IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

SALVATORE PELULLO,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

TROY ARCHIE, ESQ.
(Attorney ID 015611996)
Afonso & Archie, P.C
21 Route 130 South
Cinnaminson, New Jersey 08077
Tel.: (856)786-7000
Fax: (856) 385-8181
archie@aanjlaw.com
Attorneys for Mr. Pelullo

QUESTION(S) PRESENTED

1. Whether Congress has the power to dispossess citizens of their Second Amendment right to keep and bear arms based on a citizen's non-violent felony conviction.

2. Whether an "open-ended continuance" violates a defendant's Sixth Amendment constitutional and statutory speedy trial rights.

3. Whether, in light of this Court's decision in *Bruen* and the Third Circuit's decision to grant *en banc* rehearing in *Range v. Attorney General United States*, this Court should exercise its GVR power and remand this matter to the Third Circuit.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Salvatore Pelullo, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The Third Circuit's initial opinion was published at *United States v. Nicodemo Scarfo, Salvatore Pelullo, William Maxwell and John Maxwell*, Nos. 15-2811, 15-2826, 15-2844, 15-2925, 19-1398, 868 F.3d 907 (3rd Cir. July 15, 2022)(Pet. App. 1-169a). The Third Circuit then denied the petition for rehearing on September 22, 2022 (Pet. App.170).

JURISDICTION

The Third Circuit issued its precedential opinion on July 15, 2022. (See Pet. App. 1-169.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment II provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

18 U.S.C. §§922(d)(1) and (g)(1) provide: "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person, including as a juvenile—(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" and "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."

In relevant part, the United States Constitution, Amendment VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"

18 U.S.C. §3161(a) states "[i]n any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial."

28 U.S.C. § 2106 states, "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF THE CASE

On October 26, 2011, the government filed a 24 count indictment against Salvatore Pelullo ("Pelullo" or "Petitioner") and thirteen co-defendants. Relevant to this Petition is Count 24, which alleged a conspiracy to violate 18 U.S.C. §§922(d)(1) and/or (g)(1). (See Indictment, ¶¶ 123-24.) 18 U.S.C. §§922(d)(1) and (g)(1) provide: "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person, including as a juvenile—(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" and "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." Count 24 alleged that Pelullo engaged in a conspiracy "to provide firearms and ammunition to [himself]," which was illegal because Pelullo had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. §922(d)(1) and 18 U.S.C.

§922(g)(1). (*Id.* para. 123(a)-(b).) The predicate crimes underpinning these alleged violations were that Petitioner had been previously convicted of bank fraud, wire fraud, and securities fraud – all non-violent offenses. *See* Case No. 99-cr-121-2 (E.D. Pa.) and Case No. 02-cr-346 (E.D. Pa.)).[1]

On November 1, 2011, Petitioner was arrested and had his initial appearance in the Southern District of Florida. After an approximately 30-day detention, Petitioner appeared before the District Court in Camden, New Jersey, on December 2, 2011, and pled not guilty. After accepting his plea, the District Court failed to enter a trial date and, instead, entered a "complex case order" ("CCO") at the government's urging and with the Petitioner's consent. The CCO reflected that the "ends of justice" would be met by entry of a "continuance" and that trial would commence "on a date to be determined." Moreover, without having had even one day of case oversight, the District Court determined that the "ends of justice" would forever be met until it opted to set a trial date. Thus, from the time of Petitioner's initial appearance, no trial date was set and no specified period of time for a "continuance" was established. Under the District Court's rubric, all time within Petitioner's case was excludable.

Over the course of the next 16 months, despite several status conferences, the District Court never revisited the question of the CCO's "continuance" and never again considered whether the "ends of justice" required extending that "continuance." On March 17,

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[1] As a result of pleading guilty to these two underling cases, Petitioner received a sentence of six months incarceration on the 1999 case and six months house arrest on the 2002 case.

2013, Petitioner moved the District Court for dismissal of the indictment for violation of his speedy trial rights. He contended that the single reference to the "ends of justice" entered by the District Court in the CCO did not justify the excessive delay before a trial date was set. Petitioner calculated that at least 97 days should have been non-excludable time. On April 23, 2013, 508 days after arraignment, the District Court denied the motion and, instead, for the first time, set a trial date in the case.

Opening statements in Petitioner's trial began on January 6, 2014, and closing arguments took place between June 4 and June 16, 2014. Throughout the course of the trial, the government repeatedly paraded the firearms connected with Count 24 before the jury despite the fact that other counts had no connection with possession and/or receipt of firearms. (Petitioner later determined that the firearms had also been introduced at the grand jury proceedings prior to indictment in support of Counts 1 and 24.) On July 3, 2014, the jury convicted Petitioner on all counts, including Count 24.

Pelullo petitions this Court on two grounds pursuant to U.S. Sup. Ct. R. 10(a) & (c) and one alternative ground pursuant to U.S. Sup. Ct. R. 10(c) and 28 U.S.C. § 2106. First, that 18 U.S.C. §922 is unconstitutional as applied to him in light of the holding of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) because Mr. Pelullo's underlying convictions were non-violent and a prohibition on non-violent felons possessing firearms is inconsistent with this Nation's historical tradition of firearm regulation. A Circuit split exists as to the constitutionality of 18 U.S.C. §922 in light of *Bruen*. *See Range v. AG U.S.*, No. 21-2835, 2022 U.S. App. LEXIS 31614, at *30 (3d Cir. Nov. 16, 2022) (en banc rehearing pending) (holding that 922(g)(1)

is constitutional in light of *Bruen*); *U.S. States v. Rahimi*, No. 21-11001, 2023 WL 1459240, at *3 (5th Cir. Feb. 2, 2023) (holding that 922(g)(8) is unconstitutional in light of *Bruen*).

