No._____

IN THE
SUPREME COURT OF THE UNITED STATES

ZACHARY MICHAEL LINAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit err in affirming the district court's application of U.S.S.G. § 2A1.2(a)(1) (Second Degree Murder) rather than § 2A2.2 (Aggravated Assault) or § 2K2.1 (Prohibited Possession of Firearms) in a manner that expands judicial fact-finding at sentencing beyond the jury's verdict, in violation of the Fifth and Sixth Amendments and in conflict with the principle that sentencing enhancements should not be based on unproven allegations?

2. Is U.S.C. § 922(g)(1) unconstitutional in light of *Bruen* and its accompanying decisions?

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The Fifth Circuit Court of Appeals unpublished decision is attached as [App. A]. The Judgment of the District Court is attached as [App. B].

PARTIES TO THE PROCEEDING AND COMPLIANCE WITH RULE 14(B)

The parties concerned are included in the caption of this matter, and there are no corporate parties.

JURISDICTION

The jurisdiction of the Fifth Circuit Court of Appeals was invoked from the denial by the United States District Court for the Western District of Texas, under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The decision of the Court of Appeals was entered on December 24, 2024 [App. A]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the constitutionality of 18 U.S.C. § 922(g)(1), which prohibits felons, both nonviolent and violent, from possessing firearms. The relevant constitutional and statutory provisions are as follows. The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall

not be infringed." *U.S. Const. amend. II. Title 18 U.S.C. § 922(g)(1) provides:* "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. § 922(g)(1) (2024). These provisions are central to this case. Petitioner challenges the constitutionality of § 922(g)(1), as applied to felons, under the Second Amendment and the interpretive framework established by *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. ___ (2022).

This case also challenges whether the Fifth Circuit erred by affirming a sentencing enhancement under U.S.S.G. § 2A1.2(a)(1) based on judicial fact-finding beyond the jury's verdict, in violation of the Fifth and Sixth Amendments and relying on unproven allegations.

STATEMENT OF THE CASE

Zachary Michael Linan appeals his 180-month (the statutory maximum) sentence for possessing a firearm after having been convicted of a felony. (ROA. 24-50141.69-71). Mr. Linan was charged in a one-count indictment, filed on September 7, 2023. Having been convicted of a crime punishable by imprisonment for a term exceeding one year, he did unlawfully and knowingly possess firearms and ammunition in violation of Title 18, United States Code, § 922(g)(1) and 924(a)(8). (ROA. 24-50141.23).

On November 1, 2023, Mr. Linan pleaded guilty to the possession of a firearm by a convicted felon with a written consent to plea before the Magistrate Judge. (ROA. 24-50141.36).

Sentencing was held on February 28, 2024. (ROA. 24-50141.123). Mr. Linan was sentenced to 180 months' confinement in the BOP, with this term to run consecutively to any sentence of named pending state charges. (ROA. 24-50141.69-71).

Written judgment was entered in on March 7, 2024. (ROA 24-50141.69). Mr. Linan timely filed a notice of appeal on February 28, 2024. (ROA 24-50141.54). The Fifth Circuit Court of Appeals decided the case on December 24, 2024. In their ruling, the Fifth Circuit failed to reach the merits of the case and dismissed Mr.

Linan's appeal without weighing the significant constitutional issues demanded by *Bruen*.[1]

Specifically, the Court said, "Because he did not raise these issues in district court, review is only for plain error. E.g., *United States v. Broussard,* 669 F.3d 537, 546 (5th Cir. 2012)." Applying the plain-error standard to these introductory procedural issues was improper both legally and procedurally. More practically, the Fifth Circuit used this improper procedural application to avoid the deeper constitutional issues that *Bruen* demands. The court continued stating, "And, our court has very recently rejected the contention that § 922(g) is facially unconstitutional. *United States v. Diaz*, 116 F.4th 458, 471–72 (5th Cir. 2024)." See *United States v. Linan*, No. 24-50141 (5th Cir. Dec. 24, 2024). [App. A]. What follows is this timely petition for a Writ of Certiorari.

[1] *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 597 U.S. ___ (2022).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit erred in affirming the district court's application of U.S.S.G. § 2A1.2(a)(1) (Second Degree Murder) rather than § 2A2.2 (Aggravated Assault) or § 2K2.1 (Prohibited Possession of Firearms), in a manner that expands judicial fact-finding at sentencing beyond the jury's verdict, in violation of the Fifth and Sixth Amendments, and conflicts with the principle that sentencing enhancements should not be based on unproven allegations.

A. Standard of review

Because of the counsel's objection to the application of the guidelines, the issues raised herein have been preserved (ROA 24-50141.225). This court reviews a district court's legal interpretation and application of the sentencing guidelines de novo and its factual findings for clear error. *United States v. Lowder,* 148 F.3d 548, 552 (5th Cir. 1998).

