NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

MARCUS RAMBO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether after *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022) and *United States v. Rahimi*, 602 U.S. ___, 144 U.S. 144 S.Ct. 1889 (2024), a criminal defendant may raise an as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(1).

(2) If so, whether under the *Bruen/Rahimi* methodology, the Second Amendment is unconstitutional as applied to a defendant like Petitioner with only non-violent priors.

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

Petitioner Rambo was the defendant in the district court and appellant below.

Respondent United States of America was the plaintiff in the district court and appellee below.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court: *United States v. Rambo*, 23-cr-20149-CMA (S.D. Fla. Aug. 10, 2023), *aff'd*, *United States v. Rambo*, 2024 WL 3534730 (11th Cir. July 25, 2024), *pet. for reh'g en banc denied* (11th Cir. Oct. 23, 2024) (No. 23-13772).

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Marcus Rambo respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 24-10693 in that court on August 14, 2024, *United States v. Rambo*, 2024 WL 3534730 (11th Cir. July 25, 2024), with rehearing en banc denied on October 23, 2024.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in Appendix A-1. A copy of the decision of the United States Court of Appeals for the Eleventh Circuit denying the petition for rehearing en banc, is contained in Appendix A-2. A copy of the decision of the United States District Court for the Southern District of Florida, denying Petitioner's Motion to Dismiss, is contained in Appendix A-8.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The United States Court of Appeals had jurisdiction over this cause pursuant to 28 U.S.C. § 1291. The decision of the court of appeals was entered on July 25, 2024, *United States v. Rambo*, 2024 WL 3534730 (11th Cir. July 25, 2024), and rehearing en banc was denied on October 23, 2024. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, U.S. Const. amend. II, 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.

Title 18, United States Code Section 922(g)(1) provides:

> It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to possess in or affecting commerce, any firearm or ammunition . . .

STATEMENT OF THE CASE

I. Legal Background

In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court recognized that based on the text of the Second Amendment and history, the amendment conferred an individual right to possess handguns in the home for self-defense. *Id*. at 581-82, 592-95. Soon thereafter, in *United States* v. *Rozier*, 598 F.3d 768 (11th Cir. 2010), the Eleventh Circuit was asked to pass on the constitutionality of 18 U.S.C. § 922(g)(1), the federal felon-in-possession ban, as applied to a defendant with non-violent drug priors who possessed the firearm in his home for self-defense. And the Eleventh Circuit held that "statutes disqualifying felons from possessing a firearm *under any and all circumstances* do not offend the Second Amendment." *Id.* at 771 (emphasis added). Simply "by virtue of [any] felony conviction," the court held, Rozier could be constitutionally stripped of his Second Amendment right to possess a firearm even for self-defense in his home, and the circumstances of such possession were "irrelevant." *Id*.

Notably, the Eleventh Circuit reached that conclusion without considering the Second Amendment's "plain text," including *Heller*'s specific determination that reference to "the people" in the Second Amendment—consistent with the use of the same term in other amendments—"unambiguously refers" to "all Americans." 554 U.S. at 579-81. Instead, *Rozier* relied entirely upon dicta in *Heller* about "presumptively lawful" "longstanding prohibitions" against felons possessing firearms, *id.* at 626 & n. 26, even though there was no question about § 922(g)(1) in *Heller*, and the Court acknowledged it had not engaged in an "exhaustive historical analysis" on the point. *Compare Heller*, *id.* at 626 ("we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment") *with Rozier*, 598 F.3d at 768 (ignoring the latter

caveat; finding dispositive, *Heller*'s comment, 554 U.S. at 626, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons").

Over a decade later, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court clarified *Heller*'s text-and-history approach which had been uniformly misunderstood by the lower courts, and set forth a two-step "test" for deciding the constitutionality of all firearm regulations going forward. At "Step One," *Bruen* held, courts may consider *only* whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. at 17. If it does, *Bruen* held, "the Constitution presumptively protects that conduct." *Id.* And regulating presumptively protected conduct is unconstitutional unless the government, at "Step Two" of the analysis, can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation"—that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Id.* at 37.

After *Bruen* but prior to this Court's decision in *United States v. Rahimi*, 602 U.S. ___, 144 S.Ct. 1889 (2024), the Eleventh Circuit decided *United States v. Dubois*, 94 F.4th 1284 (11th Cir. Mar. 5, 2024), *pet. for cert. filed* Oct. 8, 2024 (No. 24-5744). In *Dubois*, the Eleventh Circuit continued to follow its pre-*Bruen* approach in *Rozier*. It declined to conduct *Bruen*'s two-step analysis for Second Amendment challenges—viewing that as "foreclose[d]" by *Rozier*, 94 F.4th at 1291, and rejecting the suggestion that *Bruen* had abrogated *Rozier*. *Id.* Rather, the Eleventh Circuit cited as determinative the dicta from *Heller* referenced above. *See Dubois, id.* at 1291-93 (stating the Court "made it clear" in *Heller*, *id.* at 626-27 & n. 26, that its holding "did not cast doubt" on felon-in-possession prohibitions," which were "presumptively lawful;" and in *Bruen*, 597 U.S. at 17, that its holding was "'[i]n keeping with *Heller*'").

In the view of the Eleventh Circuit, *Bruen* did not abrogate the *Rozier* approach because "*Bruen* repeatedly stated that its decision was faithful to *Heller*." *Dubois*, 94 F.4th at 1293. Therefore, the Eleventh Circuit held, *Rozier* remained good law, and felons remained "*categorically 'disqualified*' from exercising their Second Amendment right." *Id*. at 1293 (quoting *Rozier*, 598 F.3d at 770–71) (emphasis added).

Although the Eleventh Circuit technically left the door open to reconsideration after this Court decided *Rahimi*, by stating: "We require clearer instruction from the Supreme Court before we may reconsider the constitutionality of section 922(g)(1)," 94 F.4th at 1293, it soon shut that door—definitively. After this Court handed down its decision in *Rahimi*, Petitioner asked the Eleventh Circuit to reconsider *Rozier/Dubois* in light of *Rahimi* in his case, particularly given that he had raised an as-applied challenge based on non-violent priors and *Rahimi* confirmed as-applied challenges were permitted. But the Eleventh Circuit panel refused. Instead, it granted the government's motion for summary affirmance, finding the circuit's pre-*Bruen* approach precluding all challenges to § 922(g)(1) continued to govern even post-*Rahimi*. *United States v. Rambo*, 2024 WL 3534730 (11th Cir. July 25, 2024); Appendix A-1. Petitioner sought rehearing en banc, asking the full Eleventh Circuit to recognize that *Rahimi* confirmed *Rozier/Dubois* no longer controlled Second Amendment analysis, and these prior circuit precedents had been abrogated. But the Eleventh Circuit denied rehearing en banc. *United States v. Rambo*, No. 23-13772 (11th Cir. Oct. 23, 2024). Not one judge on the court dissented.

II. Factual and Procedural Background

In December 2022, the United States charged Petitioner Marcus Rambo with a single count of violating 18 U.S.C. § 922(g)(1), for knowingly possessing a firearm and ammunition, while knowing that he had been convicted of a felony. Appendix A-6.