Second, that the open-ended continuance entered into by the District Court violated the Speedy Trial Act and the Sixth Amendment. Both of these issues involve important questions of federal law that have not been determined by this Court and federal questions that conflict with the rationale set forth in relevant decisions of this Court. U.S. Sup. Ct. R. 10(c).

Finally, in the alternative, Pelullo requests that this Court exercise its discretion pursuant to 28 U.S.C. § 2106 and vacate the July 15, 2022 decision as to only Count 24 and remand this matter to the Third Circuit pending the resolution of the en banc decision in *Range*. This appeal arises out of the Third Circuit, and if the en banc *Range* court holds that 922(g) as applied to non-violent offenders is unconstitutional, Pelullo can avail himself to that relief on direct appeal without having this Court intervene on the merits. As set forth in greater detail below, this Court has exercised its § 2106 power in other cases where, as here, a change in law occurred while the appeal was pending.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DETERMINE WHETHER FELON DISPOSSESSION UNDER 18 U.S.C. §§922(D)(1) AND (G)(1) IS UNCONSTITUTIONAL WHEN APPLIED TO NON-VIOLENT FELONY CONVICTIONS.

When this Court handed down the *Bruen* decision on June 23, 2022, it inherently called into question the constitutionality of Pelullo's conviction for conspiracy to violate 18 U.S.C. §922(d)(1) and 18 U.S.C. §922(g)(1). Specifically, *Bruen* held that "the government may not simply posit that the [firearms] regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. 2111 at 2126 (citations omitted). Whether banning non-violent offenders from possessing a firearm comports with "this Nation's historical tradition of firearm regulation" is an open constitutional question of great importance that this Court must decide. Because Pelullo's underlying felonies are undisputedly non-violent, this case provides the perfect vehicle to determine this constitutional question.[2]

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[2] The *Bruen* issue was not directly raised in Pelullo's Third Circuit appeal as the *Bruen* decision was rendered only a few weeks prior to the determination of the case. However, whether prohibiting non-violent felons from possessing a firearm comports with the Second Amendment is a pure question of law of great importance that if allowed to remain wrongly determined would result in a miscarriage of justice. Issues such as these can be raised for the first time on appeal. *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136, 147–48 (3d Cir. 2017) (citing *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

As a preliminary matter, the Second Amendment guarantees that "the right of the people to keep and bear arms shall not be infringed." U.S. Const., amend. II. This Court, in *D.C. v. Heller*, determined that such a right applies to the "ordinary, law-abiding citizen to possess a handgun in the home for self-defense." 554 U.S. 570 (2008). Last term, this Court held, "consistent with Heller and McDonald, that the Second ... Amendment[] protect[s] an individual's right to carry a handgun for self-defense outside the home." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2122 (2022). After all, the "Second Amendment is not a 'second class right.'" *U.S. v. Quiroz*, No. 4:22-cr-00104-DC, D.E. 82, p. 25 (W.D.Tex. Sept. 19, 2022) (quoting *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780 (2010)).

In *Bruen*, the Court laid out a new standard when analyzing firearm regulations. This standard has starkly changed the landscape of Second Amendment jurisprudence and rightly called into question prohibitions and restrictions that were previously summarily analyzed as comporting with the Second Amendment. In *Bruen* this Court held, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. 2111 at 2126. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' *Id.* at 2129-30. Since *Bruen*, courts across the country have reached wildly different results when evaluating firearms laws, creating tremendous inconsistency in how the Second Amendment is interpreted in different federal courts across the country.

Relevant to this case, 18 U.S.C. §§922(d)(1) and (g)(1) prohibit possession of firearms by those who have been previously convicted of a felony offense, with no differentiation between violent and non-violent offenses. Some courts, such as the United States Court of Appeals for the Third Circuit, have determined that provisions of 18 U.S.C. § 922 as applied to non-violent offenders are constitutional under the *Bruen* test by asserting a conclusory analysis that the court admits is flawed and/or incomplete. *Range v. Att'y Gen. U.S.*, 53 F.4th 262, 271 (3d Cir. 2022) (rehearing *en banc* pending) (basing its determination on supposed analogous firearms restrictions from the early years of the Nation while acknowledging that "modern-day regulation is not a dead ringer for historical precursors[,]" but nevertheless concluding that the historical record it reviewed "*may* be analogous enough to pass constitutional muster."]) (citations omitted) (emphasis added); *but see U.S. v. Stambaugh*, No. CR-22-00218-PRW-2, 2022 WL 16936043, at *6 (W.D. Okla. Nov. 14, 2022) ("While the United States needed not find a 'historical twin,' surety laws and § 922(n) are simply not 'analogous enough to pass constitutional muster[.]'"). *See also U.S. v. Charles,* No. MO:22-CR-00154-DC, 2022 WL 4913900, at *12 (W.D. Tex. Oct. 3, 2022) (denying defendant's motion to dismiss while acknowledging "many unknowns in our post-*Bruen* world"); *U.S. v. Carleson,* No. 3:22-CR-00032-SLG, 2022 WL 17490753, at *3 (D. Alaska Oct. 28, 2022); *U.S. v. Hunter*, No. 1:22-CR-84-RDP-NAD-1, 2022 WL 17640254, at *1 (N.D. Ala. Dec. 13, 2022); *U.S. v. Kays*, No. CR-22-40-D, 2022 WL 3718519, at *5 (W.D. Okla. Aug. 29, 2022).

