No._____

**IN THE SUPREME COURT OF THE UNITED STATES**

ALBERTO JIMENEZ PASTRANA, PETITIONER

V.

UNITED STATES OF AMERICA

_____

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

_____

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 922(g)(1), which criminalizes possession of a firearm by a convicted felon, exceeds Congress's power under the Commerce Clause.
2. Whether 18 U.S.C. § 922(g)(1) violates the Second Amendment.

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

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Alberto Jimenez Pastrana asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 15, 2024.

## PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the courts below.

## RELATED PROCEEDINGS

*United States v. Jimenez Pastrana,* U.S. District Court for the Western District of Texas, Number 4:22 CR 00699-DC-1, Judgment entered April 3, 2023.

*United States v. Jimenez Pastrana,* U.S. Court of Appeals for the Fifth Circuit, Number 23-50212, Judgment entered February 15, 2024.

## OPINION BELOW

The unpublished opinion of the court of appeals is an appendix to this petition.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on February 15, 2024. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States[.]" U.S. Const. art. I, § 8, cl. 3.

The Second Amendment to the United States Constitution that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

## STATUTORY PROVISION INVOLVED

Title 18 U.S.C. § 922(g)(1) provides:

"It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in and affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or trans-ported in interstate or foreign commerce."

## STATEMENT

Petitioner Alberto Pastrana was charged by indictment with being a previously convicted felon knowingly in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The indictment alleged that the firearm "had been shipped and transported in interstate and foreign commerce." Pastrana pleaded guilty to that charge.

After Pastrana entered his plea, a U.S. probation officer prepared a presentence report. The report recommended a total offense level of 34 which, with Pastrana's criminal history category of V, created an advisory guideline sentencing range of 235 to 293 months' imprisonment. That range was limited by the statutory maximum sentence of 15 years, 180 months. *See* 18 U.S.C. § 924(a)(8); U.S.S.G. §5G1.1(a). The district court sentenced Pastrana to 180 months' imprisonment.[1]

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

Pastrana appealed. He argued that 18 U.S.C. § 922(g)(1) exceeds Congress's power under the Commerce Clause and that the statute violates the Second Amendment. Reasoning from the opinion in *United States v. Lopez*, 514 U.S. 549 (1995), he argued that firearm possession is local, noncommercial conduct and thus is not an activity that substantially affects interstate commerce. Reasoning from the opinion in *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022), he argued that history did not support a blanket prohibition on firearm possession by persons convicted of a felony. The court of appeals rejected both arguments. On the commerce-clause issue, the Fifth Circuit held that, under its precedent, § 922(g)(1) was a valid exercise of Congress's authority over commerce. *See* Appendix at 2 (citing *United States v. Alcantar,* 733 F.3d 143, 145-46 (5th Cir. 2013)). On the Second Amendment issue, the Fifth Circuit held that *Bruen* did not require a conclusion that § 922(g)(1) was plainly unconstitutional. Appendix at 2.

## REASONS FOR GRANTING THE WRIT

### I. BECAUSE MERE POSSESSION OF A FIREARM IS NOT COMMERCIAL ACTIVITY, SECTION 922(g)(1) CANNOT BE JUSTIFIED BY THE COMMERCE POWER.

Title 18 U.S.C. § 922(g) prohibits specified categories of persons from possessing firearms "in or affecting commerce." Subsection 922(g)(1) prohibits firearm possession by persons who were previously convicted of felony offenses. In cases involving previous iterations of a federal felon-firearm prohibition statute, the Court has ruled that the proof of the statutory element "in and affecting commerce" can be satisfied by proof that, at some point in the past, the firearm traveled in interstate commerce. *See Scarborough v. United States*, 431 U.S. 563, 566–67 & n.5 (1977) (interpreting predecessor statute). *Scarborough* did not, however, consider whether a statute that reaches conduct with such a minimal, temporally distant link to interstate commerce is a constitutional exercise of the federal commerce power.

