NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

DEONTA LOWE,

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

Do convicted felons have Second Amendment rights, in light of this Court's interpretation of "the people" in *District of Columbia v. Heller*, 554 U.S. 570, 592-95 (2008), its references to the Second Amendment rights of "law-abiding citizens" in *Heller*, 554 U.S. at 625, 635, and in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 29-31 (2022), and its dicta regarding the presumptive lawfulness of "longstanding prohibitions on the possession of firearms by felons" in *Heller*, 554 U.S. at 627-628, n.26, and in *McDonald v. Chicago*, 561 U.S. 742, 786 (2010)?

INTERESTED PARTIES

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

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

- *United States v. Lowe*, No. 22-13251, 2024 WL 3649527 (11th Cir. Aug. 5, 2024)
- *United States v. Lowe*, No. 5:21-cr-00032-TES-CHW (M.D. Ga. Sep. 12, 2022) (judgment convicting Lowe of violating 18 U.S.C. §§ 922(g)(1) and 924(a)(2) and imposing 120-month term of imprisonment)

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Deonta Lowe 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 22-13251, in that court on August 5, 2024. *United States v. Lowe*, No. 22-13251, 2024 WL 3649527 (11th Cir. Aug. 5, 2024).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Lowe*, No. 22-13251, 2024 WL 3649527 (11th Cir. Aug. 5,

2024) (unreported), is contained in the Appendix A-1. Its order denying *en banc* review is contained in Appendix 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 United States Court of Appeals for the Eleventh Circuit had jurisdiction over this cause pursuant to 28 U.S.C. § 1291. It entered its decision on August 4, 2024, and its order denying *en banc* review on October 2, 2024. This petition is timely filed pursuant to Sup. Ct. R. 13.1 and 13.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. AMEND. II.

18 U.S.C. § 922(g)(1). Section 922(g)(1) of Title 18 reads: "It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

18 U.S.C. § 924(a)(2) (2021). Section 924(a)(2) of Title 18 read: "Whoever knowingly violates subsections (a)(6), (d), (g), (h), (i), or (o) of section 922 shall be fined under this title, imprisoned not more than 10 years, or both."

INTRODUCTION

This Court broke new ground in *District of Columbia v. Heller*, 554 U.S. 570, 592-95 (2008), when it held that the Second Amendment, as understood by the Founding generation, constitutionalized a pre-existing, individual right to carry firearms, and not a collective, civic right to participate in militias. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 23-24 (2022), it expounded upon the originalist standard it had employed in *Heller*, adopting a two-part analysis. Accordingly, to determine whether a law violates the Second Amendment, courts must first consider whether the plain text of the Second Amendment encompasses

the conduct that the challenged law proscribes. *Id*. If so, the government bears the burden of proving a Founding-era legal tradition that is relevantly similar to the challenged law, in terms of how and why the law burdens the Second Amendment right. *Id*.

This Court provided an example of the relevant historical inquiry in *United States v. Rahimi*, 602 U.S. 680 (2024), holding that 18 U.S.C. § 922(g)(8) – which bars firearm possession by those under certain types of restraining orders – was not facially unconstitutional. It relied on two common Founding-era legal regimes that were relevantly similar to § 922(g)(8) – "going armed" laws and surety bonds. Analogous to the status defined in § 922(g)(8), these Founding-era laws typically applied based on individualized judicial findings involving specific, serious misconduct with a gun. Moreover, like § 922(g)(8), the disarmament they demanded was of limited duration and permit certain exceptions.

These cases have triggered an avalanche of constitutional challenges to the various federal status-based prohibitions on possessing firearms. Throughout this period, the Eleventh Circuit has never applied *Bruen*'s text-and-history test to the felon disarmament law established in 18 U.S.C. § 922(g)(1). It has maintained that felons simply do not have the firearm right. *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010). It initially relied on language from *Heller* and *Bruen* referring to "law-abiding citizens," *see Heller*, 554 U.S. at 625, 635; *Bruen*, 597 U.S. at 9, 15, 26, 29, 30, 31, 38, 60, 70, 71, and another passage advising that its holdings did not preclude some "presumptively lawful" measures, such as "longstanding

prohibition" on felons possessing firearms. *Heller*, 554 U.S. at 626. It deemed the "law-abiding citizens" references to be a binding part of *Heller*'s holding. *Rozier*, 598 F.3d at 771 n.6. And it has adhered to this rule even after *Rahimi*, 602 U.S. at 701-02, made clear that this language was dicta.

Although most other Circuits have not similarly bypassed the *Bruen* test, they are in sharp disagreement about what, if any, impact this Court's statements about "law-abiding citizens" and "longstanding prohibitions" on felons possessing firearms, should have on the Second Amendment analysis. In the context of 18 U.S.C. § 922(g)(1)'s disarmament of felons, four Circuits have held that the plain meaning of "the people" encompasses felons, and two more Circuits have said the same in dicta. One Circuit has held that the plain meaning of "the people" excludes felons and two more Circuits, including the Eleventh Circuit, have held that felons do not have Second Amendment rights without addressing the Amendment's text or history. This leaves three Circuits who have not resolved the issue – with one of them explicitly leaving the issue open.

Resolving this issue is essential to determine the rights of millions of convicted felons in this country, and is an important next step in the development of Second Amendment law. If the Eleventh Circuit is right, then this Court should clarify this additional prong of the Second Amendment analysis. If it is wrong, then this Court should say so, thus redirecting courts and litigants to focus their efforts on the scope of the permissible burdens on the Second Amendment rights of felons, rather than the scope of the right itself.