Numerous other courts have taken a completely different approach, fervently vacating 922(g) offenses after conducting a *Bruen* analysis. For instance, the Fifth

Circuit Court of appeals reached the exact opposite result as *Range* when it ruled that § 922(g)(8), which prohibits those who have been adjudicated of civil domestic abuse of possessing a firearm, is unconstitutional. *United States v. Rahimi*, No. 21-11001, 2023 WL 1459240 (5th Cir. Feb. 2, 2023). The Court held that although the statute "embodies salutary policy goals meant to protect vulnerable people in our society . . . *Bruen* forecloses any such analysis in favor of a historical analogical inquiry[.] Through that lens, we conclude that [§ 922(g)(8)] . . . is an 'outlier that our ancestors would never have accepted." *Id.* at *10. Similarly, the District Court of Western Oklahoma ruled that § 922(g)(3), which prohibits users of controlled substances from possessing firearms is unconstitutional as applied to adjudicated marijuana users. *U.S. v. Jared Michal Harrison*, 2023 WL 1771138, (W.D. Okla. Feb. 3, 2023). In doing so, the Court rebuked the argument that historical intoxication laws support a permanent ban on firearm possession, "stating","[w]here the seven laws the United States identifies took a scalpel to the right of armed self-defense—narrowly carving out exceptions but leaving most of the right in place—§ 922(g)(3) takes a sledgehammer to the right[.]" *Id.* at 8. Here, as in *Harrison*, a permanent ban on the right to possess a firearm on the basis of a non-violent conviction has taken a sledgehammer to the Second Amendment.

Other District Courts have reached the same result. *See e.g., U.S. v. Stambaugh,* No. CR-22-00218-PRW-2, 2022 WL 16936043, at *6 (W.D. Okla. Nov. 14, 2022) (holding § 922(n) unconstitutional); *U.S. v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516, at *15 (W.D. Tex. Nov. 10, 2022) (holding § 922(g)(8) unconstitutional); *U.S. v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482, at *13 (W.D. Tex. Sept. 19, 2022)

(holding § 922(n) unconstitutional). Some of these courts have done so with great trepidation, vacating the conviction while expressing sincere doubts about its interpretation of *Bruen*. *U.S. v. Holden*, No. 3:22-CR-30 RLM-MGG, 2022 WL 17103509, at *3 (N.D. Ind. Oct. 31, 2022) (holding § 922(n) unconstitutional "with an earnest hope that its author has misunderstood" *Bruen*).

Still other courts have declared that they are unable or unequipped to apply this Court's holding in *Bruen* and have retained or considered retention of a historian to help decide the question of law. *U.S. v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) ("This Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may be, are not trained historians. We lack both the methodological and substantive knowledge that historians possess."); *Baird v. Bonta,* No. 2:19-CV-00617-KJM-AC, 2022 WL 17542432, at *9 (E.D. Cal. Dec. 8, 2022) (issuing show cause order giving parties thirty days to show cause why court should not appoint historical expert).

In the case at bar, because the statutory provisions underpinning Petitioner's conviction ("the Dispossession Statutes") broadly and permanently criminalize the possession of firearms and ammunition for those convicted of non-violent felonies, they do not meet the standard delineated in *Bruen* as applied to the Petitioner. Petitioner's conviction for conspiracy to violate 18 U.S.C. §§922(d)(1) or (g)(1) must be vacated.

Alternatively, even if the Dispossession Statues do pass constitutional muster, the Court should still decide this issue as soon as possible to clarify application of *Bruen* for the lower courts. *See e.g. U.S. v. Holden*, No. 3:22-CR-30 RLM-MGG, 2022 WL 17103509, at *3 (N.D.

Ind. Oct. 31, 2022); *U.S. v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) *supra* (expressing bewilderment at how to apply to the *Bruen* test to § 922 issues).

In either instance, federal courts are rife with conflicting conclusions and methodology when analyzing § 922 in light of this Court's opinion in *Bruen.* Such inconsistent and contradictory decisions have even arisen within the same federal district court mere months apart. *Compare Kays*, 2022 WL 3718519, at *5 (W.D. Okla. Aug. 29, 2022) *with Stambaugh,* 2022 WL 16936043, at *6 (W.D. Okla. Nov. 14, 2022). The resolution of this issue is an important question of federal law that necessitates this Court's intervention. Further, now that the Third Circuit and Fifth Circuit have reached opposite conclusions on the constitutionality of subsections of § 922, a Circuit split has emerged less than eight months after *Bruen*.

An analysis of *Bruen* as applied to Pelullo shows that his case is broad enough for this Court to resolve many – if not all – of the issues that lower courts have faced with their interpretation of § 922.

A. *Bruen's* First Step Clearly Applies to Petitioner.

Bruen's first step only asks a strictly textual question: does the Second Amendment's plain text cover the conduct? Petitioner can easily show that the answer to *Bruen's* first step as applied to him is in the affirmative.

The Second Amendment's text is plain and succinct: "the right of the people to keep and bear arms shall not be infringed." The Dispossession Statutes prohibit the sale or disposal of a firearm to, or possession of a firearm by, a person who has been convicted of a

crime punishable by imprisonment for a term exceeding one year, or possession of a firearm by a person who has been convicted of a crime punishable by imprisonment for a term excessing one year. Both statutes proscribe the conduct as it relates to an individual who has been previously convicted of a felony offense (*i.e.*, a crime punishable by imprisonment of a term exceeding one year).

