No. __________

IN THE

Supreme Court of the United States

RHOBASHI HOLMES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the lifetime ban on possession of firearms by all felons, codified at 18 U.S.C. § 922(g)(1), plainly unconstitutional on its face, because it is permanent and applies to all persons convicted of felonies, even those who are not violent and pose no risk to the public?

Does § 922 (g)(1) plainly exceed the scope of Congress's power to regulate interstate and foreign commerce?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Holmes*, No. 21-cr-52-1, U.S. District Court for the Eastern District of Louisiana. Judgment entered January 10, 2023.
- *United States v. Holmes*, No. 23-30096, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 2, 2024.

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RHOBASHI HOLMES,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rhobashi Holmes respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Alternatively, Mr. Holmes notes that numerous petitions raising the same issues are now or will shortly be filed in this Court. That includes the pending petition in *Andre Michael Dubois v. United States* (No. 24-5744), filed on October 8, 2024. The government requested additional time to file a response to that petition, and its response is due December 12, 2024. Additionally, a petition arising out of the lead case on this issue in the Fifth Circuit—*United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024)—will likely be filed next month. Accordingly, Mr. Holmes requests that his petition be held pending those and/or other petitions if this Court anticipates that it may grant a writ of certiorari on the issues raised herein.

JUDGMENT AT ISSUE

The opinion of the United States Court of Appeals for the Fifth Circuit is attached as Pet. App. 1.

JURISDICTION

On August 2, 2024, the Fifth Circuit affirmed the district court's judgment and sentence. No petition for rehearing was filed. On October 18, 2024, Mr. Holmes filed with this Court an Application for Extension of Time to File a Petition for Writ of Certiorari. Justice Alito granted that application on October 2, 2024, extending the time in which to file Mr. Holmes's petition to December 2, 2024. Thus, this petition for a writ of certiorari is timely filed pursuant to Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g)(1) states in relevant part:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The Second Amendment to the U.S. Constitution provides in relevant part:

> 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.

Art I, § 8, cl. 3 of the U.S. Constitution provides in relevant part that Congress shall have the power:

> To regulate Commerce . . . among the several States[.]

Art I, § 8, cl. 18 of the U.S. Constitution provides that Congress shall have the power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

INTRODUCTION

Since this Court's decision in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), the courts of appeal have been wrestling with challenges to the constitutionality of 18 U.S.C. § 922(g)(1). Some courts have rejected all challenges, relying on dicta in *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) and *Bruen*, that bans on possession of firearms by convicted felons are "presumptively lawful." *See, e.g.*, *United States v. Dubois*, 94 F.4th 1284, 1292 (11th Cir. 2024); *Vincent v. Garland*, 80 F.4th 1197, 1201 (10th Cir. 2023), *cert. granted*, *judgment vacated*, 144 S. Ct. 2708 (2024). Some have rejected facial challenges but entertained as-applied challenges. *See, e.g.*, *Range v. Att'y. Gen.*, 69 F.4th 96, 106 (3d. Cir. 2023) (en banc), *cert. granted*, *judgment vacated*, 144 S. Ct. 2706 (2024); *United States v. Duarte*, 101 F. 4th 657, *vacated and en banc granted*, 108 F.4th 786 (9th Cir. 2024); *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024).

Last term's opinion in *United States v. Rahimi*, 144 S. Ct. 1189 (2024), did not alter the state of disarray. Lower courts continue to be divided on whether *Bruen* meaningfully altered the test to be applied to bans on possession of firearms by convicted felons. *Compare United States v. Williams*, 113 F.4th 637, 662-63 (6th Cir. 2024) (rejecting as applied challenge by "dangerous person" but indicating persons with other categories of non-dangerous felonies might be successful), *with Diaz*, 116 F.4th at 469-70 (finding felon dispossession consistent with the historical tradition) *and United States v. Jackson*, 110 F.4th 1120, 1128-29 (8th Cir. 2024) (same, relying on Congress's judgment of what categories of persons are dangerous).

This is an important question. 8,040 cases were prosecuted in FY2023 under 18 U.S.C. § 922(g) in federal courts nationwide, the vast majority of which are § 922(g)(1). U.S. Sentencing Comm'n, "Quick Facts – 18 U.S.C. § 922(g) Offenses" (June 2024).[1] And thousands more are prosecuted under similar state statutes each year.