Lowe's case is a suitable vehicle by which to quell the confusion on this point. The Eleventh Circuit's decision rests entirely on the question of whether felons have Second Amendment rights. Although it referenced the plain error standard of review in resolving Lowe's claim, its analysis relied entirely on its precedent, in a manner identical to that used in numerous cases that it resolved *de novo*. Moreover, a ruling in favor of Lowe would make any error plain in his case. Hence, the plain error standard does not prevent this Court from resolving the issue in this case, or from clarifying the issue for the countless cases raising the constitutionality of 18 U.S.C. § 922(g)(1).

STATEMENT OF THE CASE

A. Legal Background

1. **English Firearm Right**. The Second Amendment codifies as "pre-existing" right. *Heller*, 554 U.S. at 579-81. This right stems from the English Declaration of Rights, which directly refuted the disarmament laws that preceded the Glorious Revolution and the overthrow of King James II. The English people became heavily armed during their 17th Century civil wars. David E. Vandercoy, *The History of the Second Amendment*, 28 Val. U. L. Rev. 1007, 1015 (1994). After the Restoration of the Monarchy, King Charles II began to disarm "disaffected persons" with the Militia Act of 1661. *Id*. at 1016. With the Game Act of 1671, he dramatically limited the right to hunt and barred possessing firearms by non-hunters. *Id*. King James II continued the disarmament policy, amassed a standing army, and replaced Protestants with Catholics at high government posts. *Id*. at 1016-1017. This culminated in the Glorious

Revolution, when King James II fled upon Prince William III landing in England with an army. *Id*. at 1017. A special parliament crowned King William and Queen Mary as co-sovereigns and adopted the Declaration of Rights of 1689. *Id*. An early draft of the Declaration of Rights recited the abuses of James II, including his disarming of Protestant subjects. *Id*. at 1018. The final version set forth the positive right of Protestant subjects to have arms for their defense, "as allowed by law" – a phrase referring to how arms were used. *Id*.; *see* 1 W. & M., Sess. 2, ch. 2 (1689).

2. **Second Amendment**. Similarly, in the run-up to the Revolutionary War, King George III "began to disarm inhabitants of the most rebellious areas[]" of the Colonies. *Heller*, 554 U.S. at 594. Following the American Revolution, the states ratified the Constitution, and the Bill of Rights, including the Second Amendment's proscription against "infring[ing]" "the right of the people to keep and bear Arms[.]" U.S.CONST. AMEND. II. Given this history, "by the time of the founding," the right to bear arms was "understood to be an individual right protecting against both public and private violence." *Heller*, 554 U.S. at 594. It was thus designed to safeguard not only the people's right to private self-defense, but also to prevent the overbroad disarmament policies of tyrannical governments.

3. ***Heller***. Notwithstanding this history, for over 200 years after the Second Amendment was ratified, courts interpreted the Second Amendment to protect a collective right raise militias. Under this interpretation, the Second Amendment was a civic right, like voting. Accordingly, it was " 'exercised by citizens, not individuals . . ., who act together in a collective manner, for a distinctly public

purpose: participation in a well regulated militia.' " *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting) (quoting Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 491 (2004)). It followed that, since "this right was exercised for the benefit of the community (like voting and jury service), rather than for the benefit of the individual (like free speech or free exercise), it belonged only to virtuous citizens." *Id*. at 462-63.

Heller thoroughly debunked this interpretation of the Second Amendment, holding, based on "both text and history," that "the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. at 595. It rejected a "freestanding 'interest-balancing' " approach advocated by Justice Breyer in dissent, reasoning "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope is too broad." *Id*.at 634. Rather, the Second Amendment "is the very product of an interest balancing by the people[.]" *Id*. at 635. Based on this understanding of the Second Amendment, it held that the District of Columbia's ban on handguns violated the Second Amendment. *Id*.

In reaching this conclusion, this Court used the phrase "law-abiding citizens" on several occasions. It first referred to "law-abiding" citizens in addressing a precedent relied upon by the dissent – *United States v. Miller*, 307 U.S. 174 (1939). The majority "read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Heller*, 554 U.S. at 625. Thus, in characterizing

Miller, *Heller* was talking about "what types of weapons *Miller* permits," not which persons the Second Amendment protects. *Id*. at 624 (emphasis in original.)

It then commented, in concluding section II of its analysis, that "the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens." *Id*. at 625. This was not framed as part of its holding, or as a dispositive part of its analysis, and, indeed, the Court's historical review did not mention "law-abiding." It was geared towards ascertaining whether the right, as originally understood, was connected to militia service. *Id*. at 605-619.

Its final use of the term "law-abiding" was in the following statement: "whatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 635. With the "whatever else" clause, this Court explicitly declined to delineate the outer limits of the Second Amendment. Instead, this sentence suggested that the floor of the Second Amendment's protection was of law-abiding citizens for self-defense in the home. It would later confirm that this statement did not limit the scope of the Second Amendment, by clarifying that the Second Amendment also protected a right to possess firearms outside of the home. *Bruen*, 597 U.S. at 10.

Another oft-quoted passage from *Heller* reads:

> [a]lthough we do not undertake an exhaustive historical analysis of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying

> of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. at 626-27. In a footnote to this sentence, it explained "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id*. at 627 n.26. In response to Justice Breyer's criticism that it had not adequately justified these exceptions, it assured "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id*. at 635.