The protected conduct under the Second Amendment is "keep and bear arms." § 922(g)(1) explicitly prohibits "possession" and, thus, this matter easily falls under Second Amendment protection. § 922(d)(1) prohibits the sale and/or disposal of a firearm to a person with a prior felony conviction. Logically, then, the felon must possess the firearm in the process of the sale/disposal, and therefore § 922(d)(1) also falls within the text of the Second Amendment. *See Kanter v. Barr*, 919 F.3d 437, 451-52 (7th Cir. 2019) (Barrett, J., dissenting) ("to have weapons" would encompass the past receipt and the current possession of weapons).

Thus, the constitutionality of the Dispossession Statutes as applied to the Petitioner turns exclusively on *Bruen's* second step, whether prohibiting a person who had any prior nonviolent felony conviction from possessing or transferring a firearm is consistent with the Nation's historical tradition of firearm regulation.

B. *Bruen's* Second Step Allows the Court to Undertake an Analysis that will Determine Important Issues of Federal Law and Ultimately Lead to Vacating Petitioner's Conviction.

The second step under *Bruen* requires the government to justify its regulation through a historical

analysis. As will be shown herein, the government cannot meet this burden because the Nation's historical tradition of firearm regulation did not apply to non-violent felons.

Congress first legislated firearm dispossession with the Federal Firearms Act ("FFA"), which was passed in 1938. 5 Cong. Ch. 850, §2(e), 52 Stat. 1250, 1251 (repealed). In that initial act, Congress restricted shipping or transporting of any firearm in interstate commerce by, inter alia, individuals convicted of a crime of violence. C. Kevin Marshall, Why Can't Martha Stewart Have A Gun?, 32 HARV. J.L. & PUB. POL'Y 695, 702 (2009). In Congress's eyes, those who had been convicted of a crime of violence had already "demonstrated their unfitness to be entrusted with such dangerous instrumentalities." *Cases v. U.S.*, 131 F.2d 619, 921 (1st Cir. 1942).

In 1961, Congress amended FFA to remove the "crime of violence" language, replacing it with "crime punishable by imprisonment for a term exceeding one year." *See* P.L. 97-342, 75 Stat. 757 (repealed). Thus, the current Dispossession Statutes were not enacted until 1968 under the Gun Control Act of 1968, P.L. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. Sec. 921, et seq.), nearly 177 years after the drafting and ratification of the Constitution and the Second Amendment.

Applying the current Dispossession Statutes to all felons whether or not they pose a threat to the public is unconstitutionally overbroad and detached from any historical precedent. "The best historical support for a legislative power to permanently dispossess all felons would be founding-era laws explicitly imposing -- or explicitly authorizing the legislature to impose -- such a ban." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting) Scholars, however, have not been able to identify any such laws. *Id.* (internal citations omitted).

In *Kanter*'s dissent, then-Judge Barrett thoroughly analyzed and recounted the full-extent of historical authority:

> History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are dangerous. Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons. Nor have the parties introduced any evidence that founding-era legislatures imposed virtue-based restrictions on the right; such restrictions applied to civic rights like voting and jury service, not to individual rights like the right to possess a gun. In 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety.

Id. at 451. Then-Judge Barrett considered Second Amendment ratification proposals and the recommendations from various state conventions to modify the proposal. *Id*. at 456-57. None of the proposals were adopted, even though all of the proposals related to prevention of individuals with a history of violence, breaching the peace, or in "actual rebellion" from obtaining and possessing firearms. *Id.* In sum, these historical considerations all applied exceptions to the Second Amendment that only applied to individuals who posed a threat of violence. *Id.*

The individual right protected by the Second Amendment is broad and was adopted from similar laws in the American colonies preceding independence. These laws permitted dispossession from firearms of those who refused allegiance to the British crown and were used to prevent upheavals and rebellion and to protect against those posing a potential danger. *Id*. at 457 (citing Robert H. Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment, 25 Law & Hist. Rev. 139, 157 (2007)); *see also NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 200 (5th Cir. 2012)("American legislators had determined that permitting [those who refused to swear an oath of allegiance] to keep and bear arms posed a potential danger.").

Then-Judge Barrett further analyzed early United States' laws related to felons and felony convictions. *Kanter*, 919 F.3d at 459-65 (Barrett, J., dissenting). Neither the federal government nor any state enacted laws that dispossessed those convicted of all felonies; rather, dispossession laws at the time focused on those who posed a dangerous threat to society. *Id.* In addition, the right to arms differed from other civic rights since it is connected with the right of self-defense and not limited to civic participation (*e.g.*, the right to vote or serve on a jury). *See* Saul Cornell, Don't Know Much About History: The Current Crisis in Second Amendment Scholarship, 29 N. KY. L. REV 657, 679 (2002) ("[R]ights belonging to individuals ... were treated differently than were civic rights such as militia service, or the right to sit on juries.").

This Nation's history does not support the proposition that non-violent felons lost their Second Amendment rights solely because of their status as felons. *Kanter,* 919 F.3d at 464 (Barrett, J., dissenting). "[T]he government does not get a free pass simply because Congress has established a 'categorical ban.'" *U.S. v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010). "The government could quickly swallow the right if it had broad power to designate any group as dangerous and thereby disqualify its members from having a gun." *Kanter,* 919 F.3d at 464 (Barrett, J., dissenting) (citing *U.S v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (*en banc*)).

