the statute disarming habitual drug users), and *United States v. Perez-Gallan*, No. 23-455 (filed Oct. 31, 2023) (which involves 18 U.S.C. 922(g)(8)(C)(ii), the statute disarming persons subject to certain domestic-violence protective orders). But our reasons for seeking immediate plenary review here—most importantly, the special need for certainty about Section 922(g)(1) given the frequency with which the government brings criminal cases under it—do not apply to *Daniels* and *Perez-Gallan*. We accordingly have not asked the Court to grant plenary review, rather than to GVR, in those cases.