The Court should consider that issue now. In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act, 18 U.S.C. § 922(q), holding that Congress lacked the power to criminalize the mere possession of a firearm on school premises. 514 U.S. 549 (1995). *Lopez* and later decisions indicate that noncommercial activity is not a proper subject for commerce-clause regulation. Because that is so, the congressionally created "commerce" element in § 922(g) cannot make the statute constitutional. Congress cannot, through statutory design, confer upon itself a power the constitution does not grant it.

The U.S. Constitution created a federal government of enumerated powers. *See* U.S. CONST. art. I, § 8; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (Roberts. C.J.) (plurality op.). "The Constitution's express conferral of some powers makes clear that it does not grant others." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534 (Roberts. C.J.) (plurality op.). One power not granted to the federal government is a general police power. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000). Because it lacks a general police power, Congress cannot criminalize acts simply because it thinks that doing so would advance the societal good. Instead, any crime created by Congress, as with every other exercise of Congressional power, must be justified by reference to a particular grant of enumerated authority. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2578 (Roberts, C.J.).

Section 922(g)(1)'s prohibition of firearm possession by felons is said to rest on Congress's exercise of the commerce clause. *See, e.g., United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013); *United States v. Griffith,* 928 F.3d 855, 865 (10th Cir. 2019). The commerce clause grants Congress the authority "[t]o regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. *Lopez* identified three categories of activities that Congress may regulate under its commerce power: "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at

558–59 (internal citations omitted). The Court concluded that § 922(q) did not fall within the first two categories. Thus, to survive constitutional scrutiny, it had to fall "under the third category as a regulation of activity that substantially affects interstate commerce." *Lopez*, 514 U.S. at 559.

The third *Lopez* category requires an inquiry to determine "whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559. The Court concluded that section 922(q) failed the "substantial effect" test because mere possession of a gun was not commercial activity and because regulation of such possession was not a part of a greater scheme of commercial regulation. *Lopez*, 514 U.S. at 561–63; *see also Morrison*, 529 U.S. at 615-19 (holding federal statute governing gender-motivated non-economic violence unconstitutional under Commerce Clause).

Section 922(g)(1), like § 922(q), reflects Congress's attempt to regulate simple gun possession, and, like § 922(q), the regulation is of a non-economic activity. The *Lopez* categories do not support a conclusion that § 922(g)(1) is a valid exercise of the commerce clause power.

Section 922(g)(1) does not regulate the channels of commerce. Nor does it regulate only things "in" commerce. *See Scarborough v. United States*, 431 U.S. 563, 573 (1977) (stating that under § 922's predecessor statute, "Congress must have meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities"). Thus, to be constitutional, § 922(g)(1) must fall within the third

*Lopez* category: it must regulate activity that substantially affects interstate commerce.

A substantial effect on commerce cannot be shown merely through arguments that gun possession or violent crime may cause harms that require the spending of money to remedy or that gun possession may harm economic productivity. *Lopez,* 514 U.S. at 563-67; *Morrison,* 529 U.S. at 612-18. This social cost rationale was held to sweep too broadly. Under it "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Lopez*, 514 U.S. at 564 If the costs of crime in general qualified firearm possession as economic activity, "it is difficult to perceive any limitations on federal power[.]" *Lopez*, 514 U.S. at 564.

Thus, even if mere possession has some effect on commerce, that effect is too minimal to save § 922(g)(1). Activities with a de minimus commercial impact can be regulated under the Commerce Clause only as part of "a general regulatory statute [that] bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558. Such regulation is permitted if the statute regulates non-commercial activity that is "an essential part of a larger regulation of economic activity, in which the activity would be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 560–61; *see Morrison*, 529 U.S. at 613 (noting that "thus far in our Nation's history," the Court has upheld intrastate regulation under Commerce Clause only where the regulated activity is economic in nature). Section 922(g)(1), a statute with a police function–to reduce crime–does not meet this criterion. Gun possession is not

commercial activity. The sale of guns may be regulated as commercial activity, and thus a law prohibiting sales to felons might be a viable, commerce-based way to keep guns from felons. But criminalizing simple, local possession of a gun is not commercial activity. Prohibiting the non-economic act of possessing a gun, as opposing to buying or selling a gun, is not necessary to achieve the goals of reducing sales to felons.

