**No. _____**

**IN THE SUPREME COURT OF THE UNITED STATES**

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**LAVANZEL KERR,**

**Petitioner,**

**vs.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. May a district court apply a U.S.S.G. § 2K2.1(b)(6) enhancement without resolving a defendant's affirmative defense claim?

II. Is 18 U.S.C. § 922(g) unconstitutional when applied to individuals who have never been convicted of a violent crime?

## RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. LaVanzel Kerr*, No. 2:22-CR-00028, United States District Court for the Eastern District of Louisiana. Judgment entered January 18, 2024.

- *United States v. LaVanzel Kerr*, No. 24-30064, United States Court of Appeals for the Fifth Circuit. Judgment entered August 6, 2024.

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Petitioner LaVanzel Kerr respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

## OPINION DELIVERED IN THE COURT BELOW

The final judgment and decree rendered by the United States Court of Appeals for the Fifth Circuit denying Petitioner's appeal from his conviction and sentence in the United States District Court for the Eastern District of Louisiana is attached as Appendix A.

## STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The United States Court of Appeals for the Fifth Circuit entered judgment on August 6, 2024. This Court has jurisdiction under 28 U.S.C. § 1254 to review this Petition.

## RELEVANT GUIDELINES PROVISIONS

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.

U.S. Const. amend. II.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

## STATEMENT OF THE CASE

In this case, Mr. Kerr was charged and pleaded guilty to a single-count indictment charging him with being a felon in possession of a firearm. The Presentence Investigation Report described the incident that led to his arrest:

> [Alton Williams] aggressively approached the defendant [LaVanzel Kerr] in a threatening manner while in possession of a firearm; thus, the victim's conduct contributed to the substantial risk of danger to the defendant. In return, the defendant acted in self-defense and shot [Williams].

The Report reiterated elsewhere that, "[i]n the instant offense, the defendant shot A.W. in self-defense." The report was adopted by the district court without change. But, despite adopting this finding of self-defense and over Mr. Kerr's objection, the Court applied a four-level enhancement under U.S.S.G. § 2K2.1(b)(6) for possessing a firearm in connection with another felony. The Court did not resolve Mr. Kerr's claim of self-defense when it applied the enhancement and ignored the conflict between the enhancement and the adoption and findings of the Presentence Investigation Report.

The incident that led to Mr. Kerr's arrest began late on the night of December 4, 2021, when Mr. Kerr and his friend Eric Williams parked their cars in front of the Ace Hotel in New Orleans. They talked to a valet who agreed to let them park there temporarily while they went inside. Upon returning to their cars after entering the hotel, Mr. Kerr and Eric Williams were confronted by another valet, Alton Williams, who demanded they pay for parking. The men engaged in a verbal altercation. During the altercation, Mr. Kerr punched Alton Williams. Alton Williams then went to his nearby vehicle, retrieved a Glock 19 pistol, and returned to the hotel where Mr. Kerr was seated in the driver's seat of his car. Alton Williams forcibly opened Mr. Kerr's driver's side door and confronted him. Eric Williams testified at Mr. Kerr's sentencing hearing that Alton Williams pointed the gun at Mr. Kerr's head, threatened and said he was going to kill him, and became increasingly aggressive. A New Orleans Police Department detective testified that other

witnesses stated that they did not see a gun in Alton Williams hand, and the Government argued it was in his waistband. No one disputed that Alton Williams' actions were increasingly threatening, hostile, and aggressive.

Mr. Kerr grabbed a pistol that belonged and was registered to his wife from inside of the car and fired at and struck Alton Williams. Mr. Kerr then exited his car and called 911. Mr. Kerr and Eric Williams remained on the scene and spoke with law enforcement. Mr. Kerr was not arrested for the shooting. Nor has the Orleans Parish District Attorney's Office pursued charges against him. Mr. Kerr was, however, later arrested for the instant charge of being a felon in possession of a firearm, to which he pleaded guilty.