The Department of Justice agreed to certiorari in several cases last term, but none were granted argument. *See, e.g.*, *United States v. Duarte*, 108 F.4th 786, 787 (9th Cir. 2024) (dissenting from grant of en banc rehearing). But the question will not go away, and a clear circuit split has continued. "[P]erhaps no single Second Amendment issue has divided the lower courts more than the constitutionality of the 18 U.S.C. § 922(g)(1) felon-disarmament's rule's application to certain nonviolent felons." *Id.* In sum, the circuits "require clearer instruction from the Supreme Court" regarding the constitutionality of 18 U.S.C. § 922(g)(1) after *Bruen* and *Rahimi*. *Dubois*, 94 F.4th at 1293. Because these critical issues remain unresolved and the circuits remain split as a result, scores of cases soon will return to this Court. Some already have. *See, e.g.*, *Andre Michael Dubois v. United States* (No. 24-5744).

Accordingly. this Court should grant certiorari on the questions presented—whether through Mr. Holmes's case or another. Alternatively, Mr. Holmes notes that numerous petitions raising the same issues are now or will shortly be filed in this Court. That includes the pending petition in *Andre Michael Dubois v. United States*

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[1] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY23.pdf (last visited December 2, 2024).

(No. 24-5744), filed on October 8, 2024. The government requested additional time to file a response to that petition, and its response is due December 12, 2024. Additionally, a petition arising out of the lead case on this issue in the Fifth Circuit—*United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024)—will likely be filed next month. Accordingly, Mr. Holmes requests that his petition be held pending those and/or other petitions if this Court anticipates that it may grant a writ of certiorari on the issues raised herein.

STATEMENT OF THE CASE

On April 16, 2021, Petitioner Rhobashi Holmes was charged by a federal grand jury with two separate counts of violating 18 U.S.C. § 922 (g)(1), which prohibits felons from possessing firearms. On January 28, 2022, Mr. Holmes pleaded guilty to both counts without the benefit of a plea agreement. The district court imposed a 120-month sentence, which represented a severe upward variance from the applicable Sentencing Guidelines range.

On appeal, Mr. Holmes argued that his two § 922(g)(1) convictions must be reversed because the statute violates the Second Amendment according to the framework established in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Mr. Holmes conceded that his trial counsel had failed to raise the issue and that his claim was therefore subject to plain-error review. Additionally, he argued that § 922(g)(1) exceeds Congress's authority to regulate interstate and foreign commerce, though he recognized that the argument was foreclosed by Fifth Circuit caselaw.

The Fifth Circuit declined to reach both claims, determining that a holding that § 922(g)(1) is unconstitutional would constitute an extension, rather than mere application, of *Bruen*. *United States v. Holmes*, No. 23-30096, 2024 WL 3634197, at *1 (5th Cir. Aug. 2, 2024). The court concluded: "[A]rguments that require the extension of existing precedent cannot meet the plain error standard." *Id*. (quoting *United States v. Jones*, 88 F.4th 571, 574 (5th Cir. 2023) (collecting cases rejecting plain-error extension of *Bruen* to § 922(g)(1))).

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari in Mr. Holmes's case, or, alternatively, grant certiorari in another case raising the same issues and then hold Mr. Holmes's petition pending a resolution of these important questions.

In *Bruen*, this Court established a new framework for determining whether a firearm regulation is constitutional under the Second Amendment, eliminating the two-step history and means-end scrutiny test that the Fifth Circuit and others previously employed. Specifically, *Bruen* got rid of the second step. This Court declared that "a constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Bruen*, 597 U.S. at 23 (quotations omitted). Now, under *Bruen*, for a law to survive a Second Amendment challenge, the government must "identify an American tradition" justifying the law's existence. If it cannot, courts may no longer apply "means-end scrutiny" to uphold the law under the second step. *Id*. at 2125, 2138. Instead, the inquiry ends, and the law is unconstitutional.

Thus, under *Bruen*, the government must prove that § 922(g)(1) is consistent with this Nation's historical tradition of firearm regulation. But it plainly cannot do so because there is no relevantly similar historical analogue to a lifetime ban on possession of firearms. As one Justice has noted, no historical tradition of prohibiting felons from possessing firearms for life exists. *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 597 U.S. 1. Thus, § 922(g)(1) is unconstitutional on its face. And that is clearly and obviously dictated by simple

application of *Bruen*. The Fifth Circuit was wrong to hold that *Bruen* does not compel this straightforward result. Mr. Holmes's conviction under § 922(g)(1) should be reversed.