B. The application of USSG § 2A1.2(a)(1) to the instant offense was inappropriate in this case.

The facts of the case involve a "road rage" incident. Mr. Linan was involved in an argument which resulted in the discharge of a firearm, though no one was seriously hurt. Isabella Cuellar (Mr. Linan's fiancée) reported to law enforcement that she and Mr. Linan were at the United Grocery Store with her 12-year-old daughter. While outside the store, Ms. Manriquez spit on Mr. Linan, and he

responded to this assault by pursuing her and discharging a firearm. (ROA. 24-50141.209).

Defendant agreed to a factual basis that indicated a "shots fired" call had come in at a United Grocery Store on September 10, 2023, in Odessa, Texas. Officers found a video from the United Grocery Store that showed Defendant running after a vehicle and pulling out a handgun. Later, the alleged victim stated the shot had hit her vehicle. No bullet was recovered from inside the alleged victim's vehicle, nor was a ballistics test done. Defendant did not state he had shot into the vehicle. A shell casing was recovered from the parking lot. (ROA 24-50141.199). Law enforcement then went to Defendant's house and executed a search warrant wherein three handguns were found, among other items. (ROA 24-50141.199-200).

The sentencing judge adopted the PSR and used it as the basis to sentence Mr. Linan to a top-of-the-guidelines sentence. The PSR, however, was flawed in its analysis of the law and its application to the facts. Specifically, the PSR application of USSG § 2A1.2(a)(1) (attempted murder) to the instant offense is inappropriate in this case. Under these guidelines, Mr. Linan received a base offense level of 33—far higher than was reasonable—because of this improper application. Consequently, the sentencing judge sought to maximize Mr. Lian's sentence, even saying that he would sentence him to more time if he could.

C. The PSR's use of the Assault with Intent to Commit Murder section was improper.

In particular, the PSR invoked the Assault with Intent to Commit Murder section, triggering a higher base offense level and resulting in a guideline range of 108-135 months' imprisonment for the Defendant. The section on murder should not apply to Mr. Linan's case because neither the facts nor the law supports it.

First, USSG § 2A1.2(a)(1) must include first-degree murder. It states, "[t]his section applies to the offenses of assault with intent to commit murder and attempted murder. An attempted manslaughter, or assault with intent to commit manslaughter, is covered under § 2A2.2 (Aggravated Assault). First-degree murder is defined under 18 U.S.C. § 1111 and requires 'malice aforethought.'"

D. Mr. Linan's actions did not rise to the level of malice aforethought.

This section specifically requires "malice aforethought." However, Mr. Linan's actions did not rise to the level of "malice aforethought." "Malice aforethought" has a long history going back to the common law. The term generally requires premedication for murder—or in this case, for attempted murder—to be present. However, modern interpretations in some jurisdictions allow for so-called implied malice, rather than the more commonly understood use of the term as express malice, which requires premeditation and intent.

E. Mr. Linan's actions do not closely align with attempted murder under the sentencing enhancement.

The guidelines regarding attempted murder stipulate that "[t]here are four elements that must be established to prove attempted murder. . . . They are (1) a person (2) with the specific intent to commit murder (3) does an act amounting to more than mere preparation, which (4) tends, but fails to effect the commission of murder" *Weeks v. Collins* 867 F. Supp 544, 548 (S.D. Tex. 1994), citing *Weeks v. State,* 834 S.W.2d 559, 561 (Tex. App.—Eastland 1992). In Mr. Linan's case, the government must establish the presence of all four elements of attempted murder as set forth in Weeks. See Id. While the first element, identifying the defendant as the person involved, is clearly met, the remaining elements are not supported by the evidence. The second element requires the prosecution to prove that the defendant acted with the specific intent to commit murder. In this case, no direct evidence demonstrates such intent. The defendant was observed running after a vehicle and pulling out a handgun, but these actions alone do not conclusively establish an intent to kill. Moreover, the lack of a recovered bullet from the alleged victim's vehicle and the absence of a ballistics test further undermine any assertion of specific intent to commit murder. Because the hole in the vehicle cannot conclusively be linked to Mr. Linan's actions, whether Mr. Linan discharged a firearm in the aggressors' direction cannot be established.

Mr. Linan insists that he fired the gun away from the perpetrators of the assault, not at the vehicle. And if Mr. Linan's assertion is correct, then he merely discharged a firearm away from the alleged perpetrators of the assault as a warning to stop further assaults. Mr. Linan asserts that he did so after one of the women spit on him. Mr. Linan's family was also with him, namely his fiancée and his fiancée's child. While using a firearm as a means of self-defense following a minor assault and battery like being spit upon is ill-advised, the defendant's actions and his mens rea must be understood in the context of protecting himself, his partner, and a minor child following such circumstances. This imperfect self-defense does not rise to the level of attempted murder but rather more completely explains his actions and more closely aligns with aggravated assault.

The third element necessitates an act amounting to more than mere preparation. The defendant's behavior could be construed as reckless or as an attempt to intimidate rather than an attempt to kill. This degree of force was once again improper and dangerous, but it does not rise to the level of attempted murder.

