NO. 24-5937

In the

Supreme Court of the United States

RANDY PRICE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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1. Denying certiorari because of this case's interlocutory posture would prevent timely and meaningful review of a foundational issue inherent to all post-*Bruen* Second Amendment challenges.

While this Court infrequently grants certiorari in interlocutory proceedings, there is no specific standard for whether to do so, nor has this Court adopted a categorical rule against it. Indeed, the Court has previously granted certiorari in a number of such cases. *See, e.g.*, *Trump v. United States*, 603 U.S. 593, 144 S. Ct. 2312 (2024); *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S. Ct. 2690 (1982); *United States v. MacDonald*, 435 U.S. 850, 853 (1978) (granting certiorari review of interlocutory appeal following unsuccessful motion to dismiss "[b]ecause of the importance of the jurisdictional question to the criminal law"); *Greene v. United States*, 376 U.S. 149, 153 (1964)(granting certiorari to review Court of Claims order staying court proceedings while claimant sought administrative remedies); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947)("[a]lthough the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.'" (citing *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)).

At the core of the Second Amendment framework is whether a challenged regulation burdens Second Amendment protected conduct. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). How such conduct is to be identified and defined, particularly beyond the definition of the people possessing and carrying bearable arms in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is foundational to the entire *Bruen* analysis. This is not a case-specific issue; it is foundational to

determining whether a person's conduct is protected by the Second Amendment such that a court is required to analyze whether there is a historical tradition of regulating it. The significance of the question to all post-*Bruen* Second Amendment challenges, therefore, easily outweighs any putative concerns about judicial economy, this Court's general practice with interlocutory cases, or this case's specific interlocutory posture.

2. The issue presented requires this Court to answer the important question of what constitutes protected "conduct" under the Second Amendment.

The Government does not even try to directly address the substance of the Petition. Instead, the Government reframes the issue presented to fit its contention that *United States v. Price*, 111 F.4th 392 (4th Cir. 2024)(*en banc*), is a poor vehicle to provide further guidance to lower courts. Govt. Resp. at (I); 13-14. Where the Government has no answer to the Petition's stated issue for review, it pivots to 18 U.S.C. § 922(k) not being unconstitutional in every possible application, and that overturning the Fourth Circuit's decision will not produce a different result because there is no two step analysis under *Bruen* – full stop. The government's arguments against certiorari, however, were never considered or decided below - given the Fourth Circuit's resolution of this case at *Bruen*'s first step.

The Government's response does illustrate precisely why further review is important, as every Second Amendment challenge made under *Bruen* will require courts to address the threshold question of whether *Bruen* requires a single-step

inquiry or a two-step inquiry.[1] Left unreviewed, both the method and rationale used by the Fourth Circuit to place Price's gun possession outside Second Amendment protected conduct will result in a misapplication of *Bruen* to similar future challenges.

This case is analogous to this Court's pre-*Bruen* decision *Caetano v. Massachusetts*, 577 U.S. 411 (2016), which held that the Second Amendment extends to all instruments that constitute bearable arms, and that stun guns accordingly enjoy Second Amendment protection. *Id.* at 411, 416 (Alito, J., concurring). Just as Massachusetts argued in *Caetano*, the Government in the court below argued (and the Fourth Circuit held) that a particular class of weapons (here, firearms with an obliterated serial number) are dangerous and unusual and not in common use for any lawful purpose. This Court found otherwise in *Caetano*, with Justice Alito's concurrence noting that to be unprotected, a weapon must be both dangerous ***and*** unusual. *Id.* at 418 (Alito, J., concurring, citing *United States v. Miller*, 307 U.S. 174 (1939); *accord Price*, 111 F.4th at 428 (Richardson, J., dissenting). Further, this Court found the right to bear other weapons (in *Caetano*, a firearm; here, a firearm with an obliterated serial number) is "no answer." *Caetano*, 577 U.S. at 421, citing *Heller*, 554 U.S. at 629. Just as *Caetano* confirmed that the possession of a stun gun constitutes Second Amendment protected conduct, this Court should likewise hold that possession of a firearm with an obliterated serial number constitutes Second Amendment protected conduct sufficient to satisfy *Bruen*'s first prong.

