NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

MARK CRAIG, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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I. QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1), which prohibits firearm possession by anyone convicted of "a crime punishable by imprisonment for a term exceeding one year," violates the Second Amendment on its face.

II. PARTIES TO THE PROCEEDING

Mr. Mark Craig is the Petitioner. The United States of America is the Respondent in this matter.

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IV. TABLE OF AUTHORITIES

Federal Cases

Federal Statutes:

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V. OPINIONS BELOW

The unpublished opinion by the United States Court of Appeal for the Fourth Circuit in this, *United States v. Mark Craig*, No. 22-4302, is attached to this Petition as Appendix A. The judgment of the United States Court of Appeals for the Fourth Circuit is attached as Appendix B. The final judgment order of the United States District Court for the Northern District of West Virginia is unreported and is attached to this Petition as Appendix C.

VI. JURISDICTION

This Petition seeks review of an unpublished opinion of the United States Court of Appeals for the Fourth Circuit, decided on July 18, 2024.

VII. CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation and application of the Second Amendment to the U.S. Constitution which 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."

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction.

This is a single-defendant case involving one-count of being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). On March 22, 2021, a federal grand jury indicted Craig on the charge of unlawful possession of a firearm in the Northern District of West Virginia, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Craig entered a guilty plea without a plea agreement. The district court imposed 10 years in prison and entered its final judgement in Craig's case on May 13, 2022. On May 20, 2022, Craig filed a timely notice of appeal.

Because the charge constitutes an offense against the United States, the district court had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Factual Background.

On December 20, 2020, in Harrison County, West Virginia, Sheriff's Deputies were dispatched to the Circle K store in Enterprise, West Virginia, for an alleged domestic incident. J.A. 28.[1] The alleged victim of the domestic incident, Marline Craig, told deputies that her husband, Craig, grabbed her by the throat and then struck Marline in the face area with his head, lacerating the bridge of her nose. J.A.

[1] "J.A." is a reference to the Joint Appendix filed by the parties in connection with the direct appeal.

28-29. As well, Marline claimed that an elderly bystander, later identified as Charles Herron, confronted Craig told him that he would not allow Craig to put his hands on Marline again. J.A. 29. Craig entered a truck and returned with a silver revolver that he held openly and exposed to Mr. Herron. J.A. 29.

Craig then left the scene in a truck, driving on West Virginia's Route 19. J.A. 29. Video surveillance from the gas station captures the individual identified as Craig pulling into the parking lot in a 2019 white GMC truck, where he appears to confront and argue with Marline Craig near her vehicle – a red or orange sedan parked nearby. The video captures Mr. Herron approaching and confronting Craig. The video captures Craig retrieve the firearm from his vehicle and hold it in the air, before bringing it back down and concealing it in his rear waistband. J.A. 29.

Shinnston Police Department Officer T. Layton, who was familiar with Craig and Craig's residence, observed Craig traveling southbound on Route 19 in the vehicle described by the dispatcher, crossing the local Veteran's Memorial Bridge. J.A. 29. Officer Layton activated his emergency lights and attempted to stop the vehicle, but it is alleged that Craig failed to stop initially. J.A. 29-30. Craig did stop near the Demarco's Meat Market. Officer Layton approached the vehicle and ordered Craig to place his hands outside of the vehicle and to open the door. Craig began to flee in his vehicle at a high rate of speed. J.A. 29-30. Officer Layton followed Craig's vehicle southbound on Route 19, in a 25 to 35 mph zone. According to Officer Layton, Craig was travelling at speeds ranging from 50 to 70 mph, and at multiple times, traveled on the wrong side of the road. Craig continued to his residence then drove

around the residence in the yard. Craig then jumped from his vehicle and fled on foot towards the local Go-mart store. Officer Layton lost sight of Craig and discontinued the foot pursuit as other units responded. J.A. 30.

Officer Layton returned to Craig's residence. In the abandoned vehicle, Officer Layton observed a silver Smith & Wesson revolver, loaded with six rounds of .38 caliber ammunition on the rear passenger seat floorboard. J.A. 30. As a result of the incident, Craig was charged in State Court, Harrison County, with domestic battery – 3rd offense; wanton endangerment involving a firearm; prohibited person in possession of a firearm; and being a prohibited person in possession of a concealed firearm. J.A. 30. Arrest warrants were issued for Craig.

