

No. _____

In the
Supreme Court of the United States

Kelvun Montrail Williams,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(n) violates the Second Amendment under *New York State Rifle and Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

PARTIES TO THE PROCEEDING

Petitioner is Kelvun Montrail Williams, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

Question Presented.....	i
Parties to the Proceeding	ii
Table of Contents.....	iii
Index to Appendices.....	iv
Table of Authorities	v
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved.....	1
Statement of the Case	1
Reasons For Granting This Petition	2
I. It implicates the prosecution and incarceration of thousands.	2
II. Lower courts are misapplying <i>Bruen</i> in fundamental ways.	3
Conclusion.....	9

INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the
Northern District of Texas

Appendix C *United States v. Quiroz*, No. 22-50834, Doc. 69, (5th Cir. Feb. 16, 2023)

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	6, 9
<i>New York State Rifle and Pistol Association, Inc. v. Bruen</i> , 142 S. Ct. 2111 (2022)	2, 3, 4, 6, 7, 8, 9
<i>United States v. Bartucci</i> , No. 119CR00244ADABAM, 2023 WL 2189530 (E.D. Cal. Feb. 23, 2023)	6, 7, 9
<i>United States v. Gore</i> , No. 2:23-CR-04, 2023 WL 2141032 (S.D. Ohio Feb. 21, 2023).....	5, 7, 9
<i>United States v. Hicks</i> , No. W:21-CR-00060-ADA, 2023 WL 164170 (W.D. Tex. Jan. 9, 2023).....	5, 8, 9
<i>United States v. Holden</i> , No. 3:22-CR-30 RLM-MGG, 2022 WL 17103509 (N.D. Ind. Oct.. 31, 2022).....	5
<i>United States v. Jackson</i> , No. CR ELH-22-141, 2023 WL 2499856 (D. Md. Mar. 13, 2023).....	5, 6, 7, 8, 9
<i>United States v. Kays</i> , 624 F. Supp. 3d 1262 (W.D. Okla. 2022)	5, 9
<i>United States v. Kelly</i> , No. 3:22-CR-00037, 2022 WL 17336578 (M.D. Tenn. Nov. 16, 2022)	3, 5, 7, 8
<i>United States v. Now</i> , No. 22-CR-150, 2023 WL 2710340 (E.D. Wis. Mar. 30, 2023)	5
<i>United States v. Now</i> , No. 22-CR-150, 2023 WL 2717517 (E.D. Wis. Mar. 15, 2023)	5, 6, 7
<i>United States v. Posada</i> , No. EP-22-CR-1944(1)-KC, 2023 WL 3027877 (W.D. Tex. Apr. 20, 2023) .	5, 7, 8, 9
<i>United States v. Rowson</i> , No. 22 CR. 310 (PAE), 2023 WL 431037 (S.D.N.Y. Jan. 26, 2023).....	5, 7, 9