Finally, the fourth element, which requires an act that tends but fails to affect the commission of murder, is not substantiated. No bullet was recovered from inside of the alleged victim's vehicle. No ballistics test was done. Defendant did not state he had shot into the vehicle. The recovery of the shell casing from the parking lot and the discharge of a firearm are both acknowledged. However, if the shell casing could be recovered by law enforcement with all its expansive resources, why

was the bullet not recovered too? (ROA 24-50141.199). As a result, the alleged victims' statement that a shot hit their vehicle, without additional corroborating evidence such as a bullet or ballistics test, fails to demonstrate that the defendant's actions were likely to result in murder but merely failed.

Therefore, the facts of this case more appropriately align with aggravated assault under § 2A2.2 rather than attempted murder under § 2K2.1. The evidence indicates that the defendant's actions, while serious, do not rise to the level of attempted murder, as there is insufficient proof of specific intent and a direct connection between the defendant's conduct and a failed attempt to kill. Consequently, the charge of aggravated assault more accurately reflects the defendant's alleged conduct in this incident.

F. The court should have applied § 2A2.2 (Aggravated Assault) or § 2K2.1.

1. Applying § 2A2.2. (Aggravated Assault)

Mr. Linan's actions are better described as aggravated assault under the guidelines. His conduct was sudden, occurring within the context of a road-rage incident. Therefore, the more relevant section to apply would be under 18 US § 1112, "voluntary- upon a sudden."

Mr. Linan pled to a factual basis in the case that indicated a "shots fired" call had come in at a United Grocery Store on September 10, 2023, in Odessa, Texas. Video from the store showed Defendant running after a vehicle and pulling out a handgun. (ROA 24-50141.199). While the alleged victim later stated the shot had

hit her vehicle, no bullet was recovered from inside of the alleged victim's vehicle, nor was a ballistics test done. Defendant did not state he had shot into the vehicle. Despite the application of extensive police resources, only a shell casing was recovered from the parking lot. (ROA 24-50141.199-200).

Mr. Linan alleges that he fired away from the perpetrators of the assault and not into the vehicle. He further alleges that he fired away from the perpetrators of the assault as a warning to stop the driver's assault on his child. Mr. Linan alleges that the driver of the vehicle spit on his child. Though the discharging of a firearm even away from the perpetrators is potentially dangerous and may have been an unreasonable means to stop the assault on a child, Mr. Linan's actions are at worst consistent with aggravated assault under the guidelines.

The Odessa Police, who responded to the scene, charged the Defendant with "Aggravated Assault with a Deadly Weapon" (ROA 24-50141.207). At the time of the PSR, this offense was unindicted. The police had the discretion to charge the Defendant differently but determined that aggravated assault accurately described the Defendant's behavior and actions. Additionally, case law demonstrates that in Texas, aggravated assault can be committed with a different mens rea than attempted murder:

Under Texas law, though, an aggravated assault occurs when a person commits an assault, as defined in Tex. Penal Code Ann. § 22.01 (West 2011), and the assault includes the presence of at least one aggravating factor outlined in Tex.

Penal Code Ann. § 22.02. The parties agree that . . . conviction for aggravated assault was based on the following section of the Texas Penal Code that defines assault: (a) A person commits an [assault] if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.[2]

Additionally, the presence of only a single bullet casing at the scene strongly suggests that only one shot was fired (ROA 24-50141.199). This evidence supports an argument for attempted manslaughter or aggravated assault, rather than premeditated attempted murder.

Under § 2A2.2 (Aggravated Assault) of the United States Sentencing Guidelines, the elements that typically qualify an offense for this enhancement are best described as follows. An assault is generally defined as an intentional and unlawful attempt to cause physical injury to another person, or an intentional act that causes another person reasonably to fear imminent physical injury. Because this assault involved the discharge of a firearm, it arguably became aggravated in nature. According to the Commentary for U.S.S.G. § 2A2.2, aggravated assault is

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[2] Tex. Penal Code Ann. § 22.01. Also see, *United States v. Torres,* 923 F.3d 420, 423 (5th Cir. 2019).

defined as "a felonious assault involving any of the following: (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony."

According to Mr. Linan, he discharged a firearm in the context of self-defense following an assault, with the primary intent of protecting himself, a minor child, and his fiancée. His actions do not align with the criteria set forth in the definition of aggravated assault: (A) Mr. Linan's use of the firearm was not with the intent to cause bodily injury but rather as an "imperfect self-defense mechanism" to protect those in immediate danger. (B) There is no evidence to suggest that Mr. Linan caused serious bodily injury as a result of discharging the firearm. (C) There is no indication that Mr. Linan engaged in strangling, suffocating, or attempting to strangle or suffocate anyone. (D) Mr. Linan did not have the intent to commit another felony; his sole intention was to defend himself and his loved ones from an immediate threat.

Therefore, Mr. Linan's actions, while not condoned, arguably do not even meet the criteria for aggravated assault as defined under U.S.S.G. § 2A2.2. Instead, his conduct is better understood as an instance of imperfect self-defense, which certainly does not rise to the level of attempted murder.

