NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

WILLIE MCCOY

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. 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)?

2. Does 18 U.S.C. §§ 922(g)(1) and 924(a)(2) satisfy the Second Amendment in all of its applications?

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. McCoy 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. McCoy*, No. 22-13451, 2024 WL 4867161 (11th Cir. Nov. 22, 2024)

- *United States v. McCoy*, No. 1:21-CR-00042-LAG-TQL (M.D. Ga. Sep. 22, 2022) (judgment convicting McCoy of violating 18 U.S.C. §§ 922(g)(1) and 924(a)(2) and imposing 84-month term of imprisonment)

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Willie McCoy 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 October 7, 2024. *United States v. McCoy*, No. 22-13451, 2024 WL 4867161 (11th Cir. Nov. 22, 2024).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. McCoy*, No. 22-13451, 2024 WL 4867161 (11th Cir. Nov. 22, 2024) (unreported), is Appendix 1.

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 November 22, 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 additional example of this 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 found that Founding-era "going armed" laws and surety bond laws established a tradition of temporarily disarming some persons based on an individualized judicial findings involving specific, serious misconduct with a gun, which was relevantly similar to § 922(g)(8).

These cases have triggered an avalanche of constitutional challenges to the various federal status-based prohibitions on possessing firearms. By far the most common such prohibition is 18 U.S.C. § 922(g)(1)'s disarmament of convicted felons. The analyses and holdings in these cases diverge widely from one another, splintering the Second Amendment into countless Circuit splits, which will likely take numerous decisions of this Court to iron out. Most significantly to § 922(g)(1), *Rahimi* left open two important issues, which this case presents an opportunity to resolve.

The first issue is whether felons have any Second Amendment rights. The Eleventh Circuit has concluded they do not, without ever applying *Bruen*'s text-and-history test to the felon disarmament law established in 18 U.S.C. § 922(g)(1). *See*, *e.g., United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), vacated by 2024 WL 76413 (S.Ct. 2025); *infra* n.1. Although most other Circuits have not similarly

bypassed the *Bruen* test, they are in sharp disagreement about whether and how to map onto the test this Court's statements about "law-abiding citizens" and "longstanding prohibitions" on the possession of firearms by felons, leading to a 4-3 split on the question of whether "felons" have Second Amendment rights. *See Heller*, 554 U.S. at 625, 627-28, 635; *Bruen*, 597 U.S. at 29-31; *McDonald v. Chicago*, 561 U.S. 742, 786 (2010).

The second issue is whether § 922(g)(1) is constitutional in all of its applications, or whether it may violate the Second Amendment as applied to some subset of convicted felons. The Eleventh Circuit implicitly rejects such challenges by holding that convicted felons are disqualified from having Second Amendment rights. Other Circuits have explicitly addressed the question, leading to a 3-3 Circuit split.

Resolving these issues is necessary to determine the rights of millions of convicted felons in this country and would provide essential guidance to lower courts. If felons have Second Amendment rights, or if as applied challenges to felon disarmament laws are available, 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.

STATEMENT OF THE CASE

A. Legal Background

1. **English Firearm Right**. The Second Amendment codifies a "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. 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***. Nonetheless, over the next 200 years, some courts interpreted the Second Amendment to protect a collective right to 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, 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 also rejected a "freestanding 'interest-balancing' " approach advocated by Justice Breyer in dissent, reasoning "[c]onstitutional 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.

On three occasions, *Heller* used the phrase "law-abiding citizens." First it interpreted *United States v. Miller*, 307 U.S. 174 (1939), "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. It was talking about "what types of weapons *Miller* permits," not which persons the Second Amendment protects. *Id.* at 624 (emphasis in original.) Next, in explaining why the nature of the firearm right "ha[d] been for so long unresolved[,]" it reasoned that "[f]or most of our history, . . . 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. Rather, the Court's historical review did not mention "law-abiding." *Id.* at 605-619. Finally, it said "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. This statement explicitly declined to delineate the outer limits of the Second Amendment, suggesting only that the floor of the Second Amendment's protection was of law-abiding citizens for self-defense in the home.

