NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

KAREEM REAVES,

***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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QUESTION PRESENTED FOR REVIEW

Whether a person who was previously convicted of a felony is categorically excluded from the protections of the Second Amendment.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Kareem Reaves, No. 22-20129-Cr-Scola (October 17, 2023)

United States Court of Appeals (11th Cir.):

United States v. Kareem Reaves, No. 23-13582 (November 7, 2024)

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Kareem Reaves 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 23-13582 in that court on November 7, 2024, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit summarily rejecting Petitioner's facial Second Amendment challenge to 18 U.S.C. § 922(g)(1) and affirming the district court's judgment is unpublished and can be

found in the Appendix at A-1. The district court's judgment is also unpublished and can be found in the Appendix at A-2.

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 decision of the court of appeals was entered on November 7, 2024. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

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

1. In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court recognized that the text and history of the Second Amendment conferred an individual right to possess handguns in the home for self-defense. *Id.* at 581-82, 592-95. Specifically, *Heller* determined that the Amendment's reference to "the people" – consistent with the use of the same term in other amendments – "unambiguously refers" to "all Americans." *Id.* at 579-81. However, even though the criminal histories of the plaintiffs in *Heller* were not at issue in that case, and the Court acknowledged that it had not engaged in an "exhaustive historical analysis . . . of the full scope of the Second Amendment," the Court also stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" and that restrictions on felons possessing firearms were "presumptively lawful regulatory measures." *Id.* at 626, 627 n.26.

Soon thereafter, in *United States* v. *Rozier*, 598 F.3d 768 (11th Cir. 2010), the Eleventh Circuit passed on the constitutionality of the federal felon-in-possession ban, 18 U.S.C. § 922(g)(1). It 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 of appeals held, a person 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.* In reaching this

conclusion, the Eleventh Circuit relied entirely upon *Heller*'s pronouncements about "presumptively lawful" "longstanding prohibitions" against felons possessing firearms. *Id.*

Over a decade later, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), the 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, "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 the Court's recent decision in *United States v. Rahimi*, 602 U.S. 680, 144 S. Ct. 1889 (2024), the Eleventh Circuit decided *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), *cert. granted, vacated, and remanded*, ___ S. Ct. ___, 2025 WL 76413 (Mem.) (Jan. 13, 2025) (No. 24-5744). In *Dubois*, the Eleventh Circuit followed the same approach it had taken pre-*Bruen* in *Rozier*. It declined to conduct *Bruen*'s two-step analysis for Second Amendment challenges because it viewed that analysis as "foreclose[d]" by *Rozier*, and concluded

Rozier had not been abrogated by *Bruen*. 94 F.4th at 1291. Rather, the Eleventh Circuit cited as determinative the same *Heller* language it relied upon in *Rozier*, and held *Bruen* did not alter its reliance on that language because "*Bruen* repeatedly stated that its decision was faithful to *Heller*." *Dubois*, 94 F.4th at 1293. *See id.* at 1291-93 (stating *Heller*, 554 U.S. at 626-27, "made . . . clear" that its holding did not cast doubt on felon-in-possession prohibitions," which were presumptively lawful," and *Bruen*, 597 U.S. at 17, "made . . . clear" that its holding was "'[i]n keeping with *Heller*'"). Therefore, *Dubois* 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).

Certiorari was granted in *Rahimi* while *Dubois* was pending before the Eleventh Circuit, but the court of appeals declined to stay proceedings until this Court ruled. *Dubois*, 94 F.4th at 1290. Subsequently, the Eleventh Circuit declined to reconsider *Rozier* and *Dubois* in light of *Rahimi*, instead finding its pre-*Bruen* approach precluding all challenges to § 922(g)(1) continued to govern even post-*Rahimi*. *See United States v. Gray*, 2024 WL 4647991 (11th Cir. Nov. 1, 2024). The *en banc* Eleventh Circuit has also refused to reconsider *Rozier* and *Dubois* in light of *Rahimi*, with no judges dissenting. *See United States v. Rambo*, 2024 WL 3534730 (11th Cir. July 25, 2024) (No. 23-13772) (unpublished), *reh'g en banc denied* (11th Cir. Oct. 23, 2024), *pet. for cert. filed* (Dec. 5, 2024) (No. 24-6107).

