No. 24-5937

---

IN THE SUPREME COURT OF THE UNITED STATES

---

RANDY PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

---

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

---

# BRIEF FOR THE UNITED STATES IN OPPOSITION

---

SARAH M. HARRIS
Acting Solicitor General
Counsel of Record

ANTOINETTE T. BACON
WILLIAM A. GLASER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

## QUESTION PRESENTED

Whether the federal statute that prohibits transporting, shipping, receiving, or possessing a firearm with an obliterated serial number, 18 U.S.C. 922(k), violates the Second Amendment on its face.

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 24-5937

RANDY PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

_____

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

_____

# BRIEF FOR THE UNITED STATES IN OPPOSITION

_____

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 111 F.4th 392. The memorandum opinion and order of the district court (Pet. App. B1-B17) is reported at 635 F. Supp. 3d 455.

## JURISDICTION

The judgment of the court of appeals was entered on August 6, 2024. The petition for a writ of certiorari was filed on November 4, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Southern District of West Virginia indicted petitioner for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), and possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). See Pet. App. A7. Section 922(k), the provision at issue here, makes it unlawful to "transport," "ship," "receive," or "possess" a firearm that "has had the importer's or manufacturer's serial number removed, obliterated, or altered." 18 U.S.C. 922(k). The district court dismissed the Section 922(k) count, holding that the statute violates the Second Amendment on its face. See id. at B1-B17. The en banc Fourth Circuit reversed and remanded. See id. at A1-A58.

1. In July 2019, police officers in Charleston, West Virginia, attempted to stop petitioner's car. See C.A. App. 76. Petitioner failed to stop and led officers on a short pursuit before abandoning the car and fleeing on foot. See ibid. The officers arrested petitioner and searched his car, where they found a pistol with an obliterated serial number. See ibid. Petitioner had previous felony convictions for involuntary manslaughter, kidnapping, aggravated robbery, attempted aggravated burglary, and felonious assault. See ibid.

A grand jury indicted petitioner for possessing a firearm as a felon, in violation of Section 922(g)(1), and possessing a firearm with an obliterated serial number, in violation of Section

922(k). See Pet. App. A7. Petitioner moved to dismiss both counts, arguing that the statutes violated the Second Amendment on their face. See ibid.

The district court granted petitioner's motion in part and denied it in part. See Pet. App. B1-B17. The court held that Section 922(k) violates the Second Amendment on its face because the statute is not "consistent with the Nation's historical tradition of firearm regulation." Id. at B8 (citation omitted); see id. at B7-B12. But relying on this Court's statement that felon-disarmament laws are "presumptively lawful," District of Columbia v. Heller, 554 U.S. 570, 627 n.26 (2008), the district court rejected petitioner's facial challenge to Section 922(g)(1). See Pet. App. B12-B15.

2. The government filed an interlocutory appeal from the district court's order dismissing the Section 922(k) count. See Pet. App. A8. After the Fourth Circuit panel received briefing and heard oral argument, the Fourth Circuit ordered that the case be reheard en banc. See C.A. Doc. 55, at 2 (Jan. 12, 2024). The en banc court reversed and remanded, holding that Section 922(k) complies with the Second Amendment. See Pet. App. A1-A58.

In a nine-judge majority opinion, the en banc court stated that this Court's decision in NYSRPA v. Bruen, 597 U.S. 1 (2022), required courts to evaluate Second Amendment challenges under a two-step framework. Pet. App. A9. A court must first determine "whether the Second Amendment's plain text covers the conduct at

issue," and if so, must then determine "whether the Government has justified the regulation as consistent with the 'principles that underpin' our nation's historical tradition of firearm regulation." Ibid. (citation omitted). The court rejected petitioner's challenge to Section 922(k) at the first step. See id. at A12-A16. It read this Court's precedents as establishing that the text of the Second Amendment encompasses only arms "in common use * * * for lawful purposes like self-defense." Id. at A11 (citation omitted). It then determined that "firearms with obliterated serial numbers are not in common use for a lawful purpose." Id. at A16. The court perceived "'no compelling reason why a law-abiding citizen' would use a firearm with an obliterated serial number," and it stated that "such weapons would be preferable only to those seeking to use them for illicit activities." Id. at A15 (citation omitted).