Another 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, this Court 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 rejected 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, on the ground that felons were not "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.

5. ***Bruen***. In *Bruen*, 597 U.S. 1, this Court rejected the balancing test that courts of appeal had used after *Heller*, instead adopting a two-part text-and-history test. Accordingly, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id*. at 17. For a law

restricting such conduct to withstand Second Amendment scrutiny, the government "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id*.

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, e.g., 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.")

On a number of occasions, however, the phrase found its way into the Court's historical analysis. For example, *Bruen* explained that "two relevant metrics" in comparing historical regulations to modern ones is "how and why the regulations burden a law-abiding citizens' right to armed self-defense." *Id*. at 29. 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 law at issue, which restricted the right of law-abiding New Yorkers. 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), *vacated by* 2024 WL 76413 (S.Ct. 2025), 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*[,]" which "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.* This Court later vacated *Dubois* for reconsideration in light of *Rahimi*, 602 U.S. 680. *See Dubois v. United States*, No. 24-5744, _S.Ct._, 2025 WL 76413 (2025).

7. ***Rahimi***. In *Rahimi*, 602 U.S. at 684-86, 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 person represents a credible threat of domestic violence. This Court found the restriction was constitutional as applied to Rahimi, based on surety laws and "going armed" laws, which together established an historical tradition of temporarily disarming persons based on an individualized judicial finding that they present a threat of violence. *Id.* at 695-98. It reject "the Government's contention that Rahimi may be disarmed simply because he is not 'responsible[,]' " but did not elaborate on the Second Amendment rights of the non-law-abiding. *Id.* at 701. And it put to bed the supposedly binding status of its references to "responsible" citizens, explaining it had merely used the term "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.* As with the irresponsible, "the question" concerning 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. McCoy*, No. 22-13436, 2024 WL 4432995 (11th Cir. Oct. 7, 2024).[1] It therefore

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[1] *See also United States v. Johnson*, No. 23-11885, 2024 WL 3371414, *3 (11th Cir. July 11, 2024); *United States v. Young*, No. 23-10464, 2024 WL 3466607, *9 (11th Cir. July 19, 2024); *United States v. Rambo*, No. 23-13772, 2024 WL 3534730, *2 (11th Cir. July 25, 2024);*United States v. Lowe*, No. 22-13251, 2024 WL 3649527, *2-*3 (11th Cir. Aug. 5, 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. Thomas*, No. 23-14014, 2024 WL 3874142, *3 (11th Cir. Aug. 20, 2024); *United States v. Sheely*, No. 22-13500, 2024 WL 4003394, *3 (11th Cir. Aug. 30, 2024); *United States v. Hester*, No. 23-11938, 2024 WL 4100901, *1 (11th Cir. Sept. 6, 2024); *United States v Perez-Quibus*, No. 23-10465, 2024 WL 4524712, *1 (11th Cir. Oct. 18, 2024); *United States v. Dukes*, No. 23-14025, 2024 WL 4563933, *2 (11th Cir. Oct. 24, 2024); *United States v. Barnes*, No. 23-13438, 2024 WL 4589481, *4 (11th Cir. Oct. 28, 2024); *United States v. Gray*, No. 23-10247, 2024 WL 4647991, *2 (11th Cir. Nov. 1, 2024); *United States v. Morrissette*, No. 24-10353, 2024 WL 4709935, *2 (11th Cir. Nov. 7, 2024); *United States v. Reaves*, No. 23-13582, 2024 WL 4707967, *3 (11th Cir. Nov. 7, 2024); *United States v. Volz*, No. 22-13436, 2024 WL 4432995, *2 (11th Cir. Oct. 7, 2024); *United States v. Washington*,

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

Willie McCoy 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. 1 (indictment), 25 (change of plea form). 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 an 84-month prison term. Dist. Ct. dkt. 4.3 at 2.