2. In December 2022, the United States charged Petitioner with a single count of knowingly possessing a firearm and ammunition, knowing he was previously convicted of a crime punishable by imprisonment exceeding one year, in violation of 18 U.S.C. § 922(g)(1). On July 24, 2023, Petitioner pled guilty to the indictment. On October 17, 2023, the district court sentenced him to a term of imprisonment of 46 months. Appendix A-2.

Petitioner filed his initial brief in the Eleventh Circuit barely a month after this Court decided *Rahimi*, and raised a facial Second Amendment challenge to § 922(g)(1). *See* Appendix A-1 at 2. The court of appeals summarily affirmed, finding it was "'clearly correct as a matter of law' that section 922(g)(1) is constitutional under the Second Amendment. *Id.* at 7. Specifically, the Eleventh Circuit held that its binding precedents in *Rozier* and *Dubois* foreclosed Petitioner's arguments "because his status puts him in a class whose conduct the Second Amendment does not protect. *Id.* at 7 (citing, *inter alia*, *Rozier*, 598 F.3d 770-71; *Dubois*, 94 F.4th at 1292-93).

The Eleventh Circuit further explained that *Rahimi* did not change its analysis. *Id.* at 7. The court of appeals found it "notabl[e]" that "*Rahimi* concerned a different subsection of § 922 and again noted that felon-in-possession prohibitions are presumptively lawful, so its holding was not clearly on point and therefore could not have destroyed the 'fundamental props' of our prior precedent." *Id.* at 7 (citing, *inter alia*, *Dubois*, 94 F.4th at 1293).

REASONS FOR GRANTING THE WRIT

I. The lower courts are divided on whether *Bruen* and *Rahimi* supplant the Court's pronouncements in *Heller* that restrictions on firearms possession by felons are "longstanding" and "presumptively lawful."

The Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), recognized that the Second Amendment conferred an individual right to possess handguns in the home for self-defense. *Heller* was clear that the phrase "the people" as used in the Second Amendment "unambiguously refers" at the very least to "*all Americans*," and "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) (noting that the phrase "the people" was a "term of art" at the time, and had the same meaning as in other parts of the Bill of Rights)).

However, *Heller* also raised questions in the lower courts as to whether, despite its expansive language, the phrase "the people" in the Second Amendment was nonetheless limited to the narrower subset of citizens who abided by the law. Specifically, it stated both that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," and that restrictions on felons possessing firearms were "presumptively lawful regulatory measures." 554 U.S. at 626, 627 n.26. The Court made these pronouncements even though the criminal histories of the plaintiffs in *Heller* were not at issue, and despite the Court's acknowledgement that it had not engaged in an "exhaustive

historical analysis . . . of the full scope of the Second Amendment." *Id.* at 626. Nonetheless, these pronouncements raised questions in the lower courts as to whether the phrase "the people" in the Second Amendment was nonetheless limited to the narrower subset of citizens who abided by the law. This distinction is critical: if someone is not one of "the people," then she is categorically excluded from the Second Amendment's protections.

After *Heller*, the lower courts uniformly relied on *Heller*'s "longstanding" and "presumptively lawful" language to categorically exclude felons from the Second Amendment's protections. However, after the Court further clarified its Second Amendment jurisprudence in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680, 144 S. Ct. 1889 (2024), the circuit courts have split as to whether those decisions abrogate prior circuit precedent that relied on *Heller*.

For example, after *Rahimi*, the Third, Fifth, and Sixth Circuits expressly rejected prior circuit precedent that relied on *Heller*'s pronouncements regarding felons. *See United States v. Williams*, 113 F.3d 637, 646, 648 (6th Cir. 2024) (determining that *Bruen* and *Rahimi* "supersede our circuit's past decisions on [the constitutionality of] § 922(g)," which "simply relied on *Heller*'s one-off reference to felon-in-possession statutes"); *United States v. Diaz*, 116 F.4th 458, 465-67 (5th Cir. 2024) (pre-*Bruen* circuit precedents no longer control because *Bruen* "established a new historical paradigm for analyzing Second Amendment claims" and the mention

of felons in prior Supreme Court cases was "mere dicta" which "cannot supplant the more recent analysis set forth by the Supreme Court in *Rahimi*, which we apply today"); *Range v. Att'y Gen.*, 124 F.4th 218, 225 (3d Cir. 2024) (*en banc*) (noting *Bruen* "abrogated our Second Amendment jurisprudence" which relied, *inter alia*, on *Heller*'s "longstanding" and "presumptively lawful" language to find § 922(g)(1) constitutional).