Petitioner moved to dismiss the indictment as both facially unconstitutional under the new two-step Second Amendment methodology set forth in *Bruen*, and unconstitutional as applied to him given that his priors—a 2012 Florida conviction (when he was 17) for carrying a concealed weapon, possession of cannabis, and possession of a firearm by a minor; a 2013 Florida conviction for carrying a concealed firearm; a 2015 Florida conviction for battery on a corrections officer by "touch or strike," and a 2019 federal conviction for possession of a firearm by a convicted felon—were non-violent. Appendix A-7. He noted that *Bruen* dictated that at Step One of Second Amendment analysis, the court asks only whether "the Second Amendment's plain text covers [the] individual's conduct." And if it does, the Constitution presumptively protects that conduct, and the burden falls on the government at Step Two to justify its regulation by demonstrating it is consistent with the Nation's historical tradition of firearm regulation—that is, the tradition in existence when the Bill of Rights was adopted in 1791. Petitioner argued § 922(g)(1) failed both steps of *Bruen*. As support for an as-applied dismissal, Petitioner cited, *inter alia*, the then-recent opinion in *Range v. Att'y Gen. United States*, 69 F.4th 96 (3d Cir. 2023) (en banc), which found no historical tradition that would support disarmament of a defendant previously convicted of making a false statement on a food stamp application.

The government responded that *Rozier* remained controlling law after *Bruen*, and even if not, the "historical record" showed that all felons may be restricted from possessing firearms. As of that writing, the government argued, "almost all courts have rejected historical challenges to Section 922(g)(1)." The government did not respond to Petitioner's as-applied challenge, based on his specific priors. Appendix A-8.

In reply, Petitioner pointed out that *Rozier* never considered the Second Amendment's plain text as *Bruen* required at Step One, nor did the government show at Step Two that there was

a longstanding historical tradition of disarming a person like himself who had never been convicted of a crime of violence and whose prior convictions related primarily to the unlawful possession of firearms—"the very right at issue here." Appendix A-9.

In a sur-reply, the government maintained that *Rozier* continued to control, but if it did not, what controlled after *Bruen* was the "Founding-era understanding that *even non-violent law-breakers*" like those who refused to take loyalty oaths "could be disarmed." According to the government, the Third Circuit's opinion in *Range* was a limited ruling that only applied to a defendant convicted of a non-violent misdemeanor treated as a felony-equivalent for § 922(g)(1) purposes. By contrast, the government argued, Petitioner was on federal supervised release after serving a 27-month sentence for a prior § 922(g)(1) conviction when he committed the instant offense, which was "a far cry from Bryan Range's misdemeanor conviction." Without citing any authority, the government also challenged Petitioner's reliance on the categorical approach in arguing that his "touch or strike" battery conviction under Fla. Stat. §§ 784.03 and 784.07 was non-violent. Appendix A-10.

The district court denied the motion to dismiss, citing the government's response, its sur-reply, *Rozier*, and district court cases that had followed *Rozier* post-*Bruen*. Appendix A-11. Strangely, though, the court also cited as supportive *Leonard v. United States*, No. 22-cv-22670-RAR, DE 15 (S.D. Fla. Mar. 10, 2023), which had candidly acknowledged, contrary to the court's ultimate finding in Petitioner's case, that it was "conceivable that § 922(g)(1) may be unconstitutional as applied to specific felons with non-violent and/or limited criminal histories." By contrast to such individuals, the *Leonard* court noted, Mr. Leonard had an "extensive criminal past," involving many felonies that "involve[d] violence, the use of firearms, and/or the sale of

illicit drugs." Given that record, the *Leonard* court had "no doubt" that Leonard was rightly classified as "dangerous," and had no viable as-applied Second Amendment challenge.

The district court did not acknowledge Petitioner's different, non-violent priors, or specifically address his as-applied challenge based on his specific priors.

Having preserved both a facial and as-applied Second Amendment challenge, Petitioner pled guilty and the district court sentenced him to 30 months incarceration. Appendix A-12.

On appeal, Petitioner continued to press both the facial and as-applied challenges he had preserved below. *See United States v. Rambo*, DE 26 (11th Cir. Mar. 21, 2024) (No. 23-13772). Rather than responding on the merits to either challenge, the United States instead moved for summary affirmance, arguing that both challenges were "squarely foreclosed" by *Dubois* which had reaffirmed the rule from *Rozier* that "statutes disqualifying felons from possessing a firearm *under any and all circumstances* do not offend the Second Amendment," and rejected the argument that *Bruen* abrogated *Rozier*. Appendix A-3 (emphasis added by the government). Petitioner opposed summary affirmance, arguing that *Rahimi* had confirmed *Bruen* set forth a new methodology, and clarified that methodology; neither *Rozier* nor *Dubois* had complied with the *Bruen/Rahimi* methodology, as neither case considered the plain text of the Second Amendment nor required the government to identify Founding era analogues so the court could determine if there had been a consistent tradition of similar regulation that was both "comparably justified" and imposed a "comparable burden;" and *Rahimi* had confirmed the error in rejecting all as-applied challenges post-*Bruen*. Petitioner asked the Court, at the very least, to decide his as-applied challenge as a matter of first impression under *Bruen* and *Rahimi*. Appendix A-4.

The Eleventh Circuit refused. Appendix A-1. It granted the government's motion for summary affirmance, and decided the case without any further merits briefing, finding—based on

Rozier and *Dubois*—that the government was "clearly correct as a matter of law" that § 922(g)(1) was constitutional under the Second Amendment "facially and as applied to Rambo." *United States v. Rambo*, 2024 WL 3534730, at *2 (11th Cir. July 25, 2024). According to the panel, the Eleventh Circuit's "binding precedents in *Dubois* and *Rozier*" "foreclose[d]" Petitioner's Second Amendment arguments, and

> *Rahimi* did not abrogate *Dubois* or *Rozier* because it did not "demolish" or "eviscerate" the "fundamental props" of those precedents.[1] *Rahimi* did not discuss § 922(g)(1) at all, nor did it undermine our previous interpretation of *Heller*. To the contrary, *Rahimi* reiterated that prohibitions "like those on the possession of fireearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *United States v. Rahimi*, 144 S.Ct.1889, No. 22-915, slip op., at 15 (June 21, 2024)(quoting *Heller*, 554 U.S. at 626).

Rambo, 2024 WL 3534730, at *2.

Petitioner sought rehearing en banc, arguing (1) As confirmed by *Rahimi*, *Bruen* dictates a completely different mode of Second Amendment analysis from the dicta-based mode of analysis in *Rozier* and *Dubois*; and (2) the decisions in *Bruen* and *Rahimi* were "clearly on point" and abrogated *Rozier* and *Dubois*—even though the latter involved different statutes and this Court did not specifically discuss our circuit precedent—because *Bruen/Rahimi* changed the applicable mode of analysis.

On October 23, 2024, the Eleventh Circuit denied rehearing en banc. Not one member of the court dissented. Appendix A-2.

[1] This very rigid standard for abrogation was the one followed in *Dubois*, 94 F.4th at 1293.

REASONS FOR GRANTING THE PETITION

I. The Circuits are Intractably Divided on Whether As-Applied Second Amendment Challenges to 18 U.S.C. § 922(g)(1) are Cognizable after *Bruen* and *Rahimi*

This appeal asks, as a threshold question, whether after *Bruen* and *Rahimi* the government may categorically preclude a person who comes within the orbit of 18 U.S.C. § 922(g)(1) from possessing a firearm simply because that person has a predicate felony conviction, or whether a defendant may mount a challenge that his prior record does not supply a basis, consistent with the Second Amendment, for permanent disarmament. Post-*Bruen*, but prior to *Rahimi*, both the Third and Ninth Circuits had granted as-applied challenges to § 922(g)(1) based on the specifics of the defendant's prior record. *See, e.g*, *Range v. Att'y Gen.*, 69 F.4th 96, 106 (3d Cir. June 6, 2023) (en banc); *United States v. Duarte*, 101 F.4th 657, 691 (9th Cir. 2024). During that same period, the Seventh Circuit had assumed for the sake of argument that there was room for as-applied challenges to § 922(g), but noted that this Court had not yet specifically considered "whether non-violent offenders may wage as-applied challenges." *United States v. Gay*, 98 F. 4th 843, 846 (7th Cir. 2024). And three other circuits—in addition to the Eleventh in *Dubois*, the Eighth and Tenth Circuits as well, *see United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023); *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023)—had rejected felony-by-felony challenges and found the lifetime ban in § 922(g)(1) constitutional in all circumstances. In short, prior to *Rahimi*, the federal courts of appeals were cleanly split on this important, "pure question of law." *Atkinson* v. *Garland*, 70 F.4th 1018, 1025 (7th Cir. 2023) (Wood, J., dissenting).

