No. _____

In the

Supreme Court of the United States

TRAVIS ADAM BROWN,

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

JESSICA GRAF
**Counsel of Record*
JESSICA GRAF, PLLC
2614 130th Street
Suite 5 PMB 1030
Lubbock, Texas 79423
(806) 370-8006
jessica@jessicagraflaw.com

QUESTION PRESENTED

I. Whether 18 U.S.C. § 922(g)(1) is constitutional under the Second Amendment.

II. Whether substantive reasonableness review necessarily requires the court of appeals to reweigh the sentencing factors.

PARTIES TO THE PROCEEDING

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

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Travis Adam Brown*, 7:22-CR-00152-DC-1, United States District Court for the Western District of Texas. Judgment and sentence were entered on April 10, 2023.

2. *United States v. Brown*, No. 23-50222, 2024 WL 1994278 (5th Cir. May 6, 2024), Court of Appeals for the Fifth Circuit. The judgment affirming the judgment and sentence was entered on May 6, 2024.

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PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Brown*, No. 23-50222, 2024 WL 1994278 (5th Cir. May 6, 2024), and is reprinted on pages 1a–2a of the Appendix.

JURISDICTION

The Fifth Circuit entered judgment on May 6, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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.

Section 18 U.S.C. 3553(a) provides:

> (a) **Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . .

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments

have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

Travis Adam Brown pled guilty to being a felon in possession of ammunition. (ROA.170). The charge stemmed from an incident on June 26, 2022, where Odessa, Texas police responded to a domestic disturbance call. (ROA.173). When police arrived at Mr. Brown's residence, Mr. Brown had left. (ROA.173). Police spoke to "A.I.", Mr. Brown's girlfriend, who stated Mr. Brown had assaulted her and displayed a shotgun. (ROA.173). Mr. Brown was arrested at his mother's home. (ROA.174). Police got a search warrant for Mr. Brown's home and found various types of handgun ammunition. (ROA.174). Officers also found a few rifle barrels but no functioning firearm. (ROA.174). There were no shotgun shells. Police never found a firearm connected to Mr. Brown.

Mr. Brown's sentencing guidelines came out to 41–51 months. (ROA.186). The district court overruled his objections to this guideline range. (ROA.126). But, without warning, the district court upwardly varied and sentenced Mr. Brown to the statutory maximum of 180 months of imprisonment. (ROA.135). The court provided a cursory citation to the 18 U.S.C. § 3553(a) factors to justify the sentence, noting the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment. (ROA.132). The court also concluded that it believed Mr. Brown had assaulted A.I. and referenced his criminal history. (ROA.133–34).

On appeal, Mr. Brown challenged the guideline calculations and the reasonableness of his sentence. The Fifth Circuit affirmed. On the issue of substantive reasonableness, the Fifth Circuit wrote a single sentence: "In light of that deferential standard of review, we are not persuaded that the district court made

false factual findings in support of the sentence or otherwise erred in its assessment of the relevant sentencing factors." *United States v. Brown*, No. 23-50222, 2024 WL 1994278, at *2 (5th Cir. May 6, 2024).

REASONS TO GRANT THIS PETITION

I. 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 convicted of a crime punishable by a year or more. Despite 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, 316–17 (4th Cir. 2012) (collecting cases). This changed, however, following *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (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 fits within the nation's historical tradition of gun regulation. *See Bruen*, 597 U.S. at 24. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id*. at 20–21.

In *United States v. Rahimi*, 144 S. Ct. 1889 (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*, 144 S. Ct. at 1903. That rationale 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 unknown 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 Americans who seek to keep firearms in their home for self-defense."), appeal pending No. 23-60408 .

As the government noted in a recent Supplemental Brief 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) (Supplemental Federal Parties).[1]

The government has now asked this Court to grant certiorari in a wide range of cases presenting the constitutionality of § 922(g)(1). All those Petitions were granted, and the cases remanded in light of *Rahimi*, *supra*. *See Garland v. Range*, No. 23-374, 2024 WL 3259661 (July 2, 2024); *Vincent v. Garland*; No. 23-6170, 2024 WL 3259668 (July 2, 2024); *Jackson v. United States*, No. 23-6170, 2024 WL 3259675 (July 2, 2024); *Cunningham v. United States*, No. 23-6602, 2024 WL 3259687 (July 2, 2024); *Doss v. United States*, No. 23-6842, 2024 WL 3259684 (July 2, 2024). Notably, this Court remanded both those cases that resulted in a finding of 922(g)(1)'s unconstitutionality (like *Range*), and those that found it constitutional, (the remainder). This demonstrates that *Rahimi* does not resolve the constitutional status of the statute—were that so, it would be unnecessary to remand those cases in which the arms-bearer lost in the court of appeals. This Court should grant certiorari to

[1]Available at *https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf*, last visited July 25, 2024.

decide this momentous issue, and, if it does so in another case, 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.").