According to the Presentence Investigation Report, the Sentencing Guidelines recommended a sentence of imprisonment within the range of 37 to 46 months. The Presentence Investigation Report identified Mr. Kerr's prior convictions, none of which are a violent crime. Mr. Kerr objected to the four-level enhancement for possessing a firearm in connection with another felony. He argued that the facts did not establish a felony offense because Mr. Kerr "acted in complete self-defense to the threat of death or great bodily harm." He also moved the Court for a downward departure pursuant to U.S.S.G. §§ 5k2.10, 5k2.11, and 5K2.12. After a sentencing hearing where both Mr. Kerr and the government called witnesses to testify regarding the events that occurred outside of the Ace Hotel, the district court overruled the objection and denied the motion. The court then imposed a sentence of 37 months' imprisonment, followed by 3 years of supervised release.

On May 22, 2024, Mr. Kerr timely filed an appeal with the United States Court of Appeals for the Fifth Circuit. Mr. Kerr argued (1) that the district court wrongly applied the U.S.S.G. § 2K2.1(b)(6) enhancement without resolving the claim of affirmative defense; (2) that Mr. Kerr's conviction is unconstitutional because it conflicts with the Second Amendment, and that permanently barring nonviolent felons from possessing firearms is not consistent with the Nation's historical tradition of firearm regulation; and (3) that the district court erred when it unreasonably denied Mr. Kerr's motion for downward departure or variance. Mr. Kerr's appeal was denied on August 6, 2024. The Court of Appeals

stated that "the district court's implicit finding, when overruling Kerr's sentencing objection, that Kerr was not acting in self-defense is not clearly erroneous" and that Mr. Kerr's "unpreserved *Bruen* challenge" failed because "any error was not plain." Appendix A at 2-3.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT SHOULD GRANT THE WRIT TO MAKE CLEAR A DISTRICT COURT MAY NOT APPLY A U.S.S.G. § 2K2.1(b)(6) ENHANCEMENT WITHOUT RESOLVING AN AFFIRMATIVE DEFENSE CLAIM

U.S.S.G. § 2K2.1 provides for a four-offense-level enhancement if a prohibited person possesses a firearm "in connection with another felony offense." U.S.S.G. § 2K2.1(b)(6). A firearm meets this test when the firearm "facilitated, or had the potential of facilitating" the felony offense." U.S.S.G. § 2K2.1, comment n.14(A). At sentencing, the Government bears the burden of proving by a preponderance of the evidence any factors used to support a sentencing enhancement. *See* U.S.S.G. § 6A1.3, comment. These findings must be made with reasonably reliable evidence. *See* U.S.S.G. § 6A1.3.

The Eight Circuit Court of Appeals has held that "[w]hen an affirmative defense to the other felony is arguably supported by the facts, the Government also must negate that defense by a preponderance of the evidence." *United States v. Robison*, 759 F.3d 947, 949–850 (8th Cir. 2014). The Fifth Circuit Court of Appeals and other courts of appeals have not resolved whether the Government bears that burden.

Here, the district court did not resolve Mr. Kerr's claim of self-defense. At sentencing, the district court stated "I'm going to overrule the objections," but did not make any finding on whether the government had proven that Mr. Kerr did not act in self-defense. The court also adopted the Presentence Investigation Report, which twice stated that Mr. Kerr's actions were in self-defense, but made no attempt to reconcile these statements with overruling Mr. Kerr's affirmative defense.

As the Eighth Circuit recognized in *Robison*, however, if the defendant successfully claims an affirmative defense to the underlying felony, he is not liable for that felony and therefore he did not possess the gun "in connection with" another felony. Put another way, if there exists a valid affirmative defense,

the defendant did not commit a felony. And because the government bears the burden of proving facts in support of a sentence enhancement, evidence in equipoise should be resolved in the defendant's favor.