Although the question was not directly presented in *Rahimi*, and the Court did not explicitly recognize this particular split in that case, as explained below, the manner by which the Court resolved *Rahimi* confirmed that as-applied challenges to the lifetime firearm ban in § 922(g)(1)

are indeed cognizable. After *Rahimi*, at least five circuits have weighed in on the as-applied question, and there is again a direct circuit split.

A. Three Circuits (the Third, Fifth, and Sixth) have recognized that an as-applied Second Amendment challenge is cognizable after *Rahimi*; however, two circuits (the Eighth and Eleventh) continue to reject any as-applied Second Amendment challenge. The Third, Fifth, and Sixth Circuits have each considered as-applied challenges to § 922(g)(1) after *Rahimi*, and confirmed that such challenges are indeed cognizable, even while rejecting such challenges based on the defendant's individual circumstances.

In *United States v. Moore*, 111 F.4th 266 (3d Cir. 2024), *reh'g en banc denied* Oct. 9, 2024 (No. 23-1843), the Third Circuit entertained but rejected an as-applied challenge to § 922(g)(1) for a defendant on supervised release. The court cited *Rahimi* in holding that a 1790 Pennsylvania law disarming a convict while he served his criminal sentence "is sufficiently analogous to § 922(g)(1) as applied to convicts on supervised release." 111 F.4th at 270, 273.

In *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), the Fifth Circuit likewise entertained an as-applied challenge after *Rahimi*. As a threshold matter, the Fifth Circuit agreed with Diaz that his challenge based on the fact that his only priors were for car theft, evading arrest, and possession a firearm as a felon was not barred by pre-*Bruen* circuit precedent, because *Bruen* established a new historical paradigm for analyzing Second Amendment claims, which made the circuit's pre-*Bruen* precedents obsolete. *Id.* at 467-71. And notably, the Fifth Circuit made a point to state that "especially after *Rahimi*," it "respectfully disagree[ed]" with the Eleventh Circuit's approach in *Rambo*, relying on the "felons and mentally ill" language in *Heller* to uphold § 922(g)(1). *Diaz*, 116 F.4th at 466, n.2; *see also id.* at 466 ("Without precedent that conduct's *Bruen*'s historical inquiry into our Nation's tradition of regulating firearm possession by felons in

particular, we must do so ourselves"). After conducting that historical inquiry for *Bruen* Step Two for the first time in the circuit, the Fifth Circuit found that § 922(g)(1) was indeed constitutional as applied to Diaz because of his prior conviction for car theft. Although the Fifth Circuit was clear that the mere fact that Diaz was a felon was *not* itself enough, *id.* at 469, the court found that "[t]aken together," historical "laws authorizing severe punishments for thievery and permanent disarmament in other cases establish that our tradition of firearm regulation supports application of § 922(g)(1) to Diaz." *Id.* at 471.

In *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024), the Sixth Circuit also entertained an as-applied challenge based on the specifics of the defendant's record. Although it reasoned consistently with the Fifth Circuit on several points, its *Bruen* Step Two approach was markedly different. Specifically, after conducting its "historical study," the Sixth Circuit concluded that history confirmed "legislatures may disarm groups of people, like felons, whom the legislature believes to be dangerous—so long as each member of that disarmed group has an opportunity to make an individualized showing that he himself is not actually dangerous." *Id.* at 663. Setting "dangerousness" as the determinant of whether § 922(g)(1) is unconstitutional as applied to a particular defendant, the Sixth Circuit held that at *Bruen* Step Two it is the defendant who bears the burden of demonstrating that in light of his "specific characteristics"—namely, his entire criminal record—he is not dangerous. *Id.* at 657-78, 659-63. And, given Williams' priors for aggravated robbery, attempted murder, and for "stashing a pistol that was used to murder a police officer," the Sixth Circuit had "little trouble concluding that Williams is a dangerous felon," whom the government could constitutionally disarm for life. *Id.* at 662-63.

Thereafter, in *United States v. Goins*, 118 F.4th 794 (6th Cir. 2024), the Sixth Circuit continued to follow the "totality of facts" "dangerousness" standard set in *Williams*, even for a

defendant who possessed a gun while on state probation for driving under the influence. Differing from the Third Circuit in *Moore* by acknowledging that history "may not support disarmament of any criminal defendant under any criminal justice sentence in all circumstances," 118 F.4th at 804, the Sixth Circuit nonetheless concluded that temporary disarmament of Mr. Goins while on probation did not violate the Second Amendment because he had four "prior convictions for the same dangerous conduct" which "evince[d] a likelihood of future dangerous conduct." *Id.* *See id.* at 804-05 (noting that Goins was charged with five DUIs, and convicted of four, during an 8-year period; in one incident, his actions caused an accident requiring him to be transported to the hospital; and in the same 8-year period he was twice convicted of public intoxication and twice convicted of driving on a suspended license; all in all, his record revealed "a dangerous pattern of misuse of alcohol and motor vehicles, often together," and "his actions, including causing a motor vehicle accident pose a danger to public safety").

By contrast to the case-by-case, offender-specific approach of these three circuits, both before and after *Rahimi* the Eighth and Eleventh Circuits have categorically barred all Second Amendment challenges by all offenders to a § 922(g)(1) conviction. As noted *supra*, the Eleventh Circuit held prior to *Bruen* in *Rozier*, and confirmed after *Bruen* in *Dubois*, that felons are "categorically 'disqualified' from exercising their Second Amendment right" "in all circumstances." *Dubois*, 94 F.4th at 1293 (quoting *Rozier*, 598 F.3d at 771) (holding the Eleventh Circuit's pre-*Bruen* precedent of *Rozier* survived *Bruen*). And in Petitioner's case, an Eleventh Circuit panel thereafter held—and the full court confirmed by denying rehearing en banc—that that the *Rozier/Dubois* rule continued to apply even after *Rahimi*.

Similarly, the Eighth Circuit held both prior to and post-*Rahimi* that § 922(g)(1) is constitutional in all of its applications. As noted *supra*, after *Bruen*, in *United States v. Jackson*,

the Eighth Circuit had explicitly rejected felony-by-felony litigation. And even after this Court GVR'd for reconsideration in light of *Rahimi*, the Eighth Circuit (without soliciting briefing from the parties) stuck to its position—noting that "*Rahimi* does not change our conclusion" that "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." *United States v. Jackson*, 110 F. 4th 1120, 1122, 1125 (8th Cir. 2024). According to the Eighth Circuit, the mere status as a felon is sufficient to permanently disarm an individual, because a felon is "not a law-abiding citizen, and history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society;" indeed, "legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms." *Id*. at 1127-29. *See also United States* v. *Cunningham*, 114 F.4th 671, 675 (8th Cir. 2024) (confirming that post-*Rahimi*, "there is no need for felony-by-felony determinations regarding the constitutionality of § 922(g)(1) as applied to a particular defendant").