I. Simple application of *Bruen*'s historical-tradition test makes clear that a blanket, lifetime ban on possession of firearms for all felons cannot withstand constitutional scrutiny.

A. Bruen represented a fundamental shift in Second Amendment analysis.

The Second Amendment to the U.S. Constitution mandates that 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. In *Dist. of Columbia v. Heller*, this Court held that the Second Amendment codifies an individual right to possess and carry weapons, explaining that the inherent right of self-defense is central to its protections. 554 U.S. 570, 628 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (holding "that individual self-defense is the central component of the Second Amendment right").

Following *Heller* (but before *Bruen*), the Fifth Circuit and others "adopted a two-step inquiry for analyzing laws that might impact the Second Amendment." *Hollis v. Lynch*, 827 F.3d 436, 446 (5th Cir. 2016). First, courts asked "whether the challenged law impinge[d] upon a right protected by the Second Amendment—that is, whether the law regulate[d] conduct that falls within the scope of the Second Amendment's guarantee." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives [NRA]*, 700 F.3d 185, 194 (5th Cir. 2012); *see also United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020). To make that determination, courts "look[ed] to whether the law harmonize[d] with the historical traditions

associated with the Second Amendment guarantee." *NRA*, 700 F.3d at 194. If the regulated conduct was deemed to fall outside the scope of the Second Amendment's protection under that framework, then the law was deemed constitutional without further analysis. *McGinnis*, 956 F.3d at 754.

However, if the regulated conduct fell within the protective scope of the Second Amendment, courts proceeded to step two: determining and applying "the appropriate level of means-end scrutiny—either strict or intermediate." *Id.* (internal quotation marks and citation omitted). "[T]he appropriate level of scrutiny 'depend[ed] on the nature of the conduct being regulated and the degree to which the challenged law burden[ed] the right." *NRA*, 700 F.3d at 195 (quoting *United States v. Chester,* 628 F.3d 673, 682 (5th Cir. 2010)). Under that framework, "a 'regulation that threaten[ed] a right at the core of the Second Amendment'—i.e., the right to possess a firearm for self-defense in the home—'trigger[ed] strict scrutiny,' while 'a regulation that does not encroach on the core of the Second Amendment' [was] evaluated under intermediate scrutiny." *McGinnis*, 956 F.3d at 754 (quoting *NRA*, 700 F.3d at 194).

In *Bruen*, this Court expressly abrogated the two-step inquiry adopted by the Fifth Circuit and others and announced a new framework for analyzing Second Amendment claims. The Court reasoned that "[s]tep one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history." *Id.* However, *Bruen* rejected the practice of applying "means-end scrutiny" to conduct deemed protected (i.e., step two of the old framework), explaining that "*Heller* and *McDonald* do not support applying

means-end scrutiny in the Second Amendment context." 142 S. Ct. at 2127. Under *Bruen*'s newly announced framework, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id*. at 2126, 2129-30. And, upon such a finding, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. Only upon the government making such a showing may a court "conclude that the individual's conduct falls outside of the Second Amendment's 'unqualified command.'" *Id.* (citation omitted). In other words, for a firearm regulation to pass constitutional muster, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127

B. Under the new framework, § 922(g)(1) violates the Second Amendment because firearm possession is protected by the Amendment's plain text, and the government cannot show a historical tradition of categorically disarming felons.

Straightforward application of *Bruen*'s test makes absolutely clear that § 922(g)(1) cannot survive constitutional scrutiny, and the Fifth Circuit was wrong to hold otherwise.

1. The text of the Second Amendment covers Mr. Holmes's conduct, and he is among "the people" the Amendment protects.

The plain text of the Second Amendment protects the right to possess and carry weapons for self-defense. *See Heller*, 554 U.S. at 583-92. And *Bruen* clarified that this right extends outside of the home. 142 S. Ct. at 2122. Section 922(g)(1) is a permanent and complete ban on any firearm possession by felons in any context. Thus, the statute regulates (and in fact fully prohibits) conduct that is presumptively protected

under the plain text of the Second Amendment. As a result, the statute is presumptively unconstitutional under *Bruen*. *Id.* at 2129-30.