Under Louisiana law, certain actions are "justifiable, although otherwise criminal" and "shall constitute a defense to prosecution." La. Rev. Stat. Ann. § 14:18. One such justification is self-defense and is defined with regards to homicide as follows:

> **A.** A homicide is justifiable:
>
> > **(1)** When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.
> >
> > **(2)** When committed for the purpose of preventing a violent or forcible felony involving danger to life or of great bodily harm by one who reasonably believes that such an offense is about to be committed and that such action is necessary for its prevention. The circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to his own life or person if he attempted to prevent the felony without the killing.
> >
> > **(3)** When committed against a person whom one reasonably believes to be likely to use any unlawful force against a person present in a dwelling or a place of business, or when committed against a person whom one reasonably believes is attempting to use any unlawful force against a person present in a motor vehicle as defined in R.S. 32:1(40), while committing or attempting to commit a burglary or robbery of such dwelling, business, or motor vehicle.
> >
> > **(4) (a)** When committed by a person lawfully inside a dwelling, a place of business, or a motor vehicle as defined in R.S. 32:1 (40) when the conflict began, against a person who is attempting to make an unlawful entry into the dwelling, place of business, or motor vehicle, or who has made an unlawful entry into the dwelling, place of business, or motor vehicle, and the person committing the homicide reasonably believes that the use of deadly force is necessary to prevent the entry or to compel the intruder to leave the dwelling, place of business, or motor vehicle.
> >
> > **(b)** The provisions of this Paragraph shall not apply when the person committing the homicide is engaged, at the time of the homicide, in the acquisition of, the distribution of, or possession of, with intent to distribute a controlled dangerous substance in violation of the provisions of the Uniform Controlled Dangerous Substances Law.
>
> **B.** For the purposes of this Section, there shall be a presumption that a person lawfully inside a dwelling, place of business, or motor vehicle held a reasonable belief that the use of deadly force was necessary to prevent unlawful entry thereto, or to compel an

unlawful intruder to leave the dwelling, place of business, or motor vehicle when the conflict began, if both of the following occur:

**(1)** The person against whom deadly force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered the dwelling, place of business, or motor vehicle.

**(2)** The person who used deadly force knew or had reason to believe that an unlawful and forcible entry was occurring or had occurred.

**C.** A person who is not engaged in unlawful activity and who is in a place where he or she has a right to be shall have no duty to retreat before using deadly force as provided for in this Section, and may stand his or her ground and meet force with force.

**D.** No finder of fact shall be permitted to consider the possibility of retreat as a factor in determining whether or not the person who used deadly force had a reasonable belief that deadly force was reasonable and apparently necessary to prevent a violent or forcible felony involving life or great bodily harm or to prevent the unlawful entry.

La. Rev. Stat. Ann. § 14:20.

In Louisiana, the prosecution has the affirmative burden of proving beyond a reasonable doubt a homicide defendant did not act with justification. *See State v. Lynch*, 436 So.2d 567, 569 (La. 1983). At federal sentencing, that burden is lowered, but not eliminated, to preponderance-of-the-evidence. The preponderance of evidence standard requires that a factual finding be based upon evidence that makes the existence of the fact more likely than not. *See*, *e.g.*, *United States v. Myers*, 772 F.3d 213, 220 (5th Cir. 2014).

The actual standard of proof is irrelevant here because the district court did not resolve Mr. Kerr's affirmative defense under any standard. It is well established that the Government is required to prove by a preponderance of the evidence any factors used to support a sentencing enhancement. *See* U.S.S.G. § 6A1.3, comment. Mr. Kerr submits that the Government is also required to negate any affirmative defense supported by the facts by at least a preponderance of the evidence. *See Robison*, 759 F.3d at 949–50. Here the district court failed to resolve the claims of affirmative defense one way or another, and thus made no findings on the record that the Government had negated Mr. Kerr's affirmative defenses by a preponderance of the evidence. Thus, the district court reversibly erred by wrongly applying the four-level

enhancement pursuant to U.S.S.G. § 2K2.1(b)(6) without resolving the claims of affirmative defense raised by Mr. Kerr.

In this case, the Fifth Circuit failed to address the pertinent issues of whether, in an instance such as this one, the Government must negate any affirmative defense supported by the facts by at least a preponderance of the evidence and/or whether a district court must resolve an affirmative defense claim. Instead, the Fifth Circuit stated, without further explanation, that the district court made an "implicit finding" that "Kerr was not acting in self-defense" when it "overrule[d] Kerr's sentencing objection." Appendix A at 2. The Fifth Circuit's statement that the district court made an implicit finding is merely conjecture. The record makes plain, and the Fifth Circuit did not dispute, that the district court did not make any statement or ruling on the affirmative defense. Indeed, the district court adopted the Presentence Investigation Report, which stated that Mr. Kerr *did* act in self-defense.

