No. 22-7257

In the

Supreme Court of the United States

Samuel Lee Morrison,

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 & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

PARTIES TO THE PROCEEDING

Petitioner is Samuel Lee Morrison who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Samuel Lee Morrison*, 3:20-CR-289-1, United States District Court for the Northern District of Texas. Judgment and sentence were entered on June 2, 2022.

2. *United States v. Samuel Lee Morrison*, No. 22-10570, 2023 WL 2366984 (5th Cir. Mar. 6, 2023), Court of Appeals for the Fifth Circuit. The judgment affirming the conviction and sentence was entered on March 6, 2023.

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel Lee Morrison seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Samuel Lee Morrison*, No. 22-10570, 2023 WL 2366984 (5th Cir. Mar. 6, 2023), and is reprinted on pages 1a–2a of the Appendix.

JURISDICTION

The Fifth Circuit entered judgment on March 6, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United Stated 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

In May 2019, Samuel Lee Morrison received a two-year term of deferred-adjudication probation for a Texas felony offense. (ROA.143). On June 3, 2020, Dallas police officers arrested Mr. Morrison for a probation violation on an unrelated case. (ROA.136). Officers searched Mr. Morrison's residence and found a Glock pistol. (ROA.136). Later that day, Mr. Morrison told ATF agents he had purchased the gun in January 2020. (ROA.136).

On June 23, 2020, the grand jury issued a federal indictment accusing Mr. Morrison of violating 18 U.S.C. §§ 922(n), 924(a)(1)(D). (ROA.13–14). Specifically, the indictment alleged Mr. Morrison "[o]n or about January 26, 2020 . . . knowing that he was then under indictment for a crime punishable by imprisonment for a term exceeding one year . . . did willfully receive a firearm[.]" (ROA.13). Mr. Morrison later pleaded guilty to the sole count in the indictment, and the district court sentenced him to 60 months of imprisonment and one year of supervised release. (ROA.48–51, 103, 128).

New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022), issued while the appeal was pending. With *Bruen* in hand, Mr. Morrison urged that his conviction and sentence violated the Second Amendment. The Fifth Circuit affirmed, reasoning that Mr. Morrison could not overcome the "plainness" prong of plain error because the constitutionality of § 922(n) post-*Bruen* remains "subject to reasonable dispute[.]" App. 2a.

REASONS TO GRANT THIS PETITION

I. The lower courts require guidance to apply *Bruen*'s framework to federal criminal statutes.

A. Courts are struggling to apply *Bruen*'s historical tradition test.

"[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 21341, 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.

But many lower courts have ignored the "distinctly similar" standard, instead applying the "nuanced" test even to regulations that address general societal problems that existed at the founding. *See, e.g., United States v. Jackson*, No. CR ELH-22-141, 2023 WL 2499856, at *12 (D. Md. Mar. 13, 2023) ("*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."). And in applying only the "relevantly" similar test, these courts have allowed for means-end justifications to seep back into the analysis—something *Bruen* expressly disclaimed.[1] For instance, several courts found that § 922(n) fit into a historical tradition of disarming unvirtuous or dangerous persons.

[1] *See Bruen*, 142 S. Ct. at 2126–27. Some go so far as to insist that standalone means-end considerations retain validity despite *Bruen*'s clear instruction that they hold no place in Second Amendment jurisprudence. *United States v. Kelly*, No. 3:22-CR-00037, 2022 WL 17336578, at *6 (M.D. Tenn. Nov. 16, 2022); *United States v. Smith*, No. CR 122-081, 2023 WL 3012007, at *4 (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. Posada*, No. EP-22-CR-1944(1)-KC, 2023 WL 3027877, at *5 (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, at *9 (E.D. Wis. Mar. 30, 2023).