The question that this Court must decide is whether, in light of the *Bruen* historical analysis, the Second Amendment permits Congress to prohibit non-violent offenders from possessing a firearm. *See Folajtar v. Atty. Gen. U.S.*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J. dissenting) ("the historical limits on the Second Amendment [...] protect us from felons, but only if they are dangerous"). After all, if the historical touchstone is danger, this Nation's history does not support the prohibition as applied to non-violent offenders like the Petitioner. While some felons may fall into such a category -- those who have committed crimes like murder, assault, and rape -- it wrongfully encompasses those who have committed any non-violent felony, including "mail fraud [,] selling pigs without a license in Massachusetts, [and] redeeming large quantities of out-of-state bottle deposits in Michigan." *Kanter*, 919 F.3d at 466 (Barrett, J., dissenting) (internal citations omitted).

Recent decisions in the wake of *Bruen* continue to show that the restrictions contained in § 922 often fail to comport with history. To illustrate, the United States

District Court for the Western District of Texas began its analysis of whether §922(g)(8), which prohibits possession of a firearm by any person who is the subject to a domestic violence restraining order, is constitutional by noting, "[n]o longer can lower courts account for public policy interests, historical analysis being the only tool." *U.S. v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 U.S. Dist. LEXIS 204758, at *1 (W.D. Tex. Nov. 10, 2022). Because "the historical record does not contain evidence sufficient to support the federal government's disarmament of domestic abusers," and §922(g)(8) could not "overcome *Bruen's* presumption that the Second Amendment protects an individual's possession of a firearm," §922(g)(8) was held to be unconstitutional. *Id.* at 30. *See also Holden*, No. 3:22-CR-30 RLM-MGG, 2022 WL 17103509, at *3 (rejecting the notion that because Congress limited firearm use by persons under indictment as far back as 1938 that it has any bearing on constitutionality under *Bruen*: "From 1791 to 1938 is wide enough a gulf that the Federal Firearms Act of 1938 doesn't shed much light on the original public meaning of the Second Amendment."); *Stambaugh,* No. CR-22-00218-PRW-2, 2022 WL 16936043, at *6 (W.D. Okla. Nov. 14, 2022).

Departing from the courts in other Circuits that have focused on a particular felon's level of dangerousness,[3] the Third Circuit has recently conducted a summary historical analysis to conclude that historical "[p]unishments" from the Revolutionary War through "the nineteenth centuries provide additional support for legislatures' authority to disarm even non-violent offenders." *Range v. AG U.S.*, No. 21-2835, 2022 U.S. App. LEXIS 31614, at *30 (3d Cir. Nov. 16, 2022) (en banc rehearing pending). However, each of the punishments described within the opinion reflect a temporary disarmament of certain individuals in response to a discrete external event (normally the existence, contemplation, or immediate aftermath of war), and thereby differ from §922(g)(1)'s categorical and permanent restriction upon all felons.

Finally, nearly all of the restrictions from the Revolutionary Era forward relate to mutable conditions, such as loyalty oaths, whereas §922(g)(1) results in an immutable status – the non-violent felon will still be branded forever a felon subject to permanent disarmament rather than temporary forfeiture. *Id.* at 22-32. The notion that "[n]on-violent individuals were

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[3] *See, e,g*, *Quiroz, supra* at *29 ("So if comparing the FFA's 'crimes of violence' limitation to § 922(n)'s far broader coverage—which includes non-violent felonies and state indictments—it's doubtful § 922(n) would be constitutional under the individual-rights view *Heller* enumerated."; *U.S. v. Gonzalez*, No. 22-1242, 2022 U.S. App. LEXIS 26532, 2022 WL 4376074, at *2 (7th Cir. 2022) (deeming as-applied constitutional challenge under *Bruen* to invalidate § 922(g)(1) "frivolous" when challenger is considered a violent felon but leaving the question open as to how such a challenge would fare for a non-violent felon); *U.S. v. Jackson*, No. 21-51 (DWF/TNL), 2022 U.S. Dist. LEXIS 164604, at *5-6 (D. Minn. Sep. 13, 2022)("Although his prior felonies were nonviolent, they involved dangerous conduct.")

repeatedly disarmed … because legislatures determined that those individuals lacked respect for the rule of law and thus fell outside the community of law-abiding citizens" does not comport with the actual history of firearms regulation. *Id.* at 34. All of this suggests not only that this Court should hear this matter to determine this question for the lower courts, but also that Circuit Courts, like the Third Circuit, are misapplying the law.

C. Petitioner's Case Provides the Appropriate Vehicle for the Court to Decide the Constitutionality of this Pressing Issue.

In the instant case, Petitioner's conspiracy to violate §§ 922(d)(1) and (g)(1) was predicated upon his prior white collar convictions for securities, wire, and bank fraud. Those underlying convictions (which stem from two separate incidents) resulted in Petitioner serving six months of incarceration and six months of house arrest. Further, and most importantly, these predicate offenses are undisputedly non-violent. *See, e.g.*, *U.S. v. Johnson*, 640 F.3d 195, 204 (6th Cir. 2011) (noting bank fraud as a non-violent offense; *U.S. v. Geyley*, 932 F.2d 1330, 1338 n.9 (9th Cir. 1990) (noting that non-violent crimes include mail fraud and securities fraud); *U.S. v. Zhukov*, 2021 U.S. Dist. LEXIS 8550, No. 18-cr-633(EK), *5 (E.D.N.Y. May 4, 2021) (noting wire fraud as non-violent crime). A proper analysis - as mandated by *Bruen* - demonstrates that the prohibitions imposed by the Dispossession Statutes are unconstitutionally overbroad as applied to Petitioner.