In an attempt to sidestep this straightforward conclusion, the government has adopted a novel argument that a person's status as a "felon" excludes that person from the Second Amendment's protections. But the plain text of the Second Amendment and this Court's precedent hold otherwise. In *Heller*, this Court rejected the theory that "the people" protected by the Second Amendment was limited to a specific subset—*i.e.*, those in a militia. 554 U.S. at 579-81, 592-600. The Court explained that when the Constitution refers to "'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset," and there is thus a "strong presumption that the Second Amendment right is exercised individually and belongs to *all Americans*." *Id.* at 580-81 (emphasis added).

Comparison to other constitutional amendments confirms this view. As *Heller* explained, "the people" is a "term of art employed in select parts of the Constitution," including "the Fourth Amendment, . . . the First and Second Amendments, and . . . the Ninth and Tenth Amendments." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). It is beyond challenge that felons are among "the people" whose "persons, houses, papers, and effects" enjoy Fourth Amendment protection. U.S. Const. Amend. IV; *see United States v. Lara*, 815 F.3d 605 (9th Cir. 2016). And felons likewise enjoy "the right of the people" to "petition the government for redress of grievances." U.S. Const. Amend. I; *see Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017). If a person with a felony conviction is one of "the people" protected by the

First and Fourth Amendments, *Heller* teaches that he is one of "the people" protected by the Second Amendment, too.

This view was confirmed when this Court addressed a challenge to a different subsection of § 922(g) last term in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). The Court analyzed historical laws dealing with dangerous persons to find that § 922(g)(8) was consistent with historical tradition and therefore constitutional. *Id.* at 1899-1900. But the Court never suggested for a moment that Mr. Rahimi was not one of "the people" protected by the Second Amendment. Accordingly, Mr. Holmes is among "the people" to whom the Second Amendment applies.

2. There is no relevantly similar historical regulation that bans firearm possession for life.

Bruen provided guidance on conducting historical analysis in the hunt for relevantly similar regulations. The Court can consider "whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation." *Bruen*, 597 U.S. at 27. But *Bruen* reminded that "not all history is created equal." *Id.* at 34. That is because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Id.* (quotations omitted). Because the Second Amendment was adopted in 1791, earlier historical evidence "may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years." *Id.* Similarly, post-ratification laws that "are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Id.* at 36 (quotations and emphasis omitted).

Bruen—and, later, *Rahimi*—also offered analytical guidance for evaluating

historical clues. As this Court explained in *Rahimi*: "A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 29). In doing so, "[w]hy and how the regulation burdens the right are central to this inquiry." *Id*. Thus, "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id*. Importantly, though, "[e]ven when a law regulates arms-bearing for a permissible reason, . . . it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Id*. And this Court made clear that the burden falls squarely on the government to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19. If the government cannot do so, the infringement on the right cannot survive.

In *Heller*, this Court confirmed an individual's right to keep and bear arms but cautioned that this right is "not unlimited." 554 U.S. at 626. As an example, the Court provided, in dicta, a non-exhaustive list of "*presumptively* lawful regulatory measures"—i.e., ones that had not yet undergone a full historical analysis. *Id*. at 627 n.26 (emphasis added). This list included laws restricting possession by felons and the mentally ill and the carrying of firearms in "sensitive places." *Id*. at 626. *Heller* emphasized that "we do not undertake an exhaustive historical analysis today of the

full scope of the Second Amendment." *Id*. And since this was the Court's "first in-depth examination of the Second Amendment," *Heller* explained that it could not "clarify the entire field." *Id*. at 635. But *Heller* promised that there would be "time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id*. That time is now. The government cannot meet its burden to establish the requisite "relevantly similar" historical tradition. *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 29).

The government cannot meet its burden to establish § 922(g)(1)'s historical pedigree for a simple reason: neither the federal government nor a single state barred all people convicted of felonies until the 20th century. *See, e.g.*, Adam Winkler, *Heller's Catch-22*, 56 U.C.L.A. L. Rev. 1551, 1563 (2009). The modern version of § 922(g)(1) was adopted 177 years after the Second Amendment. *Bruen*, 597 U.S. at 66 n.28 ("[L]ate-19th-century evidence" and any "20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.").

Section 922(g)(1) very much contradicts earlier evidence from the relevant historical periods: "(1) . . . early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; [and] (4) Reconstruction." *Id.* at 2135–36. Those periods lack evidence of any analogue to § 922(g)(1).