4. ***Rozier***. In *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010), the Eleventh Circuit resolved a facial challenge to the bar on felons possessing firearms in 18 U.S.C. § 922(g)(1), holding this status-based prohibition does not violate the Second Amendment. It resolved the case based on the preliminary question of "whether [Rozier wa]s qualified to possess a handgun." *Rozier*, 598 F.3d at 770-71. It believed this step was dictated by *Heller*'s reference to the presumed lawfulness of " 'longstanding prohibitions on the possession of firearms by felons . . . .' " *Id*. at 771 (quoting *Heller*, 554 U.S. at 626). In response to the defendant's argument that this passage was dicta, it held "to the extent that this portion of *Heller* limits the Court's opinion to possession of firearms by law-abiding and qualified individuals, it is not dicta." *Id*. at n.6. But if the passage was "superfluous to the central holding of *Heller*," it would "still give it considerable weight." *Id*. It thus concluded that "Rozier, by virtue of his felony conviction, falls within" a class of people whose Second Amendment rights could be constitutionally restricted. *Id*. at 771.

5. ***Bruen***. In *Bruen*, 597 U.S. 1, this Court rejected the balancing test that courts of appeal had used after *Heller*, whereby varying levels of scrutiny would apply depending on " 'how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right.' " *Id.* at 18 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)). Instead, this Court exposited a two-part text-and-history test that it had applied in *Heller*. Accordingly, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. *Id.* at 17. To constitutionalize a law restricting such conduct, the government then "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

Bruen made three points clear about what the government must show: first, the history relevant to a challenged federal law is the regulations that existed around the time the Second Amendment was ratified in 1791, *id.* at 34-35; (2) several outlier regulations do not establish the requisite historical "tradition," *id.* at 65-66; and (3) the historical tradition of regulations must be "relevantly similar" to the modern law in terms of whether they "impose a comparable burden on the right of armed self-defense and whether the burden is comparably justified[.]" *Id.* at 29-30.

Bruen repeated the phrase "ordinary, law-abiding citizen" throughout the decision, but these qualifiers did not purport to make law about persons who are not "ordinary" or "law-abiding." For the most part, this language characterized this Court's previous holdings, described the parties before the Court, or limited the scope of its holding. *See id.* at 8 (*Heller* and *McDonald*, 561 U.S. 742 "recognized that the

Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense."); *id.* ("petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense."); *id.* at 15 ("petitioners . . . are law-abiding, adult citizens . . . ."); *id.* at 31-32 ("It is undisputed that Koch and Nash – two ordinary, law-abiding, adult citizens – are part of 'the people' whom the Second Amendment protects."); *id.* at 71 ("New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.")

On four occasions, the phrase found its way into the Court's historical analysis. *See id.* at 29 ("two relevant metrics" in determining historical basis for modern regulation are "how and why the regulations burden a law-abiding citizens' right to armed self-defense.") *id.* at 38 ("Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense."); *id.* at 60 ("None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose."); *id.* at 70 ("Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to 'demonstrate a special need for self-protection distinguishable from that of the general community' in order to carry arms in public.") (citation omitted.) Even still, *Bruen* did not purport to preemptively adjudicate the rights of persons not before it. Rather, this phrase

helped to focus its inquiry onto the historical laws most analogous to the New York law there at issue. At most, *Bruen* implied, without deciding, that the rights of those who are not "law-abiding, responsible citizens" would require a different historical analysis.

6. ***Dubois***. In *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), the Eleventh Circuit upheld § 922(g)(1) based on *Rozier*, 598 F.3d 768, and the Circuit's prior panel precedent rule. It specifically rejected the claim that *Bruen* had abrogated *Rozier*, reasoning "*Bruen* could not have clearly abrogated our precedent upholding section 922(g)(1)" because "*Bruen* repeatedly stated that its decision was faithful to *Heller*[,]" *Heller* "made it clear . . . that [its] holding did not cast doubt' on felon-in-possession prohibitions,' " and "*Bruen*, like *Heller*, repeatedly described the right as extending only to 'law-abiding, responsible citizens.' " *Dubois*, 94 F.4th at 1293 (quoting *McDonald*, 561 U.S.at 786). It advised "[w]e require clearer instruction from the Supreme Court before we may reconsider the constitutionality of section 922(g)(1)." *Id.*

7. ***Rahimi***. This Court provided clearer instruction in *United States v. Rahimi*, 602 U.S. 680, 701-02 (2024), putting to bed the supposed binding status of its prior references to "responsible, law-abiding citizens." *Rahimi* was about 18 U.S.C. 922(g)(8)'s disarmament of persons subject to restraining orders issued based on an individualized finding that the restrainee represents a credible threat of violence to their intimate partner or child. The court found the restriction was constitutional as applied to him, based on the historical tradition – in the form of

surety laws and so-called "going armed" laws – of temporarily disarming persons based on an individualized judicial finding that they present a credible threat of violence. *Id*. at 695-98. It did not elaborate on the Second Amendment rights of those subject to this restriction, other than to reject "the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.' " *Id.* at 701. It explained "[i]n *Heller* and *Bruen*, we used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not 'responsible.' The question was simply not presented." *Id*. at 701-02.

Although *Rahimi* did not specifically address the "law-abiding" qualifier, *Heller* and *Bruen* used "law-abiding" in the exact same way they used "responsible" – "to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right." *Id*. "Law-abiding" was contextually indistinguishable from and grammatically parallel to "responsible." The latter term being dicta, it follows that the former term was dicta as well. "The question" as to the rights of the non-law-abiding "was simply not presented." *Id*.

8. **Post-*Rahimi* Eleventh Circuit law**. Just as it held *Bruen* had not abrogated its precedent in *Dubois*, the Eleventh Circuit has consistently held that *Rahimi* did not abrogate its precedent either, including in the decision below. *United*

States v. Lowe, No. 22-13251, 2024 WL 3649527 (11th Cir. Aug. 5, 2024).[1] It therefore continues to reject all Second Amendment challenges to § 922(g)(1) based on its prior conclusion that felons are disqualified from having Second Amendment rights. *Rozier*, 598 F.3d at 770-71.