Four judges concurred in the judgment. Judge Niemeyer agreed that "the majority reache[d] the right conclusion" but criticized it for "unnecessarily mov[ing] the historical component of the Bruen test into its first step." Pet. App. A18, A20; see id. at A17-A20. Judge Quattlebaum, joined by Judge Rushing, similarly concluded that the en banc court had reached the correct result but stated that "common use comes into play on step two." Id. at A24; see id. at A23-A31. Judge Agee, meanwhile, believed that petitioner's facial challenge to Section 922(k) could be "resolved on a far simpler basis: because [petitioner] is a convicted

violent felon who may not possess any firearm, § 922(k) is not unconstitutional as applied to him." Id. at A20-A21.

Two judges dissented. Judge Gregory expressed the view that the en banc court's decision could have "a disparate impact on males of color" and could "add weight to the albatross of mass incarceration that burdens our nation." Pet. App. A34-A35; see id. at A31-A36. Judge Richardson concluded that petitioner's conduct "falls within the plain text of the Second Amendment" and that the government had failed to show that Section 922(k) comports with the historical tradition of firearm regulation. Id. at A36; see id. at A36-A46. Judge Richardson acknowledged that petitioner "asserts a facial challenge," id. at A37, but did not address the standard for facial invalidation of a federal statute.

ARGUMENT

Petitioner renews (Pet. 13-21) his contention that Section 922(k) violates the Second Amendment on its face -- i.e., that the Amendment prohibits any application of the statute to anyone who transports, ships, receives, or possesses a firearm with an obliterated serial number, no matter the circumstances. As an initial matter, this criminal case arises in an interlocutory posture. That alone provides a sufficient reason to deny review, because further developments in this case as it heads to trial may make it unnecessary ever to reach the constitutional question that petitioner raises. In any event, the court of appeals correctly rejected petitioner's facial challenge to Section 922(k), and its

decision does not conflict with any decision of this Court or of any other court of appeals. Petitioner argues (Pet. 13) that this Court should nonetheless grant review "to determine * * * what constitutes Second Amendment protected 'conduct' under * * * step one" of the test set forth in NYSRPA v. Bruen, 597 U.S. 1 (2022), but that issue has no bearing on the outcome of this case. The petition for a writ of certiorari should be denied.

1. This case arises in an interlocutory posture; the government filed an interlocutory appeal from the district court's order resolving petitioner's motion to dismiss, and the court of appeals reversed and remanded the case for further proceedings. See Pet. App. A8, A17. That posture "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). This Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., Supreme Court Practice § 4-55 n.72 (11th ed. 2019). It also has frequently denied interlocutory petitions raising Second Amendment issues. See, e.g., Wilson v. Hawaii, 145 S. Ct. 18, 21 (2024) (statement of Thomas, J., respecting the denial of certiorari); Harrel v. Raoul, 144 S. Ct. 2491, 2492 (2024) (statement of Thomas, J.).

Adhering to that practice here would promote judicial economy. If petitioner is acquitted on the Section 922(k) count on remand, his current claim will become moot. And if he is convicted, he may decide to forgo further challenges to Section

922(k) given his sentencing exposure on the Section 922(g)(1) count. Compare 18 U.S.C. 924(a)(1)(B) (statutory maximum of 5 years for violating Section 922(k)), with 18 U.S.C. 924(a)(8) and (e)(1) (statutory maximum of 15 years or life for violating Section 922(g)(1), depending on the defendant's criminal record). Alternatively, petitioner could raise his current claims, together with any other claims that may arise on remand, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.").

2. In any event, the court of appeals correctly rejected petitioner's facial challenge to Section 922(k). Petitioner has not come close to satisfying the standard for facial challenges, and Section 922(k) complies with the Second Amendment regardless.

a. A facial challenge to a federal statute is the "'most difficult challenge to mount successfully,' because it requires a defendant to 'establish that no set of circumstances exists under which the Act would be valid.'" United States v. Rahimi, 602 U.S. 680, 693 (2024) (citation omitted). If the challenged statute complies with the Constitution in even "some of its applications," the facial challenge fails. Ibid.