The government may argue that, historically, *some* jurisdictions *sometimes* regulated firearm use by those considered *presently* violent. But not all people with a felony conviction are presently violent. Moreover, the historical regulations required

an individualized assessment of a person's threat to society. And finally, the historical regulations almost always allowed people deemed violent to still possess weapons for self-defense. Thus, even those convicted of serious crimes—including rebellion—remained entitled to protect themselves in a dangerous world, with firearms if necessary. Those laws' targeted nature makes them a far cry from declaring that any person, convicted of any felony, can *never* possess "the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629.

England, before the founding, did not ban felons from ever again possessing a firearm. *See Kanter*, 919 F.3d at 457 (Barrett, J., dissenting); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Policy 695, 717 (2009); Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 260 (2020). To the extent that England sought to disarm individuals, those regulations usually required a more culpable mental state and made exceptions for self-defense, both features absent from § 922(g)(1). *Rahimi* discusses at length the surety laws and laws against affray or going armed against the king's subjects. 144 S. Ct. at 1899-1902.

To the extent that England tried to disarm whole classes of subjects, it did so on discriminatory grounds that would be unconstitutional today—and yet still permitted those targeted to keep arms for self-defense. For example, in the age of William and Mary (both Protestants), Catholics were presumed loyal to James II (a Catholic trying to retake the throne) and treasonous. Thus, Catholics could keep "Arms, Weapons, Gunpowder, [and] Ammunition," only if they declared allegiance to

the crown and renounced key parts of their faith. *See Bruen*, 597 U.S. at 45 n.12 (quoting 1 Wm. & Mary c. 15, § 4, in 3 Eng. Stat. at Large 399 (1688)). In short, the English never tried to disarm all felons. Rather, they tried to limit the use of firearms by those individuals found to be violent and rebellious. And even those individuals could keep arms for self-defense. A "relevantly similar" historical regulation that is not. *Bruen*, 597 U.S. at 29.

"[T]here is little evidence of an early American practice of," forever barring all people convicted of a felony from ever again possessing a firearm. *Bruen*, 597 U.S. 1 at 46. The early United States accepted that those who committed crimes—even serious ones—retained a right to defend themselves. That can be seen in the colonies' and states' statutes, early American practice, and rejected proposals from state constitutional conventions. *See Kanter*, 919 F.3d at 454 (Barrett, J., dissenting); *Folajtar*, 980 F.3d at 915 (Bibas, J., dissenting); *Chester*, 628 F.3d at 679; *Binderup v. Att'y Gen. of the U.S.*, 836 F.3d 336, 368 (3d Cir. 2016) (en banc) (Hardiman, J., concurring).

To the extent that the new nation sought to disarm people, the regulatory approach was much more limited than § 922(g)(1). For example, the Virginia colony disarmed Catholics, still viewed as traitors to the crown. 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) (citation omitted). But there was an exception for weapons allowed by a justice of the peace "for the defense of his house and person." *Id.* And following the Declaration of

Independence, Pennsylvania ordered that those who did not pledge allegiance to the Commonwealth and renounce British authority be disarmed. *Id.* at 159. Thus, to the extent that either regulation would comply with the Second Amendment, as understood today, they required a specific finding that a specific person posed a risk of violence to the state.

Colonial and Founding-era practice also suggests that committing a serious crime did not result in a permanent disarmament. For example, leaders of the seminal Massachusetts Bay colony once disarmed supporters of a banished seditionist. Greenlee, *supra*, at 263 (citations omitted). Nevertheless, "[s]ome supporters who confessed their sins were welcomed back into the community and able to retain their arms." *Id.* And in 1787, after the participants in Shay's Rebellion attacked courthouses, a federal arsenal, and the Massachusetts militia, they were barred from bearing arms, for three years, not life. *Id.* at 268-67. In fact, Massachusetts law required the Commonwealth to hold *and then return* the rebels' arms after that period. Sec'y of the Commonwealth, *Acts and Resolves of Massachusetts 1786–87*, at 178 (1893).

American practice and laws during the Nineteenth Century—before and after the Civil War—also confirm that § 922(g)(1) does not comport with the "Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 34. The United States continued to regulate—but not ban—firearm possession by those feared to be violent. *See id.* at 55 (holding that 19th century surety laws allowed people likely to breach the peace to still keep guns for self-defense or if they posted a bond). But, as discussed

above, that is not similar to § 922(g)(1). There is no evidence of a precursor to § 922(g)(1)'s broad, categorical ban. In fact, there are at least two documented instances where attempts to disarm a class of offenders was rejected as inconsistent with the right to bear arms.