Section 922(g)(1)'s interstate-commerce element, which is supposed to ensure, "through case-by-case inquiry, that the firearm possession in question affects interstate commerce," *Lopez*, 514 U.S. at 561, cannot save the statute. In *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971), the Court considered whether § 922(g)'s predecessor, 18 U.S.C. § 1202(a), barred all possession of firearms by felons without requiring the government to prove that the felon's possession was "in commerce or affecting commerce." *Id.* at 338. The Court declined to reach the constitutional issue, instead resolving the question as a matter of statutory interpretation. *Id.* at 339 n.4. The Court held that the government was required to demonstrate some nexus between interstate commerce and the felon's possession of the weapon. *Id.* at 350.

The Court again addressed the statutory interstate nexus issue in *Scarborough*, concluding that proof the firearm previously traveled in interstate commerce satisfied the "statutorily required nexus" between the firearm possession and commerce. 431 U.S. at 564, 566–67. *Scarborough* addressed only the type of proof needed to meet the statutory requirements of what was then § 1202. 431 U.S. at 570–76. In *Scarborough,* as in *Bass*, the statutory-nexus question was distinct from the

constitutional issue whether a statute regulating mere possession falls without the commerce power and was not addressed.

*Lopez* acknowledged that the presence of a statutory nexus should be considered in determining whether a statute violates the commerce clause. *Lopez*, 514 U.S. at 561. Some courts have inferred from this suggestion that the mere presence of a jurisdictional element of the type found in § 922(g)(1) will always save a statute from a commerce clause challenge. *See, e.g.*, *United States v. Santiago*, 238 F.3d 213, 216 (2d Cir. 2001); *United States v. Dorris*, 236 F.3d 582, 585 (10th Cir. 2000); *cf. United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996) (upholding § 922(g)(1), in part, on presence of jurisdictional element). But that inference treats too lightly our constitutional structure of a limited central government with enumerated powers. And the Court appeared to cast significant doubt on the viability of the inference in *Jones v. United States*, 529 U.S. 848 (2000).

*Jones* considered whether the federal arson statute, 18 U.S.C. § 844(i), which contains a jurisdictional element like the one in § 922(g)(1), criminalizes the destruction of privately-owned property. *Jones*, 529 U.S. at 850. The Court construed the jurisdictional element in § 844(i) narrowly and limited its reach to the crime of arson of property that is "currently used in commerce or in an activity affecting commerce." *Jones*, 529 U.S. at 859. In so ruling, the Court noted that a broader construction might render the statute unconstitutional under *Lopez*. *Id.* at 858. Although the *Jones* analysis turned on the definition of the word "use" in the arson statute—a term not present in the felon-in-possession statute—the case nonetheless

has important implications for § 922(g)(1). *Jones* indicated that the mere presence of a jurisdictional element will not save a statute from a commerce clause challenge. Instead, that element must be construed, if possible, to bring the statute within the limits set by the Constitution. *Id.*

Thus, both *Lopez* and *Jones* cast doubt on the constitutionality of the *Scarborough* statutory analysis, which requires no more than a showing under the statute's terms of a tangential connection to commerce. *See United States v. Bell*, 70 F.3d 495, 498 (7th Cir. 1995) (noting doubt raised by *Lopez*). *Lopez* acknowledged that previous cases were unclear on the point. It clarified that the regulated activity must substantially affect commerce "to be within Congress's power to regulate it under the Commerce Clause." *Lopez*, 514 U.S. at 559.