B. The Eighth and Eleventh Circuits are wrong, given the resolution in *Rahimi* and for the reasons stated by the Fifth and Sixth Circuits. The Eleventh Circuit's pre-*Rahimi* decision in *Dubois* rejected every possible as-applied post-*Bruen* challenge to § 922(g)(1) without considering either text, historical regulations that might possibly be Founding era "analogues" for § 922(g)(1), or a defendant's prior record. But notably, that position was squarely rejected by the Court itself in *Rahimi*. Specifically, in holding that Rahimi's facial challenge failed because the statute "is constitutional as applied to the facts of Rahimi's own case," 144 S.Ct. at 1898, the Court necessarily and squarely rejected the position the government took at the *Rahimi* oral argument that as-applied challenges are unavailable in Second Amendment cases "if and when they come." 2023 WL 9375567, at *43. In fact, in making clear that the "no set of circumstances" standard from *United States v. Salerno*, 481 U.S. 739, 745 (1987) indeed applies to Second Amendment

challenges, the Court necessarily recognized that as-applied Second Amendment challenges *are* permitted. *See id.* ("[T]o prevail, the Government need only demonstrate that Section 922(g)(8) is constitutional in some of its applications.")

Although an as-applied challenge to § 922(g)(1) was not before the Court in *Rahimi*, at the oral argument Justice Gorsuch nonetheless recognized, in response to the government's assertion there that the Court should never entertain as-applied Second Amendment challenges, that there may indeed "be an as-applied *if it's a lifetime ban*." 2023 WL 9375567, at 43. And, consistent with the implicit recognition of as-applied Second Amendment challenges in *Rahimi*, the Fifth and Sixth Circuits have rightly recognized that an as-applied challenge for § 922(g)(1) is indeed cognizable in certain circumstances.

In *Williams*, the Sixth Circuit found that it was "history" that showed § 922(g)(1) could be "susceptible to an as-applied challenge in certain cases." 113 F.4th at 657. After conducting a "historical study" which it found revealed governments in England and colonial America disarmed groups that they deemed to be dangerous, the Sixth Circuit held that a conviction under § 922(g)(1) "must focus on each individual's specific characteristics" in order to be consistent with the Second Amendment. *Id.* at 657.

In so concluding, the Sixth Circuit explained that accepting that all felons could be permanently disarmed—without a finding of dangerousness—would be incompatible with at least three strands of this Court's jurisprudence. *First*, it would be "inconsistent with *Heller*" because "[i]f courts uncritically deferred to Congress's class-wide dangerousness determinations, disarmament laws would most often be subject to rational-basis review," contrary to express statements in *Heller*. *Williams*, 113 F.4th at 660; *see Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment

would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

Second, the Sixth Circuit found, "history cuts in the opposite direction," as "English laws" and common-law "disarmament legislation" showed that, traditionally, "individuals had the opportunity to demonstrate that they weren't dangerous" and therefore it would be "mistaken" to "let the elected branches"—Congress—"make the dangerousness call" without any space for as-applied exceptions. *Id*. at 660.

Third, the Sixth Circuit reasoned, "complete deference to legislative line-drawing would allow legislatures to define away a fundamental right," which clashes with "[t]he very premise of constitutional rights" which "don't spring into being at the legislature's grace." *Id*. at 661; *see Kilbourn* v. *Thompson*, 103 U.S. 168, 199 (1880) ("[L]iving under a written constitution . . . it is the province and duty of the judicial department to determine . . . whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution[.]"). And, the Sixth Circuit concluded, "as-applied challenges provide a mechanism for courts to make individualized dangerousness determinations." 113 F.4th at 661.

This view, the Sixth Circuit explained, was "differen[t] than" that held by "some of our sister circuits" including the Eleventh, which the Sixth Circuit criticized as "hav[ing] read too much into the Supreme Court's repeated invocation of 'law-abiding, responsible citizens.'" *Id*. at 646. Accordingly, "[t]he relevant principle from our tradition of firearms regulation is that, when the legislature disarms on a class-wide basis, individuals must have a reasonable opportunity to prove that they don't fit the class-wide generalization" and proscribing "resort to the courts through

as-applied challenges . . . would abridge non-dangerous felons' Second Amendment rights." *Id*. at 662.

In concluding that as-applied challenges are permissible, the Fifth Circuit in *Diaz* agreed with the Sixth that a defendant's criminal history was what controlled. But its reasoning was different. In rejecting the proposition that "status-based gun restrictions" such as § 922(g)(1) categorically "foreclose Second Amendment challenges," and explaining that after *Bruen* and *Rahimi* "history and tradition" must be analyzed to "identify the scope of the legislature's power to take [the right] away," the Fifth Circuit quoted then-Judge Barrett's dissent in *Kanter* v. *Barr*, 919 F.3d 437 (7th Cir. 2019). *See* 116 F.4th at 466 (citing *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting) ("[A]ll people have the right to keep and bear arms," but "history and tradition support Congress's power to strip certain groups of that right"). Noting that *Bruen* "mandates" this approach, and *Rahimi* had just confirmed it, *id.* at 466, the Fifth Circuit was clear that "[s]imply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny. . . . [N]ot all felons today would have been considered felons at the Founding. Further, Congress may decide to change that definition in the future. Such a shifting benchmark should not define the limits of the Second Amendment[.]" *Id*. However, the Court reasoned, at the Founding, "at least one of the predicate crimes that Diaz's § 922(g)(1) conviction relies on—theft—was a felony and thus would have led to capital punishment or estate forfeiture," and therefore "[d]isarming Diaz fits within this tradition of serious and permanent punishment." *Id.* at 470. But undoubtedly, the Fifth Circuit acknowledged, the analysis would be different for "as-applied challenges by defendants with different predicate convictions." *Id.* at 470, n.4.

The Court should grant certiorari to resolve the circuit conflict on this threshold issue, and recognize explicitly that for the above reasons, as-applied Second Amendment challenges are

indeed cognizable after *Bruen/Rahimi*. While admittedly, en banc proceedings are currently pending in both the Third Circuit in *Range* and the Ninth Circuit in *Duarte*, both of these courts previously recognized that as-applied challenges to § 922(g)(1) are available. And the government has not argued in either en banc case that anything in *Rahimi* specifically casts doubt on that proposition.

II. The Circuits are Intractably Divided on Whether, Under the *Bruen/Rahimi* Methodology, the Second Amendment is Unconstitutional As Applied to a Defendant With Non-Violent Priors

A. Only the Eleventh Circuit still follows its pre-*Bruen* mode of Second Amendment analysis after *Rahimi*. The Eleventh Circuit is the only Circuit in the country at this juncture that refuses to *even try* to apply the new Second Amendment methodology set forth in *Bruen* and clarified in *Rahimi*. Although the Tenth Circuit, like the Eleventh Circuit, had continued to adhere to a post-*Heller* precedent analogous to *Rozier* after *Bruen*, *see Vincent v. Garland*, 80 F. 4th 1197 (10th Cir. 2023), after the GVR in *Vincent* for reconsideration in light of *Rahimi*, the Tenth Circuit asked for full supplemental briefing by both parties as to the impact of *Rahimi*. And even the Eighth Circuit, which has continued to preclude all as-applied challenges after *Rahimi*, at least justified that result by identifying what it believes are appropriate analogues for Step Two of the *Bruen* analysis. *See United States v. Jackson*, 110 F. 4th 1120, 1126-27 (8th Cir. 2024) (*Jackson II*) (relying on disarmament of various groups, including religious minorities, loyalists, and Native Americans in colonial America).