First, as with Shay's Rebellion, Congress declined to disarm southerners who fought against the Union in the Civil War. Steven G. Bradbury, et al., *Whether the Second Amendment Secures an Individual Right*, 28 OP. O.L.C. 126, 226 (2004). The reason: some northern and Republican senators feared that doing so "would violate the Second Amendment." *Id.* Second, when a Texas law ordered that people convicted of unlawfully using a pistol be disarmed, it was struck down as unconstitutional under the Texas constitution. *Jennings v. State*, 5 Tex. Ct. App. 298, 298 (1878).

In sum, the 19th century history provides clear evidence that mass disarmament for people convicted of an offense is unconstitutional. Not only was there a consistent practice of allowing people who broke the law to keep weapons for self-defense—at least one state appellate court and Congress agreed that disarming lawbreakers was unconstitutional. As *Bruen* teaches: "[I]f some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." 142 S. Ct. at 2131.

Rahimi did not affect this analysis—and, in fact, made all the clearer § 922(g)(1)'s lack of constitutional backing. The prohibition there passed constitutional muster because there were historical analogues *temporarily* disarming

those proven to be presently violent. 144 S. Ct. 1898-99. The restraining order subsection of § 922(g) passed constitutional muster because there is an individualized finding of dangerousness, after notice and an opportunity to be heard, and the restriction lasts only as long as the restraining order does. *Id*. at 1895-96.

Again, "[w]hy and how the regulation burdens the right are central to the inquiry." *Id*. at 1898. Section 922(g)(1) contains a lifetime prohibition on possession of firearms by all convicted felons, without an individualized determination of ongoing dangerousness. It therefore violates the Second Amendment on its face, and Mr. Holmes's conviction under § 922(g)(1) must be vacated.

II. This Court should additionally answer the question of whether 18 U.S.C. § 922(g)(1) exceeds Congress's authority under the Commerce Clause.

Separately or additionally to the *Bruen* question, this Court should answer the question of whether 18 U.S.C. § 922(g)(1) exceeds Congress's authority to regulate interstate and foreign commerce because it fails to require evidence demonstrating a requisite interstate commerce nexus.

Article I, § 8 of the Constitution provides: "Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes …." In *United States v. Lopez*, this Court established the test for the scope of Congress's power to regulate activities that "affect" interstate commerce: "We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." 514 U.S. 549, 559 (1995). *Lopez* seemed to, but did not expressly, overrule the more permissive test for federal regulation of gun possession

articulated in *Scarborough v. United States*, which required only the "minimal nexus that the firearm have been, at some time, in interstate commerce." 431 U.S. 563, 575 (1977). A fair reading of *Scarborough* suggests that the case was concerned with statutory interpretation and did not purport to resolve any constitutional issues. *See United States v. Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc). The Fifth Circuit has adhered to the view that *Scarborough*'s "minimal nexus" is sufficient both to prove guilt under § 922(g)(1) and to bring any subsequent act of firearm possession within Congress's power to regulate. *See, e.g., United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013).

Members of this Court and judges on lower courts have acknowledged the irreconcilability of *Lopez* and a constitutional reading of *Scarborough*. *See, e.g.*, *Alderman v. United States*, 562 U.S. 1163, 1166 (2011) (Thomas, J., dissenting from denial of certiorari); *United States v. Hill*, 927 F.3d 188, 215 n. 10 (4th Cir. 2019) (Agee, J., dissenting); *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting in part). Indeed, if *Scarborough* is a constitutional decision, then it grants the federal government unlimited power to regulate the affairs of citizens. *See Alderman*, 562 U.S. at 1167 (Thomas, J., dissenting from denial of certiorari) ("[T]he lower courts' reading of *Scarborough*, by trumping the *Lopez* framework, could very well remove any limit on the commerce power."). Any physical object has almost certainly crossed a state line at some point in the past. To hold that this past travel grants Congress a perpetual right to regulate what someone does or does not do with that object is to eliminate any restrictions on Congress's power. *See*

Nat'l Fed'n of Indep. Bus. v. Sebelius [NFIB], 567 U.S. 519, 557 (2012) ("The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.").