According to U.S.S.G. § 1B1.1's Commentary (1)(B), bodily injury is defined as "any significant injury, e.g., an injury that is painful and obvious or is of the type

for which medical attention ordinarily would be sought." In Mr. Linan's case, while a firearm was discharged, there is no evidence to indicate that his actions resulted in a significant injury meeting this definition. The intent behind discharging the firearm was not to inflict bodily injury but to protect himself, the minor child, and his partner following an assault. There is no record of any injury caused by Mr. Linan's actions that was painful, obvious, or required medical attention. Given these circumstances, Mr. Linan's conduct does not align with the definition of bodily injury as specified under U.S.S.G. § 1B1.1's Commentary, further demonstrating that his actions do not constitute aggravated assault. Instead, they should be viewed as an instance of imperfect self-defense, falling short of attempted murder. In conclusion, the actions of Mr. Linan, while not endorsed as the best means of self-defense, were taken in a moment of fear and immediate danger. They do not meet the threshold for aggravated assault as defined by U.S.S.G. § 2A2.2 and § 1B1.1. Therefore, a lesser charge should be considered in light of the circumstances surrounding his need to defend himself and his loved ones.

The facts do not stipulate in which direction Mr. Linan fired the firearm. Mr. Linan contends that he fired the firearm away from the perpetrators as a means to stop further assaults upon him and to prevent possible attacks upon his fiancée and her minor child. The guidelines for aggravated assault refer to the discharge of a firearm. However, merely discharging a firearm within our society does not meet the definition of assault.

In the alternative, in the case of Mr. Linan, discharging a firearm at two women in a car constitutes an intentional act that placed the victims in reasonable fear of imminent physical injury, meeting the elements of aggravated assault. The use of a firearm, a deadly weapon, further justifies the application of this enhancement rather than the attempted murder enhancement.

Consequently, if the § 2A2.2 (aggravated assault) sentencing guidelines were applied, they would result in a base offense level of 14. Additionally, Subsection (2) of the same provision increases the offense level by 5 levels if a "firearm was discharged," resulting in an offense level of 19. This corresponds to a sentencing range of 33-41 months under the guidelines.

2. In the alternative the court should have applied § 2K2.1 (Prohibited Possession, or Transportation of Firearms or Ammunition)

Alternatively, according to Guidelines §2K2.1 on Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition, which requires application of the "greatest" base offense level, Mr. Linan requests an alternative offense calculation as follows. According to subsection (6) of the Guidelines, if the defendant was a prohibited person at the time of committing the offense, the base offense level should thus be set at 14.

Next, pursuant to § (b)(1)(A), an additional two levels would be warranted "if the offense involved three or more firearms." In this case, during the search of the Defendant's home, three common firearms were discovered: two Taurus handguns

and a Glock 27 .40 caliber gun. Thus, two levels would be warranted because of the presence of these three common firearms.

Lastly, under § (b)(6)(B), an additional four levels would be warranted. This provision specifies that if the offender "used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels." As a result, the computation starts with a base offense level of 14, to which 2 levels are added under (b)(1)(A) for the involvement of three firearms. An additional 4 levels are then warranted under (b)(6)(B), which pertains to using or possessing firearms in connection with another felony offense. This results in a total offense level of 20.

Mr. Linan thus contends that the base offense level of 14, plus 2 levels, and an additional 4 levels, results in an offense level of 20. With a criminal history category of II, sentencing guidelines provide a range of 37-46 months before acceptance of responsibility. Given that an offense level of 20 is higher than 19, Defendant contends that the latter calculation is more suitable for this case.

II. U.S.C. § 922(g)(1) is unconstitutional considering *Bruen* and its accompanying decisions.

A. Other circuit courts are overturning felon-in-possession bans.

In addition, other circuits have shown a willingness to rule on this issue in a contrary manner, such as in *Range* in the Third Circuit.[3] These differences in rulings have created a circuit split which the U.S. Supreme Court will almost certainly address soon. Just a few days before *Range*, the Eighth Circuit issued a contrary ruling upholding the felon-in-possession ban under *Bruen*.[4]

The revolution created by *Bruen* has firmly created an atmosphere striking down many federal and state laws on firearms issues. The statue under which Mr. Linan has been convicted, 922(G), is one such statute. Therefore, 922(G) is part of a class of laws whose constitutionality is actively being questioned across the federal court system.[5]

A key point in the case involved the background of Zackey Rahimi, who had a history of violent behavior, including assaulting his domestic partner and discharging a firearm in public. This background made him a particularly unsympathetic defendant and possibly a poor test case for challenging firearm

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[3] *Range v. Att'y Gen.,* 69 F.4th 96 (3d Cir. 2023). Holding that petitioner, who had one felony conviction for making a false statement to obtain food stamps, remained among "'the people' protected by the Second Amendment."

[4] See *United States v. Jackson,* No. 22-2870 (8th Cir. Aug. 30, 2023).

[5] See New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

prohibitions under the Second Amendment. His actions clearly demonstrated the immediate threat to public safety that § 922(g)(8) is designed to mitigate.

A good-faith argument that this ruling does not apply to the felon-in-possession ban under 18 U.S.C. § 922(g)(1) rests on several distinctions. Firstly, the context and nature of the prohibitions differ significantly. While § 922(g)(8) addresses the immediate threat posed by individuals under domestic-violence restraining orders, § 922(g)(1) applies broadly to all felons, regardless of the nature of their offenses or their current threat level. This broader application does not directly align with the specific historical practices discussed in *Rahimi*.