While Petitioner disputes the correctness of the Eighth Circuit's *Bruen* Step Two analysis for the reasons stated by the dissenters from rehearing en banc in *Jackson II*, *see* ___F.4th ___, 2024 WL 4683965 (8th Cir. Nov. 5, 2024) (Stas, J., joined by Erickson, Grasz, and Kobes, JJ., dissenting from rehearing en banc), at least the *Jackson II* panel recognized that *Bruen* and *Rahimi*

do in fact dictate a new methodology applicable to all Second Amendment claims which requires searching for a relevantly similar, Founding-era historical analogue. Only the Eleventh Circuit does not, consistently affirming denials of well-founded as-applied challenges based on its pre-*Bruen* mode of analysis which reflexively followed dicta in *Heller*, over *Heller*'s holding on plain text, history, and tradition. The true outlier today, only the Eleventh Circuit refuses to even engage in any *Bruen/Rahimi* analysis. Other circuits, notably, have harshly criticized and rejected the Eleventh Circuit's approach. And district courts across the country—both prior to and after *Rahimi*—have recognized that § 922(g)(1) would indeed be unconstitutional as applied to a defendant, like Petitioner, with non-violent priors.

For the reasons outlined below, the Eleventh Circuit is clearly wrong.

B. After *Bruen/Rahimi*, § 922(g)(1) is presumptively unconstitutional at Step One of the required analysis, for the reasons stated by the Third, Fifth, and Sixth Circuits. In *Heller*, the Court was clear that "the people" as used in the Second Amendment "unambiguously refers" at the very least to "*all Americans*"—"not an unspecified subset"—because any other interpretation would be inconsistent with the Court's interpretation of the same phrase in the First, Fourth, Ninth, and Tenth Amendments. *Id.* at 579-81 (citing *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990) ("the people" was a "term of art" at the time, which had the same meaning as in other parts of the Bill of Rights)).

Just as *Bruen* found dispositive that the Second Amendment does not "draw . . . a home/public distinction with respect to the right to keep and bear arms," 597 U.S. at 32, it should be dispositive here—as a textual matter—that the Second Amendment likewise does not draw a felon/non-felon distinction. Indeed, even prior to *Bruen*, panels of the Eleventh and Seventh Circuits had recognized that the term "people" in the Second Amendment is *not* textually limited

to law-abiding citizens. *See United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (noting that even "dangerous felons" are "indisputably part of 'the people'" for Second Amendment purposes); *see also United States v. Meza-Rodriguez*, 798 F.3d 664, 671 (7th Cir. 2015) (a person's criminal record is irrelevant in determining whether he is among "the people" protected under the Second Amendment; the amendment "is not limited to such on-again, off-again protections").

But indeed, *if* there even *could* have been doubt on that point prior to *Rahimi*, there *cannot* be after *Rahimi*. That is because this Court in *Rahimi* squarely rejected the Solicitor General's proffered limitation of "the people" to the narrower subset of "law-abiding, responsible" citizens. The *Rahimi* majority acknowledged that the Second Amendment "secures *for Americans* a means of self-defense." *Id.* at 1897 (emphasis added). And Justice Thomas—who disagreed with the majority *only* as to *Bruen* Step Two—provided a robust explanation of the proper Step One analysis, confirming that *any American citizen* is among "the people" as a matter of the plain text. 144 S.Ct. at 1933 (noting "the people" "unambiguously refers to all members of the political community, not an unspecified subset;'" "The Second Amendment thus recognizes a right 'guaranteed to "*all Americans*;"' citing *Bruen*, 597 U.S. at 70, and *Heller*, 554 U.S. at 581) (emphasis added).

Justice Thomas left no doubt about the implication of *Heller*/*Bruen*/*Rahimi* for "the people" question in § 922(g)(1), by confirming that "Not a single Member of the Court adopts the Government's [law-abiding, responsible citizen] theory." 144 S.Ct. at 1944. In short, as Justice Thomas has definitively exposed, the "law-abiding, responsible citizen" theory unanimously rejected by *Rahimi* "is the Government's own creation, designed to justify every one of its existing regulations. It has no doctrinal or constitutional mooring." *Id.* at 1945. And since that necessarily

abrogates the assumptions underlying *Rozier* and *Dubois*, *Rahimi* should have compelled the Eleventh Circuit to conclude—as the Third, Fifth and Sixth Circuits have now concluded—that this Court meant what it said when it declared in *Heller* that the Second Amendment right "belongs to all Americans." 554 U.S. at 581.

In *Moore*, the Third Circuit held post-*Rahimi*—consistent with the uniform post-*Bruen* view of the en banc Third Circuit in *Range*—that any "adult citizen" is one of the "'people' whom the Second Amendment presumptively protects." 111 F.4th at 269. Therefore under *Bruen*, the *Moore* court reaffirmed, the burden shifts to the government at Step Two of the analysis to justify its regulation of arms-bearing conduct. *Id.* And notably, the *Moore* court was clear that the fact that Moore was on supervised release did not relieve the government of its Step Two burden. *Id.* at n. 2. "To hold otherwise," the court explained, "would relegate the Second Amendment to 'a second-class right subject to an entirely different body of rules than the other Bill of Rights Guarantees.'" *Id.* (citing *Bruen*, 597 U.S.at 70, and caselaw establishing that the First and Fourth Amendments apply to those on parole, probation and supervised release, stating "So too for the Second Amendment").

The Sixth Circuit has agreed with the Third on these points and elaborated further. In *Williams*, it found that as the Court recognized in *Heller*, the phrase "the people" in the plain text of the Second Amendment must have the same meaning as in both the First and Fourth Amendments, because the protections provided in those Amendments do not evaporate when the claimant is a felon. 114 F.4th at 649. *Id*. Excluding a felon from "the people" in the Second Amendment would exclude him from the First and Fourth Amendments too, the Sixth Circuit reasoned, which is "implausible under ordinary principles of construction" since "[c]ourts presume that words are used in a consistent way across provisions." *Id.* (citing *Hurtado v. California*, 110

U.S. 516, 533-34 [] (1884) ("The conclusion is equally irresistible, that when the same phrase was employed [elsewhere], . . . it was used in the same sense and with no greater extent"); *Pulsifer v. United States*, 601 U.S. 124, 149 [] (2024)); and A. Scalia & B. Garner, *Reading Law* 170-171 (2012) (explaining in a given statute, the same term usually has the same meaning). And in *Goins*, the Sixth Circuit found "no textual basis to distinguish probationers from other felons, or from any other member of the political community." 118 F.4th at 798 n.3

The Sixth Circuit also rightly determined that its pre-*Bruen*, pre-*Rahimi* precedent was no longer viable because *Bruen* and *Rahimi* "supersede[d] our circuit's past decisions on 922(g)." 113 F.4th at 646. Expressly disagreeing with the Eleventh Circuit in *Dubois*, the Sixth Circuit held—just as Petitioner argued to the Eleventh Circuit—that pre-*Bruen* circuit precedent is not binding because:

> Intervening Supreme Court precedent demands a different mode of analysis. *Heller*, to be sure, said felon-in-possession statutes were "presumptively lawful." But felon-in-possession statutes weren't before the Court in *Heller* or *McDonald*. And while *Bruen* didn't overrule any aspect of *Heller*, it set forth a new analytical framework for courts to address Second Amendment challenges. Under *Bruen*, courts must consider whether a law's burden on an individual's Second Amendment rights is "consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898. Specifically, courts must study how and why the founding generation regulated firearm possession and determine whether the application of a modern regulation "fits neatly within" those principles. *Id*. at 1901.
>
> Our circuit's pre-*Bruen* decisions on § 922(g)(1) omitted any historical analysis. They simply relied on *Hell*er's one-off reference to felon-in-possession statutes. Those precedents are therefore inconsistent with *Bruen*'s mandate to consult historical analogs. Indeed, applying *Heller*'s dicta uncritically would be at odds with *Heller* itself, which stated courts would need to "expound upon the historical justifications" for firearm-possession restrictions when the need arose. 554 U.S. at 635. Thus, this case is not as simple as reaffirming our pre-*Bruen* precedent.