On appeal, Mr. McCoy argued, *inter alia*, that 18 U.S.C. §§ 922(g)(1) and 924(a)(2) violated the Second Amendment. COA dkt. 12 at 53-66. He contended that text of the Second Amendment covered his conduct, and that the categorical ban on felons possessing firearms was inconsistent with the relevant historical tradition of firearms regulations. *Id*. at 54-60.

No. 22-12759, 2024 WL 4867048, *5 (11th Cir. Nov. 22, 2024); *United States v. Hayes*, No. 23-10926, 2024 WL 4948971, *1 (11th Cir. Dec. 3, 2024); *United States v. Mitchell*, No. 23-10780, 2024 WL 4973106, *2 n.1 (11th Cir. Dec. 4, 2024); *United States v. Pierre*, No. 23-11604, 2024 WL 5055533, *3 (11th Cir. Dec. 10, 2024); *United States v. Dial*, No. 24-10732, 2024 WL 5103431, *3 (11th Cir. Dec. 13, 2024); *United States v. Cole*, Nos 24-10877, 24-10878, 2025 WL 339894, *4 (11th Cir. Jan. 30, 2025).

He also argued that this Court's 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. COA dkt 12 at 60-62. He further argued, *id*. at 64-66, that his guilty plea had not waived his challenge, based on *Class v. United States*, 583 U.S. 174, 182 (2018). Under a separate sub-heading, he argued that even if some applications of §§ 922(g)(1) and 924(a)(2) could withstand Second Amendment scrutiny, the law was unconstitutional as applied to him. COA dkt 12 at 62-63.

In its answer brief, the government agreed that neither his plea agreement nor his guilty plea waived his Second Amendment claim. COA dkt. 17 at 60 n.18. But it Mr. McCoy had not raised his Second Amendment claim below, so the government relied entirely on the supposedly preclusive effect of the plain error test. *Id*. at 60-62. It acknowledged that Bruen had "refined" the Second Amendment analysis, *id*. at 61, but did not engage the test, and made no effort to shoulder its burden of showing that § 922(g)(1) was consistent with a Founding-era tradition of firearm regulations. Nor did it engage McCoy's argument that Bruen had abrogated Circuit precedent, reasoning that even if it had, it still would not make an error in violating McCoy's constitutional rights plain. *Id*. at 61 n.19.

In reply, McCoy contended that plain error did not apply, since, under *Class*, 583 U.S. 174, a Second Amendment violation was an unwaivable jurisdictional claim implicating the power of the federal government to proscribe his conduct, and pointing to Circuit law holding that such claims are not subject to plain or harmless

error analysis. COA dkt. 26 at 28-29. He reasoned "[j]ust as a litigant cannot supply jurisdiction that odes not exist by affirmatively waiving the issue, he cannot supply jurisdiction by failing to timely object." *Id*. at 28. He further argued that this Court's references to "law-abiding citizens" and "longstanding prohibitions" like bans on felons possessing firearms were dicta, unnecessary to its holdings in *Heller* and *Bruen*, so these statements should not bind the court of appeals, which should apply the *Bruen* test *de novo*. *Id*. at 30-32. He then rested on the government's failure to attempt to meet its historical burden. *Id*. at 32.

C. The Decisions Below

The Eleventh Circuit affirmed in *United States v. McCoy,* 22-13451, 2024 WL 4867161, *3-*4 (11th Cir. Nov. 22, 2024). It summarized the holdings of *Heller*, 554 U.S. 570, *Rozier*, 598 F.3d 768, *Bruen*, 597 U.S. 1, *Rahimi*, 602 U.S. 680, and *Dubois*, 94 F.4th 1284. As *Dubois* had held *Bruen* did not abrogate *Rozier*, it was bound by its prior panel precedent rule to reaffirm that holding. *Id*. at *4. It added, without explanation, "[a]dditionally, *Rahimi* did not abrogate *Dubois*, meaning the latter case is still binding as well." *Id*. Applying the plain error standard, it ruled the district court could not have erred in failing to find § 922(g)(1) unconstitutional on its face or as applied to McCoy, absent a binding decision specifically mandating that result. *Id*.

