No. 23-376

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PATRICK DARNELL DANIELS, JR.

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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In the decision below, the Fifth Circuit held that 18 U.S.C. 922(g)(3), the federal statute disarming unlawful users of controlled substances, violates the Second Amendment. Respondent Patrick Daniels's defenses of that holding lack merit. And his arguments confirm the overlap between this case and *United States* v. *Rahimi*, No. 22-915 (argued Nov. 7, 2023), the pending case concerning the constitutionality of the statute disarming persons subject to domestic-violence protective orders, 18 U.S.C. 922(g)(8). This Court should accordingly hold the petition for a writ of certiorari pending the decision in *Rahimi* and then dispose of the petition as appropriate.

A. The Court Of Appeals Erred In Holding Section 922(g)(3) Unconstitutional As Applied To Daniels

As the government's brief in *Rahimi* explains, the Second Amendment allows Congress to disarm persons

who are not law-abiding, responsible citizens—a category that includes persons whose possession of firearms would endanger themselves or others. See Gov't Br. at 10-27, *Rahimi*, *supra* (No. 22-915) (*Rahimi* Gov't Br.). And as the petition in this case explains, armed drug users pose a grave danger to themselves and to society. See Pet. 7-12. Daniels's contrary arguments lack merit.

Like the respondent in *Rahimi*, Daniels argues (Br. in Opp. 9-12) that, because the Second Amendment protects the right of "the people" to possess arms, Congress may disarm only those persons who are outside the political community. But our Nation has a long tradition of imposing firearms restrictions even upon persons who are among "the people." See Reply Br. at 10-11, *Rahimi*, *supra* (No. 22-915) (*Rahimi* Reply Br.). For example, legislatures have disarmed loyalists, individuals who have misused firearms, individuals whose conduct gave reasonable cause to fear a breach of the peace, and intoxicated persons. *Id.* at 11.

Like the respondent in *Rahimi*, Daniels also reads (Br. in Opp. 14-17) this Court's decision in *NYSRPA* v. *Bruen*, 142 S. Ct. 2111 (2022), to mean that a modern firearms regulation complies with the Constitution only if a similar statute existed at the Founding. But *Bruen* does not reduce the interpretation of the Second Amendment to a rote archival search for Founding-era laws that match the challenged statute. See *Rahimi* Reply Br. at 3. To the contrary, *Bruen* directs courts to use text, history, and tradition to discern the "constitutional *principles*" that delimit Congress's power to regulate firearms. 142 S. Ct. at 2134 (emphasis added; citation omitted). And it makes clear that modern laws can comply with the Second Amendment even if they lack "historical twin[s]." *Id.* at 2133 (emphasis omitted).

It would be particularly incongruous to apply Daniels's approach in the context of illegal drug use—a social problem that, as the Fifth Circuit acknowledged, did not exist at the Founding. See Pet. App. 10a.

Daniels infers (Br. in Opp. 17-20) from historical laws disarming intoxicated individuals that Congress may disarm a drug user only while he is under the influence of drugs. Contrary to Daniels's suggestion (*id.* at 17-18), however, those past laws do not "set the outer limits for what the Founders considered to be reasonable." Lawmakers usually do not legislate to the full extent of their constitutional authority. Their failure to enact a law may reflect doubts about the law's necessity, feasibility, or political expediency, rather than doubts about its constitutionality. See *Rahimi* Gov't Br. at 39. A past failure to enact a law no doubt matters when "there is ample evidence that the *reason* it was not [enacted] is that it was thought to violate the right embodied in the constitutional guarantee." *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting). But Daniels cites no evidence that past generations read the Second Amendment to forbid laws comparable to Section 922(g)(3).

In any event, past lawmakers did more than just ban persons from carrying arms while intoxicated. As the government has explained (Pet. 15-16 & n.8) and as Daniels does not dispute, many 19th-century statutes provided for "habitual drunkards" to be committed to asylums—and thus to be deprived of their arms—in the same manner as "lunatics." Daniels dismisses those statutes on the ground that they were enacted in the "late-19th century," Br. in Opp. 23 (citation omitted), but the earliest of the statutes cited by the government

was enacted in 1827, and several more were enacted before the Civil War, see Pet. 16 n.8.