The issue this case presents is a pure issue of law, with no unique factual disputes that would distinguish it from other non-violent firearms possession cases. This issue is clearly already percolating in the lower courts,

with anomalous results occurring in dozens of cases. Further, it is a virtual certainty that this Court will soon have to settle whether § 922 as applied to non-violent offenders remains constitutional under *Bruen*. There is no need for this Court to wait to decide this issue. The Petitioner's case is ripe for this Court's consideration. Pelullo requests this Court grant the petition as applied to him, which would all-but necessarily decide the future of § 922 as applied to non-violent offenders.

II. AN "OPEN-ENDED CONTINUANCE" VIOLATES A DEFENDANT'S CONSTITUTIONAL AND STATUTORY SPEEDY TRIAL RIGHTS.

Pelullo respectfully asks this Court to grant certiorari to determine whether the entry of an open-ended continuance – without the court ever having scheduled a trial date and which extended for more than 16 months before a trial date is set – violates the Speedy Trial Act and a criminal defendant's Sixth Amendment right. The standard governing open-ended continuances has been inconsistently applied across the Circuit Courts. As the Speedy Trial Act applies to every single criminal defendant in the federal system and the Sixth Amendment applies to every single criminal defendant in any system, this is an important issue of law that this Court must determine.

The Speedy Trial Act was an attempt by Congress to codify the Sixth Amendment right to a speedy trial. 18 U.S.C. § 3161 et seq. The Act mandates that "the appropriate judicial officer, at the earliest practicable time, shall . . . set the case for trial **on a day certain**, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district." *Id.* at § 3161(a). Further, the Speedy Trial Act provides precise

time limits when each stage of a criminal prosecution must commence. Under the provision relevant here, the trial must begin within 70 days of the indictment. *Id.* at §3161(c)(1). The Act enforces these time limits with a mandatory sanction of dismissal. If this 70-day limit is exceeded, the indictment, "shall be dismissed on motion of the defendant." *Id.* at § 3162(a)(2). "[T]he Act serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice." *Bloate v. U.S.,* 559 U.S. 196, 211 (2010).

While the Speedy Trial Act requires strict conformity with its mandate that charges, "shall be dismissed" if a defendant is not afforded a trial within a certain number of days, some days can be tolled for "good cause." 18 U.S.C. § 3162. For instance, delay is allowed for the duration of a continuance granted by the district court "on the basis … that the ends of justice [are better] served by taking such action [and that doing so] outweigh[s] the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). If a continuance is improper or the court does not justify its findings on the record, however, the clock continues to run. *Id.*; *Zedner v. U.S.,* 547 U.S. 489, 508 (2006). Additionally, this Court has held that delay of more than one year is presumptively prejudicial under the Sixth Amendment. *Doggett v. U.S.*, 505 U.S. 647, 652 (1992) (n.1).

As the right to a speedy trial derives from the constitution itself, "ends of justice" exclusions were intended by Congress to be "rarely used[.]" *U.S. v. Nance*, 666 F.2d 353, 355 (9th Cir. 1982). Accordingly, courts have emphasized that an ends of justice exclusion cannot be used as "a general exclusion for every delay." *U.S. v. Martin*, 742 F.2d 512, 519 (9th Cir. 1994). As this Court has previously stated, it was clear that Congress saw "a

danger that such [ends of justice] continuances could get out of hand and subvert the Act's detailed scheme." *Zedner*, 547 U.S. at 508-09. Yet despite Congress's concerns, circuit courts throughout the nation have relaxed the necessary standard, and district courts issue these "open-ended continuances" routinely.

Approximately 30 days after his initial detention, Petitioner made his first appearance before the district court and pleaded not guilty. After accepting the plea, the district court failed to enter a trial date and, instead, entered an open-ended "complex case order" ("CCO") at the government's request and with the Petitioner's consent. The CCO reflected that the "ends of justice" would be met by entry of a "continuance" and that trial would commence "on a date to be determined." 16 months elapsed without the district court setting a trial date or ever reevaluating its conclusion that the "ends of justice" would be met by a continuance. While the Speedy Trial Act exempts days as a result of "case complexity" supporting an express finding of an "ends of justice" exception, it cannot be that a single finding of complexity exempts all days under the Act in perpetuity. This is particularly true where, as here, the district court did not set a trial date until Petitioner filed a motion to dismiss on the basis that his Speedy Trial rights had been violated.[4]

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[4] Petitioner concedes, as he did in the lower courts, that some days in the 16 months would have been exempted for other reasons that are permissible under the Speedy Trial Act. However, absent a holding that an open-ended continuance based on complexity is permissible to toll the requirements of the Act in perpetuity, there can be no doubt that more than 70 days of unexcused days had passed under the Act before a trial date had been set.

The use of open-ended continuances has become pervasive throughout the criminal justice system, and this Court has not directly addressed this issue. However, in *Zedner v. U.S.*, this Court emphasized that a district court's discretion is not limitless: "[t]he provision [of the Speedy Trial Act] gives the district court discretion -- within limits and subject to specific procedures -- to accommodate limited delays for case-specific needs." 547 U.S. 489, 499 (2006). Moreover, while the central holding of *Zedner* is that a defendant cannot waive his speedy trial rights prospectively, entry of "open-ended continuances" by district courts have the same effect, especially if a defendant consents to a continuance early in his case. In essence, the defendant never has the opportunity to "revoke" that consent or have the district court revisit the issue, regardless of how much time passes before the district court deigns to set a trial date.[5]

Against this backdrop, circuit courts are divided as to whether "open-ended continuances" are allowable under the Sixth Amendment and/or the Speedy Trial Act. Even circuits that allow such continuances are split as to how much delay is too much time under the Act. This Court should grant certiorari to determine this issue.

