No. _____

In the

Supreme Court of the United States

_____

David Jimenez,

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 18 U.S.C. §922(g)(1) comports with the Second Amendment?

PARTIES TO THE PROCEEDING

Petitioner is David Jimenez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Jimenez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Jimenez*, No. 23-10213, 2024 WL 1429426 (5th Cir. April 3, 2024)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on April 3, 2024. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTE AND CONSTITUIONAL PROVISION

Section 922(g) of Title 18 reads in relevant part:

> 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.

The Second Amendment to the United States Constitution 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.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner David Jimenez pleaded guilty to being a felon, knowing that he was felon, and possessing a firearm in and affecting commerce, in violation of 18 U.S.C. §922(g)(1). ROA.16, 164. At rearraignment, Petitioner consented to proceed before a magistrate judge. ROA.35, 97-100. The presiding magistrate advised him during the hearing that conviction under 18 U.S.C. §922(g) required proof of these elements:

> First, that the defendant knowingly possessed a firearm, as charged.
>
> Second, that before the defendant possessed the firearm, the defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of 1 year.
>
> Third, that the defendant knew he had been convicted of such a crime at the time he possessed the firearm.
>
> And fourth, that the firearm possessed traveled in and affected interstate or foreign commerce, that is, before the defendant possessed the firearm, it had traveled at some time from one state to another or between any part of the United States and any other country.

ROA.130-31.

The presiding judge made no comment on Congress's ability to criminalize this conduct. The magistrate also relied on a written stipulation that Petitioner executed before the hearing to find that a factual basis existed to support Petitioner's guilty plea. ROA.37-38, 166, 169-72. In that stipulation, Petitioner admitted that he was a felon, knew he was felon, and possessed a firearm in and affecting commerce "[b]ecause bro, people trying to kill me in these streets." ROA.37. The magistrate

judge recommended accepting Petitioner's guilty plea, and the district court later did so without objection. ROA.5, 47-49.

In the presentence investigation report ("PSR"), probation calculated a guideline range of 15–21 months, commensurate with offense level 12 and criminal history category ("CHC") III. ROA.233. Neither party objected, and the district court adopted these calculations at sentencing. ROA.199, 236-39. Ultimately, the court upwardly departed under USSG §4A1.3, imposed a sentence of 33 months, three years of supervised release under conditions, a $100 special assessment, and ordered the forfeiture of the indicted firearm. ROA.59, 203-05. Petitioner came to the federal proceedings with two adult felony convictions for burglary and juvenile convictions for assault and robbery. ROA.220-223.

B. Appellate Proceedings

Petitioner appealed pressing, *inter alia*, a Second Amendment argument. He contended that he had a Second Amendment right to possess arms, and that a criminal conviction could not lie for the exercise of that right. He also contended that his guilty plea was invalid because the district court did not advise him of the constitutional limits on the government's power to prosecute him for possessing a firearm. He conceded that these claims were reviewable only for plain error and foreclosed under circuit precedent.

The court of appeals affirmed. *See* [Appx. A]; *United States v. Jimenez*, No. 23-10213, 2024 WL 1429426, at *1 (5th Cir. Apr. 3, 2024)(unpublished). It applied plain error review and found his claims foreclosed by circuit precedent. *Jimenez*, 2024 WL

1429426, at *1 (citing *United States v. Jones*, 88 F.4th 571, 573–74 (5th Cir. 2023) (per curiam)).

REASONS FOR GRANTING THE PETITION

This Court should decide the constitutionality of 18 U.S.C. §922(g)(1) under the Second Amendment. It should hold the instant Petition pending resolution of any merits cases presenting that issue.

The Second Amendment guarantees "the right of the people to keep and bear arms." Yet 18 U.S.C. § 922(g)(1) denies that right, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. In spite of this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges to the statute for many years. *See United States v. Moore*, 666 F.3d 313, 316-317 (4th Cir. 2012) (collecting cases). This changed, however, following *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111 (2022). *Bruen* held that where the text of Second Amendment plainly covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation's historical tradition of gun regulation. *See Bruen*, 142 S. Ct. at 2129-2130. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id*. at 2127-2128.

In *United States v. Rahimi*, No. 22-915, __U.S.__, 2024 WL 3074728, at *11 (June 21, 2024), this Court held that 18 U.S.C. §922(g)(8) comports with the Second Amendment. That statute makes it a crime to possess a firearm during the limited time that one:

> is subject to a court order that … restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and … includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or ….by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury…

18 U.S.C. §922(g)(8).

Upholding this statute, this Court emphasized its limited holding, which was "only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, No. 22-915, __U.S.__, 2024 WL 3074728, at *11. That rationale plainly leaves ample space to challenge 18 U.S.C. §922(g)(1). Section (g)(1) imposes a permanent, not a temporary, firearm disability. And that disability can arise from all manner of criminal convictions that do not involve a judicial finding of future physical dangerousness.