Moreover, the decision in *Rahimi* was narrowly tailored to address the specific issue of domestic violence, without broadly redefining Second Amendment rights or existing firearm prohibitions. The Court's analysis and the legal arguments presented were focused on the unique circumstances of domestic violence, leaving the constitutionality of other firearm regulations, such as the felon-in-possession ban, for potential future consideration. This suggests that the ruling should not be interpreted as a blanket invalidation of all firearm restrictions under the Second Amendment.

Moreover, the decision in *Rahimi* saw a variety of concurring opinions from the justices, reflecting differing views on the interpretation of the Second Amendment and the application of historical traditions to modern regulations. This divergence in the concurring opinions indicates that the majority view was not

entirely unified, making it less clear how broadly this ruling should be applied to other firearm prohibitions, such as the felon-in-possession ban under 18 U.S.C. § 922(g)(1). The various concurrences suggest that while the Court upheld the specific statute in question, there may not be a clear consensus on how to approach similar issues in the future.

Therefore, we thought it prudent to advise the court of these pending matters that may become relevant during the pendency of Mr. Linan's appeal. Perhaps this will also help provide context for the court when assessing the justice of Mr. Linan's overall sentence. This is especially true given that Mr. Linan received a top-of-the-guidelines sentence.

B. Emerging precedent from the U.S. Supreme Court and the Federal Courts makes it increasingly likely that the felon-in-possession ban will be ultimately ruled unconstitutional by the U.S. Supreme Court.

Aside from *Rahimi*, the U.S. Supreme Court has increasingly struck down or limited the application of federal firearms laws. Most prominently, the U.S. Supreme Court just overruled the federal ban on bump stocks.[6]

The *Garland* bump-stock ruling underscores the likelihood that the Court will issue a definitive ruling on the felon-in-possession issue soon. The court has clearly shown an increasing willingness to address Second Amendment issues

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[6] *Garland v. Cargill,* No. 22-976 (June 14, 2024). The court ruled in a 6-3 decision that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) exceeded its authority by classifying bump stocks as "machineguns" as defined by the National Firearms Act of 1934 (NFA).

directly in recent years. This prospect is heightened by the circuit split discussed earlier, notably between the Third and Eighth Circuits, regarding the constitutionality of the felon-in-possession ban. Additionally, numerous lower-court decisions have diverged on this issue. As this case unfolds, we trust that the Court will carefully consider the latest precedents from federal courts as this issue evolves while this case is pending. We trust as always; the court will consider providing further guidance on this issue as it deems justice requires.

C. Applying the *Bruen* test as interpreted by *Rahimi* to the felon-in-possession ban likely requires overturning the ban.

The test under *Bruen* is still text, history, and tradition. However, *Rahimi* gave some additional commentary on how the Supreme Court wishes this statute to be applied when challenging a federal firearms law. Specifically, the Supreme Court's ruling in *Rahimi* upheld the constitutionality of 18 U.S.C. § 922(g)(8), which prohibits individuals subject to domestic violence restraining orders from possessing firearms. However, this decision specifically focused on the unique public-safety risks and the historical context associated with domestic violence. The Court emphasized the historical precedent of disarming individuals deemed dangerous, finding that this aligns with the regulatory intent of § 922(g)(8) to protect domestic-

violence victims from further harm. However, just as in *Bruen*, the court emphasized that a historical analogue must be found to uphold such a statute.[7]

Specifically, the court in *Rahimi* said,

> Under our precedent, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin the Nation's regulatory tradition. *Bruen*, 597 U.S., at 26-31. When firearm regulation is challenged under the Second Amendment, the Government must show that the restriction "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S., at 24. A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances." *Id*., at 29, and n. 7. Why and how the regulation burdens the right are central to this inquiry. As *Bruen* explained, a challenged regulation that does not precisely match its historical precursors "still may be analogous enough to pass constitutional muster." *Id*., at 30. Pp. 5-8.7.[8]

Here the court reaffirmed the Bruen Test, although in this case the court did not find that the test was violated. However, the court outlines the framework of how the Bruen test should be applied post-Rahimi. First, it acknowledges the tradition in which Second Amendment rights are protected, reaffirming once again that these rights are fundamental rights:

> We have held that the right to keep and bear arms is among the "fundamental rights necessary to our system of ordered liberty." *McDonald v. Chicago*, 561 U.S. 742, 778 (2010). Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense. *Bruen*, 597 U.S., at 17. The spark that ignited the American Revolution was struck at Lexington and Concord, when the British governor dispatched soldiers to seize the local farmers' arms and powder stores. In the aftermath of the Civil

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[7] *Bruen,* 142 S. Ct. at 2111.

[8] *Rahimi*, 602 U.S. ___ (2024) at *11.