Craig was spotted by law enforcement on February 16, 2021, but eluded police after a short pursuit. Craig was finally apprehended Saturday, February 27, 2021. *Id*. The case ATF agent, Special Agent Jared Newman, determined that Craig has two March 14, 2016, felony convictions for Third or Subsequent Offense Domestic Battery in case numbers 15-F-188 and 16-F-90 in the Circuit Court of Harrison County, West Virginia. SA Newman determined that no pardon or commutation has been given to Craig for these felony offenses. J.A. 30-31.

SA Newman test-fired the firearm and found it to be operable. J.A. 31. SA Newman conducted an interstate nexus examination on the firearm and determined that it was manufactured outside the State of West Virginia and constitutes a firearm as defined in 18 U.S.C. § 921(a)(3). *Id.*

C. Procedural History.

On March 2, 2021, a federal grand jury in the Northern District of West Virginia returned an indictment:

> [o]n or about December 20, 2020, in Harrison County, in the Northern District of West Virginia, defendant MARK ALLEN CRAIG, II, knowing that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, that is on or about March 14, 2016, defendant MARK ALLEN CRAIG, II was convicted of Third or Subsequent Offense Domestic Battery in the Circuit Court of Harrison County, West Virginia, in case number 15-F-188-1; and on or about March 14, 2016, defendant MARK ALLEN CRAIG, II was convicted of Third or Subsequent Offense Domestic Battery in the Circuit Court of Harrison County, West Virginia, in case number 16-F-90-1, did knowingly possess a firearm in and affecting interstate and foreign commerce, that is, a Smith & Wesson six-shot revolver, model 10, .38 S&W Special caliber, serial number 599817, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

J.A. 14.

Craig made his initial appearance on March 11, 2021, before United States Magistrate Judge Michael J. Aloi. J.A. 3. On May 17, 2019, Craig appeared for arraignment and detention hearings. J.A. 3. Magistrate Judge Aloi ordered Craig detained and remanded him into the custody of the United States Marshal Service pending trial. J.A. 4.

Craig entered a plea of guilty, without a plea agreement, on November 15, 2021. J.A. 10. Before sentencing, the United States Probation Department prepared

a Presentence Report ("PSR") calculating Craig's sentencing guidelines at 120 months, at the statutory maximum. J.A. 177.

Craig filed four objections to the PSR. First, Craig objected to his base offense level being 24, rather than 14. J.A. 185. Second, Craig objected to the determination that his possession of a firearm was "in connection with" another felony offense, justifying a four-level increase under the Federal Sentencing Guidelines. J.A. 186. Craig argued in this objection and at sentencing that there was insufficient evidence of another felony offense, namely, felony domestic violence, and that in the light most favorable to the Government Craig did not access the firearm until after the encounter with his wife ended. J.A. 186.

Third, Craig objected to the increase proposed for reckless flight under the Guidelines, arguing that Craig engaged in mere flight which does not warrant an increase, even in the case of a high-speed chase. J.A. 187. Finally, Craig objected to an enhancement under the Guidelines for his alleged obstruction of justice based upon several phone calls with his wife after his arrest. J.A. 188.

On April 19, 2022, Chief U.S. District Court Judge Thomas S. Kleeh overruled Craig's objections and sentenced Craig to 120 months in prison, followed by a term of supervised release of three years. J.A. 11. The district court issued a judgment in a criminal case on May 13, 2022. J.A. 144-150. Craig filed a timely notice of appeal on May 20, 2022. J.A. 151.

E. The United States Court of Appeals for the Fourth Circuit.

Craig contended on appeal that § 922(g)(1) violates the Second Amendment on its face. The Supreme Court changed the game on Second Amendment jurisprudence in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The Supreme Court issued this decision in June 2022, after Craig was convicted, but during the pendency of his direct appeal. There, the Court set aside the analytical framework federal Courts had adopted for analyzing Second Amendment challenges.

Bruen's new framework provides that if the Second Amendment's plain text covered Craig's conduct, then it is presumptively constitutionally protected. To convict Craig for this conduct, Craig argues the Government must affirmatively prove that a total ban on receipt of firearms by indicted persons is consistent with this nation's historical tradition of firearm regulation. Craig argues the Government cannot meet this burden, even under a plain error standard; thus, the Second Amendment's unqualified command controls and the Fourth Circuit should have reversed Craig's conviction as constitutionally impermissible.

Specifically, at *Bruen* step one, Craig argued the Second Amendment's "plain text" covers his conduct because (1) the firearm he possessed is an "Arm[]," (2) possessing that firearm constitutes "keep[ing]" it, and (3) he is one of "the people" who enjoy Second Amendment rights. On the last point, he noted that *Heller* construed "the people" as "'unambiguously refer[ring] to all members of the political community, not an unspecified subset.'" He pointed out that *Heller* said "the people" refers to all "'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,'" and he explained that *Heller* read "the people" to have the same meaning it has in the First, Fourth, and Ninth Amendments, which protect all American citizens. Finally, he emphasized that *Heller* held, and *Bruen* reaffirmed, that "the people" protected by Second Amendment comprise "'all Americans.'"