REASONS FOR GRANTING THE WRIT

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

One of the most pressing questions still open after *Rahimi* is who exactly has an individual right to keep and bear arms under the Second Amendment? This Court provided strong 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; *see also Bruen*, 597 U.S. at 9, 15, 26, 29, 30, 31, 38, 60, 70, 71. 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; *see also McDonald*, 561 U.S. at 786, 90.

The Circuits are confused about how this language fits into *Bruen*'s two-step analysis. 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 keep and bear arms.

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 considered whether 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 recounted 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 for 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 "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 question, divorced from the constitutional text or regulatory history.

Notwithstanding the intervening decisions of this Court, the Eleventh Circuit continues to adhere to *Rozier*. Hence, it affirmed the 18 U.S.C. § 922(g)(1) conviction of McCoy, 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. *See supra* n.1. *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 the non-law-abiding. *Heller* 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." 554 U.S. at 576-77. While this might "include an idiomatic meaning," it "excludes secret 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 Second Amendment and its English precursor. *Id*. at 592-94.

Fifth, 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, as outlined under the next point heading.

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 people." Rather, permissible restrictions turn on the "history and tradition" concerning "the scope of the legislature's power" to limit the Second Amendment rights of certain persons. *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. The Circuits are split over whether § 922(g)(1) is consistent with the Second Amendment in all its applications.

Another question that remains open after *Rahimi* is whether the felon disarmament law of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) might be unconstitutional as applied to a subset of felons. On this point, the Third, Fifth, Sixth, and the Seventh Circuit hold such challenges are available in some circumstances. The Fourth, Eighth, Eleventh Circuits have foreclosed as applied Second Amendment challenges.

A. The Third, Fifth, and Sixth Circuits have entertained as-applied challenges to 18 U.S.C. § 922(g)(1) and 924(a)(2).

In *Range v. U.S. Attorney General*, 124 F.4th 218 (3d Cir. 2024), the Third Circuit held that § 922(g)(1) was unconstitutional as applied to a person whose only felony conviction was for fraudulently obtaining food stamps. It held that the 1961 Act codifying § 922(g)(1) itself, as well as its 1938 precursor, came too late to demonstrate a Founding-era practice. *Id.* at 229. It noted that *Rahimi* had approved "disarming (at least temporarily) physically dangerous people[,]" but it rejected the government's attempt "to stretch dangerousness to cover all felons and even misdemeanors that federal law equates with felonies." *Id.* at 230. It rejected the argument that the capital punishment sometimes associated with nonviolent crimes during the Founding era validated § 922(g)(1), concluding this practice did "not suggest that the particular (and distinct) punishment at issue here – de facto lifetime disarmament for all felonies and felony-equivalent misdemeanors – is rooted in our Nation's history and tradition." *Id.* at 231. Nor did Founding- era forfeiture laws

constitutionalize § 922(g)(1), as they did not "affect[] the perpetrator's right to keep and bear arms generally." *Id.* And Range's offense did not involve a firearm that Founding-era laws might have required he forfeit. *Id*; *but see United States v. Moore*, 111 F.4th 266 (3d Cir. 2024), *reh'g en banc denied* Oct. 9, 2024 (No. 23-1843) (holding, without reference to specific criminal history, that § 922(g)(1) did not violate Second Amendment right of felon as long as he remained on supervised release).

In *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), the Fifth Circuit entertained an as-applied challenge to § 922(g)(1). It began its historical analysis: "[Diaz's] only relevant criminal convictions for our purposes are car theft, evading arrest, and possessing a firearm as a felon. To survive Diaz's as-applied challenge, the government must demonstrate that the Nation has a longstanding tradition of disarming someone with a criminal history analogous to this." *Id.* at 467. It then reviewed Founding era laws severely punishing and ordering estate forfeiture for theft. *Id.* at 467-68. It found § 922(g)(1) constitutional as applied to Diaz based on these laws, but "emphasiz[ed] that [its] holding [wa]s not premised on the fact that Diaz is a felon." *Id.* at 469.