> War, Congress's desire to enable the newly freed slaves to defend themselves against former Confederates helped inspire the passage of the Fourteenth Amendment, which secured the right to bear arms against interference by the States. *McDonald,* 561 U.S., at 771776. As a leading and early proponent of emancipation observed, "Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty." Cong. Globe, 0th Cong., 2d Sess., 1967 (1868) (statement of Rep. Stevens).[9]

Therefore, the Court still considers the right to bear arms to be one of the most sacred of rights, and it recognizes the historical tradition that the Founders understood, namely that disarming Americans was the catalyst of the American revolution. Therefore, the deprivation for life of one's right to bear arms is presumably completely antithetical to the historical tradition understood by the Founders and even by subsequent generations following the Civil War.

As affirmed in the Bruen test and elaborated in *Rahimi*, thorough historical scrutiny is paramount in evaluating the constitutionality of firearm regulations. The Bruen test underscores that regulations must align with historical practices and be tailored to address specific, identifiable threats to public safety. *Rahimi* further emphasizes that while contemporary laws need not mirror historical regulations exactly, they must demonstrate a clear and necessary connection to historical precedents. Mr. Linan contends that a more exhaustive historical analysis is indispensable to assess fully whether the felon-in-possession ban meets the rigorous standards set forth by the Bruen test and affirmed in *Rahimi*.

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[9] *Rahimi*, 602 U.S. ___ (2024) at *9-10.

Moreover, Mr. Linan argues that a total ban on firearm possession by all felons, such as the one imposed by the modern felon-in-possession ban, did not exist at the time of the founding and would have been considered antithetical to the beliefs of the Founders regarding individual rights and liberties. The Founders intended to restrict firearm access only for those who pose immediate threats to public safety, such as those engaged in violent acts or insurrections, rather than imposing a broad, indiscriminate ban on all individuals with prior felony convictions. This discrepancy highlights the divergence between historical practices and the sweeping scope of the contemporary felon-in-possession ban, reinforcing Mr. Linan's argument that such a regulation exceeds permissible limits under the Second Amendment as outlined in the Bruen test and *Rahimi*.

III. The Government fails to establish the existence of a founding-era historical analogue as required by *Bruen*.

Bruen explicitly uses the text, history, and tradition test as its metric to determine if a firearms law is constitutional. Consequently, the bulk of our brief will use that test and discuss why historically analogous laws did not exist during the founding period. Also, throughout American history, the laws disarming persons often relied on racist and prejudiced undertones that on their face and by their application would be unconstitutional today. A recent article from *the Harvard Law Review* summarizes this point best: "Many, perhaps most, gun laws enacted between 1789 and 1940 were influenced at least in part by racism. The concealed

carry law at issue in *NYSRPA [Bruen]* traces back to *the Sullivan Law*, which was at least partially influenced by anti-immigrant sentiment."[10]

That said, historically the roots of the federal felon-in-possession ban can be found only in the twentieth century. The federal felon-in-possession ban was passed as part of the Federal Firearms Act of 1938.[11] At that time, 922(g)(1) prohibited only violent felons, which the First Circuit addressed in 2011.

As Greenlee states,

> The federal felon ban codified in § 922(g)(1) (1938) itself was originally intended to keep firearms out of the hands of violent persons.[12] As the First Circuit explained in 2011, the current federal felony firearm ban differs considerably from the version of the proscription in force just half a century ago. Enacted in its earliest incarnation as the Federal Firearms Act of 1938, the law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses. . . . The law was expanded to encompass all individuals convicted of a felony . . . several decades later, in 1961.[13]

It was not until the Gun Control Act of 1968 was passed in the panic of the assassination of President Kennedy, Senator Kennedy, and Dr. Martin Luther King that Congress further overstepped their constitutional authority and included

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[10] Adam Winkler, Racist Gun Laws and the Second Amendment, 135 Harv. L. Rev. F. 537, See generally Amici Curiae Brief of Italo-American Jurists and Attorneys in Support of Petitioners, NYSRPA, No. 20-843 (July 15, 2021)

[11] 52 Stat. 1250, the Federal Firearms Act of 1938.

[12] Greenlee, Joseph, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms from Possessing Arms,* Wyoming Law Review Vol. 20 Num. 9, Art. 7, 2020, Citing See *Federal Firearms Act,* Ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938).

[13] *Id., United States v. Booker,* 644 F.3d 12, 24 (1st Cir. 2011) (citing Federal Firearms Act, Ch. 850, §§ 1(6), 2(f), 52 Stat. 1250,52 Stat. at 1250–51 (1938); An Act to Strengthen the Federal Firearms Act, Pub.L. No. 87–342, § 2, 75 Stat. 757, 757 (1961) (some citations omitted)).

nonviolent felons. Even worse, it also made possession of a firearm or ammunition a crime for anyone who had been convicted of a crime punishable by imprisonment for more than one year. The key word here is *punishable*, meaning that a party convicted does not actually have to be sentenced to over a year of incarceration. Furthermore, this prohibition includes all handguns, shotguns, and even small-caliber firearms like .22 rifles, all of which are in common use.[14]

Furthermore, for federal crimes, only a pardon from the president can restore one's right to possess firearms. In 1992, Congress prohibited the government from spending money to review a felon's application to restore gun rights. The pre-*Bruen* Supreme Court in 2002 upheld this on procedural grounds in *Bean* stating that "no action" does not equal a denial. Specifically, Justice Thomas writing for the majority said, "mere inaction by ATF does not invest a district court with independent jurisdiction to act on an application" Therefore this ruling essentially established that a citizen had no right to force the government to review their application if Congress did not want to fund it. See *United States v. Bean, 537* U.S. at 76, (2002). However, in a post-*Bruen* world, while the procedural issue on rights restoration has previously been settled by this Court in *Bean*, the issue of whether U.S.C. § 922(g)(1) comports with the *Bruen* test has not.

