No. 22-915

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ZACKEY RAHIMI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Congress and most States have determined that someone who has been found by a court to pose a credible threat of violence against his intimate partner or child should be required to temporarily relinquish his guns. The Fifth Circuit held that the Second Amendment precludes that widespread, sensible response to the deadly toll of domestic violence. The court's decision nullifies an exceptionally important federal statute, 18 U.S.C. 922(g)(8). It calls into question similar laws in "46 States, the District of Columbia, and multiple territories." Illinois Amicus Br. 9. And it threatens grave consequences for the safety of victims of domestic violence, law-enforcement officers, and the public. See, *e.g.*, Gun Violence & Domestic Violence Prevention Groups Amicus Br. 14-19; Horwitz Amicus Br. 19-22.

Respondent provides no good reason to deny review and no persuasive defense of the Fifth Circuit's deci-

sion. His arguments against certiorari misunderstand the critical protections provided by laws like Section 922(g)(8) and ignore this Court's strong presumption of granting review when a court of appeals holds a federal statute unconstitutional. And respondent's arguments on the merits contradict the Court's precedents and the historical record. The Court should grant the petition for a writ of certiorari and reverse.

A. The Fifth Circuit's Decision Warrants Review

Respondent principally argues (Br. in Opp. 11-18) that the Fifth Circuit's decision does not warrant this Court's review—or, at least, that it does not warrant review at this time. That argument is unsound.

1. Most obviously, the decision below warrants review because the court of appeals invalidated an Act of Congress—not just as applied to a particular defendant, but on its face. Respondent states (Br. in Opp. 15) that this Court "sometimes" treats a court of appeals' invalidation of a federal statute as a "factor" that weighs in favor of granting certiorari, but that grudging concession does not accurately describe the Court's practice. In fact, the Court applies a "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa County* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay). Even in the absence of a circuit conflict, this Court's "usual" approach is to grant review "when a lower court has invalidated a federal statute." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019); see, *e.g.*, *Vidal* v. *Elster*, cert. granted, No. 22-704 (June 5, 2023). That "usual" practice appropriately reflects the respect due to Congress as a coordinate branch of the federal government.

Respondent cites (Br. in Opp. 16-17) a smattering of purported counterexamples scattered across the past several decades, but each example differs from this case in material ways. In one case, this Court denied review after a court of appeals recognized the constitutionality of the challenged statute as a general matter, but held it unconstitutional "as applied to two [challengers]." *Id.* at 16; see *Binderup* v. *Attorney General United States*, 836 F.3d 336 (3d Cir. 2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017). In another, this Court *granted* certiorari—twice—but declined to grant review a third time after the court of appeals on remand applied legal principles set forth in this Court's first two opinions. See *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *ACLU* v. *Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 555 U.S. 1137 (2009). In a third, the government had opposed review because of "a possible mootness question." Gov't Br. in Opp. at 12, *Wilson* v. *NLRB*, 505 U.S. 1218 (1992) (No. 90-1362). And respondent states (Br. in Opp. 16) that, in the remaining cases, this Court denied review after "the invalidity of a federal statute bec[ame] obvious" in light of one of this Court's recent decisions. But even the Fifth Circuit did not suggest—and could not plausibly have suggested—that the purported invalidity of Section 922(g)(8) is "obvious." See pp. 8-9, *infra*.

2. As the petition for a writ of certiorari explains (at 14-15), this Court's review is also warranted because the Fifth Circuit's decision conflicts with the Third and Eighth Circuits' decisions upholding Section 922(g)(8). See *United States* v. *Boyd*, 999 F.3d 171 (3d Cir.), cert. denied, 142 S. Ct. 511 (2021); *United States* v. *Bena*, 664 F.3d 1180 (8th Cir. 2011). Respondent discounts those decisions (Br. in Opp. 14) because the Third and Eighth

Circuits issued them before *New York State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111 (2022), and respondent asserts that those courts might "come to a different answer after *Bruen*." But the Third and Eighth Circuits upheld Section 922(g)(8) under the historical framework *Bruen* endorsed, not under the means-ends scrutiny framework it rejected. See *Boyd*, 999 F.3d at 186; *Bena*, 664 F.3d at 1183.