Section 922(k) has at least some valid applications. For instance, the government may apply Section 922(k) to persons who

are outside the scope of "the people" protected by the Second Amendment and who accordingly have no constitutional right to keep and bear arms. U.S. Const. Amend. II. Because the Amendment protects a right to possess arms for "traditionally lawful purposes, such as self-defense within the home," District of Columbia v. Heller, 554 U.S. 570, 577 (2008), the government also may apply Section 922(k) to persons who obliterate serial numbers on firearms to evade detection for the crimes they commit with those firearms. The government likewise may apply Section 922(k) to persons who "ship," "transport," "receive," or "possess" firearms with obliterated serial numbers, 18 U.S.C. 922(k), as part of unlawful domestic or international firearms trafficking. That ends the facial challenge.

b. Even putting aside the standard for facial invalidation, petitioner's challenge to Section 922(k) lacks merit. The Second Amendment protects the "right of the people to keep and bear Arms." U.S. Const. Amend. But the Second Amendment does not prevent legislatures from regulating firearms in ways that are "consistent with the principles that underpin our regulatory tradition." Rahimi, 602 U.S. 692 (2024). Of course, as Judge Richardson correctly recognized, the government bears the "burden" of "demonstrat[ing] that its regulation * * * can be justified by our Nation's historical tradition," Pet. App. 36a (Richardson, J., dissenting). But the government has carried that burden here.

American legislatures have long imposed "conditions and qualifications" on the manufacture and sale of arms, Heller, 554 U.S. at 627, including by requiring the placement of marks or numbers on firearms and ammunition. For instance, some States in the early republic required the inspection and marking of gunpowder casks. See, e.g., Act of Oct. 4, 1776, ch. 6, § 3, 1776 N.J. Acts 7; Act of Apr. 18, 1795, ch. 1857, §§ 6-7, 15 The Statutes at Large of Pennsylvania 349-350 (James T. Mitchell & Henry Flanders eds., 1911). Other States required inspectors to "stamp" musket and pistol barrels with distinctive "letters and figures" and made it unlawful to "alter" those stamps. Act of Mar. 8, 1805, ch. 81, §§ 1, 4, 1804-1805 Mass. Acts 112; see, e.g., Act of Mar. 10, 1821, ch. 162, §§ 1, 3-4, 1821 Me. Laws 546.

Section 922(k) closely resembles those historical laws in both "how and why the regulations burden a law-abiding citizen's right to armed self-defense." Bruen, 597 U.S. at 29. Section 922(k) does not require individuals such as petitioner to add marks to their firearms; rather, it makes it unlawful to possess a firearm "which has had the importer's or manufacturer's serial number removed, obliterated, or altered." 18 U.S.C. 922(k) (emphasis added). Prohibiting individuals from obliterating markings or numberings already placed on firearms by importers or manufacturers does not meaningfully burden armed self-defense or other lawful uses that the Second Amendment protects. And just as Section 922(k)'s historical precursors enabled authorities to

trace unsafe powder or barrels involved in explosions, Section 922(k) enables authorities to trace firearms used in crimes.

Judge Richardson accepted that the Founding-era laws and Section 922(k) impose "similar-enough burdens," but viewed those laws as different because the Founding-era laws "were enacted for product quality purposes." Pet. App. A45 (Richardson, J., dissenting). But this Court's precedents require only "a well-established and representative historical analogue, not a historical twin." Bruen, 597 U.S. at 28 (emphases omitted). Further, if laws requiring the marking of arms were constitutional at the Founding, they remain constitutional today, regardless of the motives behind the laws' enactment. "The decisions of this [C]ourt from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power" based on the "purpose or motive" that "caused the power to be exerted." McCray v. United States, 195 U.S. 27, 55 (1904).