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[14] 18 U.S.C. Ch. 44 § 921.

For state crimes, restoring one's firearms rights may be possible in extremely narrow circumstances and only on a state-by-state basis. But to restore one's right to possess a firearm at the federal level for a state crime, a party must have his conviction set aside or expunged, for which the person has been pardoned or has had their civil rights restored.

In reality, this process is extremely difficult for a state-level crime and very few individuals are allowed to utilize it. For a federal crime, the president of the United States must pardon, but presidential pardons are extremely rare events. To suppress a fundamental right like the right bear arms behind them is unconstitutional on its face.

The same is true of servicemen convicted under the Uniform Code of Military Justice of crimes equivalent to federal felonies. Those too are considered federal crimes, subjecting these servicemen to the revocation of their Second Amendment rights. These armed-service members do not have a mechanism, short of a presidential pardon, to restore their gun rights. Tragically, those who pledged their lives for our republic have no mechanism by which to restore their rights.

IV. The founding era's restoration of rights

It is even more tragic because the Founding Era did provide for a restoration of rights in a much more liberal and free manner both at the state and the federal level. While the Founding Era punished many serious crimes with the death

penalty, they were progressive enough to establish mechanism for free men to restore their firearms rights.

Many crimes during this period were punished by death. Therefore, the issue of rights restoration was a moot point: "Persons who may have been prohibited from keeping arms in the founding era were often punished by death."[15]

However, there were crimes that did not carry the death penalty. For these crimes, "[m]any who committed firearms offenses were not disarmed at all, but instead had to pay a surety to ensure good behavior."[16]

For example,

> Connecticut's 1775 law disarmed "inimical" persons only "until such time as he could prove his friendliness to the liberal cause."[17] Massachusetts's 1776 law disarming disaffected persons provided that "persons who may have been heretofore disarmed by any of the committees of correspondence, inspection or safety" may "receive their arms again . . . by the order of such committee or the general court."[18] Many disarmament acts provided exemptions for prohibited persons who swore loyalty to the king.[19] And when Anne Hutchinson's supporters were being disarmed in the Bay Colony, some who sought forgiveness from the Colony were welcomed back into the community

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[15] Greenlee at 268 Citing, *Baze v. Rees,* 553 U.S. 35, 94 (2008) (noting "the ubiquity of the death penalty in the founding era" and that it was "the standard penalty for all serious crimes") (Thomas, J., concurring)

(Quoting Stuart B Anner, the Death Penalty: An American History 23 (2002)).

[16] Greenlee at 268, For example, in 1759, New Hampshire persons "who shall go armed offensively" were not released "until he or she find such surities of the peace and good behavior." *Acts and Laws of His Majesty's Province of New-Hampshire in New England* 2 (1759). For an example of how this process worked, see *Welling's Case,* 47 Va. 670, 670 (Va. Gen. Ct. 1849)

[17] Greenlee at 268 Citing, Gilbert, supra note 92, at 282.

[18] Mass. Gen. Laws 484 (1776).

[19] Greenlee at 268 Citing, See, e.g., 52 *Archives of Maryland,* supra note 87, at 451–52; 7 Hening, supra note 87, at 36; *the Acts of the General Assembly of the Commonwealth of Pennsylvania,* supra note 103, at 193.

> and could once again possess arms. So, once the perceived danger abated, the arms disability was often lifted. [20]

After the Revolution but just prior to the ratification of the Bill of Rights, Shays's Rebellion served as testbed for the American experiment's success. However, it also served a test on the restoration of the liberty of those involved in it. The young republic wisely exercised grace when responding to those involved, as did the Founding Fathers when restoring the firearms rights of those involved:

> Armed bands attacked courthouses, the federal arsenal in Springfield, and other government properties, ultimately resulting in a military confrontation with a Massachusetts militia on February 2, 1787. As the rebellion ceased later that year, Massachusetts established "the disqualifications to which persons shall be subjected, who have been, or may be guilty of treason, or giving aid or support to the present rebellion, and to whom a pardon may be extended."[21] Among these disqualifications were the temporary forfeiture of many civil rights, including a three-year prohibition on bearing arms.[22]

Thus, those involved in an armed insurrection against the United States at the time of the founding were prohibited from possessing arms for only three years. Today, there are men who are prohibited for life without option other than a presidential pardon, and very few of them committed crimes half as serious as treason.

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[20] Greenlee at 268 citing, See *Johnson*, supra note 84, at 175.

[21] 1 Private and Special Statutes of the Commonwealth of Massachusetts from *1780–1805,* 145 (1805).

[22] Greenlee at 268-269 Citing, *id.* at 146– 47.