In concluding that its pre-*Bruen*, pre-*Rahimi* precedent was no longer viable, the Sixth Circuit expressly disagreed with the Eleventh Circuit's decision in *Dubois*, holding 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 *Heller*'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.

In sharp contrast, the Fourth Circuit, like the Eleventh, continues to rely on prior circuit precedent relying on *Heller*'s pronouncements even after *Bruen* and *Rahimi*. *See United States v. Hunt*, 123 F.4th 697, 703 (4th Cir. 2024) (holding that "this Court's previous decisions rejecting [Second Amendment] challenges to Section 922(g)(1) remain binding because they can be read 'harmoniously' with *Bruen* and *Rahimi* and have not been rendered 'untenable' by them"). As is true of the Eleventh Circuit's decision in *Rozier*, that prior Fourth Circuit precedent "relied on the Supreme Court's statements in [*Heller*], that 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons' and that restrictions on felons possessing firearms were 'presumptively lawful regulatory measures.'" *Id*. (quoting *Heller*, 554 U.S. at 626, 627 n.26). Alternatively, it held that even if not bound by preexisting precedent, *Heller*'s "presumptively lawful" language made clear that the Second Amendment protects firearm possession only "by the law-abiding, not by felons." *Id*. at 705.

Although the Tenth Circuit has not yet considered the implications of *Rahimi* for its pre-*Bruen* circuit precedent rejecting a Second Amendment challenge to § 922(g)(1), it has held that *Bruen* did not abrogate that precedent. *See Vincent v. Garland*, 80 F.4th 1197, 1201-02 (10th Cir. 2023) (holding that "*Bruen* did not indisputably and pellucidly abrogate our precedential opinion"), *cert. granted, vacated, and remanded*, 144 S. Ct. 2708 (2024) (No. 23-683). Like the pre-*Bruen*

precedent in the Fourth and Eleventh Circuits, that Tenth Circuit precedent "relied solely" on *Heller*'s language stating "that 'nothing in this opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons' and [that] felon dispossession statutes are 'presumptively lawful.'" *Id.* at 1201 (quoting *Heller*, 554 U.S. at 626–27 & n.26). After this Court granted certiorari, vacated the Tenth Circuit's decision and remanded *Vincent* for reconsideration in light of *Rahimi*, the Tenth Circuit asked the parties to brief the impact of *Rahimi*, but it has not yet issued a decision in that case.

Finally, although the Eighth Circuit did not rely entirely on *Heller*'s statements regarding the "longstanding prohibitions on the possession of firearms by felons," 554 U.S. at 626, when it recently held § 922(g)(1) constitutional, it concluded both *Bruen* and *Rahimi* "did not disturb those statements or cast doubt on the prohibitions." *United States v. Jackson*, 110 F.4th 1120, 1125 (citing *Bruen*, 597 U.S. at 70; *id.* at 81 (Kavanaugh, J., concurring, joined by Roberts, C.J.); *id.* at 129 (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.), *reh'g en banc denied*, 121 F. 4th 656 (8th Cir. 2024); *Rahimi*, 144 S. Ct. at 1901-02).

In sum, there is a split in the circuit courts as to whether *Bruen* and *Rahimi* supplant the Court's pronouncements in *Heller* that restrictions on firearms possession by felons are "longstanding" and "presumptively lawful" summarily defeat Second Amendment challenges to § 922(g)(1), even after *Bruen* and *Rahimi*.

II. The Eleventh Circuit's reliance on *Heller*'s pronouncements to conclude § 922(g)(1) does not violate the Second Amendment cannot be reconciled with *Bruen* and *Rahimi*.

The Eleventh Circuit's decision to ignore the two-step analysis adopted by the Court in *Bruen* and *Rahimi* and instead rely on *Heller*'s pronouncements regarding the possession of firearms by felons is wrong. After *Bruen*, a court must first decide whether the text of the Second Amendment applies to a person and his proposed conduct. 597 U.S. at 31-33. If it does, the government "must affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. By relying on *Heller*'s language rather than engaging in the methodology adopted in *Bruen* and *Rahimi*, the Eleventh Circuit implicitly held either: that felons are not part of "the people" for purposes of the Second Amendment; or that the government can affirmatively prove that § 922(g)(1) is "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. Neither is true.