Finally, Daniels errs in arguing (Br. in Opp. 1) that "§ 922(g)(3) is, for all practical purposes, a complete and permanent ban on the exercise of a person's Second Amendment rights." Section 922(g)(3) applies only to a person who "*is* an unlawful user of * * * any controlled substance." 18 U.S.C. 922(g)(3) (emphasis added). A person can thus regain his ability to possess arms simply by stopping his unlawful drug use. See Pet. 12.

B. The Court Should Hold The Petition For A Writ Of Certiorari Pending The Resolution Of *Rahimi*

Daniels's brief in opposition confirms that this Court should hold the petition for a writ of certiorari pending the resolution of *Rahimi*. Daniels's arguments reflect the significant overlap between *Rahimi* and this case. See, *e.g.*, Br. in Opp. 2 ("The Government's position in this case is the same one it has taken in [*Rahimi*]."); *id.* at 8 ("[T]he Government's arguments regarding application of the *Bruen* test are identical to the arguments it has made in *Rahimi*."); *id.* at 23 ("[T]his case does share issues in common with *Rahimi* regarding the proper application of *Bruen*'s history and tradition test.").

Daniels suggests (Br. in Opp. 8) that this Court should deny (rather than hold) the petition for a writ of certiorari because the court of appeals "addressed only [an] as applied challenge." But the court of appeals' analysis did not turn on any specific characteristics of Daniels's conduct, and the concurrence found it "hard" to "avoid the conclusion that most, if not all, applications of § 922(g)(3) will likewise be deficient" under the court's reasoning. Pet. App. 38a-39a (Higginson, J., concurring); see Pet. 18. This Court, moreover, rou-

tinely grants certiorari when a court of appeals holds a federal statute unconstitutional as applied to a particular set of facts. See, *e.g.*, *Vidal* v. *Elster*, No. 22-704 (argued Nov. 1, 2023); *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 140 S. Ct. 2082, 2085-2086 (2020); *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020).

Daniels suggests in the alternative (Br. in Opp. 24-25) that this Court should grant plenary review so that it can consider whether Section 922(g)(3) complies with the Fifth Amendment's Due Process Clause and the vagueness doctrine. But the Fifth Circuit's decision rested solely on the Second Amendment; the court did not reach Daniels's other constitutional arguments. See Pet. App. 4a n.1 ("[W]e need not address his additional challenges."). Because this Court is a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), it should not consider Daniels's due-process and vagueness claims in the first instance.

In addition, the due-process issues raised by Daniels do not independently warrant this Court's review. See *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975) ("declin[ing] to entertain" "alternative grounds for affirmance" because "the issues [were not] of sufficient general importance to justify the grant of certiorari" in their own right). Multiple courts of appeals have rejected the claim that Section 922(g)(3) violates the Due Process Clause's prohibition of vague laws, and Daniels does not allege any circuit conflict on the issue. See *United States* v. *Hasson*, 26 F.4th 610, 616-621 (4th Cir.), cert. denied, 143 S. Ct. 310 (2022); *United States* v. *Patterson*, 431 F.3d 832, 836 (5th Cir. 2005), cert. denied, 547 U.S. 1138 (2006); *United States* v. *Cook*, 970 F.3d 866, 872-878 (7th Cir. 2020); *United States* v.

Bramer, 832 F.3d 908, 909-910 (8th Cir. 2016) (per curiam); *United States* v. *Purdy*, 264 F.3d 809, 811-813 (9th Cir. 2001); *United States* v. *Edwards*, 540 F.3d 1156, 1162 (10th Cir. 2008), cert. denied, 555 U.S. 1124 (2009).

* * * * *

The Court should hold the petition for a writ of certiorari pending the disposition of *United States* v. *Rahimi*, No. 22-915 (argued Nov. 7, 2023), and then dispose of the petition as appropriate.

Respectfully submitted.

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