<i>United States v. Simien</i> , No. SA-22-CR-00379-JKP, 2023 WL 1980487 (W.D. Tex. Feb. 10, 2023), <i>reconsideration denied</i> , No. SA-22-CR-00379-JKP, 2023 WL 3082358 (W.D. Tex. Apr. 25, 2023)	5, 6, 9
<i>United States v. Smith</i> , No. CR 122-081, 2023 WL 3010178 (S.D. Ga. Apr. 19, 2023)	5
<i>United States v. Smith</i> , No. CR 122-081, 2023 WL 3012007 (S.D. Ga. Mar. 29, 2023)	5, 7, 9
<i>United States v. Stambaugh</i> , No. CR-22-00218-PRW-2, 2022 WL 16936043 (W.D. Okla. Nov. 14, 2022), <i>reconsideration denied</i> , No. CR-22-00218-PRW-2, 2023 WL 172037 (W.D. Okla. Jan. 12, 2023)	4
<i>United States v. Stennerson</i> , No. CR 22-139-BLG-SPW, 2023 WL 2214351 (D. Mont. Feb. 24, 2023)	5, 7, 9
<i>United States v. Williams</i> , No. 22-10129, 2023 WL 2342341 (5th Cir. Mar. 3, 2023)	1, 2
State Cases	
<i>United States v. Quiroz</i> , No. PE:22-CR-00104-DC, 2022 WL 4352482 (W.D. Tex. Sept. 19, 2022)	5
Federal Statutes	
18 U.S.C. § 922(n)	1, 2, 3, 4, 5, 6, 7, 8
18 U.S.C. § 924(a)(1)(D)	2
28 U.S.C. § 1254	1
Constitutional Provisions	
U.S. Const. amend. II	1, 2, 4, 6, 7, 8
Other Authorities	
Executive Office for the United States Attorneys, U.S. Dept. of Justice, Annual Statistical Report Fiscal Year 2021, available at https://www.justice.gov/usao/page/file/1476856/download	3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kelvun Montrail Williams seeks a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported but available online at *United States v. Williams*, No. 22-10129, 2023 WL 2342341 (5th Cir. Mar. 3, 2023). It is reprinted in Appendix A to this Petition. The district court's judgment is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 3, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Second Amendment to the U.S. Constitution:

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(n):

It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

Petitioner Kelvun Montrail Williams received deferred adjudication for a term of seven years for a state offense in February 2018. On July 8, 2020, local law enforcement arrested him for outstanding warrants, and a search incident to arrest revealed

a firearm in Williams’s waistband. The government then indicted Williams for violating 18 U.S.C. §§ 922(n) and 924(a)(1)(D). Williams pleaded guilty without a plea agreement, and the court sentenced Williams to 46 months imprisonment and a three-year term of supervised release. Williams appealed.

New York State Rifle and Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022), issued while the appeal was pending. With *Bruen* in hand, Williams urged that his conviction and sentence violated the Second Amendment. The Fifth Circuit affirmed, reasoning that Williams could not overcome the “plainness” prong of plain error because the constitutionality of § 922(n) post-*Bruen* remains “subject to reasonable dispute[.]” *United States v. Williams*, No. 22-10129, 2023 WL 2342341, at *1 (5th Cir. Mar. 3, 2023).

REASONS FOR GRANTING THIS PETITION

United States v. Quiroz, Case No. 22-50834 pending before the Fifth Circuit, presents the exact issue posed here. And in that case, the Court of Appeals, noting “the significance of the issues” presented, made the unique request for supplemental briefing from the Solicitor General. Feb. 16, 2023 Letter, *United States v. Quiroz* (No. 22-50834), Doc. 69. This request shows that Williams’s petition raises an important question of federal law that has not been, but should be, settled by this Court.

I. The issue implicates the prosecution and incarceration of thousands.

As of May 25, 2023, the Bureau of Prisons reported that it imprisons 159,387 people. [Bureau of Prisons Population Statistics](#). And as of May 20, 2023, 21.7% of its inmates (32,187) were incarcerated for “Weapons, Explosives, [and] Arson” offenses, the second largest category of offenses within the federal prison population. [Bureau](#)

[of Prisons Inmate Statistics, Offenses](#). “For more than 25 years” in fact, firearm crimes have been one of the “four crime types” that “have comprised the majority of federal felonies and Class A misdemeanors[.]” [U.S. Sentencing Comm’n, FY2021 Overview of Federal Criminal Cases 4 \(Apr. 2022\)](#). In fiscal year 2021, “[c]rimes involving firearms were the third most common federal crimes[.]” FY2021 Overview of Federal Criminal Cases 19. Of the 57,287 individuals sentenced, 8,151 were firearm cases—a 14.2% share. FY2021 Overview of Federal Criminal Cases 1, 5. This represents an 8.1% increase from the year before, despite the number of cases reported to the U.S. Sentencing Commission declining by 11.3% and hitting an all-time low since fiscal year 1999. FY2021 Overview of Federal Criminal Cases 2. These figures only capture the tail end of the criminal process at the district court. The scope of prosecutions looms larger. “The Department of Justice filed firearms-related charges in upwards of 13,000 criminal cases during the 2021 fiscal year.” *United States v. Kelly*, No. 3:22-CR-00037, 2022 WL 17336578, at *3 (M.D. Tenn. Nov. 16, 2022) (citing Executive Office for United States Attorneys, U.S. Dept. of Justice, Annual Statistical Report Fiscal Year 2021 at 15 (Table 3C), available at <https://www.justice.gov/usao/page/file/1476856/download>) (emphasis added). Those persons charged, convicted, and imprisoned for violating § 922(n), among countless others imprisoned for similar crimes, warrants this Court’s attention.