A. "[T]he people" protected by the Second Amendment includes felons.

In *Rahimi* this Court squarely rejected the 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." 144 S. Ct. at 1897 (emphasis added). And Justice Thomas, who disagreed with the majority only as to *Bruen*'s second step, confirmed that any American citizen is indeed among "the people" as a matter of the plain text. 144 S.

Ct. at 1933 (Thomas, J., dissenting) (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).

Justice Thomas left no doubt about the implication of *Heller*, *Bruen*, and *Rahimi* for "the people" question in § 922(g)(1), by confirming that "[n]ot a single Member of the Court adopts the Government's [law-abiding, responsible citizen] theory." 144 S. Ct. at 1944 (Thomas, J., dissenting). In short, as Justice Thomas 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." *Rahimi*, 554 U.S. at 581.

Post-*Rahimi,* the en banc Third Circuit squarely rejected the government's arguments that a felony conviction removed a person from "the people" protected by the Second Amendment. *Range*, 124 F.4th at 222. It agreed that *Heller*'s reference to "law-abiding citizens," on which the government relied, "should not be read as rejecting *Heller*'s interpretation of 'the people.'" *Id.* at 226 (quoting *Heller*, 554 U.S.

at 625) (internal quotation marks omitted). In reaching this conclusion, it: (1) noted that references in *Heller* and *Bruen* to "law-abiding" citizens were dicta because the criminal histories of the plaintiffs in those cases were not before the Court; (2) explained that the phrase "the people" was also found elsewhere in the Constitution and it saw "no reason to adopt a reading of 'the people' that excludes Americans from the scope of the Second Amendment while they retain their constitutional rights in other contexts;" (3) noted that *Rahimi* "makes clear that citizens are not excluded from Second Amendment protections just because they are not 'responsible.'" *Id.* at 226-27 (quoting *Rahimi*, 144 S. Ct. at 1903).

The Sixth Circuit has agreed with the Third on these points and elaborated further. In *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024) 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. *Id.* 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)); A. Scalia & B. Garner, *Reading Law* 170-171 (2012) (explaining in a given statute, the same term usually has the same meaning). And in *United States v. Goins*, 118 F.4th 794 (6th Cir. 2024), the Sixth Circuit found "no textual basis to distinguish probationers from other felons, or from any other member of the political community." *Id.* at 798 n.3

The Fifth Circuit reasoned similarly in *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024). There, the Fifth Circuit agreed post-*Rahimi* that not only is a new Second Amendment methodology required after *Bruen*, but 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 (holding 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").

In all three of these circuits, pre-*Bruen* circuit precedent that failed to apply this Court's text-and-historical tradition test does not control after *Bruen* and *Rahimi*. Because these circuits applied the Court's new methodology, they found felons like Petitioner are indeed part of "the people" covered by the Second Amendment's plain text under *Bruen*'s Step One, and therefore entitled to the presumption that § 922(g)(1) is unconstitutional. Were Petitioner's case before the

Third, Fifth, or Sixth Circuits, those courts would have shifted the government to show at Step Two that there exists a tradition of at least "relevantly similar" regulation dating to the Founding. The government cannot do so, however, as there was no such Founding-era regulation.

B. The government cannot meet its Step Two burden under *Bruen* and *Rahimi* because there is no historical tradition of lifetime felon disarmament dating to the Founding, which is necessary to uphold § 922(g)(1).

Admittedly, the Second Amendment's application to all Americans does not mean that the right to bear arms is "unlimited." *Bruen*, 597 U.S. 21. However, *Bruen* established strict rules for determining in what circumstances those pre-existing Second Amendment rights may be "stripped." Specifically, the Court held that where an individual's conduct is presumptively protected by the Second Amendment's plain text, a regulation restricting that conduct can stand only where the Government shows 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." *Bruen*, 597 U.S. at 37. Here, the government cannot meet its burden as to § 922(g)(1). Not only were there no felon disarmament regulations at or near the Founding, but there were no Founding-era laws specifically disarming *any* citizens or category of citizens *for life*.