B. Procedural History

Deonta Lowe pleaded guilty to one count of knowingly possessing a firearm after being convicted of a felony in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Dist. Ct. dkt. 96 (plea sheet), 103 (plea agmt.). As part of the plea agreement, he waived the right to appeal his sentence, with certain exceptions, but he did not waive his right to challenge the constitutionality of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He did not argue in District Court that these sections violated the Second Amendment. The District Court imposed a 120-month prison term. Dist. Ct. dkt. 115.

On appeal, Mr. Lowe argued that 18 U.S.C. §§ 922(g)(1) and 924(a)(2) violated the Second Amendment. COA dkt. 18. He contended that text of the Second Amendment covered his conduct. Specifically, the plain meaning of "the people" did

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[1] *See also United States v. Pierre*, No. 23-11604, 2024 WL 5055533, *3 (11th Cir. Dec. 10, 2024); *United States v. Gray*, No. 23-10247, 2024 WL 4647991, *2 (11th Cir. Nov. 1, 2024); *United States v. Hayes*, No. 23-10926, 2024 WL 4948971, *1 (11th Cir. Dec. 3, 2024); *United States v. Rambo*, No. 23-13772, 2024 WL 3534730, *2 (11th Cir. July 25, 2024); *United States v. Dukes*, No. 23-14025, 2024 WL 4563933, *2 (11th Cir. Oct. 24, 2024); *United States v. Morrissette*, No. 24-10353, 2024 WL 4709935, *2 (11th Cir. Nov. 7, 2024); *United States v. Dial*, No. 24-10732, 2024 WL 5103431, *3 (11th Cir. Dec. 13, 2024); *United States v. Whitaker*, No. 24-10693, 2024 WL 3812277, *2(11th Cir. Aug. 14, 2024); *United States v. Bass*, No. 23-11551, 2024 WL 3861611, *3 (11th Cir. Aug. 19, 2024); *United States v. McCoy*, No. 22-13451, 2024 WL 4867161, *4 (11th Cir. Nov. 22, 2024).

not exclude felons, "to keep and bear" arms included carrying firearms inside and outside the home, and "arms" included handguns.

He then argued that the categorical ban on felons possessing firearms was inconsistent with the relevant historical tradition of firearms regulations. Because §§ 922(g)(1) and 924(a)(2) addressed a problem that has persisted since the Founding era – the potential dangerousness of felons, the law must be "distinctly similar" to a Founding-era historical tradition. But no such tradition exists. Sections 922(g)(1) and 924(a)(2), and its precursor, came too late to inform the Founding-era tradition, and no other laws were distinctly similar to felon disarmament laws.

He argued this Court's statement in *Heller*, 554 U.S. at 626, that "longstanding prohibitions" like the felon disarmament law were presumptively lawful, was dicta, and that its announcement of the two-pronged text-and-history test in *Bruen*, 597 U.S. at 24, had abrogated Circuit precedent, which had not considered the constitutional text or regulatory history in finding § 922(g)(1) constitutional. He finally argued that his guilty plea had not waived his challenge, based on *Class v. United States*, 583 U.S. 174, 182 (2018).

In its answer brief, see COA dkt. 23, the government agreed that neither his plea agreement nor his guilty plea waived his Second Amendment claim. It argued that Mr. Lowe had forfeited his claim, however, and he could not show plain error because no binding precedent had ever invalidated 18 U.S.C. § 922(g)(1) under the Second Amendment. On the merits, it recounted Congress's policy rationale for disarming felons, before arguing that the Second Amendment's individual right to a

firearm only extended to "law-abiding" persons, stemming from this Court's dicta, and the Eleventh Circuit's holding in *Rozier*, 598 F.3d 768. It contended that *Bruen* had not abrogated *Rozier*, because *Rozier* had not applied the means-end scrutiny, common in other Circuits, that *Bruen* had specifically rejected. It argued that both in England and in the Founding era of the United States, authorities enjoyed the power to disarm various categories of people, including Catholics, Native Americans, people who refused to take a loyalty oath or did not support the American Revolution, and supporters of an outspoken preacher. It concluded that § 922(g)(1) was relevantly similar to these laws both in terms of "how" the laws burdened the firearm right – by disarming certain categories of people, and "why" they did so, because these categories were not thought to be responsible, law-abiding persons.

In reply, see COA dkt. 27, the Petitioner argued that the Court should review his claim *de novo*, since it was a jurisdictional claim implicating the power of the federal government to proscribe his conduct. He pointed to Circuit law holding that such claims are not subject to plain or harmless error analysis. He elaborated on his argument that *Bruen* had abrogated *Rozier*, noted that the government's policy arguments were immaterial to the constitutional issue, and detailed how each of the court's references to law-abiding citizens in *Heller* and *Bruen* were immaterial to its holdings, and thus dicta. He contended that the government's construction of "the people" to exclude felons was inconsistent with this Court's construction of the phrase in *Heller*, and it inappropriately relied on historical sources rather than the plain meaning of the text. Finally, he contended the government's historical sources were

only similar to felon disarmament laws at a level of abstraction so broad that, if accepted by the courts, there would be no limit to what categories of persons the authorities could not disarm. Moreover, some of the English disarmament policies the government relied upon were precisely what prompted the English precursor to the Second Amendment.