Since the petition for a writ of certiorari was filed, the Eighth Circuit has confirmed that its pre-*Bruen* precedents remain good law to the extent they relied on text and history rather than means-ends scrutiny. See *United States* v. *Sitladeen*, 64 F.4th 978, 985 (2023) ("[W]e did not reach our conclusion * * * by engaging in means-end[s] scrutiny[.] * * * Therefore, we remain bound by [the earlier decision].") (citations omitted). And a district court in the Eighth Circuit has specifically determined that the Eighth Circuit's decision in *Bena* remains binding. See *United States* v. *Robinson*, No. 22-CR-165, 2023 WL 3167861, at *4 (E.D. Mo. May 1, 2023) ("The Eighth Circuit's analysis of *Bruen* in *Sitladeen* is highly instructive of how it might approach a Second Amendment challenge to § 922(g)(8), and of *Bena*'s continued validity.").

Respondent also asserts (Br. in Opp. 14) that the Third Circuit's decision in *Boyd* "placed the burden of [proof] on the defendant," and that *Bruen* "reallocated the burden" to the government. But *Boyd*'s outcome did not turn on the allocation of the burden of proof or on the defendant's failure to provide historical support for his claim. The Third Circuit instead affirmatively identified "longstanding historical support" for laws disarming dangerous individuals, and then concluded

that persons subject to domestic-violence restraining orders fall within that category. *Boyd*, 999 F.3d at 186.

3. The decision below additionally warrants review because of the exceptional importance of the question presented. Respondent attempts (Br. in Opp. 17-19) to minimize the significance of the Fifth Circuit's holding, but his arguments reflect a serious misunderstanding of the vital role played by Section 922(g)(8) and its state analogues.

Most directly, the decision below has led to the suspension of prosecutions under Section 922(g)(8) throughout the Fifth Circuit. See Pet. 15. Respondent waves away that problem, asserting (Br. in Opp. 17) that Section 922(g)(8) prosecutions are less frequent than prosecutions for violations of Section 922(g)(1)'s prohibition on the possession of firearms by felons. But a bar to the enforcement of an important criminal statute is no small matter.

More fundamentally, respondent's focus on Section 922(g)(8) prosecutions ignores the background-check system created by Congress to prevent the sale of firearms to prohibited persons. See 34 U.S.C. 40901. Congress has specifically instructed the federal government to take steps to ensure that domestic-violence restraining orders are promptly incorporated into that system, and has provided funding to allow States to include such orders in the databases used for background checks. See 34 U.S.C. 40903(1), 40913(b)(5), and 40941(a); 34 U.S.C. 40911(b)(3)(c)(i) (Supp. III 2021). The background-check system has resulted in more than 76,000 denials based on domestic-violence restraining orders since its creation in 1998 and more than 3800 such denials in 2021 alone (the most recent year

for which statistics are available).* Section 922(g)(8) thus plainly affects far more than "50 people per year." Br. in Opp. 17.

Congress also has required States, as a condition of receiving certain federal funds, to implement policies to notify domestic abusers of the prohibition in Section 922(g)(8). See 34 U.S.C. 10449(e)(1). Indeed, in this case, the restraining order against respondent warned him that possessing a firearm while the order remained in effect may be a federal felony. See Pet. 2. But the decision below creates uncertainty about whether state courts imposing domestic-violence restraining orders should continue to notify domestic abusers that federal law prohibits them from possessing guns.