At *Bruen* step two, Craig argued the government would be unable to show that § 922(g)(1) squares with America's tradition of firearms regulation. He explained that felon-disarmament laws did not appear in the United States until the 20th century—too late for *Bruen* purposes—and that laws from the Founding era were too dissimilar to discharge the government's burden. He also argued the government could not carry its burden by positing a generalized historical tradition of disarming "dangerous" groups, since that label was too broad—too elastic and manipulable—to comport with Bruen, which required a more granular focus on the specific "how" and "why" of historical firearms regulations.

The Government disagreed with Craig on each of these questions. It argued that (1) "the people," as used in the Second Amendment, is limited to "law-abiding, responsible citizens," and therefore does not include felons; (2) § 922(g)(1) is consistent with America's tradition of firearms regulations, including a purported history of disarming "untrustworthy" groups in order to "protect society" from "violence;" and (3) *Bruen* did not abrogate the Fourth Circuit's post-*Heller* opinion in *Moore* upholding § 922(g)(1).

The Fourth Circuit agreed with the Government. In its short, unpublished opinion, it held that "[w]e recently considered and rejected the same argument in *United States v. Canada*, holding that "Section 922(g)(1) is facially constitutional because it has a plainly legitimate sweep and may constitutionally be applied in at least some set of circumstances." 103 F.4th 257, 258 (4th Cir. 2024) (internal quotation marks omitted). *Canada*, we conclude, clearly forecloses Craig's challenge to the validity of his conviction." Opinion at 2.

IX. REASONS FOR GRANTING THE WRIT

This Court should GVR Craig's case to the Fourth Circuit for reconsideration in light of the Court's recent opinion in *Rahimi,* which was decided after the Fourth Circuit decided *Canada*. The Fourth Circuit's opinion is inconsistent with key aspects of *Rahimi*, including (1) its rejection of the government's argument that American citizens can be disarmed based solely on their (supposed) membership in a class defined by "vague," "unclear" descriptors like "irresponsible," and (2) its insistence that lower courts should decide Second Amendment challenges based on the holdings of, rather than dicta in, this Court's cases.

Pursuant to 28 U.S.C. § 2106, this Court "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." This statute "confer[s] upon this Court a broad

power to GVR." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996). The Court has exercised that power "when intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (ellipsis in original). Among other things, this Court "ha[s] GVR'd in light of . . . [its] own decisions" that "the lower court had no opportunity to consider." *Lawrence*, 516 U.S. at 166, 169; *see also id*. at 168 ("GVR orders are premised on matters that we have reason to believe the court below did not fully consider.").

Under these standards, a GVR in light of *Rahimi* is appropriate. The Fourth Circuit had no opportunity to consider *Rahimi* in deciding *Canada.* The Fourth Circuit relied entirely upon *Canada* in deciding Craig's case and—based upon the short unpublished opinion—the Fourth Circuit did not consider *Rahimi* in deciding Craig's case.

Rahimi rejected a facial Second Amendment challenge to 18 U.S.C. § 922(g)(8)(C)(i), which criminalizes firearm possession by people subject to domestic-violence restraining orders if those orders contain "a finding that the defendant 'represents a credible threat to the physical safety' of his intimate partner or his or his partner's child." 144 S. Ct. at 1895-96, 1898-99. The Court in *Rahimi* did not expressly address *Bruen*'s first step, instead appearing to take it for granted that § 922(g)(8)(C)(i) "regulates arms-bearing conduct" and therefore implicates the