1. The Government bears the burden of showing a tradition.

As a preliminary matter, *Bruen* prescribed two ways of conducting the required historical tradition inquiry. Where a modern statute is directed at a

"longstanding" problem that "has persisted since the 18th century," *Bruen* directed a "straightforward" inquiry: if there is no historical tradition of "distinctly similar" regulation, the regulation is unconstitutional. *Id.* at 26-28 (conducting this "straightforward" inquiry to strike down New York's restriction on public carry of firearms).

However, if the statute is directed at "unprecedented societal concerns or dramatic technological changes," or problems "unimaginable at the founding," then and only then *Bruen* held, are courts empowered to reason "by analogy." *Id.* at 2132. Courts in such cases ask only whether historical analogues are "*relevantly* similar." *Id.* (emphasis added). Notably, the "central considerations" in a "relevantly similar" inquiry are what *Bruen* called the "how and why" – that is, "whether modern and historical regulations impose a *comparable burden* on the right of armed self-defense and whether that burden is *comparably justified*." *Id.* at 2133 (emphasis added). And in *Rahimi*, the Court confirmed that the government must show *both* "how" *and* "why." That is, *both* a comparable burden *and* a comparable justification for Founding-era regulations are required in a "relevantly similar" analysis; a comparable justification alone does not suffice. *See* 144 S. Ct. at 1899-1902 (finding, from among the multitude of purported "analogues" the government proffered in its brief, *see* Brief for the United States, *United States v. Rahimi*, 2023 WL 5322645, at **13-27 (U.S. Aug. 14, 2023), that only "two distinct legal regimes" "specifically addressed firearms violence" – the surety and going-armed laws – were "'relevantly

similar' in *both* why *and* how it burdens the Second Amendment;" explaining "the penalty" is "another relevant aspect of the burden," and "[t]he burden that Section 922(g)(8) imposes on the right to bear arms also fits within the Nation's regulatory tradition") (emphasis added); *see also id.* at 1907 (Gorsuch, J., concurring) (reiterating the important methodological point that the government must show *both* a comparable justification *and* a comparable burden).

In contrast to the modern problem of gun violence by domestic abusers which *Rahimi* analyzed under the "relevantly similar" standard, *see* 144 S. Ct. at 1898, the colonies were heavily populated with felons sent from England in 1791, and thus, the problem of felon gun violence addressed by § 922(g)(1) was "longstanding."[1] Thus, the Court should rightly analyze § 922(g)(1) under the "straightforward" analysis used in both *Heller* and *Bruen*, where the challenged statutes likewise aimed to prevent interpersonal gun violence. *See id.* at 1932 (Thomas, J., dissenting).

However, even *if* the Court were to employ the more nuanced "relevantly similar" analysis used in *Rahimi* to assess whether the government has met its burden to "establish the relevant tradition of regulation" for § 922(g)(1), *Bruen*

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[1] *See, e.g.*, Encyclopedia Virginia, "Convict Labor during the Colonial Period," *available at* https://encyclopediavirginia.org/entries/convict-labor-during-the-colonial-period (last accessed Jan. 6, 2025) (noting that as of 1776, Virginia alone housed at least 20,000 British convicts). Notably, in 1751, Ben Franklin wrote a satirical article entitled "Rattle-Snakes for Felons," criticizing the way England had been ridding itself of its felons by sending them to the colonies to grow their population, and suggesting that rattlesnakes be sent back to England as "suitable returns for the human serpents sent us by our Mother Country." Bob Ruppert, "The Rattlesnake Tells the Story," *Journal of the American Revolution* (Jan. 2015).

dictates, and *Rahimi* confirms, that this Court must hold the government to four additional rules:

First, to establish a true "tradition" of "historical regulation," the government must point to *actual early regulations* – that is, laws or statutes, rather than proposals or vague "understandings" never enacted into law. *See Rahimi*, 144 S. Ct. at 1898 (focusing on the burdens imposed by "regulations" and "laws at the founding"); *id.* at 1936 (Thomas, J., dissenting) (explaining that under *Bruen*, rejected proposals "carry little interpretive weight").

Second, the government must then show the same type of regulation was actually *prevalent* in the country at the Founding – that is, that the firearm regulation on which it relies were "well-established and representative." "[A] single law in a single State" is not enough; instead, a "widespread" historical practice "broadly prohibiting" the conduct in question is required. *Bruen*, 597 U.S. at 36, 38, 46, 65 (expressing doubt that regulations in even *three* of the thirteen colonies "could suffice").

