No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CORTLIN REESE,

Petitioner,

versus

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)(9) and (n) violate the Second Amendment under *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022)?

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The opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction and sentence can be found at *United States v. Reese*, No. 23-30567, 2024 WL 1478879 (5th Cir. Apr. 5, 2024) (unpublished), and is set forth at App. 001.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution:

> 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.

Section 922(g)(9) of Title 18 provides in relevant part:

> (g) It shall be unlawful for any person—
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence.

Section 922(n) of Title 18 provides in relevant part:

> (n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

On February 15, 2023, the petitioner Cortlin Reese pled guilty to two federal firearms violations: (1) receipt of a firearm while under felony indictment in violation

of 18 U.S.C. § 922(n) and (2) possession of firearms by a person convicted of domestic violence in violation at 18 U.S.C. § 922(g)(9). ROA.38. As a part of his plea, Reese agreed that on October 22, 2022, he possessed two handguns on his person while he was attending a social event in Baton Rouge, Louisiana. At the time he possessed the two handguns, he knew he was under felony indictment and knew he had a prior misdemeanor conviction for domestic abuse battery. ROA.105-06.

Prior to sentencing, a probation officer prepared a presentence investigation report (PSR). ROA.69. The PSR provided that Reese had only a single prior conviction for domestic abuse battery, which was a misdemeanor for which Reese was sentenced to serve six months in parish prison. ROA.138. The PSR also provided that on March 16, 2022, Reese was indicted for Second Degree Murder and was on bond for that charge when he possessed the firearms at issue in the instant case. ROA.139. Reese faced an advisory guideline range of 27 to 33 months with an offense level of 17 and a criminal history category of II. ROA.146.

The court imposed a guideline sentence of 30 months imprisonment and three years of supervised release. ROA.71. Judgment was entered on August 2, 2023, ROA.71, and Reese filed a timely notice of appeal on August 14, 2023. ROA.84.

Reese appealed and challenged the constitutionality of 18 U.S.C. § 922(g)(9) and (n) under this Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). On April 5, 2024, the United States Court of Appeals affirmed Reese's conviction because, reviewing under plain error, it held that there

was no binding precedent holding § 922(g)(9) or § 922(n) unconstitutional in view of *Bruen* and the application of *Bruen* to those statutes. App. 1-2.

REASONS FOR GRANTING THE WRIT

I. The interpretation of *Bruen* to criminal statutes has divided the circuits

The Second Amendment guarantees "the right of the people to keep and bear arms." U.S. Const. amend. II. Yet 18 U.S.C. § 922(g)(9) and (n) deny that right, on pain of 15 years imprisonment, to anyone with a prior misdemeanor domestic violence offense or who are currently under indictment for a felony that has yet to be proven.

Enter *Bruen*. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022)). "When the Second Amendment's plain text covers an individual's conduct," *Bruen* held that the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. No longer may the government defend a regulation by showing that it is narrowly tailored to achieve an important or even compelling state interest. *Id.* at 17-24.

In *Bruen*'s wake, courts of appeals have split as to whether 18 U.S.C. § 922(g)(1) (the prohibition on felons from possessing firearms) infringes on rights protected by the Second Amendment. The Third Circuit sustained the Second Amendment challenge of a man previously convicted of making a false statement to obtain food stamps, notwithstanding that the crime was punishable by imprisonment for a term exceeding one year. *See Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023). By contrast, the Eighth Circuit has held that § 922(g)(1) is constitutional in all instances, at least against Second Amendment attack. *See*

United States v. Cunningham, 70 F.4th 502, 506 (8th Cir. 2023) (citing *United States v. Jackson*, 69 F.4th 495, 501-02 (8th Cir. 2023)). The Seventh Circuit considered a more robust development of the historical record necessary at the trial court and remanded the issue accordingly. *See Atkinson v. Garland*, 70 F.4th 1018, 1022–24 (7th Cir. 2023). The Tenth Circuit stands alone in declining to even venture into the historical justifications for § 922(g)(1) — it decided that *Bruen* did not abrogate precedent upholding § 922(g)(1) based on a head count of votes from *Bruen*'s concurring and dissenting opinions and its footnote concerning "shall-issue" regimes. *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023). Finally, the Ninth Circuit recently ruled that § 922(g)(1) was unconstitutional as applied to nonviolent felon. *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024).

