No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

JORGE BARTOLOMEI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statute prohibiting the possession of a firearm by any person who was previously convicted of "a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(g)(1), violates the Second Amendment.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- United States District Court for the Southern District of Texas:
  United States v. Jorge Bartolomei, No. 4:22-cr-91 (May 2, 2023)

- United States Court of Appeals for the Fifth Circuit:
  United States v. Jorge Bartolomei, No. 23-20196 (Jan. 23, 2024)

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MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

Petitioner Jorge Bartolomei petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (App. 1a-2a) is unreported but available at 2024 WL 243324.

JURISDICTION

The Fifth Circuit entered judgment on January 23, 2024. App. 1a. This petition is filed within 90 days of that date. *See* Sup. Ct. R. 13.1 & 13.3. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITTUIONAL AND STATUTORY PROVISIONS

The Second Amendment provides:

> 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.

18 U.S.C. § 922(g)(1) provides:

> (g) It shall be unlawful for any person–
>
> > (1) 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 or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

1. In June of 2021, petitioner Jorge Bartolomei sold a Glock model 22, 40-caliber pistol to an undercover federal law-enforcement agent operating in Hitchcock, Texas. At the time of the transaction, petitioner was on bond as a result of his arrest three months earlier on a state charge of unlawfully possessing a separate firearm as a felon. Prior to both incidents, petitioner sustained convictions for the Texas felony offenses of grand larceny, attempted retaliation on an officer, theft, possessing less than a gram of cocaine, forging a government document, and possessing between four ounces and five pounds of marijuana.

Petitioner later pleaded guilty to a single-count indictment charging him with possessing the Glock knowing that he had previously been convicted of an offense punishable

by more than one year, in violation of 18 U.S.C. § 922(g)(1). For that crime, the district court sentenced petitioner to the then-applicable statutory maximum term of 120 months' imprisonment.[1] *See* 18 U.S.C. § 924(a)(2) (eff. Dec. 21, 2018 to June 24, 2022).

2. Petitioner appealed. On appeal, for the first time, petitioner argued that his guilty plea and conviction should be set aside because Section 922(g)(1)'s application to his mere possession of the handgun at issue—based solely on his status as a felon—is inconsistent with the Nation's historical tradition of firearm regulations, and thus violated the Second Amendment under the rule of *New York State Rifle & Pistol Ass'n (NYSRPA) v. Bruen*, 597 U.S. 1 (2022). Consistent with its practice of rejecting unpreserved *Bruen*-based challenges to Section 922(g)(1) on the ground that the statute's compliance with the Second Amendment remains unsettled, and thus was not plain as of the time of petitioner's appeal—the court of appeals affirmed.[2] App 1a-2a; *accord United States v. Jones*, 88 F.4th 571, 573-74 (5th Cir. 2023).

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[1] The penalty provisions of Section 924(a) were amended in June of 2022—after petitioner's offense concluded—to raise the maximum prison term for violating Section 922(g) to 15 years (or 180 months). *See* 18 U.S.C. § 924(a)(8) (eff. June 25, 2022).

[2] The same issue is before the court of appeals, in a preserved posture, in several other pending appeals. *See, e.g.*, *United States v. Charles*, No. 23-50131; *United States v. Collette*, No. 22-51062. The court of appeals has thus far preferred to abate these and other cases pending this Court's resolution of *United States v. Rahimi*, No. 22-915 (argued Nov. 7, 2023). Petitioner urged the court of appeals to take the same course in his case. Def. C.A. Reply Br. 2-3, 8. But the panel declined.