Third, a "longstanding" tradition is required, and that accounts for time. Per *Bruen*, "when it comes to interpreting the Constitution, not all history is created equal" because "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them," which in the case of the Second Amendment, was in 1791. *Id.* at 34. Courts must "guard against giving

postenactment history more weight than it can rightly bear." *Id.* at 35. The farther the historical evidence moves past 1791, the less probative it becomes.

Finally, the government "bears the burden" of "affirmatively prov[ing] 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 19. Consistent with "the principle of party presentation," courts are "entitled to decide a case based on the historical record compiled by the parties." *Id.* at 25, n. 6. They "are not obliged to sift the historical materials for evidence to sustain [a] statute." *Id.* at 60. If "history [is] ambiguous at best," the statute is unconstitutional. *Id.* at 39-40.

In short, to meet the *Bruen* Step Two inquiry, the government must affirmatively present evidence of actual historical regulations that: were *not only* "comparably justified" to § 922(g)(1), *but also* imposed a "comparable burden;" were sufficiently prevalent to constitute a true "tradition;" and date to the Founding. While the government was able to make such a showing in *Rahimi* because surety and "going armed" laws established a tradition of "*temporarily* disarm[ing]" an "individual found by a court to pose a credible threat to the physical safety of another," 144 S. Ct. at 1903 (emphasis added), for the reasons described below, the government cannot meet its burden for § 922(g)(1) with any longstanding "relevantly similar" regulations.

2. The Government cannot meet its burden for § 922(g)(1) because there is no longstanding tradition of depriving felons from possessing a firearm.

The government cannot meet its *Bruen* Step Two burden for § 922(g)(1) for multiple reasons. *First*, it is only since 1961 that federal law has only included a general prohibition on firearm possession by felons. *See* Act To Strengthen The Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961). And, a law passed 170 years after the Second Amendment's ratification cannot meet the "longstanding" requirement of *Bruen*. *See id.* at 36-37 (emphasizing "belated innovations" from the 20th century "come too late to provide insight into the meaning of the Constitution in [1791];" citing with approval the Chief Justice's dissent in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 312 (2008)); *see also Bruen*, *id.* at 66 n.28 (declining to "address any of the 20th century historical evidence brought to bear by [the government] or their *amici*").

Second, even the earliest version of § 922(g)(1), which applied exclusively to certain types of violent criminals, and prohibited them from "receiving" firearms, was only enacted in 1938, well after the Bill of Rights was adopted in 1791, and also, to the extent it is relevant, well after the Fourteenth Amendment was enacted in 1868. The Federal Firearms Act of 1938, Pub. L. No. 75-785, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938). And it was not until much later, in 1968, that Congress gave § 922(g)(1) its current form prohibiting *all* felons from possessing firearms.

Third, as scholars and historians have long pointed out, "no colonial or state law in eighteenth century America formally restricted," much less prohibited *permanently* and under pain of criminal punishment, the ability of felons to own firearms."[2] Indeed, even before *Bruen*, then-Judge Barrett recognized both that "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons," and that "no[] historical practice supports a legislative power to categorically disarm felons because of their status as felons." *Kanter v. Barr*, 919 F.3d 437, 451, 458 (7th Cir. 2019) (Barrett, J., dissenting).

Finally, the lack of any longstanding tradition in this country of permanently disarming felons may well be explained by the fact that unlike many other classes of citizens, felons were *not* exempted from militia service at the Founding. And indeed, as militia members, felons were not simply *permitted* to possess arms; they were actually *required* to purchase and possess arms for militia service. *See* Federal Militia Act of May 8, 1792, §§ 1-2, 1 Stat. 272 ("each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years . . . *shall* severally and respectively be enrolled in the militia, and that every citizen so

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[2] Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1374 (2009); *accord* C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009); Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous"*, 25 Tex. Rev. L. & Pol. 245, 291 (2021); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009).

enrolled "*shall*, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt," and various other firearm accoutrements, including ammunition; exempting from this requirement many classes of people – such as "all custom-house officers" – but *not* felons). Moreover, the militia statutes of eight states – Pennsylvania, Massachusetts, New York, Georgia, New Hampshire, Delaware, Maryland and Connecticut – passed shortly before or after 1791 contained similar requirements, and similarly did not exempt felons.[3]

Given this primary historical evidence, the government cannot show a historical tradition dating to the Founding of gun regulation either "distinctly" or "relevantly" similar to § 922(g)(1).