The Court should grant certiorari to address the doubts raised about the constitutionality of § 922(g)(1). The statute has faced and continues to face repeated challenges to its constitutionality throughout the nation. *See United States v. Scott*, 263 F.3d 1270, 1274 (11th Cir. 2001) (collecting cases to that point); *see also United States v. Moore,* 2021 WL 3502933 (10th Cir. Aug. 10, 2021); *United States v. Libsey,* 2021 WL 3466041 (9th Cir. Aug. 6, 2021); *United States v. Williams,* 2021 WL 1961649 (11th Cir. May 17, 2021). These ongoing challenges and the thousands of § 922(g) prosecutions brought each year, *see* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/FigureF4.pdf, mean that the issue presented will recur

until the Court provides a definitive statement regarding the application of *Lopez*'s principles to the statute.

## II. Section 922(g)(1) Does Not Comport With the Second Amendment.

The Second Amendment to the United States Constitution states "[a] well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. The amendment codifies and protects an individual right to possess firearms, a right whose "central component" is self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008); *see Bruen*, 142 S. Ct. at 2133. *Heller* and *McDonald v. City of Chicago,* 561 U.S. 742 (2010), established the outlines of the right but it was not until *Bruen* that the Court explained how to evaluate statutes that impair that right.

*Bruen* taught that a court must first look to see whether the challenged statute addresses a matter that is covered by "the Second Amendment's plain text[.]" 142 S. Ct. at 2126. When the statute does so, the court must determine whether the statute can be shown by the government to be "consistent with this Nation's historical tradition of firearm regulation." *Id.*

### C. Possession of a firearm is presumptively protected conduct, even if the possessor is a felon.

Section 922(g)(1) completely bans firearm possession by all persons ever convicted of a felony offense, without regard to the type of firearm, the way in which the firearm used, or the type of prior felony. The plain language of the Second Amendment, read naturally and reasonably, includes persons who have previously

been convicted of a felony offense. It does so because the amendment states that the right to keep and bear arms belongs to "the people." U.S. Const. amend. II. The "people" is a far-reaching term that indicates the "'the Second Amendment right is [one] exercised individually and belong[ing] to *all* Americans.'" *United States v. Daniels*, 77 F.4th 337, 342 (5th Cir. 2023) (quoting *Heller*, 554 U.S. at 581, and adding emphasis). *Heller* explained that, when the Constitution refers to "'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset," and that there is a "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id.* at 580–81.

The Amendment's use of the broad term "the people" shows the right is generally applicable. The courts of appeals have read the broad categorical term "the people" to embrace a larger group than merely law-abiding or responsible citizens. *See Daniels*, 77 F.4th at 342-43; *Range v. Attorney General* 69 F.4th 96, 101 (3d Cir. 2023) (en banc) (references to "law-abiding, responsible citizens" in *Heller*, *McDonald*, and *Bruen* were dicta); *see also Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) (any "law-abiding" qualifier would relate to the power to restrict a right, not to who possesses the right). Because the Second Amendment right belongs to the individuals who make up the people, *Heller*, 554 U.S. at 580–81, § 922(g)(1)'s categorical ban on an individual's possession of a firearm based on his status as a felon is presumptively unconstitutional under the plain text of the Second Amendment and the first stage of the *Bruen* analysis.

Because § 922(g)(1) impairs the right covered by the plain text of the Second Amendment, the burden shifts to the Government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. *Bruen* described three metrics by which the sufficiency of the historical precedent should be analyzed: temporal proximity to the founding era, similarity to the challenged restriction, and breadth. *Id.* at 2130–34, 2136, 2138.

The Court taught that "when it comes to interpreting the Constitution, not all history is created equal. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–35). The Court observed that events long separated in time from the adoption of the amendment, whether the events predated or postdated the amendment, may not accurately reflect the scope and meaning of the right enshrined. *Bruen,* 142 S. Ct. at 2136.