In addition, the Second Amendment protects the possession of firearms that are "'in common use at the time' for lawful purposes," but allows legislatures to forbid the possession of "'dangerous and unusual weapons.'" Heller, 554 U.S. at 624, 627 (citation omitted); see Bruen, 597 U.S. at 47; United States v. Miller, 307 U.S. 174, 178 (1939); see also Pet. App. A40 (Richardson, J., dissenting) ("I agree that history and tradition demonstrate that the government may regulate or ban dangerous and unusual weapons."). Section 922(k) fits within that historical

principle as well. Firearms with obliterated serial numbers are not in common use for lawful purposes; to the contrary, the primary reason to obliterate a serial number is to avoid being connected with a firearm that was stolen or involved in a crime. See Pet. App. A30 (Quattlebaum, J., concurring in the judgment). That is why States in the 1920s began to prohibit the obliteration of firearm serial numbers. See, e.g., Act of June 13, 1923, ch. 339, § 13, 1923 Cal. Stat. 702. Today, 41 States and the District of Columbia prohibit the obliteration of firearm serial numbers or the possession of firearms with obliterated serial numbers. See District of Columbia C.A. Amicus Br. 6-7 & nn.1-3 (collecting statutes).

No court of appeals has held that Section 922(k) violates the Second Amendment. Since Bruen, two courts of appeals have rejected unpreserved challenges to Section 922(k) on plain-error review. See United States v. Lopez, No. 22-13036, 2024 WL 2032792, at *2-*3 (11th Cir. May 7, 2024) (per curiam); United States v. Ramadan, No. 22-1243, 2023 WL 6634293, at *2-*3 (6th Cir. Oct. 12, 2023). And every district court to consider the issue, apart from the district court in this case, has concluded that Section 922(k) complies with the Second Amendment. See Pet. App. A13 n.5 (collecting cases). The court of appeals' decision does not warrant further review.

3. Petitioner argues (Pet. 13) that Bruen requires courts to evaluate Second Amendment claims under a two-step framework,

that historical analysis comes into play only at the second step, and that the court of appeals erred by upholding Section 922(k) at the first step. That contention does not warrant granting certiorari.

Although some courts have read Bruen to require a two-step inquiry, this Court in Bruen formulated a one-step test: courts must determine "whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." 597 U.S. at 26. Lower courts had previously applied a "two-step approach" under which they would examine text and history at step one and would then apply strict or intermediate scrutiny at step two, but Bruen described that approach as having "one step too many." Id. at 19. The historical analysis required by Bruen enables a court to determine the original meaning of the phrase "the right of the people to keep and bear Arms." U.S. Const. Amend. II. In drawing a rigid distinction between textual and historical analysis, petitioner ignores this Court's admonition that "history * * * inform[s] the meaning of constitutional text." Bruen, 597 U.S. at 25; see, e.g., Heller, 554 U.S. at 592-595 (consulting history in interpreting the Second Amendment's text).

Regardless, even if the court of appeals relied on more steps than Bruen requires, this Court "reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956). The court of appeals reached the correct judgment in

rejecting petitioner's facial challenge to Section 922(k). That judgment remains correct regardless of whether a court regards Bruen's test as having one step or two, and regardless of whether a court considers the character of the weapon at the first or the second step. Indeed, three of the five judges who adopted petitioner's view regarding "the scope of Bruen's step one," Pet. 12, nevertheless agreed with the nine-judge majority that the Second Amendment permits the government to prohibit the possession of firearms with obliterated serial numbers. See Pet. App. A20 (Niemeyer, J., concurring in the judgment); id. at A24, A31 (Quattlebaum, J., concurring in the judgment). "The fact that the [court of appeals] reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the [lower] court's decision." California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam).

Petitioner also argues (Pet. 17) that this Court should grant certiorari to provide "guidance for future Second Amendment cases." Although "more guidance on which weapons the Second Amendment covers" could be beneficial, Harrel, 144 S. Ct. at 2492 (statement of Thomas, J.), this case would be a poor vehicle for providing it. Petitioner has litigated the case as a facial challenge, and the challenged statute does not prohibit any type of firearm outright; the statute merely prevents obliteration of serial numbers on those firearms. Petitioner contends (Pet. 19-21) that the court of appeals' reasoning could have consequences

for challenges to the National Firearms Act, 26 U.S.C. 5801 et seq., which restricts the possession of certain dangerous weapons such as machineguns and sawed-off shotguns. But any concerns about the scope of the National Firearms Act should be addressed in cases involving that statute, not in a facial challenge to Section 922(k).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General

ANTOINETTE T. BACON
WILLIAM A. GLASER
Attorneys

FEBRUARY 2025