The Ninth Circuit has held that an "ends of justice" continuance must be specifically limited in time. *U.S. v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990) ("We hold that an 'ends of justice' extension under section 3161(h) is proper <u>only</u> if ordered for a specific period of time.")

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[5] In light of *Zedner*'s central holding – that the right to a speedy trial cannot be waived – it cannot be that the 16 month delay in setting a trial date is excusable simply because Petitioner consented to the initial CCO. To interpret the law in that fashion would allow a waiver of the speedy trial right simply because at some point in time prior to trial, the defendant consented to a CCO.

(emphasis added); *see also U.S. v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994) ("The Act requires criminal cases to be brought to trial promptly, subject to certain, enumerated exceptions. *This delicate balance could be seriously distorted if a district court were able to make a single, open-ended 'ends of justice' determination early in a case, which would 'exempt the entire case from the requirements of the Speedy Trial Act altogether.*'") (citations omitted) (emphasis added); *U.S. v. Crawford*, 982 F.2d 199, 204-05 (6th Cir. 1993) (dismissing indictment where district court silently granted an ends-of-justice continuance without specifying or approximating its length). The Second Circuit has reached the same conclusion, holding that an ends of justice continuance must be "limited in time" to a specified period, at the end of which "a trial court should set at least a tentative trial date." *U.S. v. Gambino,* 59 F.3d 353, 358 (2d Cir. 1995).

By contrast, several other circuits have held that a District Court may grant an open-ended continuance in some circumstances, but even in that group, courts differ on when an open-ended continuance is permissible. *See U.S. v. Barnes,* 159 F.3d 4, 13 n.5 (lst Cir. 1998); *U.S. v. Lattany,* 982 F.2d 866, 881 (3d Cir. 1992); *U.S. v. Jones,* 56 F.3d 581, 585-86 (5th Cir. 1995); *U.S. v. Spring,* 80 F.3d 1450, 1458 (10th Cir. 1996).

In the First and Eleventh Circuits, open-ended continuances are permitted on an unlimited basis. *See U.S. v. Rush*, 738 F.2d 497 (1st Cir. 1984); *U.S. v. Twitty*, 107 F.3d 1482, 1489 (11th Cir. 1997). In the most extreme situation, the Eleventh Circuit explicitly held that "[i]f the trial court determines that the 'ends of justice' require the grant of a continuance, and makes the required findings, any period of delay is excludable under [the Act]." *Twitty,*

107 F.3d at 1489; *U.S. v. Hill*, 487 Fed. Appx. 560, 562 (11th Cir. 2012).

The Third, Fifth, Sixth, and Tenth Circuits permit open-ended continuances but only if the durations are "reasonable." *See, e.g.*, *U.S. v. Sabino*, 274 F.3d 1053 (6th Cir. 2001) (holding that open-ended ends-of-justice continuances for reasonable periods are permissible where it is impossible to set specific ending dates); *U.S. v. Spring*, 80 F.3d 1450 (10th Cir. 1996); *U.S. v. Jones*, 56 F.3d 581 (5th Cir. 1995) (held open-ended continuances are not prohibited but such continuance for any substantial length of time is extraordinary); *U.S. v. Lattany*, 982 F.2d 866 (3d Cir. 1992) (open-ended continuances are not prohibited provided they are reasonable in length). Courts and commentators have noted these splits for many years, yet the issue has not yet been resolved. *See U.S. v. Westbrook,* 119 F.3d 1176, 1187 n.4 (5th Cir. 1997); Greg Ostfeld, *Speedy Justice and Timeless Delays: The Validity of Open Ended "Ends-of-Justice" Continuances Under the Speedy Trial Act,* 64 U. Chi. L. Rev. 1037 (1997).

Despite the circuits that take a hardline on this issue and allow open-ended continuances in perpetuity, there can be no question that the Framers, in crafting the Sixth Amendment, did not envision a scenario where a defendant could be arrested and arraigned, only to languish in prison for an unlimited period without ever having a specific trial date set. After all, if district courts can exclude all time before trial with a single open-ended continuance, the rights afforded by the Sixth Amendment and the Speedy Trial Act hold no meaning. Likewise, even if a defendant consents to an initial CCO, that initial consent cannot constitute a waiver of his right to a speedy trial for all time. *See Zedner*, 547 U.S. at 499.

This is particularly true when the plain language mandates "the appropriate judicial officer, at the earliest practicable time, **shall . . . set the case for trial on a day certain**, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district." *Id.* at § 3161(a) (emphasis added).

The allowance of open-ended continuances adopted by the vast majority of circuits is anathematic to the right to a speedy trial and the plain language of the Speedy Trial Act. To maintain unity nationwide and to correct the violation of so many individual's rights, this Court should grant certiorari on this issue to determine whether open-ended continuances violate a defendant's constitutional and statutory rights to a speedy trial.

III. IN THE EVENT THIS COURT DETERMINES NOT TO GRANT CERTORARI ON THE AFFIRMATIVE ISSUES RAISED IN THIS MATTER, IT SHOULD EXERCISE ITS GVR POWER AND REMAND TO THE THIRD CIRCUIT PENDING THE RESOLUTION OF *RANGE*.

This Court rendered its decision in *Bruen* approximately three weeks before the Third Circuit panel decided Mr. Pelullo's case in the instant matter. Therefore, Mr. Pelullo could not argue the precise *Bruen* issue in the Third Circuit. The Court has previously exercised its power pursuant to 28 U.S.C. § 2106 to grant, vacate, and remand ("GVR") to the circuit court for reevaluation of an issue in light of an intervening change in law that the circuit did not analyze in the first instance. *See e.g. Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996). In the event this Court does not grant certiorari as to the affirmative issues

raised by Mr. Pelullo, it should nevertheless grant certiorari and remand to the Third Circuit.