The Court further explained that relevant founding-era historical precedent must be comparable to the challenged regulation. How similar the historical precursors must be to the challenged law depends on the societal problem it seeks to address. When "a challenged regulation addresses a general societal problem that has persisted since the 18th century," the government must identify distinctly similar historical regulations. *Bruen*, 142 S. Ct. at 2131. The "lack of a distinctly similar historical regulation addressing that problem" or the presence of evidence that earlier generations addressed the societal problem through materially different means

suggests that "the challenged regulation is inconsistent with the Second Amendment." *Id.* The total handgun ban in *Heller* and public-carry restriction in *Bruen* involved this type of "straightforward" historical inquiry. *Id.*

Whether a historical regulation is a proper analogue for a uniquely modern regulation turns on whether they are "relevantly similar," with regard to how and why the regulations burden the Second Amendment right. *Id.* at 2132–33. Historical precedents are "relevantly similar" when the historical law and the modern law both restrict the right to bear arms for comparable reasons. The test does not require a "historical twin," but neither is it satisfied by an analogue that "remotely resembles" current law. *Bruen*, 142 S. Ct. at 2132–33.

The breadth of a regulation is to be measured by evidence that there was historically "a tradition of broadly prohibiting" conduct in the manner of the challenged restriction. *Bruen*, 142 S. Ct. at 2138 (emphasis added). In other words, the founding-era historical evidence must show "a governmental practice has been open, widespread, and unchallenged since the early days of the Republic." *Id.* at 2137 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment)). The Government cannot "simply posit that the regulation promotes an important interest." *Bruen,* 142 S. Ct. at 2126. Nor can it rely on "outlier" historical restrictions. *Id.* at 2133, 2156.

None of the *Bruen* metrics support the broad prohibition found in section 922(g)(1). The Second Amendment was ratified in 1791. Historical evidence from the

period immediately surrounding ratification is entitled to significant weight under *Bruen*. While some categorical firearms restrictions existed during this time, scholars have noted the period was marked by less burdensome temporary restrictions than were found in Restoration England and that there existed an opportunity to have firearms rights restored. *See* Joseph G. S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 268–70 (2020). For example, some religious dissidents in the Massachusetts Bay Colony had their rights restored after expressing contrition, and even those who engaged in an armed rebellion in Massachusetts were subjected only to a three-year prohibition on bearing arms. *Id.*

By the 19th century, "prohibitions on arms possession were mostly discriminatory bans on enslaved people or freedmen," or on targeted disfavored groups like "tramps." *Id.* at 269–70. These prohibitions, like earlier laws, did not disarm felons as a class, though in the course of discriminating on improper grounds they may have affected the rights of some who had been convicted of felonies.

Before *Bruen*, courts often acknowledged the absence of founding-era restrictions on felons. Yet they concluded that § 922(g)(1) was constitutional by relying on *Heller*'s dicta that prohibitions on felon firearm possession were "longstanding," or by applying a means-end test that *Bruen* swept aside. *See, e.g.*, *Medina v. Whitaker*, 913 F.3d 152, 159–60 (D.C. Cir. 2019). However, the "longstanding prohibitions" language in *Heller* is dicta, and courts have cautioned against reliance on it. *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010).

Indeed, *Heller* never suggested that these prohibitions would be exempt from historical scrutiny. To the contrary, it explained "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before use." *Heller*, 554 U.S. at 635. *Bruen*'s metrics rejected reliance on conclusory claims that a prohibition was longstanding.

Instead, the government must provide historical examples of regulations that are "distinctly similar" to § 922(g)(1) because, as in *Heller* and *Bruen*, the restriction does not address "unprecedented societal concerns or dramatic technological changes." *Bruen*, 142 S. Ct. at 2132–33. Section 922(g)(1) categorically bans firearm possession by all felons. Crime and felons have existed since before the country's founding. So too has the presumed "societal concern" addressed by § 922(g)(1): felons possessing firearms.

There are no "distinctly similar" founding-era laws demonstrating a tradition of broadly prohibiting firearm possession by felons. *See Kanter*, 919 F.3d at 454 (Barrett, J., dissenting) (noting scholars have not been able to identify any founding-era laws disarming all felons). The earliest firearm restrictions for felons in America were passed in the 20th century. *See, e.g.*, Greenlee at 272–75. The modern statutes that dispossess felons of firearms, including § 922(g)(1), bear "little resemblance to laws in effect at the time the Second Amendment was ratified." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011); *see also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012). Reliance on the passage of § 922 itself to support its own historical tradition is

logically circular and ignores *Bruen*'s skepticism of 20th century historical evidence. *See Bruen*, 142 S. Ct. at 2137, 2154 n.28; *Range*, 69 F.4th at 104.