II. Both Sections 922(g)(9) and (n) are unconstitutional under the Second Amendment

Reese raises a facial challenge to the constitutionality of 18 U.S.C. §§ 922(g)(9) & 922(n). Reese's convictions for possessing two handguns while under indictment and after being convicted of a misdemeanor crime of domestic violence should be reversed because the statutes of conviction unconstitutionally infringe on his rights under the Second Amendment. In *Bruen*, the Supreme Court reaffirmed that the Second Amendment right to bear arms is not a second-class right. 597 U.S. 1. The Court rejected decades of "judicial deference to legislative interest balancing" in the form of means-end scrutiny in Second Amendment jurisprudence. *Id.* Instead, it announced that a modern firearm regulation's constitutionality depends only on the Second Amendment's text and historical understanding.

Under this new framework, 18 U.S.C. §§ 922(g)(9) & 922(n) both violate the Second Amendment. The statutes impact the core Second Amendment right to possess a firearm for self-defense. This right belongs to all "the people" under the Constitution, including those under indictment and those with prior misdemeanor convictions for domestic violence. And the Government cannot meet its burden to show §§ 922(g)(9) & 922(n) are consistent with the Nation's historical tradition of firearm regulation, because there is no relevant historical evidence of categorically disarming such persons. The district court plainly erred in accepting Reese's guilty plea and his conviction should be vacated and 18 U.S.C. §§ 922(g)(9) & 922(n) be declared unconstitutional.

Even though criminal defendants have been routinely released pretrial with bail since before the founding, firearm restrictions on such people did not arise until the 20th century. The absence of such laws or practices from the founding is relevant evidence that § 922(n) is unconstitutional. *See Bruen*, 597 U.S. 1. The lack of historical firearm restrictions on indictees is not surprising. At the founding, the right to bear arms was also deeply connected to the historical 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) [Johnson]. 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." *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008). 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).[1] These laws "exempted" certain classes of people, but not indictees. *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 of firearm ownership). The colonies generally required even indentured servants—often convicted criminals—to be armed for militia service. *See* Johnson 185, 191-92. Countless colonial laws similarly required citizens to keep and carry firearms to and from church, as part of patrol duties, to aid against attacks by Native Americans, or otherwise to defend themselves and their community. *See id.* at 189-91; Stephen P. Halbrook, *The Right to Bear Arms* 131-35, 191-98 (2021). It follows that, while "the Second Amendment is not limited to only those in the militia, it must protect at least the pool of individuals from whom the militia would be drawn." *Firearms Pol'y Coal.,*

[1] Congress provided that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty five years … shall severally and respectively be enrolled in the militia." Second Militia Act, § 1. The Act further required that "every citizen so enrolled … shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt," and other related items like ammunition. *Id.* Similar contemporaneous state militia statutes also did not to exempt felons or those under indictment. *See, e.g.*, Thomas Herty, Digest of the Laws of Maryland 367-73 (1799); Act of Dec. 28, 1792, ch. 33, 6 N.H. Laws 84-92 (1917); Act of Apr. 4, 1786, 1 N.Y. Laws 227-36 (T. Greenleaf 1792); Act of Mar. 20, 1780, ch. 902, 5 Pa. Stat. 144-73 (J. Mitchell & H. Flanders comm'rs 1904); Horatio Marbury & William H. Crawford, Digest of the Laws of the State of Georgia 350 (1802); *cf. United States v. Miller*, 307 U.S. 174, 178-82 (1939) (discussing militia laws); Johnson 177-89 (in depth discussion about arms requirements for militia service in each colony).

Inc. v. McCraw, 623 F. Supp. 3d 740, 750 (N.D. Tex. 2022), *appeal dismissed sub nom. Andrews v. McCraw*, No. 22-10898, 2022 WL 19730492 (5th Cir. Dec. 21, 2022). Disarming indictees would have made little sense to the founders, because it would have effectively relieved them of a civic duty. Despite passing myriad other gun restrictions—early versions of gun registrations, safe storage laws, restrictions on types of firearms, and disarmament of Natives Americans, enslaved persons, and religious minorities—the founders never proposed barring indictees from receiving guns or disarming them. *See* Adam Winkler, *Gunfight* 113-18, 286-87 (2013) (detailing Revolutionary era gun laws and noting absence of restrictions like those from the 20th century). Not only were indictees not disarmed at the founding; they were likely required to own firearms.