Such a challenge could well be resolved against constitutionality of §922(g)(1). "Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were un-known before World War I." C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?,* 32 Harv. J. L. & Pub. Pol'y 695, 708 (2009); *see also* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) ("The Founding generation had no laws . . . denying the right to people convicted of crimes.").; Carlton F.W. Larson, *Four Exceptions in Search of A Theory:* District of Columbia v. Heller and Judicial Ipse

Dixit, 60 Hastings L. J. 1371, 1376 (2009)("…state laws prohibiting felons from possessing firearms or denying firearms licenses to felons date from the early part of the twentieth century.); *United States v. Bullock*, 679 F.Supp.3d 501, 505 (S.D. Miss. 2023)("The government's brief in this case does not identify a 'well-established and representative historical analogue' from either era supporting the categorical disarmament of tens of millions of Ameri-cans who seek to keep firearms in their home for self-defense.").

As such, two circuit courts have held that §922(g)(1) trenches on the Second Amendment in at least some instances. *See Range v. Att'y Gen. United States of Am*., 69 F.4th 96, 103 (3d Cir. 2023) (en banc)(finding that statute violated constitution as to a claimant with an old fraud conviction); *United States v. Duarte*, 101 F.4th 657, 661 (9th Cir. 2024)(finding that statute violated constitution as to a claimant with five felony convictions for evading arrest, drug possession, and prior unlawful possession of a firearm). As the government noted in a recent Supplemental Briefing urging this Court to grant certiorari regarding §922(g)(1), many district courts have invalidated the statute even as to defendants with extremely serious felony records. *See* Supplemental Brief for the Federal Parties in Nos. 23-374, *Garland v. Range*; 23-683, *Vincent v. Garland*; 23-6170, *Jackson v. United States*; 23-6602, *Cunningham v. United States*, and 23-6842, *Doss v. United States*, at p.4, n.1 (June 24, 2024)(collecting 12 such cases)(hereafter "Supplemental Federal Parties), *available at* https://www.supremecourt.gov/DocketPDF/23/23-

374/315629/20240624205559866_23-374%20Supp%20Brief.pdf, *last visited June 27, 2024.*

As noted, the government has now asked this Court to grant certiorari in a wide range of cases presenting the constitutionality of §922(g)(1). In the objectively not-unlikely[1] event that the Court agrees to grant certiorari in one or more such cases, it should hold the instant Petition pending the outcome. *See Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting)("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided."). In the event that this Court finds that §922(g)(1) suffers from constitutional infirmity, it should grant *certiorari* here, vacate the judgment below, and remand to determine the effect of the new opinion.

This is so notwithstanding the failure of preservation in the district court, which may ultimately occasion review for plain error. *See United States v. Olano*, 507 U.S. 725, 732 (1993). For one, an error may become "plain" any time while the case remains on direct appeal. *See Henderson v. United States*, 568 U.S. 266 (2013). Further, procedural obstacles to reversal – such as the consequences of non-preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(per curiam)(GVR "has been our practice

[1] *See* Adam Feldman, *Empirical SCOTUS: Comparing cert-stage OSG efforts under Obama and Trump*, SCOTUSBLOG (June 6, 2019), *available https://www.scotusblog.com/2019/06/empirical-scotus-comparing-cert-stage-osg-efforts-under-obama-and-trump/ , last visited June 27, 2024* (observing a plenary grant rate for certiorari petitions by the Solicitor General between 30% and just over 50%).

in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres- Valencia v. United States*, 464 U.S. 44 (1983)(per curiam)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals).

Finally, if the court below were to deny relief on plain error review, it would create a clear circuit split between that court and the Ninth Circuit. The Ninth Circuit has held that defendants may obtain plenary review of Second Amendment claims, notwithstanding the lack of preservation in district court, if those claims rely on cases decided after sentencing. *See Duarte*, 101 F.4th at 663–64. It reasoned:

> It is true that Rule 52(b)'s plain error standard "is the default standard governing ... consideration of issues not properly raised in the district court" and thus "ordinarily applies when a party presents an issue for the first time on appeal." But when the untimely issue is a Rule 12(b)(3) "defense[ ]" or "objection[ ]" to a criminal indictment, "Rule 12's good-cause standard ... displac[es] the plain-error standard" under Rule 52(b). [*S*]*ee* Fed. R. Crim. P. 12(b)(4)(B)(c)(1) ("[A] court may consider the [untimely] defense, objection, or request if the party shows good cause."). If the defendant demonstrates good cause for failing to raise the Rule 12(b)(3) issue below, we may consider it for the first time and will apply

> whatever default standard of review would normally govern the merits, which in this case is de novo review.
>
> No one disputes here that Duarte's Second Amendment challenge is untimely because he could have raised it as a Rule 12(b)(3) defense or objection to his indictment. Duarte, however, demonstrated good cause for asserting his constitutional claim now instead of then. When Duarte was indicted, he "had no reason to challenge" whether § 922(g)(1) violated the Second Amendment as applied to him. We had already held in *Vongxay* "that § 922(g)(1) does not violate the Second Amendment as it applies to ... convicted felon[s]." Only later did the Supreme Court decide *Bruen*…. We may consider his challenge for the first time and will review it de novo.

Id. (internal citations omitted)(citing *United States v. Guerrero*, 921 F.3d 895 (9th Cir. 2019), *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), and *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010)). If this Court issues a decision calling into question the government's power to criminalize Petitioner's conduct, he should have a chance to propound the Ninth Circuit's theory regarding the standard of review, either in the court below, in this Court, or both.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 1st day of July, 2024.

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