This is so notwithstanding the failure of preservation below, 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 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). And at the time of Mr. Brown's appeal, the rule in the Fifth Circuit was clear—an appellant could not win a Second Amendment challenge to 18 U.S.C. § 922(g)(1) on plain-error review. *E.g. United States v. Jones*, 88 F.4th 571, 574 (5th Cir. 2023). This Court can review an issue that was passed upon by the lower court, even if it was not pressed by a particular litigant. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). It should do so here.

II. The circuits are in conflict as to the nature of substantive reasonableness review.

The length of a federal sentence is determined by the district court's application of 18 U.S.C. § 3553(a). *See United States v. Booker*, 543 U.S. 220, 261 (2005). A district court must impose a sentence that is adequate, but no greater than necessary, to achieve the goals set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a)(2). The district court's compliance with this dictate is reviewed for reasonableness. *See Rita v. United States*, 551 U.S. 338, 359 (2007). In *Gall v. United States*, 552 U.S. 38 (2007), this Court emphasized that all federal sentences, "whether inside, just outside, or significantly outside the Guidelines range" are reviewed on appeal "under a deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 51. This review "take(s) into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id*. And "a major departure should be supported by a more significant justification than a minor one." *Id*. at 50.

Fifth Circuit precedent imposes several important barriers to relief from

substantively unreasonable sentences. By forbidding the "substantive second guessing" of the district court, it very nearly forecloses substantive reasonableness review entirely. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008). To similar effect is its oft-repeated unwillingness to "reweigh the sentencing factors." *United States v. Hernandez*, 876 F.3d 161, 167 (5th Cir. 2017); *United States v. Cotten*, 650 F. App'x 175, 178 (5th Cir. 2016); *United States v. Mosqueda*, 437 F. App'x 312, 312 (5th Cir. 2011); *United States v. Turcios-Rivera*, 583 F. App'x 375, 376-377 (5th Cir. 2014); *United States v. Douglas*, 667 F. App'x 508, 509 (5th Cir. 2016). Although *Gall* plainly affords the district court extensive latitude, it is difficult to understand what substantive reasonableness review is supposed to be, if not an effort to reweigh the sentencing factors, vacating those sentences that fall outside a zone of reasonable disagreement.

Notably, other circuits have declined to abdicate their roles in conducting substantive reasonableness review. The Second Circuit has emphasized that it is not the case that "district courts have a blank check to impose whatever sentences suit their fancy." *See United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008). The Eleventh and Third Circuits have likewise read *Gall* to "leave no doubt that an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished." *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008); *accord United States v. Levinson*, 543 F.3d 190, 195–96 (3d Cir. 2008). These cases conform to the consensus among the federal circuits that it

remains appropriate to reverse at least some federal sentences after *Gall* as substantively unreasonable. *See United States v. Ofray-Campos*, 534 F.3d 1, 44 (1st Cir. 2008)*; United States v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008); *United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008); *United States v. Shy*, 538 F.3d 933 (8th Cir. 2008).

The Fifth Circuit's restrictive approach to substantive reasonableness review is evident in its opinion in this case. In affirming the sentence, the court essentially undertook only review for procedural error. It noted that the district court did not apparently make any false factual findings or otherwise err in its assessment of the sentencing factors. Appx. at 2a. But it declined to consider whether those factors could *reasonably* support the particular sentence imposed. *See id*. To the contrary, it appeared to categorically foreclose relief for claims involving disagreement with how the district court weighed the relevant factors. *Id.* And it was especially important to weigh the relevant factors in this case where the district court imposed a sentence over *three times* greater than the recommended guideline range with little explanation. *See Gall*, 552 U.S. at 50. The case squarely presents the issue that has divided the courts of appeals. That issue is recurring and important. It is potentially implicated in nearly every federal criminal case that proceeds to sentencing, and it serves as an important check on the substantive injustice of sentences that are simply too long or too short. This Court should grant certiorari.

CONCLUSION

Petitioner asks this Court to grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Jessica Graf
JESSICA GRAF
JESSICA GRAF, PLLC
2614 130th Street
Suite 5 PMB 1030
Lubbock, Texas 79423
Telephone: (806) 370-8006
Email: jessica@jessicagraflaw.com

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