Finally, the decision below affects more than just federal law. A coalition of States explains that "46 States, the District of Columbia, and multiple territories have laws that require or permit limitations on the ability of those under a domestic-violence restraining order to access firearms, or that reference the federal law's prohibition." Illinois Amicus Br. 9. The Fifth Circuit's decision calls into question the constitutionality of all of those laws. *Ibid.*

4. Perhaps recognizing that this case satisfies all the conventional criteria for certiorari, respondent retreats (Br. in Opp. 11-13) to the assertion that review would be premature. But as demonstrated in the petition for a writ of certiorari and the amicus briefs, the Fifth Circuit's decision has immediate practical consequences for

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* See U.S. Dep't of Justice, Fed. Bureau of Investigation, Crim. Justice Info. Servs. Div., *National Instant Criminal Background Check System Operational Report 2020-2021*, at 13 (Apr. 2022); U.S. Dep't of Justice, Fed. Bureau of Investigation, Crim. Justice Info. Servs. Div., *Federal Denials*.

the federal government, for the States, and (above all) for victims of domestic violence. Respondent identifies no justification for delaying review—let alone one that would outweigh those serious harms.

Respondent suggests (Br. in Opp. 1) that, because this Court decided *Bruen* only last Term, it is still "too early" for the Court to revisit the Second Amendment. But granting certiorari here would enable the Court to decide this case two Terms after *Bruen*. It is not uncommon for the Court to address the application of one of its decisions on that timeline. To take just one example of particular relevance here, that is the same gap that separated *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), from *District of Columbia* v. *Heller*, 554 U.S. 570 (2008).

Respondent also urges this Court (Br. in Opp. 11-12) to allow the question presented to percolate in the lower courts. But since *Heller*, courts of appeals have extensively debated which categories of persons the government may disarm consistent with the history of the Second Amendment. See, *e.g.*, *United States* v. *Jackson*, No. 22-2870, 2023 WL 3769242, at *4-*7 (8th Cir. June 2, 2023); *Range* v. *Attorney General United States*, 53 F.4th 262, 269-282 (3d Cir. 2022) (per curiam), rev'd en banc, No. 21-2835 (3d Cir. June 6, 2023), slip op.; *Kanter* v. *Barr*, 919 F.3d 437, 453-469 (7th Cir. 2019) (Barrett, J., dissenting); *Medina* v. *Whitaker*, 913 F.3d 152, 157-160 (D.C. Cir.), cert. denied, 140 S. Ct. 645 (2019). More specifically, the Third and Eighth Circuits have issued opinions that examine Section 922(g)(8) through the lens of history and tradition. See pp. 3-5, *supra*. No further percolation is necessary—or, given the serious consequences of the Fifth Circuit's decision, justifiable.

B. Respondent's Defenses Of The Fifth Circuit's Decision Lack Merit

1. Respondent's defenses of the court of appeals' Second Amendment holding lack merit. Respondent first argues (Br. in Opp. 19-28) that, by using the term "right of the people to keep and bear Arms," the Second Amendment guarantees "all Americans" the right to possess firearms. *Id.* at 19-20 (citations and emphasis omitted). That sweeping argument, taken to its logical conclusion, would preclude the disarmament of felons, fugitives, drug addicts, and individuals suffering from severe mental illness. See 18 U.S.C. 922(g)(1)-(4). That is not the law, and never has been. The Second Amendment was "not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case." *Robertson* v. *Baldwin*, 165 U.S. 275, 281 (1897). One such well-established exception, recognized in this Court's cases, allows the government to disarm persons who are not "law-abiding, responsible citizens." *Heller*, 554 U.S. at 635; see *Bruen*, 142 S. Ct. at 2131. Section 922(g)(8), which applies only after a court makes an individualized finding that a person poses a danger to his intimate partner or child, is simply a specific application of that venerable principle—and a particularly focused and well-justified one at that.