C. The Decisions Below

The Eleventh Circuit affirmed. App'x 1 (*United States v. Lowe*, No. 22-13251, 2024 WL 3649527 (11th Cir. Aug. 5, 2024)). It recited the plain error standard, but relied on the prior panel precedent rule in its decision. It recounted the development of the law, beginning with *Heller*. It explained how *Bruen* had "scrapped the old two-step test courts of appeal had been applying[]" and established instead a text-and-history test. *Id*. at *4. But it concluded *Bruen* had not abrogated its holding in *Rozier*, 598 F.3d 768, that 18 U.S.C. § 922(g)(1) did not violate the Second Amendment, since *Rozier* had not relied upon the means-end scrutiny step that *Heller* had overwritten. It next pointed to *Dubois*, 94 F.4th at 1293, wherein the Eleventh Circuit had specifically rejected the contention that *Bruen* had abrogated *Rozier*, because "*Bruen*'s rebuke of the old two-step test was not 'both 'clearly on point' and 'clearly contrary to' ' " *Rozier*. *Lowe*, 2024 WL 3649527, at *5. Finally, it held that *Rahimi*, 602 U.S. 680, had not "squarely abrogate[d its] precedent in *Rozier* or *Dubois*[]" either, given that it "upheld a limitation on possession of firearms[.]" *Lowe*, 2024 WL 3649527, at *5-6.

Mr. Lowe moved *en banc* rehearing, raising two point headings. COA dkt. 34. He first argued that *Rahimi* had abrogated both *Dubois* and *Rozier* by making clear that the "responsible" (and, therefore, the "law-abiding") qualifiers used in *Heller* and *Bruen* was dicta, while *Rozier* rested squarely on the Eleventh Circuit's conclusion that this language was a binding part of the *Heller* holding. And he argued that 18 U.S.C.§ 922(g)(1) violated the Second Amendment on its face. His motion was denied. App'x 2 (COA dkt. 36).

REASONS FOR GRANTING THE WRIT

I. The Circuits are split over whether convicted felons have Second Amendment rights.

The new Second Amendment methodology employed in *Heller*, clarified in *Bruen*, and further refined in *Rahimi*, still leaves many questions open. One of the most pressing questions is who exactly has an individual right to a firearm under the Second Amendment? This Court provided guidance in *Heller*, 554 U.S. at 579-81. It discussed the meaning of "the people" in determining whether this phrase signified an individual or collective right, ultimately concluding with "a strong presumption that the Second Amendment right is exercised individually and belongs to *all Americans*." *Id*. (italics added.) Yet *Heller* also referred on several occasions to the Second Amendment right as belonging to "law-abiding citizens." *Id*. at 625, 635. And it asserted that "longstanding prohibitions on the possession of firearms by felons and the mentally ill," among other laws, were "presumptively lawful regulatory measures[.]" *Id*. at 626 & n.6. This Court referred again to the Second Amendment

right of "law-abiding citizens" in *McDonald*, 561 U.S. at 790, and *Bruen*, 597 U.S. at 9, 15, 26, 29, 30, 31, 38, 60, 70, 71, and it repeated its assurances about "longstanding prohibitions" in *McDonald*, 561 U.S. at 786.

The Circuits are confused about how this language fits into *Bruen*'s two step test. Some believe the "longstanding" qualifier suggests it is part of the historical inquiry. One court believes it informs how to interpret the plain meaning of "the people." Several, including the Eleventh Circuit, see this language as triggering a preliminary inquiry, apparently divorced from text and history – what one commentator dubbed "*Bruen* step zero." Jeff Campbell, *There Is No Bruen Step Zero: The Law-Abiding Citizen And the Second Amendment*, 26 U.D.C. L. Rev. 71 (2023). From this melee, a well-developed Circuit split has emerged over whether "felons," that is, people convicted of an offense punishable by over a year of imprisonment, have forfeited their individual right to a firearm.

A. The Third, Fifth, Sixth, and Ninth Circuits hold that the plain meaning of the constitutional phrase "the people" includes convicted felons.

In *Range v. U.S. Attorney General*, 124 F.4th 218, 226 (3d Cir. 2024), the Third Circuit reconsidered whether Range – a convicted felon challenging the constitutionality of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) – was "one of 'the people' who have Second Amendment rights." It concluded that *Heller*'s references to the Second Amendment rights of "law-abiding citizens," 554 U.S. at 625, was dicta, which did not negate *Heller*'s conclusion that the "Second Amendment right . . . presumptively 'belongs to all Americans.' " *Range*, 124 F.4th at 226 (quoting *Heller*, 554 U.S. at 580,

581). After all, noted the Third Circuit, "the criminal histories of the plaintiffs in *Heller*, *McDonald*, and *Bruen* were not at issue in those cases." *Id.*

It gave four additional reasons for construing "the people" to include felons. First, "[f]elons are not categorically barred from" exercising other rights that the Constitution attaches to "the people" – such as the First and Fourth Amendment rights. *Id.* Second, like the adjective "responsible" that this Court found too vague in *Rahimi*, 144 S.Ct. at 1903, the phrase "law-abiding" was "too vague a concept to dictate the Second Amendment's applicability[.]" *Range*, 124 F.4th at 227. Third, to hold that felons were not among "the people" would "devolve[] authority to legislators to decide whom to exclude" from the scope of the Second Amendment. *Id.* at 228. And finally, construing "the people" to include felons would not necessarily prevent all felon disarmament, since legislatures could still " 'strip certain groups' " of their Second Amendment rights under step two of the *Bruen* test, if supported by an adequate historical precedent. *Id.* at 226-27 (quoting *Kanter*, 919 F.3d at 452).

