No. _____

In the

Supreme Court of the United States

_____

Isaac Joel Chavez,

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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QUESTIONS PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioner is Isaac Joel Chavez, 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, Isaac Joel Chavez, 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The unpublished opinion of the court of appeals is reported at *United States v. Chavez*, No. 24-10064, 2024 WL 3201731 (5th Cir. June 27, 2024)(unpublished).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 June 27, 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

The government indicted Petitioner Isaac Joel Chavez with unlawful firearm possession by a felon, in violation of 18 U.S.C. § 922(g)(1). Record in the Court of Appeals 25. He pleaded guilty with a plea agreement that contained a waiver of appeal. Record in the Court of Appeals 167-176. Specifically, he agreed to waive his "rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal the conviction, sentence, fine and order of restitution or forfeiture in an amount to be determined by the district court." Record in the Court of Appeals 172. The agreement did reserve these rights: "(a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic error at sentencing, (b) to challenge the voluntariness of the defendant's plea of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel." Record in the Court of Appeals 172. The parties also entered into a written factual stipulation as part of the agreement. Record in the Court of Appeals 52-54. In it, Petitioner admitted that he briefly possessed a firearm handed him by a juvenile while the juvenile engaged in a fistfight. He also admitted that he had been previously convicted of a felony, that he knew as much, and that the firearm had at some point crossed a state or international border. Record in the Court of Appeals 52-54.

At rearraignment, the magistrate judge advised that conviction under 18 U.S.C. § 922(g)(1) required proof of these elements:

> First, that the Defendant knowingly possessed a firearm as charged in the Indictment;

> 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 one year;
>
> Third, that when he possessed the firearm, the Defendant knew he had been convicted of such a crime; and
>
> Fourth, that the firearm possessed traveled in 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.

Record in the Court of Appeals 105-106. The magistrate judge made no comment on Congress's ability to criminalize this conduct.

The magistrate judge also relied on the written stipulation that Petitioner and the government executed before the hearing to find that a factual basis supported the guilty plea. Record in the Court of Appeals 117-118. Again, the magistrate judge made no comment on Congress's ability to criminalize the admitted conduct. Ultimately, the magistrate judge recommended accepting the guilty plea, and the district court later did so without objection. Record in the Court of Appeals 118-119, 125.

In the Presentence Investigation Report ("PSR"), the probation officer reported a single adult conviction, which was for the offense of deadly conduct. Record in the Court of Appeals 189-190. At sentencing, the district court accepted the plea agreement, overruled defense objections to a Guideline range of 78-97 months imprisonment, then imposed a sentence of exactly 97 months, stating several times that it would have imposed that sentence even if it had overruled the defendant's Guideline range. Record in the Court of Appeals 142-143, 147, 159-160.

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.

The court of appeals affirmed. *See* [Appx. A]; *United States v. Chavez*, No. 24-10064, 2024 WL 3201731 (5th Cir. June 27, 2024)(unpublished). It applied plain error review and found that any error could not be deemed clear or obvious. *See id.* (citing *United States v. Jones*, 88 F.4th 571, 573–74 (5th Cir. 2023)).

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*, 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 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."), *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)(hereafter "Supplemental Federal Parties), *available at https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf, last visited July 25, 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). All of 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 clearly 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 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 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 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, while the defendant signed a waiver of appeal, the court below did not address its applicability to this constitutional challenge to the statute of conviction. There is good reason to think that the challenge would survive the waiver. It is well-settled in the Fifth Circuit that a defendant cannot waive the right not to be convicted or imprisoned for conduct that does not constitute the charged offense, and that such a challenge is impliedly reserved by an appeal waiver. *See United States v. Trejo*, 610 F.3d 308, 312-313 (5th Cir. 2010); *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008); *United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002); *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002); *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001). Because the power of Congress to enact laws flows from its authority under the Constitution, an unconstitutional statute is no law at all. *See Bond v. United States*, 564 U.S. 211, 227 (2011) (Ginsburg, J., concurring) ("a law beyond the power of Congress…is no law at all") (cleaned up). As such, the indictment and factual resume neither allege nor admit an offense, and the situation is not meaningfully different than one in which the factual resume admits facts that fail to

satisfy a statute of undisputed constitutionality. In neither case has the defendant committed or admitted conduct for which the law authorizes punishment.

Further, the Fifth Circuit "will not enforce an appeal waiver unless the guilty plea was informed and voluntary." *United States v. Ramon*, 571 F. App'x 338, 339 (5th Cir. 2014) (citing *United States v. Dees*, 125 F.3d 261, 269 (5th Cir. 1997)). Indeed, due process requires the guilty plea to be "a voluntary, knowing, and intelligent act" to be valid. *United States v. Guerra*, 94 F.3d 989, 995 (5th Cir. 1996). But "a plea does not qualify as intelligent unless a criminal defendant first receives real notice of the true nature of the charge against him[.]" *Bousley v. United States*, 523 U.S. 614, 618 (1998). *See also Guerra*, 94 F.3d at 995 ("To constitute an intelligent act," a guilty plea "must be 'done with sufficient awareness of the relevant circumstances and likely consequences.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 766 (1970)). *United States v. Pierre* recognizes, for instance, that "[a] plea of guilty…based on the fear of a non-existent penalty can be neither knowing nor intelligent, and this flaw colors the fundamental fairness of the entire proceeding." *United States v. Pierre*, No. 20-30728, 2022 WL 1198222, at *3 (5th Cir. Apr. 22, 2022) (unpublished) (citing *Kennedy v. Maggio*, 725 F.2d 269, 273 (5th Cir. 1984)). Here, if Petitioner's Second Amendment argument is validate, then the plea was constitutionally infirm because, unbeknownst to him, he pleaded guilty to a nonexistent offense. If *Pierre* renders void a guilty plea made in exchange for avoiding a non-existent penalty, certainly it renders void a guilty plea made to a non-existent offense. And had the court correctly rejected the guilty plea given its constitutional

infirmity, that rejection would also render the waiver unenforceable. *See United States v. Self*, 596 F.3d 245, 247 (5th Cir. 2010).

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 24th day of September, 2024.

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