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[1] *Price*'s reach beyond § 922(k) has already been aptly demonstrated in the Fourth Circuit. *See Bianchi v. Brown*, 111 F.4th 438, 448 (4th Cir. 2024)(*en banc*); *United States v. Hunt*, 123 F.4th 697, 705 (4th Cir. 2024).

The *en banc* Fourth Circuit erroneously resolved this case at *Bruen*'s step one not based on Price's ***conduct*** of possessing or carrying a semi-automatic handgun, but instead based on ***non-functional*** characteristics of that gun. In doing so, the Fourth Circuit improperly resurrected the reasoning of *United States v. Chester*, 628 F.3d 673, 678-679 (4th Cir. 2010), which combined text and history into a single inquiry by which it limited the applicability of Second Amendment protections based on the ***non-functional*** characteristics of a semiautomatic pistol. *Price*, 111 F.4th at 401-408. Although Price's firearm was functionally identical to a pistol of the same make and model that contained a serial number, the Fourth Circuit instead characterized Price's gun as a "new" weapon and labeled it "not in common use for a lawful purpose," thus avoiding *Bruen*'s step-two historical analysis entirely.

Bruen did not just disavow means-end scrutiny for Second Amendment challenges, it broke *Chester*'s "text and history" step one analysis into two distinct inquiries. *Bruen*, 597 U.S. at 24, 27. The Fourth Circuit's *en banc* decision in this case, and subsequent Fourth Circuit decisions, do not meaningfully acknowledge this distinction. *See, e.g.*, *United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024). The Government's response dubiously suggests it does not even exist. Govt Resp. at 12.

Heller previously answered the questions of who and what conduct the Second Amendment protects: the people and the possession and carrying of bearable arms. *Heller*, 554 U.S. at 579-581, 582-592. In the sixteen-plus years since *Heller*, however, this Court has never squarely addressed what makes a weapon "dangerous and unusual," or "in common use for a lawful purpose" and thereby outside protected

Second Amendment conduct. In light of the Fourth Circuit's reliance on a non-functional characteristic to conclude that his pistol was "dangerous and unusual" and not "in common use for a lawful purpose," it is time for this Court to step in and affirmatively do so.

The Fourth Circuit's construction of the *Heller/Miller* "in common use" standard to include non-functional characteristics is both unworkable and inconsistent with *Bruen*. Using some of the more extreme examples, a nuclear bomb is dangerous and unusual (and not in common use for lawful purposes) based on its functional characteristics, as are a missile, land mine, hand grenade, silencer, rail gun, or other similar military instrumentalities. The Fourth Circuit recognized as much in another recent *en banc* decision, *Bianchi v. Brown,* 111 F.4th 438, 454-461 (4th Cir. 2024)(*en banc*), in which it upheld Maryland's assault weapons ban against a Second Amendment challenge based on a finding that an assault weapon's functional characteristics render those firearms not "in common use." Without those functional characteristics, *Bianchi*'s "in common use" holding becomes meaningless. Yet the same court, having heard oral argument in both *Bianchi* and this case on the same day, found that the non-functional characteristics of Price's gun dictated the same outcome under *Bruen*'s step one. It is difficult to understand how the Fourth Circuit could have concluded that one of the most widely owned self-defense firearms in America[2] is not an "Arm" protected by the Second Amendment simply because its serial number had been removed. As Judge Richardson's dissent observed, this

[2] *Caetano*, 577 U.S. at 416-417.

should have been an easy case for Randy Price. *Price*, 111 F.4th at 426 (Richardson, J., dissenting). The removal of a serial number does not change the functional characteristics of a firearm, make the gun dangerous and unusual, or render the gun useless for the lawful purpose of individual self-defense.

3. The contours of what constitutes Second Amendment protected conduct, and what may be considered in making that determination, should be clearly defined for the benefit of all *Bruen* litigants, including Price.