The Fifth Circuit likewise held that the phrase "the people" encompasses felons. *United States v. Diaz*, 116 F.4th 458, 466 (5th Cir. 2024). It recited two approaches to defining the scope of "the people." "[O]ne approach 'uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature's power to take it away.' " *Id.* (quoting *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting)). It concluded that *Rahimi* implicitly endorsed the latter approach, in that this Court had "assum[ed] that Rahimi was

protected by the Second Amendment even though he committed 'family violence[.]' " *Id.* (quoting *Rahimi*, 144 S.Ct. at 1898).

The Sixth Circuit applied similar reasoning in *United States v. Williams*, 113 F.4th 637, 649 (6th Cir. 2024). It quoted *Heller*'s conclusion that " 'the people' 'unambiguously refers to all members of the political community, not an unspecified subset.' " *Id.* (quoting *Heller*, 554 U.S. at 580). And, like the Third Circuit, it noted that "the people" in other sections of the Bill of Rights did not exclude felons. *Id.* As to this Court's prior references to "law-abiding citizens," neither *Heller* nor *Bruen* "used [this phrase] to define the scope of the right to keep and bear arms." *Id.* at 646 (quoting *Heller*, 554 U.S. at 580-81). It rejected the theory that the Second Amendment right only extended to the virtuous, since "the founding generation applied this virtuous-citizen approach to civic rights only[,]" meaning rights that "were exercised collectively, for the benefit of the community." *Id.* at 647. *Heller* had unequivocally held that "the right to bear arms doesn't stem from the collective need for a militia[,]" but was "an individual right unconnected to any other civic activity." *Id.*

The Ninth Circuit construed "the people" to include felons in a different context. It had to answer the question in order to determine whether a felon had a Second Amendment right that could be infringed by the bar on making false statements in procuring a firearm, under 18 U.S.C. § 922(a)(6). *United States v. Manney*, 114 F.4th 1048, 1050 (9th Cir. 2024). It held, without analysis, that the

defendant was "a member of 'the people' the Second Amendment protects." *Id.* at 1052.

B. The Fourth Circuit holds that "the people" excludes non-law-abiding citizens.

The Fourth Circuit is the only Circuit to squarely hold that "the people" excludes convicted felons. In applying *Bruen* step one, it used history to construe the text of the Second Amendment, since the Amendment codified a pre-existing right. *United States v. Hunt*, 123 F.4th 697, 705 (4th Cir. 2024). It then noted *Heller*'s references to "law-abiding citizens" and its assurances as to the "presumptive[] lawful[ness]" of "longstanding" prohibitions on felons possessing firearm. *Id.* Seizing on the "longstanding" qualifier, it concluded "these limitations arise from the historical tradition." *Id.* It quoted " '[f]or most of our history . . . the Federal Government did not significantly regulate the possession of firearms by *law-abiding citizens*.' " *Id.* (quoting *Heller*, 554 U.S. at 625) (ellipsis and italics added in *Hunt*).

C. The Seventh and Eleventh Circuits hold that the Second Amendment permits disarming non-law-abiding citizens, without reference to the constitutional text or regulatory history.

The Seventh Circuit addressed an as-applied challenge to § 922(g)(1) in *United States v. Gay*, 98 F.4th 843 (7th Cir. 2024). While it "assume[d] for the sake of argument that there is some room from as-applied challenges," it held this assumption did not help (at least some) non-law-abiding persons. *Id.* at 846-47. The defendant in *Gay* had 22 felony convictions, including at least two violent felonies. *Id.* at 847. The Seventh Circuit thus concluded Gay was "not a 'law-abiding, responsible'

person who ha[d] a constitutional right to possess firearms." *Id*. It did not explain how or why his loss of his firearm right followed from his non-law-abiding status, except to reference this Court's use of these qualifiers to describe the Petitioners in *Heller*. *Id*. at 846.

The Eleventh Circuit also relies on this Court's references to the "law-abiding" in holding felons can be constitutionally disarmed. *Rozier*, 598 F.3d 768. In affirming the constitutionality of § 922(g)(1), it asked the preliminary question "whether one is *qualified* to possess a firearm." *Id*. at 770 (italics in original.) It believed that *Heller*'s statement regarding "longstanding prohibitions" "suggest[ed] that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id*. at 771. And it specifically rejected the contention that *Heller*'s references to "law-abiding citizens" was dicta. *Id*. at 771 n.6.

It did not consider the historical roots of felon disarmament statutes. Nor did it claim that the text of the Second Amendment excludes felons. Rather, it extracted from *Heller* an additional, binding and dispositive preliminary question, divorced from the constitutional text or regulatory history.

Notwithstanding the intervening decisions of this Court, it continues to adhere to *Rozier*. Hence, it affirmed the 18 U.S.C. § 922(g)(1) conviction of the Petitioner, and has affirmed the convictions of all other defendants raising a Second Amendment challenge to § 922(g)(1), without ever engaging the *Bruen* text-and-history analysis. *But see United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (stating

in dicta that "dangerous felons" are "indisputably a part of 'the people' " under the Second Amendment).

D. Several Circuits have suggested in dicta that "the people" includes felons.

The Eighth Circuit resolved a Second Amendment challenge to § 922(g)(1) based squarely on *Bruen*'s second step – the historical analysis, framing the test as: "[w]hen the Second Amendment's text covers an individual's conduct, the government must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *United States v. Jackson*, 110 F.4th 1120, 1126 (8th Cir. 2024). It proceeded directly to the debate over whether the history supported disarming all non-law-abiding persons, or only particularly dangerous non-law-abiding persons. *Id*. It concluded that, even if the history supported only the latter limitation, this was enough to permit a legislature's categorical disarmament of felons. *Id*. at 1126-28. By proceeding in this manner, the Eighth Circuit either assumed, or implicitly held, that the Second Amendment's text did not exclude convicted felons.