This Court should grant this writ to make clear to the Fifth Circuit and to other courts that a district court may not apply U.S.S.G. § 2K2.1 without resolving an affirmative defense

## II. THE COURT SHOULD GRANT THE WRIT TO HOLD THAT 18 U.S.C. § 922(g) IS UNCONSTITUTIONAL AS APPLIED TO INDIVIDUALS WHO HAVE NEVER BEEN CONVICTED OF A VIOLENT CRIME

The Ninth Circuit Court of Appeals recently held that 18 U.S.C. § 922(g) is unconstitutional when applied to a nonviolent offender who has served his time in prison and reentered society, because he is an American citizen and thus one of the people whom the Second Amendment protected. *See United States v. Duarte*, No. 22-50048, 2024 U.S. App. LEXIS 11323 (9th Cir. May 9, 2024). This Court should affirm that the Ninth Circuit's finding is correct and is, in fact, required by this Court's jurisprudence.

This Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), clarified not just the substance of the Second Amendment, but also rejected an improperly rights-limiting mode of analyzing the Second Amendment that had been embraced by the Courts of Appeals.

*Bruen* built upon the holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which held that there is an individual, constitutional right to keep and bear arms, including to possess a handgun in

the home, *id.* at 595, 628-630. *See also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) ("individual self- defense is 'the central component' of the Second Amendment right" (quoting *Heller*, 554 U.S. at 599)). *Bruen* took up the question whether that right to possess a handgun for protection *inside* the home also extends *outside* the home. *Bruen*, 142 S. Ct. at 2116. To carry a gun outside the home for self-defense, New York required a person to prove that "proper cause"—consisting of a "special need for self-protection distinguishable from that of the general community"—existed to issue that person an unrestricted license to carry a concealed firearm. *Id.* at 2122-23 (citation and internal quotation marks omitted). This Court held that New York's "special need" concealed carry regime violated the Constitution. *Id.* at 2122. The "plain text" of the Second Amendment protects the right to carry a handgun in public for self-defense. *Id.* at 2134-35. The petitioners were part of "the people" whose rights to bear arms are described in the Second Amendment. *Id.* at 2134; *see also Heller*, 554 U.S. at 580 ("the people" is a term of art describing "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community" (citation omitted)). And to "bear arms" mean wearing and carrying weapons "for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person," a definition that "naturally encompasses" carrying arms in public. *Bruen*, 142 S. Ct. at 2134 (cleaned up).

Separate from its substantive holding, this Court also held that the Second Amendment analytical framework around which the Courts of Appeals had coalesced since *Heller* was incorrect. *Id.* at 2125. That framework was a two-step process combining history with means-ends scrutiny. *Id.* at 2125. The Fifth Circuit Court of Appeals' version of that two-step inquiry involved, at the first step, determining "whether the conduct at issue falls within the scope of the Second Amendment right." *United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020) (quoting *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012)). This involved determining "whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." *Id*. at 754. If the conduct was outside the scope of the Second Amendment, then the law was constitutional.

*Id*. Otherwise, courts proceeded to the second step, to determine whether to apply strict or intermediate scrutiny. *Id*. That means-end framework has now been repudiated. *See Bruen*, 142 S. Ct. at 2127.

This Court emphatically rejected that two-step framework. *Bruen*, 142 S. Ct. at 2129-30. Instead, it set out a streamlined inquiry that centers the right as written into the Constitution as opposed to policy questions about whether a regulation serves important interests. First, a court must consider whether "the Second Amendment's plain text covers an individual's conduct"; if so "the Constitution presumptively protects that conduct." *Id.* To justify a regulation despite that presumptive protection, the government "may not simply posit that the regulation promotes an important interest." *Id.* at 2130. "Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* "*Only* if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* (citation and internal quotation marks omitted) (emphasis added).