3. The historical analogues that supported § 922(g)(8) in *Rahimi* cannot support § 922(g)(1) because they were not "comparably justified," and did not impose a "comparable burden" of disarmament for life.

Even *if* the government is permitted to reason "by analogy" under the "relevantly similar" standard from *Rahimi*, it still cannot meet its heavy burden here. There was no historical tradition of any analogous regulation in the Founding

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[3] *See* Mitchell, Statutes at Large of Pennsylvania, Act of March 20, 1780, §§ III, XXI, at 146, 154 (1700-1809); Wright and Potter, 7 Acts and Laws of the Commonwealth of Massachusetts, 1780-1805, ch. 14, at 381-82,389-90 (1898); Thomas Greenleaf, Laws of the State of New-York, Act of April 4, 1786, at 227-28, 232-33 (1792); Marbury, Digest of Laws of the State of Georgia, Act of December 24, 1792, §§ 9-10, at 350 (1802); Constitution and Laws of the State of New-Hampshire, Act of Dec. 28, 1792, at 251-52, 256 (1805); Laws of the State of Delaware, ch. XXXVI, §§ 1, 2, 4, at 1134-36 (1797); Herty, Digest of the Laws of Maryland, "Militia," §§ 7, 15, 19, 20, at 367-70 (1799); and Public Statute Laws of the State of Connecticut, Title CXII, ch. I, §§ 1, 10, at 499-500, 505-06 (1808).

era that was not only "comparably justified" to § 922(g)(1), but *also* posed a "comparable burden" to lifetime disarmament, as *Bruen* and *Rahimi* require.

For obvious reasons, the surety and going-armed statutes that *Rahimi* found proper "analogues" to the temporary ban in § 922(g)(8)(C)(i) based on a "credible threat," are not proper analogues for § 922(g)(1)'s lifetime ban on firearm possession by all felons. As a threshold matter, § 922(g)(8)(C)(i) "restricts gun use to mitigate demonstrated threats of physical violence" and applies only once a court has made an individualized finding that "a credible threat" exists. *Rahimi*, 144 S. Ct. at 1901. By contrast, § 922(g)(1) is a categorical ban, prohibiting every person convicted of a felony from possessing a gun without an individualized finding as to whether or not they threaten others. And although a person subject to a surety bond received "significant procedural protections" and "could obtain an exception if he needed his arms for self-defense," *id.* at 1900, that is never allowed for a felon.

Importantly for the "comparable justification" analysis required by *Bruen* and *Rahimi*, surety statutes were intended to mitigate "demonstrated threats of physical violence" like that posed by someone subject to § 922(g)(8), which is why they required "individualized" findings. 144 S. Ct. at 1899, 1901. But § 922(g)(1) contains *no* requirement that a felon pose a threat. And "going-armed" laws likewise "provided a mechanism for punishing those who had menaced others with firearms." *Id.* at 1900-01. Indeed, "going-armed" laws required a judicial determination that "a particular defendant . . . had *threatened another with a*

weapon. *Id.* at 1902 (emphasis added). In other words, both of these early legal regimes criminalized specific, serious misconduct with a gun either in the past, or expected in the near future. Section 922(g)(1), on the other hand, bans a category of people from possessing firearms whether or not they have "terrif[ied] the good people of the land," *id.* at 1901, or in fact, whether they have ever used or misused a gun.

Finally, and important for the separately-required "comparable burden" analysis – the "how" metric in *Bruen* – the Court was clear in *Rahimi* that the "penalty" is a crucial component of the burden imposed by a statute. *Id.* at 1902. That is why the Court repeatedly underscored that § 922(g)(8)'s restriction is "temporary," existing only "so long as the defendant 'is' subject to a restraining order." *Id.* at 1902. And in stark contrast, § 922(g)(1)'s categorical ban is *for life*. Thus, both analogue regimes *Rahimi* relied on to hold § 922(g)(8) fits within our Nation's tradition of firearm regulation are distinguishable in both the "why" and the "how" from § 922(g)(1). They therefore cannot serve as proper analogues for upholding § 922(g)(1) here.