Williams, 113 F.4th at 648.

And notably, the Fifth Circuit reasoned similarly in *Diaz*. There, the Fifth Circuit agreed post-*Rahimi* that not only is a new Second Amendment methodology required after *Bruen*; but

indeed, as a matter of "plain text" felons are part of "the people"—and any prior precedent relying on the *Heller* dicta without conducting the newly-mandated historical analysis no longer controls. *See Diaz*, 116 F.4th at 465-67 (pre-*Bruen* circuit precedents no longer control because *Bruen* "established a new historical paradigm for analyzing Second Amendment claims;" the mention of felons in prior Supreme Court cases was "mere dicta" which "cannot supplant the most recent analysis set forth by the Supreme Court in *Rahimi*, which we apply today;" squarely rejecting the government's "familiar argument" that for the *Bruen* Step One "plain text" analysis, felons are not part of "the people").

The reasoning of all three of these circuits is consistent with *Heller*, and correct on these points. For the reasons stated above, the Court should clarify for the Eleventh Circuit that: (1) a pre-*Bruen* circuit precedent like *Rozier*, or a post-*Bruen* circuit precedent like *Dubois* that did *not* apply the plain text-and-historical tradition test, does not control after *Bruen/Rahimi*; (2) applying the Court's new methodology, felons are indeed part of "the people" covered by the Second Amendment's plain text; (3) Petitioner has thus met the new *Bruen* Step One; and (4) as both the Fifth and Sixth Circuits have recognized, as per *Bruen* and *Rahimi*, this establishes a presumption that § 922(g)(1) is unconstitutional, and shifts the burden to the government to show at Step Two a tradition of at least "relevantly similar" regulation (in terms of both the "why" and "how") dating to the Founding.

C. After *Bruen/Rahimi*, the lower courts are in complete disarray as to the proper as-applied Step Two analysis. Petitioner's prior convictions were all non-violent. He was previously convicted of being a minor in possession of a firearm, being a felon in possession of a firearm and ammunition, carrying a concealed firearm, simple possession of cannabis, and battery on a correctional officer under Fla. Stat. § 784.07. Notably, the latter offense is essentially a

misdemeanor battery in violation of Fla. Stat. § 784.03 (either by means of "touch or strike" as charged here, or by "causation of harm" which was *not* charged here), committed against a correctional officer. What raises what is simply misdemeanor conduct to the level of a third degree felony in Florida is the status of the victim—*not* any aggravated conduct by the offender. Indeed, as this Court recognized in *Johnson v. United States*, the Florida Supreme Court has been clear that a battery can be committed by any offensive touching, "no matter how slight," and may include no more than a "'ta[p] . . . on the shoulder without consent.'" 559 U.S. 133, 138 (2010) (citing *State v. Hearns* 961 So. 2d 211, 219 (Fla. 2007)).

As the Solicitor General acknowledged in its Supplemental Brief for the Federal Parties in *Garland v. Range*, prior to *Rahimi*, many district courts had found criminal records consisting of non-violent offenses beyond the single one at issue in *Range*—including all varieties of drug offenses (mere possession, possession with intent to distribute, and manufacture so long as there was no involvement of a firearm), as well as simply carrying a concealed firearm or felon-in-possession of a firearm (so long as there was no use of the firearm)—did *not* provide a basis for permanent disarmament.[2] And plainly, under the approach of these courts, § 922(g)(1) would have been found unconstitutional as applied to Petitioner.

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[2] *See United States* v. *Hostettler*, No. 23-cr-654, ___ F.Supp.3d ___, 2024 WL 1548982, at **1-2 (N.D. Ohio Apr. 10, 2024) (§ 922(g)(1) unconstitutional as applied to defendant with priors for possession of a controlled substance, forgery, receiving stolen property, carrying a concealed weapon, aggravated possession of drugs, and felon in possession of a firearm); *United States* v. *Taylor*, No. 23-cr-40001, 2024 WL 245557, at *1 n.1 (S.D. Ill. Jan. 22, 2024) (§ 922(g)(1) unconstitutional as applied to defendant on supervised release imposed after conviction for conspiracy to manufacture methamphetamine); *United States* v. *Daniel*, 701 F.Supp.3d 730, 732, 743-44 (N.D. Ill. Nov. 7, 2023) (§ 922(g)(1) unconstitutional as applied to defendant with priors for "possession of a controlled substance and delivery of a controlled substance, in addition to convictions under Illinois narcotics laws"); *United States* v. *Quailes*, 688 F.Supp. 3d 184, 187-188 (M.D. Pa. 2023) (§ 922(g)(1) unconstitutional as applied to defendant with "four prior Pennsylvania convictions for felony drug offenses involving the possession with intent to distribute heroin and cocaine").

And indeed, while a panel of the Ninth Circuit in *Duarte* took a different approach pre-*Rahimi* that did not depend on whether the defendant's priors were violent—but rather, whether there was a similar lifetime penalty for analogous crimes at the Founding—§ 922(g)(1) would have been found unconstitutional as applied to Petitioner under the *Duarte* approach as well. According to the *Duarte* panel, a "faithful application of *Bruen* requires the government to proffer Founding-era analogues that are 'distinctly similar' to [the defendant's] underlying offenses and would have been punishable either with execution, with life in prison, or permanent forfeiture of the offender's estate. 101 F.4th at 690 (citing *Bruen*, 597 U.S. at 27). Applying that test, the *Duarte* panel found that the Second Amendment was unconstitutional as applied a defendant previously convicted of vandalism, being a felon in possession of a firearm, and drug possession. *Id.* at 691. That was because vandalism would only have made Duarte a misdemeanant at the Founding; felon in possession of a firearm "was a non-existent crime in this country until the passage of the Federal Firearms Act of 1938; "and criminalizing drug possession "did not appear to gain significant momentum until the early 20th century, with the passage of such laws as the Food and Drug Act of 1906 and the Harrison Narcotics Tax Act of 1914." *Id.* at 691 & n. 16 (noting that before these laws, "what we now think of as 'illicit drugs,' such as opium and cocaine, 'were . . . legal in the United States'") (citation omitted).

Although the Ninth Circuit is currently reconsidering *Duarte* en banc in light of *Rahimi*, the Court need not await the en banc decision because it is already clear that the pre-*Rahimi* split among the lower courts has persisted post-*Rahimi*. Notably, post-*Rahimi* the Fifth Circuit has taken an approach to § 922(g)(1) similar to that of the *Duarte* panel, while the Sixth Circuit (like the district courts cited in note 2) has focused exclusively on whether the defendant's priors

involved violence or otherwise portend future dangerousness. And under either the Fifth or Sixth Circuit's approaches, § 922(g)(1) would likely be unconstitutional as applied to Petitioner.