Importantly, the "historical tradition" in question is that with sufficient proximity to the Founding-era to reveal the understanding of the Second Amendment held by its ratifiers. That is because the Amendment's "meaning is fixed according to the understandings of those who ratified it." *Id.* at 2132. "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 2131; *see also id* at 2154 & n.28 (declining to rely on evidence of late-19th century and 20th century practice unless it is consistent with regulations closer to the Founding).

### A. Barring nonviolent felons like Mr. Kerr from possessing firearms violates the Second Amendment.

Analysis of this Court's jurisprudence and this Nation's history illustrates that barring nonviolent felons from possessing violates the Second Amendment.

### i. Permanently barring nonviolent felons from possessing firearms is not consistent with the Nation's historical tradition of firearm regulation.

That Mr. Kerr is one of "the people" and his conduct in carrying a firearm is protected by the Second Amendment means that for § 922(g) to be constitutional as applied to a nonviolent offender like him, it must be "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. In conducting this historical analysis, the government bears the burden to show that, in the Founding era, there was a "distinctly similar historical regulation" to § 922(g). *Id.* at 2131.[1] If the government fails to produce such evidence, then "the challenged regulation is inconsistent with the Second Amendment." *Id.* As then-Judge Barrett demonstrated in her dissent in *Kanter v. Barr*, no such historical analogue exists. 919 F.3d 437, 451-52 (7th Cir. 2019) (Barrett, J., dissenting), *maj. op. abrogated by Bruen*. Section 922(g) is therefore unconstitutional as applied to people, like Mr. Kerr, who have previously been convicted of nonviolent felonies.

#### 1. There is no historical evidence of Founding-era laws dispossessing nonviolent felons of the right to bear arms.

There is no evidence of Founding-era laws dispossessing nonviolent felons of the right to bear arms. "[A]t least thus far, scholars have not been able to identify any such laws." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting). Rather, the blanket prohibition on those with convictions punishable by a year or more possessing firearms in 18 U.S.C. § 922(g)(1) dates to the 1960s. *See* Marshall, *Why Can't Martha Stewart*, *supra*, at 698. A prior law—dating to 1938 but with state antecedents dating into the 1920s—dispossessed those convicted of "crimes of violence," including murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking, and some aggravated assaults. *Id.* at 699-700, 702-705. Other relatively recent studies concur about felon dispossession being a late invention. *See* 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, 1374 (2009) ("so far as I can determine, no colonial or state law in eighteenth-century America

[1] Firearm violence is a general societal problem that has persisted since the time of the Founding. *See Bruen*, 142 S. Ct. at 2131.

formally restricted the ability of felons to own firearms"); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) ("[t]he Founding generation had no . . . laws denying the right to people convicted of crimes").

With no actual felon dispossession laws from anytime close to the Founding to point to, those arguing that there is a historical tradition for dispossessing all felons focus on three other arguments. *See Kanter*, 919 F.3d at 454 (Barrett, J., dissenting). First, proponents point to proposals raised (but not adopted) by three state ratifying conventions. Second, they argue that felonies in the colonial era were punished by death, and that accordingly a penalty short of death, like dispossession, would naturally have been encompassed. Third, they argue that gun rights would have been understood at the Founding to be civic rights, like voting and jury service, limited to virtuous members of the citizenry. As now-Justice Barrett showed, however, none of those arguments withstands scrutiny.

**2. Failed proposals made at Founding-era ratifying conventions do not support general felon dispossession, but at most dispossession of violent felons.**

In terms of evidence of the state ratifying convention proposals, those proposals are of limited use, reflecting language and ideas that did not make it into the Second Amendment. One proposal was from the majority of the New Hampshire convention stating, "'Congress shall never disarm any citizen, *unless such as are or have been in actual rebellion*.'" *See Kanter*, 919 F.3d at 454 (Barrett, J., dissenting) (quoting 1 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 326 (2d ed. 1891)) (emphasis added in *Kanter*). One proposal made by Samuel Adams at the Massachusetts convention, but not adopted by the majority, stated: "And that the said Constitution be never construed to authorize Congress to . . . prevent the people of the United States, *who are peaceable citizens*, from keeping their own arms." *See id.* at 454-55 (quoting 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 675, 681 (1971)) (emphasis added in *Kanter*). And the final proposal, from the Pennsylvania minority, stated: "'That the people have a right to bear arms for the defense of themselves and their own State or the United States, or for the purpose of killing game; and no law shall be passed

for disarming the people or any of them *unless for crimes committed, or real danger of public injury from individuals . . . .*'" *Id.* at 455 (quoting 2 Schwartz, *The Bill of Rights*, *supra*, at 662, 665) (emphasis added in *Kanter*).