REASONS FOR GRANTING THE PETITION

The question whether Section 922(g)(1) is compatible with the Second Amendment, as interpreted by this Court in *Bruen*, has split the circuits and continues to be the subject of widespread confusion and disagreement in the district courts. That question is implicated in thousands of cases each year, concerns a fundamental constitutional right, and, as the government has rightly acknowledged in *Garland v. Range*, No. 23-374, *Vincent v. Garland*, No. 23-683, and elsewhere, is sufficiently important to warrant this Court's review. As with the petitions in *Range*, *Vincent*, and other cases, the Court should hold this petition pending its resolution of *United States v. Rahimi*, No. 22-915 (argued Nov. 7, 2023), which concerns the application of *Bruen*'s framework to 18 U.S.C. § 922(g)(8)'s related ban on firearm possession by persons subject to domestic-violence protective orders. After *Rahimi* is decided, the Court should do one of three things: (1) grant this petition, vacate the court of appeals' judgment, and remand for reconsideration in light of *Rahimi*; (2) grant review in *Range*, *Vincent*, or another case posing the question presented and hold this petition pending resolution of the granted case; or (3) grant review in this case.

I. The question presented has divided the courts of appeals and its resolution is of surpassing importance.

As this Court recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and reiterated in *NYSRPA v. Bruen*, 597 U.S. 1 (2022), the Second Amendment guarantees to "all members of the political community," *Heller*, 554 U.S. at 581, the individual right to possess and carry firearms in common use for self protection. *Bruen* adopted a "test

rooted in the Second Amendment's text, as informed by history," for determining whether a modern-day regulation impermissibly infringes that right. *Bruen*, 597 U.S. at 19. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 24. At that point, it is government's burden to justify the law "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Ibid*.

1. At present, the question whether Section 922(g)(1) is sufficiently compatible with the American tradition of firearm regulation, as contemplated in *Bruen*, is the subject of a 2–1 split among the circuits.

a. So far two circuits, the Eighth and the Tenth, have engaged *Bruen*-based challenges to Section 922(g)(1) and upheld the statute's status-based ban on firearm possession as permissible in all applications, including as to all felony offenses (even nonviolent ones), and as to all arms (even those that are commonly used for self defense, like petitioner's handgun). *See United States v. Jackson*, 69 F.4th 495, 501-06 (8th Cir.), *reh'g en banc denied*, 85 F.4th 468 (2023); *Vincent v. Garland*, 80 F.4th 1197, 1197-1202 (10th Cir. 2023).

In *Jackson*, the Eighth Circuit held that Section 922(g)(1) complies with the Second Amendment both "as applied to" the particular defendant and as to all "other convicted felons." 69 F.4th at 502. In reaching this decision, the court found three factors particularly salient: (1) *Heller*'s assurance that the Court's opinion should not be read "to cast doubt on longstanding prohibitions on the possession of firearms by felons," *id.* at 501 (quoting *Heller*, 554 U.S. at 626), (2) evidence of founding-era laws disarming disfavored political and

racial groups such as "Native Americans," "Catholics," and "people who refused to declare an oath of loyalty," *id.* at 502-03, and (3) *Bruen*'s "repeated statements" that the Second Amendment "protects the right of a 'law-abiding citizen.'" *Id.* at 503 (citing *Bruen*, 597 U.S at 9, 15, 26, 29-31, 38, 60, 70-71). These factors, the court reasoned, justified the conclusion that "history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society," as well as by "categories of persons based on [the legislature's] conclusion that the category as a whole present[s] an unacceptable risk of danger if armed." *Id.* at 504. Understanding Section 922(g)(1) to reflect that Congress had so concluded as to felons, the court deemed the statute "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 502.

The Tenth Circuit, in *Vincent*, concluded that *Bruen* had not clearly abrogated its prior decisions upholding Section 922(g)(1) against Second Amendment challenge. *See* 80 F.4th at 1200-02. The Court thus reaffirmed its view that Section 922(g)(1) is constitutional as to "*any* convicted felon's possession of a firearm," *id.* at 1202 (original emphasis), without requiring the government to demonstrate the statute's "consisten[cy] with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

b. As the Solicitor General has acknowledged, *see* Petition for Writ of Certiorari at 22-24, *Garland v. Range*, No. 23-374 (Oct. 5, 2023) (*Range* Pet.), the Third Circuit's decision in *Range v. Att'y Gen.*, 69 F.4th 96 (3d. Cir. 2023) (en banc), conflicts with these decisions. In *Range*, the en banc Third Circuit applied *Bruen*'s text-and-history test and found Section 922(g)(1) unconstitutional as applied to a person whose prior conviction for