The Eighth Circuit considered the textual question in greater depth in resolving a challenge to a law barring the possession of firearms by persons under 21 years old, as applied to 18- to 20-year-olds. *Worth v. Jacobson*, 108 F.4th 677, 688-92 (8th Cir. 2024). It rejected the contention that this category of persons was not among "the people," even though at common law, persons did not obtain rights until 21 years old. *Id*. at 689. Persons aged 18 to 20 were nonetheless members of the "political

community" as *Heller* had defined it, and the state could not rebut the "strong presumption" that the Second Amendment belonged to "all Americans." *Id.* at 689-91. It then squarely endorsed the proposition, albeit in dicta, that "the people" includes felons, stating:

> [n]either felons nor the mentally ill are categorically excluded from our national community. That does not mean that the government cannot prevent them from possessing guns. Instead, it means that the question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all.

Id. at 692.

Similarly, the Tenth Circuit suggested that felons are among "the people" in another case involving a challenge to a ban on firearm possession by those under 21, as applied to 18- to 20-year-olds. *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 115-16 (10th Cir. 2024). It "reject[ed] the notion that [the Second Amendment] is limited to only the class of persons with full legal rights, including the right to vote, at the time of the Founding or otherwise." *Id.* at 115. Confronting the state's contention that to qualify as one of "the people" a person must possess "full legal rights, including the right to vote," it explained "one example of how that cannot be" was the case of "American citizens with felony convictions." *Id.* at 116. "These individuals are both 'person[s]' and 'citizens,' and thus, must also be included in 'the people.' " *Id.* Yet they have been "consistently disenfranchised." *Id.*

E. The question remains open in the First, Second, and District of Columbia Circuits.

The First Circuit has had the least to say about the issue. It rejected a Second Amendment challenge to 18 U.S.C. § 922(g)(1) under the second prong of the plain error standard. *United States v. Langston*, 110 F.4th 408 (1st Cir. 2024). It reasoned that Langston could not show an error that was plain, because there was no binding precedent holding that § 922(g)(1) violated the Second Amendment, and because *Rahimi* did not otherwise "compel" such a holding. *Id.* at 419.

The Second Circuit explicitly left open the meaning of "the people," in a case concerning "four components of New York's firearm licensing regime." *Antonyuk v. James*, 120 F.4th 941, 974 (2d Cir. 2024). It discussed at length this Court's Second Amendment decisions, repeatedly referencing its statements concerning "law-abiding citizens" and "longstanding prohibitions." *Id.* at 961-968. Like the Fourth Circuit, it understood "history and tradition [to] give content to the indeterminate and underdetermined text of the Second Amendment: 'the right of the people to keep and bear arms.' " It then phrased one of the questions relevant to the character criterion of New York's licensing scheme as "whether the affected individuals are 'ordinary, law-abiding adult citizens' and *thus* 'part of 'the people' whom the Second Amendment protects.' " *Id.* at 981 (quoting *Bruen*, 597 U.S. at 31-32) (italics added.) This suggests that it would use the "law-abiding" qualifier to narrow the scope of "the people." But it ultimately declined to decide this "tricky question with wide-ranging implications," opting to resolve the facial challenge in that case on other grounds. *Id.* at 982.

The District of Columbia Circuit has not opined on the textual question of whether "the people" encompasses felons. But it held, before *Bruen* clarified that the textual and historical inquiries were distinct analytical steps, that "tradition and history" showed that felons were not "within the scope of those entitled to possess arms." *Medina v. Whitaker*, 913 F.3d 152, 157-59 (D.C. Cir. 2019). It reasoned that Founding-era felonies were all punishable by death or estate forfeiture, finding it "difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms." *Id*. at 158.

F. The plurality of the Circuits are correct that felons retain their individual firearm rights.

For a number of reasons, including those articulated by the Third, Fifth, and Sixth Circuits, this Court should conclude that the Second Amendment right belongs even to convicted felons, and that any restriction on their rights depends on the Founding-era tradition of firearms regulations.

First, the normal meaning of "the people" at the time of the Founding encompassed even the non-law-abiding. *Heller*, 554 U.S. at 576-77, made clear that courts should construe the Second Amendment's text based on its "normal and ordinary" meaning "to ordinary citizens of the founding generation." While this might "include an idiomatic meaning," it "excludes secrete or technical meanings[.]" *Id*. at 577. Nothing about "the people" even hints at an idiomatic meaning. Rather, founding-era dictionaries defined "people" to encompass the entire political

community. *See* Thomas Dyche & William Pardon, A NEW GENERAL ENGLISH DICTIONARY (14th ed. 1771) ("signifies every person, or the whole collection of inhabitants in a nation or kingdom."); Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("the body of persons who compose a community, town, city or nation.")

Second, *Heller* broadly construed "the people" consistently with this plain meaning. After reviewing every constitutional reference to "the people," it concluded the phrase "unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. at 580. It therefore held there was "a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id*. at 581.

Third, "the political community" is not coextensive with those persons having the right to vote or serve on a jury. Such collective, civic rights are "exercised for the benefit of the community," unlike individual rights, such as free speech or free exercise. *Kanter*, 919 F.3d at 462-64 (Barrett, J. dissenting). And *Heller* unequivocally rejected the contention that the Second Amendment was merely a civic right, holding instead that it "conferred an individual right to keep and bear arms." 554 U.S. at 594.