In *Diaz*, the Fifth Circuit held that § 922(g)(1) was constitutional as applied to a defendant with a prior for car theft, after finding that horse theft was a capital crime at the Founding, and due to the permanence and severity of that punishment, this Founding-era offense was an appropriate analogue post-*Rahimi*. 116 F.4th at 468-70. Notably, though, Petitioner has no prior convictions for car theft, nor for any other offense that is even arguably analogous to a capital crime at the Founding. And the Fifth Circuit was clear in *Diaz* that it was not "foreclos[ing] future as-applied challenges by defendants with different predicate convictions." *Id.* at 470 n. 4; see also 469 ("Simply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny"). And indeed, the Fifth Circuit would likely have found § 922(g)(1) unconstitutional as applied to Petitioner given that neither his felon-in-possession, carrying a concealed firearm, nor possession of cannabis offenses were even illegal—let alone capital felonies—at the Founding. Although the Fifth Circuit has focused on an offender's history of firearm misuse in other statutory contexts, *see United States v. Connelly*, 117F.4th 269 (5th Cir. 2024),[3] and in a recent § 922(g)(1) case as well, see *United States v. Isaac*, 2024 WL 483243 (5th Cir. Nov. 20, 2024) (holding that defendant who "previously misused a firearm in an attempt to

[3] In *Connelly*, the Fifth Circuit rightly recognized—in granting an as-applied challenge to 18 U.S.C. § 922(g)(3)—that the purported history and tradition of laws disarming "dangerous" individuals cited by the government had different socio-political motivations (a different "why" under *Bruen*), and the government had identified "no class of persons at the Founding who were 'dangerous' for reasons comparable to marijuana users." *Id.* at 278. As such, the court found § 922(g)(3) unconstitutional as applied to a marijuana user with no history of violent firearm use. *See id.* at 272 (finding that "our history and tradition may support some limits on a *presently* intoxicated person's right to carry a weapon . . ., but they do not support disarming a sober person based solely on past substance usage").

harm another" could be constitutionally dispossessed of a firearm"), it is significant here that Petitioner never used a firearm or caused physical harm to anyone during any of his prior offenses.

That fact, notably, would likely be dispositive post-*Rahimi* in the Sixth Circuit. By contrast to the Fifth Circuit, the Sixth has focused exclusively on a defendant's dangerousness as the determinant of an as-applied challenge—instructing courts to "focus on each individual's specific characteristics." *Williams*, 113 F.4th at 657. To guide the dangerousness inquiry, the Sixth Circuit has grouped offenses into three broad categories, noting that "certain categories of past convictions are highly probative of dangerousness, while others are less so." *Id.* at 658.

The Sixth Circuit's first category includes violent crimes against a person such as murder, rape, assault, and robbery—all of which were capital offenses at the Founding. And indeed, the Sixth Circuit holds, the fact that an individual has previously committed one of these historical violent crimes against a person is at least "strong evidence that an individual is dangerous, if not totally dispositive on the question." *Id.* The Sixth Circuit's second category includes crimes that are not strictly against a person, but nonetheless "pose a significant threat of danger" such as drug trafficking or burglary. *Id.* at 659. In its view, "most of these crimes put someone's safety at risk, and thus, justify a finding of danger," *id.*, although that presumption is rebuttable in an individual case. But as to the final category of crimes—those that cause no physical harm to another person or the community (which would include mail fraud, making false statements, and even bizarre third degree felonies such as opening food in a supermarket and putting it back on the shelf), the Sixth Circuit stated that it trusts that "district court judges will have no trouble concluding that many of these crimes don't make a person dangerous." *Id.*

However, applying its tri-partite construct to Mr. Williams, the Sixth Circuit had no trouble concluding just the opposite: that his as-applied challenge failed. For indeed, he had previously

been convicted of two counts of aggravated robbery for robbing two people at gunpoint, as well as attempted murder, and possessing a firearm as a felon in a case where he "agreed to stash a pistol that was used to murder a police officer." *Id.* Any one of those convictions, the Sixth Circuit opined, demonstrated Williams' dangerousness. *Id.* But Petitioner's record is nothing like Williams'. He has never been involved in any violence with a firearm, or caused bodily harm to anyone. His two felon-in-possession offenses did not assist with covering up a violent crime; in fact, they were unrelated to any other criminal activity. Rather, his prior firearm offenses were all simply expressions of the very Second Amendment right *Bruen* recognized to carry a firearm outside the home. Under the totality of circumstances here, the Sixth Circuit would likely have found § 922(g)(1) unconstitutional as applied to Petitioner.[4]

In short, had Petitioner filed his motion to dismiss in either the Fifth or Sixth Circuits, his motion would have been granted.

III. This Case Presents Important and Recurring Questions, and Provides an Excellent Vehicle for the Court to Resolve both Circuit Conflicts

As acknowledged by the Solicitor General in the aftermath of *Rahimi,* the conflict over the constitutionality of § 922(g)(1) is unlikely to resolve itself without further intervention by this Court. *See* Supp. Br. for the Federal Parties, *Garland v. Range*, No. 23-374, at *5 (June 24, 2024).

[4] Although the government, by moving for summary dismissal below based on *Rozier/Dubois* rather than attempting to meet its *Bruen* Step Two burden, waived its right to argue on appeal or on certiorari that the fact that Petitioner was on supervised release at the time of his instant felon-in-possession offense itself required denial of his motion to dismiss, *see Johnson*, 559 U.S. at 145; *Wood v. Milyard*, 566 U.S. 563, 466 (2012), the Sixth Circuit in *Goin*s did not consider the fact that the defendant was serving a criminal justice sentence at the time he possessed a firearm to be dispositive of whether § 922(g)(1) was unconstitutional as-applied to him. 118 F.4th at 804. Rather, applying *Williams*' "totality of the circumstances"/dangerousness rule, the *Goins* panel held that the fact that he possessed a firearm while on probation together with his prior "pattern of dangerous conduct," permitted a finding that the defendant could be temporarily disarmed. *Id.* But such a rule would not permit permanently disarming Petitioner who, unlike Goins, had no pattern—or even a single prior instance—of dangerous conduct.

Disagreement about § 922(g)(1)'s constitutionality has already had widespread and disruptive effects. *Id*. In fiscal year 2022, convictions under § 922(g)(1) accounted for nearly 12% of all federal criminal cases. *Id*. Petitioner asks that the Court grant plenary review in this case to resolve two direct circuit splits that existed prior to *Rahimi*, but have only deepened since *Rahimi*—as these splits lie at the intersection of constitutional rights and criminal law. *See Gillard v. Mississippi*, 464 U.S. 867, 873 (1983) (Marshall, J., dissenting from denial of certiorari) ("Although the issues has arisen repeatedly" failure to grant review means "criminal defendants in Mississippi and numerous other states have no legal remedy for what . . . may well be a constitutional defect."). And Petitioner's case presents an ideal vehicle for resolving both important and recurring legal questions raised herein, for multiple reasons.

First, both issues raised herein were pressed by Petitioner in the district court and on appeal. There is no possible argument in this case, as there may be in other cases that will come before this Court, that Petitioner's as-applied challenge should be reviewed deferentially for "plain error" only. *Compare Duarte*, 101 F. 4th at 663 (as-applied challenge not preserved and therefore potentially subject to plain-error review). The dispute on the applicability of plain error review, currently being litigated before the en banc Ninth Circuit in *Duarte*, will not impact this case.

Second, Petitioner's case is unlike other cases that have recently come before the Court raising these very same issues, where the court of appeals did not have a prior opportunity to consider the impact of *Rahimi*. Such cases have necessitated a GVR so that the Eleventh Circuit could consider the impact of *Rahimi* in the first instance. *See, e.g.*, *Pierre v. United States*, ___ S.Ct. ___, 2024 WL 4529801 (U.S. Oct. 21, 2024) (No. 24-37). Here, by contrast to *Pierre* and also *Dubois, pet. for cert*. filed Oct. 8, 2024 (No. 24-5744), Petitioner specifically argued to the Eleventh Circuit that *Rahimi* confirmed as-applied challenges were permissible after *Bruen*, and

that his as-applied challenge met both steps of this Court's new *Bruen/Rahimi* methodology. Nonetheless, the Eleventh Circuit refused to consider that methodology because of binding pre-*Rahimi* circuit precedent.