Greenlee, an established legal historian, confirms the stark contrast between today and the American Revolutionary period, namely that the revocation and restoration of firearms rights was far more protected than it is today:

> The contrast between Shays's rebels and present-day felons can be stark. For example, in West Virginia, someone who shoplifts three times in seven years, "regardless of the value of the merchandise," is forever prohibited from possessing a firearm.[23] In Utah, someone who twice operates a recording device in a movie theater is forever prohibited from possessing a firearm.[24] And in Florida, a man committed a felony when he released a dozen heart-shaped balloons in a romantic gesture and thus earned a lifetime firearm prohibition.[25] It is inconsistent with history for many nonviolent present-day felons—someone who shoplifts three packs of bubble gum in West Virginia—to receive a lifetime firearm prohibition, when prohibited persons in the founding era—including armed insurrectionists—regained their rights once they no longer posed a violent threat.[26]

One must conclude then that the text, history, and tradition under the *Bruen* test is in direct contrast to today's firearms revoking legislation and the oppressive and often near impossible restoration process. As a result, U.S.C. § 922(g)(1) and laws like it are not in keeping with the text, history, and tradition of the law as it existed at the founding of our nation. Thus, it must be set aside by this Court.

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[23] Greenlee at 269 Citing, See W. VA. Code § 61-3A-3(c) (2020).

[24] Greenlee at 269 Citing, See Utah Code Ann. § 13-10b-201(2)(b) (West 2020).

[25] Greenlee at 269 Citing, Erika Pesantes, *Love Hurts: Man Arrested for Releasing Helium Balloon with His Girlfriend,* Sun Sentinel (Feb. 22, 2013), www.sun-sentinel.com/news/fl-xpm-2013-02-22-fl-helium-balloon-environmental-crime-20130222-story.html [https://perma.cc/2P9W-JTLU]. The felony examples were provided in *United States v. Torres,* 789 F. App'x 655, 658 n.2 (9th Cir. 2020) (Lee, J., concurring).

[26] Greenlee at 269, Citing See *W. VA. Code Ann.* § 61-3A-3(c).

V. Post-Civil War Jim Crow-era laws sought to disarm classes of persons based on race.

In the aftermath of the Civil War, the Fourteenth Amendment was understood to guarantee all citizens regardless of race equal protection and treatment under the law. As a result, restrictions based on race were slowly removed from the law. That said, the laws were rewritten by the former confederates and former slave masters specifically to target blacks and to deny them the right to bear arms. The African American Gun Association describes it well below:

> The Fourteenth Amendment did away with actually naming African Americans in laws prohibiting the right to bear arms. Instead, in the Jim Crow era facially-neutral laws imposed prohibitive fees and restrictions on the poor and were selectively enforced in ways to deny the right of black citizens to possess and carry arms.[27]

In their summary of the Jim Crow Era, they set the stage by giving the following account:

> In 1892, Ida B. Wells wrote that a "Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give." Ida B. Wells, Southern Horrors: Lynch Law in All its Phases 16 (1892). She had in mind recent events in Jacksonville, Florida, and Paducah, Kentucky, where well-armed blacks had thwarted lynch mobs.[28]

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[27] *Bruen,* 597 U.S., Amicus Brief of African American Gun Association Inc. at 27 2022.

[28] *Bruen,* 597 U.S., Amicus Brief of African American Gun Association Inc. at 27 2002, citing Margaret Vandiver, *Lethal Punishment: Lynchings & Legal Executions in the South* 179 (New Brunswick, N.J.: Rutgers University Press, 2006); George C. Wright, *Racial Violence in Kentucky 1865-1940: Lynchings, Mob Rule & "Legal Lynchings"* 169-170 (Baton Rouge: LSU Press, 1990).

The courts of the early twentieth century recognized the racist roots of this statute too:

> This law "was passed when there was a great influx of negro laborers in this State," and it was "for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population . . . ." *Watson v. Stone,* 148 Fla. 516, 524, 4 So. 2d 700 (1941).[29]

To disarm felons as a class with the threat of extended incarceration is potentially to disarm all Americans. Ignorance of the law is no excuse. In essence, anyone can be charged and convicted of a felony because the law is without end. Nothing is more dangerous to the ordered liberty found within our republic than to allow 922(g)(1) as it is written to stand.

CONCLUSION

This case presents an opportunity for this Court to resolve a circuit split on 18 U.S.C. § 922(g)(1) in light of *Bruen*, ensuring that nonviolent felons are not categorically disarmed without historical justification. Additionally, the Court should address improper judicial fact-finding at sentencing**,** as the district court erroneously applied U.S.S.G. § 2A1.2(a)(1) (Second Degree Murder) instead of § 2A2.2 (Aggravated Assault) or § 2K2.1 (Prohibited Possession of Firearms)**,** resulting in an excessive sentence. FOR THESE REASONS, Petitioner Zachary Michael Linan requests of this Court that his Petition for Writ of Certiorari be GRANTED.

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[29] *Bruen,* 597 U.S., Amicus Brief of African American Gun Association Inc. at 28 2022.

Respectfully submitted,

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