Fourth, as the Third Circuit recognized, limiting "the people" to non-felons would "devolve[] authority to legislators to decide whom to exclude" from the scope of the Second Amendment. *Range*, 124 F.4th at 228. *Heller* concluded that such a delegation was untenable, reasoning the Second Amendment could not protect *only* "citizens' right to use a gun in an organization from which Congress has plenary

authority to exclude them." 554 U.S. at 600. Reading the Second Amendment in this way would be particularly perverse, given that categorical disarmament laws were precisely what triggered the English precursor to the Second Amendment – the "pre-existing right" that the Second Amendment enshrined in America. *Id*. at 592-94.

Fifth, and relatedly, permitting legislatures to narrow the scope of the Second Amendment by the expedient of their criminal sentencing laws would effectively foreclose as-applied challenges to any restrictions based on felony status. After all, if the Second Amendment excludes everyone who has incurred the label "felon," then no such persons would have standing to challenge their disarmament, even as applied.

Yet *Rahimi* strongly implied that as-applied challenges under the Second Amendment are available. At issue was a facial challenge to § 922(g)(8), but the Court repeatedly couched its holding and analysis in language leaving open as applied challenges on different facts. 602 U.S. at 690 ("As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition."); *id*. at 693 (explaining that to defeat a facial challenge, "the Government need only demonstrate that Section 922(g)(8) is constitutional in some of its applications[]" and concluding "here the provision is constitutional as applied to the facts of Rahimi's own case."); *id*. at 699 ("like surety bonds of limited duration, Section 922(g)(8)'s restriction was temporary as applied to Rahimi."); *id*. at 701 ("in holding that Section 922(g)(8) is constitutional as applied to Rahimi, we reject the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.' "); *cf.* at 713 (Gorsuch, J., concurring)

("Our resolution of Mr. Rahimi's facial challenge to § 922(g)(8) necessarily leaves open the question whether the statute might be unconstitutional as applied in 'particular circumstances.' "). And *Rahimi* emphasized the narrowness of its holding, stating "we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id*. at 702.

Sixth, *Rahimi* specifically rejected "responsible" as a binding part of its prior precedents *and* as a workable limitation on the scope of the Second Amendment right. *Id*. at 701-02. It reasoned "[r]esponsible is a vague term[,]" and its prior references to "responsible" citizens in *Heller* and *Bruen* was dicta that said "nothing about the status of citizens who were not 'responsible.' " *Id*. at 702. The same goes for "law-abiding." This Court's precedent says nothing about the Second Amendment rights of the non-law-abiding, and "law-abiding" is a vague term. After all, "one doesn't need an adjudication of guilt (or liability, or anything else) to have broken the law." Campbell, *There is No Bruen Step Zero*, 26 U. D.C. L. Rev. at 80. Does law-abiding only implicate those who break a criminal law? "Laws with civil penalties are laws just the same." *Id*. What about laws with no penalties, like the health insurance mandate of the Affordable Care Act? *Cf. California v. Texas*, 593 U.S. 659 (2021) ($0 penalty for not obtaining health insurance).

Finally, a broad construction of "the people" does not prevent all regulation implicating the plain text of the Second Amendment. Rather, permissible restrictions turn on the "history and tradition" concerning "the scope of the legislature's power"

to limit the Second Amendment right. *Kanter*, 919 F.3d at 452. This is *Bruen*'s second step, by which a government must show that its law is "consistent with this Nation's historical tradition of firearm regulation." 597 U.S. at 43. Hence, the government can still argue § 922(g)(1) is constitutional by showing a Founding-era tradition of firearm regulations that is "distinctly similar" to § 922(g)(1)'s permanent disarmament of felons, in terms of "how and why the regulations burden" the firearm right. *Id.* at 26-29.

II. This case presents an adequate vehicle to resolve this Circuit split.

This case is an adequate vehicle by which this Court can resolve this important, recurring question. The plain error standard does not prevent this Court from doing so. First, although the Eleventh Circuit cited to the plain error standard, it did not apply the plain error prongs. Rather, its analysis was indistinguishable from those cases in which it reviewed the Second Amendment claim *de novo*. *See, e.g., Whitaker*, 2024 WL 3812277; *Rambo*, 2024 WL 3534730. Regardless of whether the issue was raised below, it has resolved all Second Amendment challenges to § 922(g)(1) based on its prior precedent, which it has concluded this Court had not abrogated.

Second, a ruling favorable to Mr. Lowe would make the erroneous conclusion that he is disqualified from having Second Amendment rights plain in his case. *Cf. Henderson v. United States*, 568 U.S. 266 (2013). And by abrogating the precedent that the decision below was grounded upon, it would require the Eleventh Circuit to

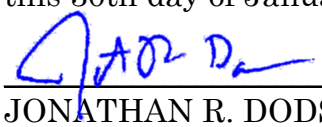
apply the *Bruen* test *de novo*, since the Eleventh Circuit does not permit parties to forfeit " 'the application of the correct law or [to] stipulate to an incorrect legal test[]' " by the expedient of plain error review. *United States v. Dawson*, 64 F.4th 1227, 1239 (11th Cir. 2023) (citation omitted.)

Even if an ultimate remand by this Court left the Eleventh Circuit will more work to do in determining whether there are history and traditions that are relevantly similar to § 922(g)(1), the parties below have already thoroughly briefed that question. And this Court's clarification of the rights of non-law-abiding citizens would still resolve an important question that impacts the rights of millions of felons and that has bedeviled courts attempting to resolve repeated waves of Second Amendment cases.

CONCLUSION

Based upon the foregoing, the petition should be granted. Mr. Lowe asks this Court to grant certiorari and review the decision of the United States Court of Appeals for the Eleventh Circuit, or, in the alternative, to grant this petition, and summarily reverse its decision for further consideration in light of *Rahimi*.

Respectfully submitted this 30th day of January, 2025,



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