In *United States v. Williams*, 113 F.4th 637, 657 (6th Cir. 2024), the Sixth Circuit employed a "fact-specific" dangerousness determination based on Williams's criminal history to determine whether his disarmament, pursuant to § 922(g)(1), was consistent with what it concluded was a Founding-era history of disarming the dangerous. *Id.* at 660, 662-63. His challenge failed because he had been previously convicted of aggravated robbery. *Id.* at 662. It summarized that a person convicted of

"a crime 'against the body of another human being' " or "a crime that inherently poses a significant threat of danger[]" should "have a very difficult time, to say the least, of showing he is not dangerous." *Id.* at 663; *see also United States v. Goins*, 118 F.4th 794, 804-05 (6th Cir. 2024) (§ 922(g)(1) constitutional as applied to person whose criminal history revealed "a dangerous pattern of misuse of alcohol and motor vehicles, often together[.]"); *cf. United States v. Gay*, 98 F.4th 843 (7th Cir. 2024) (assuming without deciding "that there is some room for as-applied challenges," but holding § 922(g)(1) constitutional as applied to a person convicted of 22 felonies including aggravated battery on an officer and possessing a weapon in prison).

B. The Fourth and Eighth Circuits have explicitly held that § 922(g)(1) is not subject to as-applied challenges by convicted felons, while the Eleventh Circuit rejects such challenges based on its prior precedent.

In *Hamilton v. Pallozzi*, 848 F.3d 614, 626-28, 626 n.11 (4th Cir. 2017), the Fourth Circuit held that § 922(g)(1) was constitutional as applied even to non-dangerous felons, while leaving open the possibility of as applied challenges on the part of those convicted of misdemeanors that are punishable by over a year, and persons whose "conviction is pardoned or [when] the law defining the[ir] crime of conviction is found unconstitutional or otherwise unlawful[.]" After this Court's intervening decisions in *Bruen* and *Rahimi*, the Fourth Circuit reaffirmed its rejection of most as-applied challenges in *United States. v. Hunt*, 123 F.4th 697, 703-05 (4th Cir. 2024). It reasoned "the historical record contains ample support for the categorical disarmament of people 'who have demonstrated disrespect for the legal norms of society.' " *Id.* at 706 (quoting *Jackson*, 110 F.4th at 1126). It reached the

same conclusion even if the relevant historical tradition was disarming the dangerous, since these historical restrictions nonetheless "swept broadly, disarming all people belonging to groups that were, in the judgment of those early legislatures, potentially violent or dangerous." *Id*. at 707.

The Eighth Circuit also maintains that § 922(g)(1) is constitutional in all of its applications. In *United States v. Jackson*, 110 F.4th 1120, 1122, 1125 (8th Cir. 2024), it concluded, based on the Supreme Court's statements regarding the presumptive validity of longstanding felon disarmament laws "and the history that supports them" that "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." It cited the categorical disarmament of disfavored categories of people in England and colonial America, as well as the failed amendments to the Second Amendment offered by the Anti-Federalists of Pennsylvania. *Id*. at 1126-27. Like the Fourth Circuit, its holding was the same whether the historical tradition is characterized as the disarmament of lawbreakers, or more specifically as the disarmament of dangerous persons. Either way, the prior categorical disarmament policies validated § 922(g)(1). *Id*. at 1127-28.

And the Eleventh Circuit, as previously discussed, has continued to hold that felons are disqualified from the Second Amendment's protections, by virtue of their being felons. *Rozier*, 598 F.3d at 770-71. By implication, this forecloses any as applied challenge by a convicted felon, since § 922(g)(1) cannot violate a non-existent right. Hence, it affirmed McCoy's conviction here.