Another historical reason counsels against concluding that the amendment prohibited firearm possession by felons. At the founding, the right to bear arms was connected to the duty to bear arms. *See* Joyce Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 1–10, 138–40 (1994); Nicholas J. Johnson, et al., Firearms Law and the Second Amendment: Regulation, Rights, and Policy 219–22 (3d ed. 2022). Indeed, the Second Amendment codified an individual right, but the prefatory clause clarifies that the purpose of that right was to "prevent elimination of the militia." *Heller*, 554 U.S. at 599. This duty to bear arms was reflected in federal and state laws requiring most citizens to keep firearms as part of militia service. *See, e.g.*, Second Militia Act, § 1, 1 Stat. 271 (May 8, 1792).. These laws "exempted" certain classes of people, but not felons. *Id.* § 2, 1 Stat. 272; *cf.* Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous"*, 25 Tex. Rev. L. & Pol. 245, 278 (2021) (finding no evidence that those with criminal convictions were excluded from militia duties or firearm ownership). The absence of founding-era laws specifically disarming felons forecloses the Government's ability to show "distinctly similar historical regulation[s]" like § 922(g)(1).

Even if the Court were to apply the "relevantly similar" standard, which should be reserved under *Bruen* for statutes addressing unprecedented modern problems, no evidence of "relevantly similar" firearms restrictions would be found. Courts that

have upheld § 922(g)(1) since *Bruen* have largely eschewed the requirement to show specific, similar historical regulations. Instead, many have relied on general arguments by the Government that § 922(g)(1) is consistent with traditions of disarming other "unvirtuous" citizens.

Scholars have, however, noted the absence of historical support for this "virtuous citizen" theory. *See* Greenlee at 275–83. Historically, categorical disarmament was limited to disempowered minority communities—*e.g.*, enslaved persons and Indians—and those who evidenced disloyalty to the government. *See id.* at 261–65; Churchill at 156–61. Such categories do not "impose a comparable burden on the right" and are not "comparably justified" to § 922(g)(1)'s categorical disarmament of felons. *See Bruen*, 142 S. Ct. at 2133 (explaining metrics of comparing "relevantly similar" analogues).

Throughout *Bruen*, the Court reasoned that the respondents had "define[d] the category … far too broadly" and rejected the extrapolation of a broad tradition from a few narrow historical restrictions. *See id.* at 2134, 2150, 2156. Historical evidence of disarming enslaved persons, Indians, and political opponents cannot be generalized to encompass all "unvirtuous" people—a term that mischaracterizes those historical categories and which would encompass considerably more categories than just felons. And the term lacks a limiting principle. *See id.* at 2134; *cf. Medina*, 913 F.3d at 159–60 (rejecting the similar "dangerousness standard" as too "amorphous ... to delineate the scope of the Second Amendment").

It was not until the 20th century that legislatures began to pass modern, categorical firearms bans, including the one prohibiting felons from possessing firearms. *See* Greenlee at 272–75. Congress passed the first version of the modern federal firearm ban for violent felons in 1938, expanding it to include non-violent felons in 1961 and all possession in 1968.[2] State laws disarming felons were, likewise, first adopted in the early 20th century. *See* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) ("Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding.") The breadth of the prohibition in § 922(g)(1) appears to exceeds that found in the American tradition, but only this Court can definitively address the issue. Because only the Court can do so and because the issue is one of tremendous importance, the Court should grant certiorari.

[2] *See* Federal Firearms Act of 1938, 75 Cong. Ch. 850, § 2(e), 52 Stat. 1250, 1251 (repealed); Act of Oct. 3, 1961, Pub. L. No. 87-342, 75 Stat. 757 (repealed); Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921–928).

## Conclusion

FOR THESE REASONS, Petitioner asks that the Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
*Counsel of Record for Petitioner*

DATED: March 27, 2024.