As now-Justice Barrett pointed out, "none of the relevant limiting language made its way into the Second Amendment." *Id.* Moreover, "only New Hampshire's proposal—the least restrictive of the three—even carried a majority of its convention." *Id.* Proposals from other states advocating a constitutional right to arms did not carry such limiting language, and none of the four parallel state constitutional provisions enacted before the ratification of the Second Amendment (including Pennsylvania and Massachusetts, as well as North Carolina and Vermont) had such language. *Id.* (citing Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 222 (1983); and Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 208 (2006)).[2]

Even on their own terms, the common concern of these never-adopted proposals was not about felons or criminals, but about "threatened violence and the risk of public injury." *Id.* at 456. The New Hampshire proposal would have restricted only the gun rights of those who had been in "rebellion,"

[2] The 1790 Pennsylvania constitution stated without qualification that, "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." Volokh, *State Constitutional Rights*, *supra*, at 208. The 1780 Massachusetts constitution focused on the collective right, stating, "The people have a right to keep and to bear arms for the common defence." *Id.* The 1776 North Carolina constitution similarly stated, "That the people have a right to bear arms, for the defence of the State. . ." *Id.* And the 1777 Vermont constitution stated, "That the people have a right to bear arms for the defence of themselves and the State . . ." *Id.* Additionally, the 1792 Kentucky constitution from just after the Second Amendment's ratification echoed Pennsylvania, stating "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." *Id.* Similarly unqualified language about the right of "every citizen" (or "person," in the case of Michigan) to bear arms in self -defense appears in early 19th century constitutions for Mississippi, Connecticut, Alabama, Maine, and Michigan, while other constitutions affirmed that right for "the people" or "the free white men" of a state. *Id.* at 208-09. It appears that the first state constitution to mention a limitation on the right in order "to prevent crime" was Tennessee in 1870, followed by Texas in 1876. *Id.* at 208-214. Idaho's 1978 constitution appears to be the only state constitution to make specific allowance for limiting possession of firearms by a convicted felon. *Id.* at 215.

meaning the "'traiterous taking up arms, or a tumultuous opposing the authority of the king, etc. or supreme power in a nation.'" *Id.* at 455 (quoting "Rebellion," 2 *New Universal Etymological English Dictionary* (4th ed. 1756)). Samuel Adams's Massachusetts proposal would have limited the right to "peaceable citizens," with "peaceable" meaning "'[f]ree from war; free from tumult'"; "'[q]uiet; undisturbed'"; "'[n]ot violent; not bloody'"; "'[n]ot quarrelsome; not turbulent.'" *Id.* at 455 (quoting 1 Samuel Johnson, *A Dictionary of The English Language* (5th ed. 1773)). And while the Pennsylvania minority proposal mentions "crimes committed," that phrasing is most consistently and coherently read as referring to a subset of crimes that pose a "real danger of public injury." *Id.* at 456.

A concern with threatened violence also animated the restrictions on arms possession that were imposed in England and in pre-revolution America. English law punished those who went "'armed to terrify the King's subjects,'" and allowed for the disarmament of those "'dangerous to the Peace of the Kingdom,'" including Catholics, who were, because of the politics of the day, considered to be a danger to revolt and commit massacres. *Id.* at 456-57 (quoting *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686); and Militia Act of 1662, 13 & 14 Car. 2, c. 3, § 13 (1662); additionally citing, *inter alia*, Joyce Lee Malcolm, *To Keep and Bear Arms* 18-19, 122 (1994); Adam Winkler, *Gunfight* 115 (2011); and Marshall, *Why Can't Martha Stewart*, *supra*, at 723). The American colonies similarly restricted access to arms for groups suspected of possible rebellion, such as slaves, Native Americans, Catholics, and those who refused to swear allegiance to the United States as a whole or to particular states. *Id.* at 457-58 (citing, *inter alia*, Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 157 (2007); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 506 (2004); Volokh, *State Constitutional Rights*, *supra*, at 208-09; Winkler, *Gunfight*, *supra*, at 115-16).