Likewise, the Government cannot show that there was an established history at the time of the ratification of the Second Amendment that domestic abusers were disarmed as a result of that conduct. One court has noted that "§ 922(g)(8)'s history started in 1994 – less than 30 years ago" in the Violent Crime Control and Law Enforcement Act of 1994. *United States v. Perez-Gallan*, 640 F. Supp. 3d 697, 702-03 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023). That made it "adolescent by *Bruen*'s standards." *Id.* at 703. Section 922(g)(9) is not meaningfully older, "having been enacted in 1986," which The Fourth Circuit has called "recent vintage." *United States v. Chester*, 628 F.3d 673, 681 (4th Cir. 2010).

Turning to the history of domestic abuse itself, one court observed that "[d]omestic abusers are not new," but that "until the mid-1970s, government

intervention – much less removing an individual's firearms – because of domestic violence practically did not exist." *Perez-Gallan*, 640 F. Supp. 3d at 703. Abusers were prosecuted "infrequently," according to surveys of the Plymouth and other New England colonies, most likely because such incidents were handled by church courts "which relied on public shaming more than anything else." *Id.*

Moving to the 19th Century, the court noted that "removing firearms from an abuser – through government intervention or otherwise – was still not a prevalent occurrence." *Id.* at 704. The court highlighted one researcher's work on states in the American west between 1860 and 1930 which revealed that "the usual mode of punishment for domestic violence was a fine," although some offenders "could receive a whipping or jail time." *Id.* at 704-05.[2] Furthermore, in that era "many states still adhered to the belief that without serious violence, the government should not interfere in family affairs." *Id.* (citing *State v. Oliver*, 70 N.C. 60, 61-62 (1874)) (if "no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive"). Another researcher, the court notes, agrees that "even into the early twentieth century, judges were 'more likely to confiscate a wife beater's liquor than his guns.'" *Id.* (quoting Carolyn B. Ramsey, *Firearms in the Family*, 78 Ohio St. L.J. 1257, 1301 (2017)). The court concluded that its "historical

[2] Relying on Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia*, 1860-1930, 86 Ind. L.J. 185, 207 (2011).

inquiry aligns with what almost all circuit courts realized pre-*Bruen* – historical restrictions on 'who' may possess a firearm are almost nonexistent." *Id.*

In *Chester*, the Fourth Circuit noted that if "the historical evidence on whether felons enjoyed the right to possess and carry arms is inconclusive, it would likely be even more so with respect to domestic-violence misdemeanants." *Chester*, 628 F.3d at 681. Thus, the court was "certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors." *Id. Chester* was not an outlier. As the *Perez-Gallan* court explained, while "the above circuit courts eventually upheld the regulations using means-end scrutiny . . . a consistent theme was how little historical support the record contained." *Perez-Gallan*, 640 F. Supp. 3d at 707.

Finally, the prohibition in § 922(g)(9) is forever, unlike the provision upheld by this Court in *United States v. Rahimi*, No. 22-915, 2024 WL 3074728 (U.S. June 21, 2024) (upholding § 922(g)(8), a temporary restriction on gun possession during the limited time a person is subject to a restraining order issued after a hearing and after a finding that the subject was dangerous.).

III. Should this Court grant certiorari to address the constitutionality of 18 U.S.C. § 922(g)(9) or (n) in another case, the Court should hold the instant petition pending the outcome

Cortlin Reese did not challenge the constitutionality of the statute at the district court. Any review will therefore eventually have to occur on the plain error standard. *See* Fed. R. Crim. P. 52(b). This means that to obtain relief Reese must show error, that is clear or obvious, that affects substantial rights, and that seriously

affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). But as shown above, there is at least a reasonable probability that Reese could establish clear or obvious violation of his Second Amendment rights if this Court evaluates the constitutionality of Section 922(g)(9) or (n), which it should quickly do. And the obviousness of error may be shown any time before the expiration of direct appeal. *Henderson v. United States*, 568 U.S. 266 (2013). Finally, a finding that the Reese has been sentenced to prison for exercising a basic constitutional right would affect the outcome and cast doubt on the fairness of the proceedings, to say the least.

In short, the Court may ultimately grant certiorari to address the question presented. If so, Reese requests that it hold the instant petition pending the outcome. Should this Court disapprove of § 922(g)(9) or (n)'s constitutionality or limit the statute's application, Reese requests that the Court grant certiorari in the instant case, vacate the judgment below, and remand for reconsideration. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this July 3, 2024,

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