making false statements in relation to food stamps had exposed him to more than a year in prison. *Range*, 69 F.4th at 98. First, the court rejected the government's contention that a person's past conviction for an offense punishable by over one year operates to remove him from "the people" to whom the right to keep and bear arms is vested. *Id.* at 101-03. Then, upon examination of the relevant historical evidence, the court held that the government had failed in its attempt to demonstrate a broad tradition of American laws imposing anything near a permanent ban on firearm possession on account of past misdeeds. *Id.* at 103-06. In reaching these conclusions, the Third Circuit rejected each of the factors the Eighth Circuit relied upon in *Jackson* to conclude the opposite. *See id.* at 101-06. As a dissenting judge observed, "the ruling is not cabined in any way and, in fact, rejects all historical support for disarming any felon." *See Range*, 69 F.4th at 116 (Shwartz, J.).

c. This clear circuit conflict over the constitutionality of an act of Congress warrants this Court's intervention. Indeed, the conflict is already entrenched. The Third Circuit ruled on the question presented en banc. And the Eighth Circuit has twice declined requests to put the question to the full court. *See Jackson*, 85 F.th at 468-79 (Stras, J., joined by Erickson, Grasz, and Kobes, J.J., dissenting from the denial of rehearing en banc); *United States v. Cunningham*, No. 22-1080, 2023 WL 5606171, at *1 (Aug. 30, 2023). Without this Court's intervention, the split is sure to deepen.

2. Resolving the question presented is also important. Despite serious concerns as to Section 922(g)(1)'s constitutionality in a wide array (if not all) of its applications under *Bruen*, the statute continues to result in the imprisonment of thousands of American citizens

each year. *See Range* Pet. 24 (marshaling statistics demonstrating that Section 922(g)(1) is the most frequently applied provision of Section 922(g)). And, for fear of the same fate, countless more individuals—like Ms. Vincent, and Mr. Range—are deterred from engaging in conduct that would otherwise come within the Second Amendment's core. Only this Court can settle this monumental question. It should do so in this case or another, and without delay, after *Rahimi* is issued.

II. The Court should hold this petition pending its decision in *Rahimi* and subsequent dispositions of *Range*, *Vincent*, and other petitions raising the question presented.

As the Solicitor General has elsewhere explained, *see Range* Pet. 25-26, there is substantial overlap between the question presented here and the question currently before the Court in *Rahimi*, *supra*. Indeed, as noted above (Pet. 3 n.2), the court of appeals' preference to reserve judgment on Section 922(g)(1)'s constitutionality pending receipt of this Court's guidance in *Rahimi* is the reason that issue was still unsettled in the Fifth Circuit at the time petitioner raised it on appeal.

Given that the Court's application of *Bruen*'s text-and-history methodology to Section 922(g)(8) in *Rahimi* will inform the application of the same methodology to Section 922(g)(1), the most prudent course is to hold this petition (as the Court has done with the petitions in *Range* and *Vincent*, *supra*, as well as in *Jackson v. United States*, No. 23-6170) pending its disposition of *Rahimi*. That course would provide the Court with the option to

either grant the petition, vacate the court of appeals' judgment, and remand for reconsideration in light of *Rahimi*,[3] or grant plenary review in this case, *Range*, *Vincent*, or another case posing the question presented.

CONCLUSION

The Court should hold the petition for writ of certiorari pending resolution of *United States v. Rahimi*, No. 22-915, and then dispose of the petition as appropriate. Alternatively, the petition should be granted.

Respectfully submitted,

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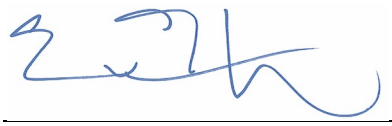

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[3] Notably, if the Court were to take this path in this and other cases raising the question presented, petitioner could still obtain relief if, during the pendency of his appeal, the court of appeals decides the question presented in his favor in any of the presently abated cases presenting the question in a preserved posture. *See supra* at 3 n.2 (citing two such cases); *see also Henderson v. United States*, 568 U.S. 266, 274 (2013) (holding that plain-error relief encompasses errors that become plain only while an appeal is pending).