II. Lower courts are misapplying *Bruen* in fundamental ways.

“[W]hen the Second Amendment’s plain text covers an individual’s conduct,” *Bruen* explained that “the Constitution presumptively protects that conduct.” 142 S.

Ct. at 2126. “To justify its regulation,” the government must show a “historical tradition of firearm regulation” that is “consistent with” the regulation at issue. *Id.* Consistency “with the Second Amendment’s text and historical understanding” looks different depending on whether the modern firearm regulation addresses “general societal problem[s] that ha[ve] persisted since the 18th century,” *id.* at 2134, or “unprecedented societal concerns or dramatic technological changes” that resulted in “regulations that were unimaginable at the founding,” *id.* at 2132. For the former, a “lack of a distinctly similar historical regulation addressing that problem,” efforts to address “the societal problem” “through materially different means,” or attempts “to enact analogous regulations” that “were rejected on constitutional grounds” provide evidence of unconstitutionality. *Id.* at 2131. But for the latter, a “nuanced approach” applies, which requires the modern regulation to be “relevantly similar” to a historical analogue. *Id.* at 2132. This “relevantly similar” test neither requires a court to “uphold every modern law that remotely resembles a historical analogue” nor requires the government to identify “a historical twin.” *Id.* at 2133. But “how and why the regulations burden a law-abiding citizen’s right to armed self-defense” are “central” “metrics” for the test’s application. *Id.* at 2132–133. Ultimately, if the government fails to “affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms,” “the Second Amendment’s unqualified command” controls. *Id.* at 2126–27.

In *Bruen*’s wake, several district courts correctly concluded that 18 U.S.C. § 922(n) violates the Second Amendment. *United States v. Stambaugh*, No. CR-22-

00218-PRW-2, 2022 WL 16936043 (W.D. Okla. Nov. 14, 2022), *reconsideration denied*, No. CR-22-00218-PRW-2, 2023 WL 172037 (W.D. Okla. Jan. 12, 2023); *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482 (W.D. Tex. Sept. 19, 2022); *United States v. Holden*, No. 3:22-CR-30 RLM-MGG, 2022 WL 17103509 (N.D. Ind. Oct. 31, 2022); *United States v. Hicks*, No. W:21-CR-00060-ADA, 2023 WL 164170 (W.D. Tex. Jan. 9, 2023). But the tide is turning against *Bruen*'s clear application to § 922(n) and the inevitable conclusion that the regulation is unconstitutional under *Bruen*'s historical test. See *United States v. Stennerson*, No. CR 22-139-BLG-SPW, 2023 WL 2214351, at *1 (D. Mont. Feb. 24, 2023); *United States v. Smith*, No. CR 122-081, 2023 WL 3012007, at *1 (S.D. Ga. Mar. 29, 2023), *report and recommendation adopted*, No. CR 122-081, 2023 WL 3010178 (S.D. Ga. Apr. 19, 2023); *United States v. Simien*, No. SA-22-CR-00379-JKP, 2023 WL 1980487 (W.D. Tex. Feb. 10, 2023), *reconsideration denied*, No. SA-22-CR-00379-JKP, 2023 WL 3082358 (W.D. Tex. Apr. 25, 2023); *United States v. Rowson*, No. 22 CR. 310 (PAE), 2023 WL 431037 (S.D.N.Y. Jan. 26, 2023); *United States v. Posada*, No. EP-22-CR-1944(1)-KC, 2023 WL 3027877 (W.D. Tex. Apr. 20, 2023); *United States v. Now*, No. 22-CR-150, 2023 WL 2717517 (E.D. Wis. Mar. 15, 2023), *report and recommendation adopted*, No. 22-CR-150, 2023 WL 2710340 (E.D. Wis. Mar. 30, 2023); *United States v. Kelly*, No. 3:22-CR-00037, 2022 WL 17336578 (M.D. Tenn. Nov. 16, 2022); *United States v. Kays*, 624 F. Supp. 3d 1262 (W.D. Okla. 2022); *United States v. Jackson*, No. CR ELH-22-141, 2023 WL 2499856 (D. Md. Mar. 13, 2023); *United States v. Gore*, No. 2:23-CR-04, 2023 WL