On January 6, 2023, the Third Circuit granted an en banc rehearing in *Range* to determine the constitutionality of the Dispossession Statutes as applied to non-violent offenders. *Range v. Att'y Gen. United States of Am.*, 56 F.4th 992 (3d Cir. 2023). The question presented in *Range* – whether prohibiting non-violent felons from possessing firearms remains constitutional in light of *Bruen* – directly impacts whether Mr. Pelullo's conviction can stand. *Range v. Att'y Gen. United States*, 53 F.4th 262, 271 (3d Cir. 2022) ("*Bruen* [] requires us to assess whether the Government has demonstrated through relevant historical analogues that § 922(g)(1) 'is consistent with this Nation's historical tradition of firearm regulation.'") (citations omitted). If the Third Circuit holds that § 922 as applied to non-violent felons is unconstitutional in *Range*, Mr. Pelullo's conviction on Count 24 must be vacated.

Appellate courts have the power to vacate and set aside any judgment on the basis that such an action "may be just under the circumstances." 28 U.S.C. § 2106; *see also Garlick v. Quest Diagnostics Inc.*, 309 F. App'x 641, 643 (3d Cir. 2009) ("The courts of appeals have broad authority to manage cases in ways that maximize efficiency and fairly vindicate the interests of the parties."); *U.S. v. Davis*, 617 F. App'x 205, 206 (3d Cir. 2015) (quoting *Haynes v. U.S.,* 390 U.S. 85, 101 (1968) ("We have plenary authority under 28 U.S.C. § 2106 to make such disposition of the case as may be just under the circumstances.")). Specifically, this Court has used its power pursuant to 28 U.S.C. § 2106 to vacate and remand cases where, as here, an intervening change in law happened after the appeal was briefed that could change

the result of the appeal. *Chater*, 516 U.S. at 167-68 (1996) (remanding matter to the circuit court after change in agency interpretation altered the way in which the issue should be analyzed in the lower court: "Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate[.]").

This Court has even endorsed using 28 U.S.C. § 2106 to vacate and remand matters where, as here, the change in the law occurred slightly before the circuit court decision was rendered. *See id.* at 169 ("In *Robinson v. Story,* 469 U.S. 1081, 105 S.Ct. 583, 83 L.Ed.2d 694 (1984), we GVR'd for further consideration in light of a Supreme Court decision rendered almost three months *before* the summary affirmance by the Court of Appeals that was the subject of the petition for certiorari.") (emphasis in original). Therefore, while the time for Mr. Pelullo to seek rehearing on this issue in front of the Third Circuit has passed, this Court may use its GVR power to vacate the July 15, 2022 decision against Mr. Pelullo and remand the matter to the Third Circuit pending an analysis of the issue in light of *Bruen*.

Further, because the *Range* issue is dispositive as to whether Mr. Pelullo's conviction can stand, this Court should exercise its GVR power for the sake of, among other things, justice and judicial efficiency. *See Chater*, 516 U.S. at 167 ("In an appropriate case, a GVR order conserves the scarce resources of this Court that might

otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the '[p]otential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues[.]')"

On this basis, Mr. Pelullo respectfully requests that this Honorable Court vacate the July 15, 2022 decision as to Count 24 of the Court of Appeals for the Third Circuit and remand the matter pending the resolution of *Range*.

CONCLUSION

This petition implicates questions directly impacting an individual's constitutional right to keep and bear arms and to a speedy trial. Petitioner urges this Court to grant this petition and review these issues, potentially alleviating Petitioner from an unconstitutional conviction.

WHEREFORE, for all the foregoing reasons, Pelullo respectfully requests that the instant Petition for a Writ of Certiorari be GRANTED.

Respectfully Submitted,

/s/ Troy A. Archie

Troy A. Archie, Esquire
Afonso & Archie, P.C.
21 Route 130 South
Cinnaminson, NJ 08077
T: (856) 786-7000
F: (856) 385-8181
archie@aanjlaw.com

Date: February 20, 2023 *Counsel for Petitioner Pelullo*

THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

SALVATORE PELULLO, Petitioner - vs – UNITED STATES OF AMERICA, Respondent	Docket No._____ **CERTIFICATE OF SERVICE** Petition for Writ of Certiorari

I, Troy A. Archie, Esq., hereby certify that on February 20, 2023, I caused a copy of the attached Writ of Certiorari and Appendix to be served by PACER ECF, Electronic Mail and US Priority Mail upon:

Mark E. Coyne, A.U.S.A.
Chief, Appeals Division
Assistant United States Attorney
United States Attorney's Office
970 Broad Street, Room 502
Newark, NJ 07102-2535

Norman Gross, Bruce P.Keller
and Sabrini G. Comizzoli, AUSA(s)
U. S. Attorney's Office
P.O. Box 2098
401 Market Street, 4th Floor
Camden NJ 08101-8000

Mrs. Elizabeth B Prelogar
Office of the Solicitor General of The United States
Office of the Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Clerk
United States Court of Appeals for the Third Circuit
601 Market Street, Room 21400
Philadelphia, PA 19106

/s/ Troy A. Archie

Troy A. Archie, Esquire
Afonso & Archie, P.C.
21 Route 130 South
Cinnaminson, NJ 08077
T: (856) 786-7000
F: (856) 385-8181
archie@aanjlaw.com

Date: February 20, 2023 *Counsel for Petitioner Pelullo*