Respondent maintains (Br. in Opp. 28-31) that Section 922(g)(8) is inconsistent with the Nation's tradition of gun regulation because "'[e]arlier generations'" did not "disarm domestic abusers as a class." *Id.* at 28 (citation omitted); see *id.* at 29 ("The Founders could have

adopted a complete ban on firearms to combat intimate-partner violence. They didn't."). But *Bruen* made clear that, in evaluating the history of the right to keep and bear arms, courts should not focus on whether the law at issue has "a historical *twin*." 142 S. Ct. at 2133. "[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Ibid.* The Eighth Circuit, for example, recently upheld Section 922(g)(1) notwithstanding the lack of an equivalent Founding-era prohibition on the possession of firearms by felons because "history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society" or "who pose an unacceptable risk of dangerousness." *Jackson*, 2023 WL 3769242, at *6-*7.

The fact that the Fifth Circuit and respondent nonetheless insist on the identification of a historical twin simply shows that some courts and litigants have misread *Bruen*. And the demand for a historical twin is particularly misplaced here, because Section 922(g)(8) and other laws disarming those who threaten domestic violence address a profound threat to public safety that was ignored or minimized for too much of our Nation's history. See Gun Violence & Domestic Violence Prevention Groups Amicus Br. 10. This Court should grant certiorari to correct the Fifth Circuit's error.

2. Respondent also defends the Fifth Circuit's judgment (Br. in Opp. 31-36) on the alternative ground that Section 922(g)(8) exceeds Congress's enumerated powers. But respondent concedes (*id.* at 35) that he "did not press th[at] argument below," and the lower courts did not consider it. See Pet. App. 45a & n.4 (identifying respondent's claims). This Court is a "court of review, not

of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and its ordinary practice precludes it from reviewing claims that were not "pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Respondent asserts (Br. in Opp. 35) a right to defend the Fifth Circuit's judgment "on any ground," but this Court's cases explain that a "prevailing party" may "defend [a] judgment on any ground *properly raised below*." *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (emphasis added). Respondent's claim that Section 922(g)(8) exceeds Congress's powers was not "properly raised below." *Ibid.* And even if this Court were to depart from its ordinary practice by considering respondent's forfeited contention in the first instance, the Court's review would be only for plain error—a standard that respondent does not even attempt to satisfy. See Fed. R. Crim. P. 52(b).

Respondent's belated contention in any event lacks merit. Section 922(g) makes it unlawful for nine categories of persons to possess a firearm "in or affecting commerce." 18 U.S.C. 922(g). This Court held in *Scarborough* v. *United States*, 431 U.S. 563 (1977), that the federal government can satisfy that jurisdictional element by showing that the relevant firearm previously traveled in interstate commerce. See *id.* at 568, 575, 578. The Court rejected the defendant's argument that "the possessor must be engaging in commerce" "at the time of the [possession] offense," explaining that Congress's use of the phrase "'affecting commerce'" demonstrated its intent to assert "'its full Commerce Clause power.'" *Id.* at 568-569, 571 (citation omitted). Here, respondent concedes (Br. in Opp. 34) that the

firearm he possessed "previously moved in interstate commerce."

Respondent, in addition, did more than just possess a gun that previously moved in interstate commerce. He also used a gun on a highway and at a fast-food restaurant. See Pet. 3; Pet. App. 2a. That conduct falls well within Congress's regulatory authority under the Commerce Clause. See *Pierce County* v. *Guillen*, 537 U.S. 129, 146-148 (2003) (highways); *Katzenbach* v. *McClung*, 379 U.S. 294, 301-305 (1964) (restaurants).

Respondent observes (Br. in Opp. 35-36) that this Court is scheduled to consider the petition for a writ of certiorari in *Seekins* v. *United States*, No. 22-6853 (filed Feb. 21, 2023), which presents the question whether Congress may criminalize the possession of ammunition based on its previous movement in interstate commerce. But that case would not affect the outcome here; as explained above, respondent has forfeited any claim that Section 922(g)(8) exceeds Congress's enumerated powers, and respondent in any event did more than just possess a firearm that previously moved across state lines. *Seekins* also involves an as-applied challenge, while the Fifth Circuit in this case held Section 922(g)(8) unconstitutional on its face. The Court should therefore grant review here regardless of how it disposes of *Seekins*.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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