2141032 (S.D. Ohio Feb. 21, 2023); *United States v. Bartucci*, No. 119CR00244ADA-BAM, 2023 WL 2189530 (E.D. Cal. Feb. 23, 2023). These courts depart from *Bruen* in fundamental ways, and their opinions demonstrate a dire need for this Court to course-correct the jurisprudence.

District of Columbia v. Heller, 554 U.S. 570 (2008), explained that the Second Amendment’s operative clause contains two subparts: “the holder of the right,” i.e., “the people”, and “the substance of the right,” i.e., “to keep and bear Arms.” *Id.* at 581. Relevant to the first, *Heller* endorsed a “strong presumption that the Second Amendment right...belongs to *all Americans*.” *Id.* (emphasis added). *Bruen* confirmed it: “The Second Amendment guaranteed to ‘*all Americans*’ the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions.” 142 S. Ct. at 2156 (quoting *Heller*, 554 U.S. at 581) (emphasis added). Yet courts that upheld § 922(n) against constitutional challenge expressed doubt (or outright rejected) that the Second Amendment’s text applies to felony indictees who receive firearms. *See Jackson*, 2023 WL 2499856, at *8; *Simien*, 2023 WL 1980487, at *6; *Now*, 2023 WL 2717517, at *5. *See also Bartucci*, 2023 WL 2189530, at *5–6 (“disagreement” over the “competing ways of determining what groups of people fall within the Second Amendment’s scope of protections” “post-*Bruen* is more alive than ever”). This departure represents just the tip of the iceberg.

The most concerning conflicts with *Bruen* stem from the courts’ application of its historical test. Lower courts have ignored the “distinctly similar” standard, uniformly applying the “nuanced” test even to regulations that address general societal

problems that existed at the founding. *See, e.g., Jackson*, 2023 WL 2499856, at *12 (“*Bruen*’s history inquiry does not split neatly into (1) a ‘straightforward’ approach for statutes ‘address[ing] a general societal problem that has persisted since the 18th century,’ which always requires a ‘distinctly similar’ historical regulation; and (2) ‘a more nuanced approach’ for laws addressing ‘unprecedented societal concerns,’ which calls for analogical reasoning.”). Courts’ application of the “relevantly” similar test also has allowed for means-end justifications, which *Bruen* expressly disclaimed, to seep back into the analysis.¹ For instance, several courts found that § 922(n) fit into a historical tradition of disarming unvirtuous or dangerous persons. *See Stennerson*, 2023 WL 2214351, at *2; *Smith*, 2023 WL 3012007, at *4; *Rowson*, 2023 WL 431037, at *22; *Kelly*, 2022 WL 17336578, at *5; *Jackson*, 2023 WL 2499856, at *16; *Gore*, 2023 WL 2141032, at *3; *Bartucci*, 2023 WL 2189530, at *7. But this cedes too much to legislatures to decide when and where “public safety” calls for disarmament. *See Jackson*, 2023 WL 2499856, at *17 (“this Court is persuaded by the historical analyses that have found that legislatures traditionally had both the authority and broad discretion to determine when individuals’ status or conduct evinced such a threat sufficient to warrant disarmament.”); *Now*, 2023 WL 2717517, at *8 (“[T]he right to keep and bear arms does not apply to persons the legislature finds are uncommonly