Third, not only did the Eleventh Circuit panel below squarely reject Petitioner's as-applied challenge based on *Bruen/Rahimi* under its rigid "prior panel precedent" rule; the Eleventh Circuit was thereafter asked in this very case to reconsider *Rozier/Dubois* en banc in light of *Bruen/Rahami*, and declare *Rozier/Dubois* abrogated. And it squarely refused to do so. Since there was not one vote for rehearing en banc, there is ***no*** chance the Eleventh Circuit will reconsider its barring of *all* as-applied challenges without the intervention of this Court.

Fourth, Issue I raises what is unfortunately a threshold obstacle for defendants in the Eighth and Eleventh Circuits—but not for defendants in other circuits. It is unjustifiable that from the very outset, defendants in these two Circuits are being denied the type of constitutional review being accorded similarly-situated defendants in every other circuit after *Bruen* and *Rahimi*. Plainly, constitutional rights and the right to meaningful appellate review should not vary by geography. The refusal of these two circuits to entertain any Second Amendment as-applied challenges is not only contrary to *Rahimi*; it has equal protection implications. As Judge Stras and three other Eighth Circuit judges recognized even prior to *Rahimi*, "By cutting off as-applied challenges" to § 922(g)(1), courts "create a group of second-class citizens: felons who, for the rest of their lives, cannot touch a firearm, no matter the crime they committed or how long ago it happened." *United States v. Jackson*, 85 F.4th 468, 469 (8th Cir. 2023) (Stras, J., joined by Erickson, Grasz, and Kobes, JJ, dissenting from denial of rehearing en banc).

And post-*Rahimi*, these same Eighth Circuit judges elaborated further in their dissent from rehearing en banc after the *Jackson* panel reaffirmed its pre-*Rahimi* position. *See United States v.*

Jackson,___ F.4th ___, 2024 WL 4683965, at *2 (8th Cir. Nov. 5, 2024) (order denying rehearing en banc) (Stras, J., joined by Erickson, Grasz, and Kobes, JJ) (noting that "other courts have not made the same mistake" of "insulating felon-dispossession laws from Second Amendment scrutiny of any kind;" citing *Diaz*, *Moore*, *Williams*, *Gay*; Judge VanDyke's dissent from the grant of rehearing en banc in *Duarte*; and Judge Agee's concurrence in the judgment in *United States v. Price*, 111 F.4th 392, 413 (4th Cir. 2024) (en banc) (recognizing that whether "§ 922(g)(1) is unconstitutional as applied to certain, non-violent felons . . . is far from settled")). Although Judge Stras and the other Eighth Circuit dissenters opined that the Eighth Circuit is the only "post-*Rahimi* outlier," *id.*, that is actually incorrect. The Eleventh Circuit is an even farther outlier, because the Eleventh is the only circuit to blindly follow its pre-*Bruen* mode of analysis, and not even give lip-serve to the *Bruen/Rahimi* methodology.

A grant of certiorari in Petitioner's case would allow the Court to kill not only "two birds with one stone"—but three. That is because, *in this single case*, the Court could squarely address the threshold error made by the Eighth and Eleventh Circuits in barring all as-applied challenges to § 922(g)(1); clarify that pre-*Bruen* circuit precedents that did not consider either the plain text of the Second Amendment or any history cannot govern after *Bruen* and *Rahimi*; and then resolve the widening conflict among the lower courts as to what type of prior criminal record renders § 922(g)(1) unconstitutional as applied. Resolving all of these issues in a single case would be the most efficient resolution possible of the multiple Second Amendment as-applied questions now dividing the lower courts.

Fifth, with specific regard to Issue II, the lower courts are deeply divided on the standard that should govern an as-applied challenge. In fact, not only the circuits but the district courts as well are all over the map on this question. They were split before *Rahimi*; they are split after

Rahimi; and the split shows no signs of lessening. Notably, post-*Rahimi*, district courts in the Seventh and Tenth Circuits have found § 922(g)(1) unconstitutional as applied to defendants with priors analogous to, or even more serious than, those of Petitioner. *See, e.g.*, *United States v. Brown*, 2024 WL 4665527 (S.D. Ill. Nov. 4, 2024) (finding § 922(g)(1) unconstitutional as applied to a defendant with a residential burglary and domestic battery conviction; none of the historical laws offered by the government imposed a comparable burden of permanent disarmament for a status, rather than criminal conduct); *United States v. Smith*, No. 24-cr-00228-GKF, 2024 WL 413821, at *9 (N.D. Okla. Sept. 10, 2024) (dismissing a § 922(g)(1) indictment where "the government [did] not show[] that drug possession was . . . linked to violence such that [the defendant] would present a danger to the public if armed") (citation omitted) (emphasis omitted); *United States v. Forbis*, ___F. Supp.3d ___, 2024 WL 3824642 (N.D. Ok.a. Aug. 14, 2024) (granting renewed motion to dismiss § 922(g)(1) indictment for defendant with two prior convictions for unlawful possession of methamphetamine, and one for driving under the influence).

Although the government has consistently argued for a tradition of disarming "dangerous" individuals, Petitioner—like the judge in *Brown*, 2024 WL at 4665527, at *5—disputes that such a tradition can be shown consistent with *Bruen* and *Rahimi*, because there are no Founding-era analogues that are both comparably justified to § 922(g)(1), and impose a comparable burden of lifetime disarmament. But indeed, even *if* the government *could* show a longstanding tradition of permanently disarming dangerous individuals who have either misused firearms or otherwise engaged in violent conduct, such a tradition would be irrelevant to a defendant like Petitioner, whose priors are indisputably non-violent under either a categorical or fact-based approach.

If the Court believes some measure of dangerousness should determine whether § 922(g)(1) is constitutional as applied to a particular defendant, this is the ideal case for the Court to flesh out the contours of such a rule. Indeed, the Court could use the several crimes in Petitioner's record to provide much-needed guidance to the lower courts on whether the dangerousness analysis for as-applied challenges is appropriately categorical or fact-based; if the latter, the relevance of remote convictions and those incurred when the defendant was a minor; and which party bears the burden of proof. While the Sixth Circuit in *Williams* placed the burden on the defendant to show he is not dangerous, most courts have held or assumed that the burden—as with all *Bruen* Step Two questions—is on the government.

Sixth, because Petitioner has several different types of non-violent priors, this single petition would permit the Court to consider the constitutionality of § 922(g)(1) "across a range" of non-violent circumstances. Supp. Br. for United States, *Garland v. Range*, *supra*, at 6. Granting this Petition would therefore be consistent with, but more efficient than, the Solicitor General's suggestion immediately after *Rahimi* that the Court grant certiorari in several cases, and consolidate them for briefing and argument, to consider *Rahimi*'s application to § 922(g)(1) cases involving different types of priors. Although the Court rejected that suggestion at the time, deciding instead to afford the courts of appeals the opportunity to reconsider their prior rulings in light of *Rahimi*, there is no need for such action here since the Eleventh Circuit has definitively declined to consider ***any*** as-applied challenge after *Rahimi*.

Finally, although there are currently en banc proceedings in the Third Circuit in *Range*, and in the Ninth Circuit in *Duarte*, and the Tenth Circuit is reconsidering its decision in *Vincent* with the benefit of supplemental briefing from the parties as to the impact of *Rahimi*, the Court need not and should not wait for the decisions in these other circuit cases before granting certiorari.

Regardless of the result reached in these proceedings, any additional lower court decisions at this juncture will simply exacerbate the already-deep Circuit split on the issues raised herein.

However, if the Court does ultimately choose to resolve the issues raised herein in another case or set of cases, Petitioner asks that the Court hold his case pending its resolution of such case(s).

CONCLUSION

Based on the foregoing, the petition for certiorari should be granted. Alternatively, the Court should hold this petition pending its decision in any other case(s) that will resolve the issues presented herein.

Respectfully submitted,

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