C. This Court should hold that § 922(g)(1) is subject to as-applied challenges, depending on the historical traditions analogous to a person's specific criminal history.

In looking beneath the felony label, the Third, Fifth, and Sixth Circuits most faithfully apply the historical analysis outlined by this Court. Accordingly, this Court should hold that disarming all modern "felons" is too broad a measure to find support in the Founding-era historical traditions, for three primary reasons. However, disarming some subset of felons may be relevantly similar to some Founding-era regulatory traditions.

First, it is illogical to conclude the disarmament decrees that prompted the firearm right in England and the United States suggests that the Second Amendment tolerated such restrictions. Rather, the Second Amendment is a bulwark against such restrictions, as this Court has already recognized in concluding that the Second Amendment was "understood to be an individual right protecting against both public and private violence." *Heller*, 554 U.S. at 594.

Second, the various disarmament laws cited by the Fourth and Eighth Circuits apply to many different groups, but not to felons, and the only connection between these laws is that they were motivated by the belief that these groups were untrustworthy. Hence, these laws are only similar to § 922(g)(1) at a very general level. If this is enough to provide constitutional cover to § 922(g)(1), it is difficult to conceive of any limit to who a legislature could not disarm. Particularly in times of social upheaval, one can imagine all kinds of nefarious laws directed at various disfavored groups. But according to the logic of the Fourth and Eighth Circuits, if the

majority of a given legislature decides a disfavored group cannot be trusted, the Second Amendment stands down. This would permit disarming some politically unpopular subsets of "the people" who may need the Second Amendment's protections the most, during the times they might be at most risk from an oppressive government or an unruly mob.

If the Second Amendment was intended as a meaningful check on the power of the government to restrict firearms, this cannot be. While nearly every firearm restriction has some conceivable connection to public safety, failing to require a closer connection between a challenged law and the historical tradition would make the Second Amendment a paper tiger, less protective of the right to a firearm than even the means-end analysis that *Bruen* struck down. The Second Amendment should not permit disarming a group of people based only on the fact that someone, or some legislature, at some point, decided to disarm an entirely different category of people, based on that group's perceived untrustworthiness.

Finally, there are more specific regulatory traditions that may justify disarming dangerous persons for some amount of time, such as those identified in *Rahimi*, 602 U.S. at 694-98, *Diaz*, 168 F.4th at 468-69, and *Williams*, 113 F.4th at 652-57. This Court need not identify every such tradition to resolve the split over whether as applied challenges are available. It is enough to conclude that text of the Second Amendment covers McCoy's possessing firearms, and that the relevant history of firearm regulation does not validate his disarmament based only on the

fact that he is a felon. Because the Eleventh Circuit has not applied the *Bruen* test in his case, it would be appropriate to permit it to do so in the first instance.

III. This case presents an adequate vehicle to resolve both Circuit splits.

This case is an adequate vehicle by which this Court can resolve these important, recurring questions. The plain error standard does not prevent this Court from doing so. First, although the Eleventh Circuit cited to the plain error standard, 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 repeatedly reaffirmed, in the absence of "clearer instruction from the Supreme Court[.]" *Dubois*, 94 F.4th at 1293.

Second, a ruling favorable to Mr. McCoy 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) (holding an error is "plain" for purposes of plain error review when case law makes it plain at the time of appellate review). Moreover, by abrogating the precedent that the decision below was grounded upon, it would require the Eleventh Circuit to apply the *Bruen* test to § 922(g)(1) for the first time, 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

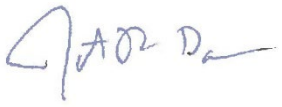
expedient of plain error review. *United States v. Dawson*, 64 F.4th 1227, 1239 (11th Cir. 2023) (citation omitted.)

This Court's resolution of the question may leave the Eleventh Circuit withe more work to do on remand. But this Court's clarification of the rights of non-law-abiding citizens would still resolve important questions that impact 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. McCoy 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 19th day of February, 2025,



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