¹ *See Bruen*, 142 S. Ct. at 2126–27. Some courts even insist that standalone means-end considerations retain validity despite *Bruen*’s clear instruction that they hold no place in Second Amendment jurisprudence. *Kelly*, 2022 WL 17336578, at *6; *Smith*, 2023 WL 3012007, at *4; *Posada*, 2023 WL 3027877, at *5; *Now*, 2023 WL 2717517, at *9.

dangerous or unvirtuous. The relevant level of similarity between § 922(n) and historical analogues is that of uncommonly dangerous or unvirtuous persons. To focus only on persons under indictment is to assess the question too narrowly.” (cleaned up)). *See also Hicks*, 2023 WL 164170, at *6 (“So no matter how many times courts or the Government categorically reject the notion that distinctions based on race, class, and religion correlate with disrespect for the law or dangerousness, it doesn’t change the fact that they are citing those historical travesties to support taking someone’s Second Amendment rights today. And again, not only citing in support status-based regulations [that] are repugnant (not to mention unconstitutional), but also advocating for that reasoning to be the controlling standard today. Just this time, the argument goes, the bare legislative majority will only brand the “right” people unvirtuous or dangerous.” (cleaned up)). And it has opened the door for at least some courts to reframe *Bruen*’s historical test as one based not on the *actual* historical record, but on the historical record that *could have* been. *Kelly*, 2022 WL 17336578, at *2, *5 n.7 (“the court must, based on the available historical evidence, not just consider what earlier legislatures did, but imagine what they could have imagined”); *Posada*, 2023 WL 3027877, at *5; *Jackson*, 2023 WL 2499856, at *12.

Courts also have elevated other portions of *Bruen* over its historical test. For instance, at least one court reasoned that *Bruen* disallowed disarmament based on *subjective* criteria but left untouched disarmament based on objective criteria given its dicta on shall issue regimes. *Kelly*, 2022 WL 17336578, at *5 (citing *Bruen*, 142 S. Ct. at 2122–24, 2156, 2161–62). Others have bundled § 922(n) with other modern

firearm regulations, and then relied on *Heller*'s presumptively lawful restrictions² despite *Bruen*'s majority opinion containing no such assurances. *Stennerson*, 2023 WL 2214351, at *1–2; *Smith*, 2023 WL 3012007, at *4. In some cases, courts also seized on *Bruen*'s comparisons to other constitutional rights³ to find that the historical tradition supported disarmament of felony indictees because of the curtailment of other rights, especially through pretrial detention. *Jackson*, 2023 WL 2499856, at *16–17, n.11; *Posada*, 2023 WL 3027877, at *3–5. Several courts also relied on surety statutes that *Bruen* itself deemed insufficient to support a tradition. Compare *Hicks*, 2023 WL 164170, at *7, with *Smith*, 2023 WL 3012007, at *3–4; *Jackson*, 2023 WL 2499856, at *17; *Simien*, 2023 WL 1980487, at *7; *Rowson*, 2023 WL 431037, at *23–24; *Kays*, 2022 WL 3718519; *Gore*, No. 2:23-CR-04, 2023 WL 2141032, at *4; *Bartucci*, 2023 WL 2189530, at *8. In short, lower courts fail to heed *Bruen* at multiple steps, demonstrating the need for this Court to speak forcefully on *Bruen*'s application.

CONCLUSION

For the reasons above, Kelvun Montrail Williams respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 1st day of June, 2023.

² *Heller*, 554 U.S. at 626–27 (“nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill”).

³ *Bruen*, 142 S. Ct. at 2130.

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