Notably, at no time, in any case before any court at any level in this country, has the government *ever* been able to identify *any* Founding-era analogue that, like the surety and going-armed laws, "importantly . . . targeted the misuse of firearms," 144 S.Ct. at 1900, and *also* categorically disarmed any citizen or any group of citizens *for life*. Thus, the government will not be able to satisfy both the "why" and

the "how" – the "comparable justification" *and* "comparable burden" components – of the "relevantly similar" analysis. Because *Bruen* held and *Rahimi* confirmed that this showing is the minimum requirement for every Second Amendment case going forward, § 922(g)(1) is facially unconstitutional. Unlike § 922(g)(8)(C)(i), it violates the Second Amendment in all circumstances. *Rahimi*, 144 S. Ct. at 1898.

Notably, even prior to *Rahimi*, three district judges strictly applying *Bruen*'s dictates found that § 922(g)(1) was indeed facially unconstitutional. *See, e.g., United States v. Prince*, 700 F.Supp.3d 663 (N.D. Ill. Nov. 2, 2023) (Gettleman, J.); *United States v. Hale*, 717 F.Supp.3d 704, 701 n.1 (N.D. Ill. Feb. 14, 2024) (citing other opinions by Judge Gettleman); *United States v. Taylor*, No. 23-cr-40001, 2024 WL 245557 (S.D. Ill. Jan. 22, 2024) (Yandle, J.); *United States v. Martin*, 718 F.Supp.3d 899 (S.D. Ill. Feb. 22, 2024) (Yandle, J.); *United States v. Neal*, 715 F. Supp.3d 1084 (N.D. Ill. Feb. 7, 2024)(Ellis, J.).

And while admittedly, no circuit court has yet found § 922(g)(1) facially unconstitutional post-*Rahimi*, the clarification of *Bruen*'s methodology in *Rahimi*, and the absence of any Founding era analogue disarming felons for life, compels a conclusion of facial unconstitutionality here. *See United States v. Brown*, 2024 WL 4665527, at *5 (S.D. Ill. Nov. 4, 2024) (Yandle, J.) (recognizing post-*Rahimi* that none of the historical "analogues" offered by the government imposed a "comparable burden" on the Second Amendment right of felons to keep and bear arms; distinguishing loyalty oath statutes which did not result in permanent

disarmament, and laws authorizing capital punishment and estate forfeiture for certain felonies, which were severe penalties imposed for criminal conduct, but "not for status crimes that arose from otherwise lawful conduct by felons who had completed their sentences;" as such, finding § 922(g)(1) unconstitutional, both facially and as applied to the defendant).

III. This case presents an important and recurring constitutional question for all § 922(g)(1) defendants, and provides an excellent vehicle for the court to resolve it.

In the wake of *Bruen* and *Rahimi*, the Second Amendment challenge raised herein has been raised by scores of other defendants convicted of § 922(g)(1) offenses. In this case, however, it was meticulously briefed by Petitioner on appeal, and was squarely rejected by the Eleventh Circuit based on its pre-*Bruen* methodology. Nor is this a case like *Dubois v. United States*, No. 24-5744, where a remand was necessary to allow the Eleventh Circuit to consider the impact of *Rahimi* in the first instance. The Eleventh Circuit panel below had a full and fair opportunity to consider the impact of *Bruen* and *Rahimi* here, and found both cases inapplicable.

Nor is it necessary for the Court to await the Eleventh Circuit's *en banc* consideration of the impact of *Bruen* and *Rahimi*. That court was already presented with a petition for rehearing *en banc* in *Rambo*, No. 24-6107, and refused to reconsider its continued adherence to *Rozier* in light of *Bruen* and *Rahimi*.

As noted in the petitions for writ of certiorari in *Rambo*, and *United States v. Whitaker*, No. 24-5997, at this time there is a deep conflict among the circuits as to

multiple sub-issues relevant to as-applied challenges to § 922(g)(1). While many petitioners have sought and will seek certiorari to resolve that conflict based on the specifics of their cases, the Court will not be able to resolve the broader issue of facial constitutionality definitively in an as-applied case. Since the issue of facial constitutionality impacts all § 922(g)(1) defendants, in the interests of judicial economy the Court should take a facial challenge case like this as a companion to whichever case(s) will be used to resolve the circuit conflict on as-applied challenges. However, if the Court chooses to resolve the facial constitutionality of § 922(g)(1) in another case, Petitioner asks that the Court hold his case pending its resolution of any such case.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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