Second Amendment's plain text. *See id.* at 1897. At *Bruen's* second step, the Court held § 922(g)(8)(C)(i) "is consistent with the principles that underpin our regulatory tradition." *Id.* at 1898. The Court cited two traditions to support this conclusion. The first was "surety laws," which "authorized magistrates to require individuals . . . to post a bond" if they went "armed offensively," thereby giving a victim "reasonable cause to fear that the accused would do him harm or breach the peace." *Id.* at 1900. The second tradition was "'going armed' laws," which punished—with arms forfeiture and imprisonment—anyone who "r[ode] or [went] armed, with dangerous or unusual weapons, to terrify the good people of the land." *Id.* at 1901. Although the Court upheld § 922(g)(8)(C)(i), it "reject[ed]" a different "contention" the government had made to defend the statute: "that Rahimi [could] be disarmed simply because he [wa]s not 'responsible.'" *Id.* at 1903. The responsible-irresponsible "line," the Court wrote, does not "derive from our case law." *Id.* True, *Heller* and *Bruen* "used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right," but those cases "did not define the term and said nothing about the status of citizens who were not 'responsible.'" *Id.* That question "was simply not presented" in *Heller* or *Bruen*. *Id.* In addition, the Court explained, "'[r]esponsible is a vague term" that cannot demarcate the bounds of the Second Amendment, since "[i]t is unclear what such a rule would entail." *Id.*; *see also id.* at 1945 (Thomas, J., dissenting) ("[The government] argues that the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding.' Not a single Member of the Court adopts

the Government's theory. . . . The Government's argument lacks any basis in our precedents and would eviscerate the Second Amendment altogether.").

Rahimi's rejection of an "irresponsible" metric undermines each potential basis of facial constitutionality on which the Fourth Circuit relied to uphold § 922(g)(1) in *Canada* and, by extension, Craig's case. First, as explained above, the government argued in the Fourth Circuit in *Canada* that "the people" protected by the Second Amendment's plain text are limited to "law-abiding, responsible citizens." That argument was based on what the Fourth Circuit called "[this] Court's repeated references to 'law-abiding citizens'" in *Heller* and *Bruen*.

In *Canada*, the Fourth Circuit wrote that if this Court's cases supported the government's reading of "the people," that fact would establish § 922(g)(1)'s facial constitutionality. But *Rahimi* rejected the use of a "responsible" filter to restrict Second Amendment rights, and it did so for reasons that are equally applicable to "law-abiding," the second half of the government's proposed limitation.

Rahimi did not specifically address the "law-abiding" portion of the government's argument because the government did not claim § 922(g)(8) was justified by Congress' power to disarm the non-"law-abiding." Instead, the government relied only on a (purported) government power to deny firearms to those who are not "responsible." *See United States v. Rahimi*, No. 22-915, Gov't Br. 27-29 (arguing § 922(g)(8) defendants are "not 'responsible'" and suggesting, by contrast, that felons and illegal immigrants are not "law-abiding"). But both prongs of the government's proposed test—"responsible" and "law-abiding"—derive from

the same source: *Heller*'s and *Bruen*'s use of those words to describe the challengers in those cases. And just as the "responsible" question "was simply not presented" in *Heller* or *Bruen*, those cases did not address the "law-abiding" question either. *Rahimi*, 144 S. Ct. at 1903. A "law-abiding"/non-"law-abiding" line, therefore, does not "derive from [this Court's] case law," as the Fourth Circuit thought it might in *Canada*. *Rahimi*, 144 S. Ct. at 1903.

The term "law-abiding," moreover, is just as "vague" and "unclear" as the term "responsible." *Id*. Neither provides a coherent, workable metric for deciding who is and is not among "the people." *See Range v. Att'y Gen.*, 69 F.4th 96, 102 (3d Cir. 2023) (en banc) ("[T]he phrase 'law-abiding, responsible citizens' is as expansive as it is vague."), certiorari granted, judgment vacated sub nom. *Garland v. Range*, No. 23-374, ___ S. Ct. ___, 2024 WL 3259661 (U.S. July 2, 2024); *United States v. Duarte*, 101 F.4th 657, 670 (9th Cir. 2024) (same), vacated by reh'g en banc; *United States v. Coleman*, 698 F. Supp. 3d 851, 861 (E.D. Va. 2023) ("[T]he Government's reliance on the Supreme Court's various references to 'law-abiding' persons as support for its contention that felons fall outside the scope of the Second Amendment does not persuade this Court. A phrase that malleable cannot be the peg that the Court references to determine who falls within or beyond the protections guaranteed by the Constitution."). Thus, any claim that Second Amendment protections are available only to "law-abiding" citizens must fail in the wake of *Rahimi*.

Second, in *Canada*, the Fourth Circuit surmised that § 922(g)(1) might find support in "a history and tradition of disarming dangerous people considered at step two of *Bruen*." In rejecting the government's "responsible" line, however, this Court also rejected the view that legislatures can disarm American citizens based only on a determination that they are "dangerous."