The Government is correct that there are no other federal appeals cases addressing whether or how non-functional characteristics of a firearm render it not "in common use for lawful purposes." There are, however, decisions which directly conflict with the Fourth Circuit's decision in this case because they do not collapse the *Bruen* inquiry into a single step by using a historical analysis to define Second Amendment protected conduct. *See United States v. Quailes*, 126 F.4th 215, 220-221 (3d Cir. 2025)(convicted felons are among the people presumptively protected by the Second Amendment and 18 U.S.C. § 922(g)(1) punishes Second Amendment conduct – possession of a firearm); *Range v. Attorney General United States*, 124 F.4th 218, 225-228 (3d Cir. 2024)(*en banc*)(finding convicted felons are part of the people at *Bruen*'s step one without conducting a separate historical analysis of felon disarmament to determine the same); *United States v. Diaz*, 116 F.4th 458, 466-467 (5th Cir. 2024)(also finding convicted felons are part of the people, such that felon status is not relevant to determining the Second Amendment's ***applicability*** in *Bruen*'s step one; felon status is instead relevant to the historical analysis in *Bruen*'s step two). The Government's descriptions of Judge Niemeyer's, Quattlebaum's and

Rushing's concurrences also illustrate similar conflicts within the Fourth Circuit itself, which is another reason why this Court should grant the Petition. Govt. Resp. at 4; Petition at 12. The Fourth Circuit's decision plainly does create a circuit conflict on the issue of whether courts may apply a historical analysis when determining whether a person's conduct is protected by the Second Amendment.

Were *Price* reviewed by this Court now and the Court agreed with Price that "in common use," if considered at all in *Bruen*'s step one, is based solely on functional firearm characteristics, then the absence of well-established and representative relevantly similar historical analogues suggests Price would also prevail under *Bruen's* step two analysis. *See generally United States v. Price*, Appeal No. 22-4609 (4th Cir.), Dkt. No. 29, Price Reply Brief, at 20-29; Dkt. No. 79, Price Supplemental Brief. Again, however, the *en banc* Fourth Circuit never addressed *Bruen*'s step two, meaning the Government's so-called historical evidence and arguments were neither analyzed nor decided. Therefore, this Court should (1) grant certiorari, (2) resolve the conflict created by the Fourth Circuit's decision by holding that *Bruen*'s step one does not permit courts to rely on historical analysis or a firearm's non-functional characteristics when determining whether a person's conduct is covered by the Second Amendment, (3) vacate the Fourth Circuit's conclusion that Price's possession of a firearm with an obliterated serial number is not conduct protected by the Second Amendment, and (4) remand the case to further address *Bruen*'s step two analysis.

Denying this Petition materially reduces the likelihood of the question presented coming back before the Court, at least in this case. The Government

acknowledges as much. Govt. Resp. at 6-7. As a practical matter, Price has already factually conceded the elements of both charged offenses in the course of litigating his motion to dismiss. There are no material factual findings left to make through a trial. If not addressed ***now***, while perhaps conceptually "possible," it is very unlikely Price will be in any position to pursue the specific issue presented later in his case. Price has also remained in custody since his original July 16, 2019, arrest, such that the burden of any further delay addressing the merits of his appeal greatly outweighs any general interests in judicial economy.

Conclusion

In 2023, the Wall Street Journal claimed *Bruen* was causing "chaos" in the lower courts. *See* Jacob Gershman, *Why American's Gun Laws Are in Chaos*, The Wall Street Journal (Aug. 1, 2023). In reality, any "chaos" is more fairly attributed to the decades-long misinterpretation of the Second Amendment only recently corrected by *Bruen*, thereby producing a multitude of challenges to nearly a century of unchecked Congressional firearm regulation.

As of February 24, 2025, a Westlaw search showed at least 3,333 case references to *Bruen*, with 337 of those cases decided by the Courts of Appeals. These totals do not even capture pending district court cases in which no written opinion has been authored. Contrary to this Court's instructions in *Bruen* and *Rahimi*, lower courts are effectively enshrining existing firearm regulations like the Gun Control Act of 1968 rather than correctly undertaking the required two-step "text-and-history" analysis to ensure the Second Amendment is not treated as a second-class

right. Denying certiorari in this case will only exacerbate that enshrinement. The right to keep and bear arms being among the "fundamental rights necessary to our system of ordered liberty," *United States v. Rahimi*, 602 U.S. 680, 690 (2024), *agere nunc*; Price's Petition should be granted.

Respectfully submitted,

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