This unlimited power renders 18 U.S.C. § 922(g)(1) facially unconstitutional. In *NFIB*, Chief Justice Roberts noted that "[a]s expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'" 567 U.S. at 551 (emphasis added). He reasoned that this limitation of Commerce Clause power to "activities" is a "distinction between doing something and doing nothing [which] would not have been lost on the Framers, who were 'practical statesmen,' not metaphysical philosophers." *Id.* at 555 (quoting *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in judgment)). Four other Justices echoed Chief Justice Roberts's sentiment regarding the Commerce Clause analysis, stating that Congress could only regulate "activity affecting commerce[.]" *NFIB*, 567 U.S. at 658 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

In this case, 18 U.S.C. § 922(g)(1) did not require that Mr. Holmes's gun possession was an economic activity, and that ought to be fatal to his convictions. As explained by *NFIB*, the Commerce Clause permits Congress to regulate only activities, i.e., the active participation in a market. But § 922(g)(1) criminalizes all possession, without reference to economic activity. Accordingly, it sweeps too broadly.

Further, the statute does not require that the charged individual be engaged in the relevant market at the time of the regulated conduct. Chief Justice Roberts also noted that Congress cannot regulate a person's activity under the Commerce Clause unless the person affected is "currently engaged" in the relevant market. *NFIB*, 567 U.S. at 556, 557. As an illustration, the Chief Justice provided the following example: "An individual who bought a car two years ago and may buy another in the future is not 'active in the car market' in any pertinent sense." *Id*. at 556. As such, *NFIB* overrules the long-standing notion that a firearm which has previously and remotely passed through interstate commerce should be considered to affect commerce indefinitely without "concern for when the [initial] nexus with commerce occurred." *Scarborough*, 431 U.S. at 577.

Mr. Holmes's case illustrates how the current reading of § 922(g)(1) removes any limitation on Congress's commerce power. His indictment alleged that he "possesse[ed]" a firearm, "said firearm having being shipped and transported in interstate commerce." With respect to the mandated inter-state commerce element, the factual basis stated only that each of the pistols seized "was not manufactured in Louisiana," and, "[a]s a result, both weapons necessarily had been shipped and transported in interstate commerce prior to them being possessed by" Mr. Holmes. The factual basis submitted in support of Mr. Holmes's conviction did not state, and the record contains no evidence, that Mr. Holmes traveled in interstate commerce to bring the firearm to Louisiana or even purchased the firearm from a vendor participating in interstate commerce.

Mr. Holmes thus was convicted under § 922(g)(1) without evidence that he was "currently engaged" in the gun market at the time of his arrest, and without evidence showing how recently he came to possess the gun. So § 922(g)(1) fails to survive *NFIB*'s Commerce Clause analysis—clearly and obviously so.

The statute has been construed to require only that a firearm has traveled in interstate commerce at some previous time. *See Scarborough*, 431 U.S. at 575. If it cannot be construed to require commercial activity of some kind by the defendant—something more substantial than mere possession of an item that crossed state lines at some unknown point—it then contains no jurisdictional element sufficient to bring it within the terms of Congressional power. In the absence of such a jurisdictional element, this Court has found federal criminal statutes to be unconstitutional, without pausing to consider whether the particular conduct of the defendant might have affected commerce. *See Lopez*, 514 U.S. at 561; *United States v. Morrison*, 529 U.S. 598, 607 (2000). In other words, without such an element, comparable statutes have been found facially unconstitutional.

For these reasons, Mr. Holmes's convictions must be reversed because § 922(g)(1) violates the Commerce Clause and thus is unconstitutional.

III. Alternatively, this Court should hold Mr. Holmes's petition pending consideration of one of the many other petitions that will place these same issues before this Court.

Finally, Mr. Holmes notes that numerous petitions raising the same issues are now or will shortly be filed in this Court. That includes the pending petition in *Andre Michael Dubois v. United States* (No. 24-5744), filed on October 8, 2024. The government requested additional time to file a response to that petition, and its

response is due December 12, 2024. Additionally, a petition arising out of the lead case on this issue in the Fifth Circuit—*United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024)—will likely be filed next month. Accordingly, Mr. Holmes requests that his petition be held pending those and/or other petitions if this Court anticipates that it may grant a writ of certiorari on the issues raised herein.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Holmes's petition for writ of certiorari. Alternatively, Mr. Holmes requests that his petition be held pending resolution of other pending or anticipated petitions raising the same issues, including the pending petition in *Andre Michael Dubois v. United States* (No. 24-5744), and the anticipated petition in *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024).

Respectfully submitted,

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