The term "responsible," as used by the government in *Rahimi*, was simply a synonym for "dangerous." The government's brief argued there was a historical tradition of disarming those who are not "responsible," by which it meant anyone who "would endanger himself or others." *Rahimi*, Gov't Br. 29 (emphasis added). At oral argument, the government confirmed that it was simply "using 'responsible' as a placeholder for dangerous with respect to the use of firearms." *United States v. Rahimi*, No. 22-915, Tr. of Oral Arg. 10. It was this argument—i.e., dangerousness equals irresponsibility, which justifies disarmament—that the Court "reject[ed]" in *Rahimi*. 144 S. Ct. at 1903. It necessarily follows that a purported tradition of disarming "dangerous" groups is insufficient to carry the government's burden at *Bruen* step two.

Additionally, "dangerous" is every bit as "vague" and "unclear" as "responsible." *Id*. The "dangerous" label is therefore too nebulous to define a historical tradition that courts must invoke to determine who may and may not exercise the right to keep and bear arms. As in *Rahimi*, it is "unclear what such a rule would entail." *Id.*; *see also id.* at 1945 (Thomas, J., dissenting) ("[T]he Government's 'law-abiding, dangerous citizen' test—and indeed any similar,

principle-based approach—would hollow out the Second Amendment of any substance. Congress could impose any firearm regulation so long as it targets 'unfit' persons. And, of course, Congress would also dictate what 'unfit' means and who qualifies."). Accordingly, *Rahimi* puts to rest the "dangerousness" theory that the Fourth Circuit said supported—or rather, might support—§ 922(g)(1).

Third, the Fourth Circuit, in *Canada*, proposed that § 922(g)(1) might be constitutional because of this Court's "repeated references to . . . 'longstanding prohibitions on the possession of firearms by felons.'" *Rahimi* undermines this reasoning as well. *Heller*'s reference to "presumptively lawful" felon-disarmament laws "is dicta," *Rahimi*, 144 S. Ct. at 1944 n.7 (Thomas, J., dissenting), and *Rahimi*'s rejection of the "responsible" metric made clear that courts should not decide Second Amendment claims based on dicta in this Court's prior opinions when those dicta relate to questions that "w[ere] simply not presented," *id*. at 1903 (majority op.). As a result, *Heller*'s statement about felon-disarmament laws—which the Court made without "an exhaustive historical analysis . . . of the full scope of the Second Amendment," 554 U.S. at 626—cannot establish § 922(g)(1)'s facial constitutionality.

Fourth, and finally, in *Canada*, the Fourth Circuit floated the possibility that it remained bound by its "post-*Heller* but pre-*Bruen* holdings rejecting constitutional challenges to [§ 922(g)(1)]," such as *Moore*. But Moore held § 922(g)(1) facially constitutional based solely on *Heller*'s dictum about felon-disarmament laws. 666 F.3d at 317-18. And as just explained, *Rahimi* steers lower

courts away from reliance on that dictum, which addressed a "question [that] was simply not presented" in *Heller*. *Rahimi*, 144 S. Ct. at 1903.

In short, *Rahimi*—which the Fourth Circuit had no opportunity to consider in deciding *Canada*—undercuts each of the legal theories that the court said might establish § 922(g)(1)'s facial constitutionality in that case. The Fourth Circuit's opinion in *Canada*, therefore, rests upon "premise[s] that the lower court would reject if given the opportunity for further consideration." *Wellons*, 558 U.S. at 225. The Fourth Circuit had an opportunity to consider *Rahimi* in deciding Craig's case, but it did not do so based upon the short unpublished opinion, choosing, instead, to rely upon *Canada* alone.

This Court has already GVR'd multiple Second Amendment challenges to § 922(g)(1) in light of *Rahimi*, including in cases that held the statute constitutional. *See Jackson v. United States*, No. 23-6170, ___ S. Ct. ___, 2024 WL 3259675 (U.S. July 2, 2024) (GVR'ing to Eighth Circuit, which had held § 922(g)(1) constitutional in all its applications); *Doss v. United States*, No. 23-6842, ___ S. Ct. ___, 2024 WL 3259684 (U.S. July 2, 2024) (same); *Vincent v. Garland*, No. 23-683, ___ S. Ct. ___, 2024 WL 3259668 (U.S. July 2, 2024) (GVR'ing to Tenth Circuit, which had held § 922(g)(1) constitutional in all its applications); *Garland v. Range*, No. 23-374, ___ S. Ct. ___, 2024 WL 3259661 (U.S. July 2, 2024) (GVR'ing to Third Circuit, which had held statute unconstitutional as applied). The Court should take the same course here.

X. CONCLUSION

For these reasons, Craig respectfully request that this Honorable Court grant a writ of certiorari and review the judgment of the Court of Appeals.

Respectfully submitted,

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