Thus, while Founding-era legislatures may have disarmed groups whom they judged to be violent threats to public order, "neither the convention proposals nor historical practice supports a legislative power to categorically disarm felons because of their status as felons." *Id.* at 458.

**3. The claim that Founding-era felons were routinely put to death and so the loss of other rights can be assumed is historically inaccurate.**

The claim that Founding-era felons were routinely executed or stripped of all rights, such that no one would have thought them within the scope of those entitled to possess arms, rests on "shaky" ground. *Kanter*, 919 F.3d at 458 (Barrett, J. dissenting). Instead, the historical evidence is that the consequences of a felony conviction at the time of the Founding were not as categorically severe as the argument assumes. *Id.* at 461.

At English common law, felonies were intertwined with punishments of actual death and civil death, which was a stripping of property and civil rights for the period between the imposition of a capital sentence and its execution. *Id.* at 458-59. But in the colonies during the period leading up to the Founding, "the connection between felonies and capital punishment started to fray." *Id.* at 459. In the seventeenth- and eighteenth-century colonies, capital punishment was used sparingly, and property crimes "'were, on the whole, not capital.'" *Id.* (quoting Lawrence M. Friedman, *Crime and Punishment in American History* 42 (1993)). By the period of and just after the Constitution's ratification, prominent legal authorities Nathan Dane and James Wilson observed that the term "felony" was no longer associated with capital punishment or civil death: as Dane put it, "'we have many felonies, not one punished with forfeiture of estate, and but a very few with death.'" *Id.* at 459-60 (quoting 6 Nathan Dane, *Digest of American Law* 715 (1823)). "'In England, civil death was a common law punishment, but in the United States, it existed only if authorized by statute. It was far from universal . . .'" *Id.* at 460 (quoting Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. Pa. L. Rev. 1789, 1796 (2012)). And for felonies with term of year—as opposed to life—sentences, there is no indication that the concept of civil death ever applied, beyond a suspension of rights while incarcerated. *Id.* at 461.

As then-Judge Barrett summed up, "a felony conviction and the loss of all rights did not necessarily go hand-in-hand," in the Founding-era, and thus, "the argument that the severity of punishment at the Founding implicitly sanctions the blanket stripping of rights from all felons, including those serving a term of years, is misguided." *Id.* Moreover, even if the historical record was supportive of a notion that felons faced death, courts do not otherwise interpret rights in this way: "for example, we wouldn't say that the state can deprive felons of the right to free speech because felons lost that right via execution at the time of the founding." *Id.* at 461-62. "The obvious point that the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society." *Id.*

**4. The argument that individual gun rights are limited to virtuous citizens relies on a misplaced analogy to civic rights like voting and sitting on juries.**

Some also contend that gun rights are limited to "virtuous citizens." *See Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019) (collecting cases and references). As then-Judge Barrett explained, because there are no Founding-era laws depriving those with felony convictions of their gun rights, these virtue arguments rely on an analogy to the right to vote and the right to serve on juries. *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting). But the analogy fails, because the right to vote and the right to sit on juries are civic rights—rights held by individuals for collective purposes. *See id.* (citing, *inter alia*, Saul Cornell, *A New Paradigm for the Second Amendment*, 22 Law & Hist. Rev. 161, 165 (2004); Saul Cornell, *"Don't Know Much About History"*: *The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 679 (2002)).

In contrast, *Heller* expressly rejected the argument that the right to bear arms is such a purely civic right, holding that "the Second Amendment confer[s] *an individual right* to keep and bear arms," and emphasizing that the Second Amendment is rooted in the individual's right to defend him- or herself, rather than the right to serve in a well-regulated militia. *See id.* (quoting *Heller*, 554 U.S. at 595 (emphasis in *Kanter*)). The Supreme Court further emphasized the individual nature of the right to bear arms in

*Bruen*, stating: "'individual self-defense is "the *central component*" of the Second Amendment right.'" *Bruen*, 142 S. Ct. at 2133 (quoting *McDonald*, 561 U.S. at 767, emphasis in *Bruen*); *see also id.* at 2127 (right as written in Second Amendment "does not depend on service in the militia").

The virtuous citizen argument thus rests on a rejected notion of gun ownership as a civic right serving the greater good. There appears, moreover, to be no historical case for virtue exclusions to individual rights, like gun possession, rather than civic rights, like voting and jury service. *Kanter*, 919 F.3d at 463 (Barrett, J., dissenting). Virtue exclusions from the exercise of civic rights were explicit, with numerous state constitutions expressly excluding or authorizing the exclusion of those who had committed certain crimes from voting and serving on juries. *Id.* (citing*, inter alia*, Alexander Keyssar, *The Right to Vote* 62–63 & tbl. A.7 (2009)). By contrast, state constitutions protecting the right to bear arms made no exclusion for certain criminals, even as many of those same constitutions provided for the exclusion of criminals from the right to vote. *Id.* (citing Volokh, *State Constitutional Rights*, *supra*, at 208-10 & Keyssar, *Right to Vote*, *supra* tbl. A.7).

In sum, "this Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2130, does not include blanket and permanent dispossession of all those with felony convictions. Such prohibitions are modern inventions without "distinctly similar" historical antecedents. *See id.* at 2131. Rather, the historical evidence at most suggests support for dispossessing those who "threatened violence" and posed "a risk of public injury" through rebellion. *Kanter*, 919 F.3d at 457 (Barrett, J., dissenting).

**ii. All of Mr. Kerr's previous felony convictions were nonviolent.**

Mr. Kerr's prior convictions were California state convictions for unlawful use of personal identification, grand theft, battery, exhibiting a deadly weapon not a firearm, driving without a license, driving with a suspended license, felon in possession of ammunition, and evading a police officer. ROA.385-89. None of these convictions were a crime of violence nor did they involve rebellion against the rule of the sovereign. *See*, *e.g.*, *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1012 (9th Cir. 2006)

("hold[ing] that battery under California Penal Code section 242 is not categorically a "crime of violence" within the meaning of 18 U.S.C. § 16").

**B. A conviction under an unconstitutional statute affects Mr. Kerr's substantial rights**

Mr. Kerr is serving a 37-month sentence for his conviction under § 922(g)(1). If the Court finds § 922(g)(1) unconstitutional on its face or as applied to Mr. Kerr in this case or another case while Mr. Kerr's appeal is pending, then he will be serving a sentence for conduct which was not a crime. Serving a sentence of 37 months as a result of an error affects a defendant's substantial rights. *See United States v. Hornyak*, 805 F.3d 196, 199 (5th Cir. 2015) (finding an error that resulted in a sentence 68 months above the proper statutory maximum affected the defendant's substantial rights under plain error review).

**C. A conviction under an unconstitutional statute seriously affects the fairness, integrity, or public reputation of judicial proceedings**

As explained above, Mr. Kerr's conviction involves the criminalization of the constitutional right to possess a firearm. Mr. Kerr is convicted and serving a federal prison sentence for exercising that constitutional right. If this Court rules § 922(g)(1) unconstitutional on its face or as applied to Mr. Kerr in this case or another case while Mr. Kerr's appeal is pending, then it would be unfair to continue to allow Mr. Kerr to serve a sentence for his constitutionally protected conduct. The integrity and public reputation of the judicial proceedings would be implicated by allowing Mr. Kerr to serve a sentence on a now-unconstitutional conviction. *See*, *e.g. Knowles*, 29 F.3d at 951-52 (holding that the failure to vacate a conviction pursuant to a statute later held to violate the Commerce Clause "would seriously affect the fairness, integrity, and public reputation of judicial proceedings); *Hornyak*, 805 F.3d at 199 ("Keeping a defendant in prison for at least an extra 68 months because of a clause in a statute declared unconstitutionally void during his direct appeal would cast significant doubt on the fairness of the criminal justice system in such a case.").

## CONCLUSION

For the foregoing reasons, the Court should grant Mr. Kerr's petition and issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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