See United States v. Stennerson, No. CR 22-139-BLG-SPW, 2023 WL 2214351, at *2 (D. Mont. Feb. 24, 2023); *Smith*, 2023 WL 3012007, at *4; *United States v. Rowson*, No. 22 CR. 310 (PAE), 2023 WL 431037, at *22 (S.D.N.Y. Jan. 26, 2023); *Kelly*, 2022 WL 17336578, at *5; *Jackson*, 2023 WL 2499856, at *16; *United States v. Gore*, No. 2:23-CR-04, 2023 WL 2141032, at *3 (S.D. Ohio Feb. 21, 2023); *United States v. Bartucci*, No. 119CR00244ADABAM, 2023 WL 2189530, at *7 (E.D. Cal. Feb. 23, 2023).

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 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)); *but see United States v. Hicks*, No. W:21-CR-00060-ADA, 2023 WL 164170, at *6 (W.D. Tex. Jan. 9, 2023) ("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 ... 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 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 restrictions[2] despite *Bruen* containing no such assurances. *See Stennerson*, 2023 WL 2214351, at *1–2; *Smith*, 2023 WL 3012007, at *4.

And in some cases, courts seized on *Bruen*'s comparisons to other constitutional rights[3] to find that the historical tradition supported disarmament of felony indictees

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[2] *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) ("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.

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 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; *United States v. Simien*, No. SA-22-CR-00379-JKP, 2023 WL 1980487, at *7 (W.D. Tex. Feb. 10, 2023), *reconsideration denied*, No. SA-22-CR-00379-JKP, 2023 WL 3082358 (W.D. Tex. Apr. 25, 2023); *Rowson*, 2023 WL 431037, at *23–24; *United States v. Kays*, 624 F. Supp. 3d 1262 (W.D. Okla. 2022); *Gore*, No. 2:23-CR-04, 2023 WL 2141032, at *4; and *Bartucci*, 2023 WL 2189530, at *8.

Lower courts have reached disparate decisions, often ignoring this Court's directive that laws aimed at conduct that the founders likewise faced must be analyzed under a different standard than modern problems. *Bruen* was a game changer for Second Amendment jurisprudence. Still, many lower courts are treating it as more of the status quo. The result is a hodgepodge of conflicting holdings that require this Court's attention.

B. Courts are divided on the constitutionality of 18 U.S.C. § 922(n).

In *Bruen*'s wake, several district courts concluded that 18 U.S.C. § 922(n) violates the Second Amendment. *See 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); *Hicks*, 2023 WL 164170. Reasoning that possession of a firearm by a person accused of a felony was an issue at the time the Second Amendment was enacted, they noted that the founders had other means of addressing the issue that did not include total disarmament. "Much like § 922(n), Massachusetts' surety laws addressed the societal fear that those accused—like those under indictment—would make an unlawful use of [their firearm]." *Quiroz*, 2022 WL 4352482, at *8 (internal quotes omitted). Yet those surety laws addressed the issue through means "materially different" than § 922(n). *Id.*

In stark contrast, numerous other courts have concluded the statute remains constitutional. *See Stennerson*, 2023 WL 2214351, at *1; *Smith*, 2023 WL 3012007, at *1; *Simien*, 2023 WL 1980487; *Rowson*, 2023 WL 431037; *Posada*, 2023 WL 3027877; *Now*, 2023 WL 2717517; *Kelly*, 2022 WL 17336578; *Kays*, 624 F. Supp. 3d 1262; *Jackson*, 2023 WL 2499856; *Gore*, 2023 WL 2141032; *Bartucci*, 2023 WL 2189530. They have done so by largely ignoring *Bruen*'s historical tradition test and instead pointing to *Heller*'s dicta regarding felon-in-possession laws. *See, e.g., Stennerson*, 2023 WL 2214351, at *2 (noting that the Ninth Circuit concluded habitual drug users in possession of firearms pose the same dangers as felons, thus 18 U.S.C. § 922(g)(3) is constitutional).

Absent intervention from this Court, citizens across the nation will face enormous disparate outcomes for the same conduct. In some circuits, individuals will

become felons—and endure all the attendant consequences—simply for possessing a firearm for home protection. In others, they will not.

II. Section 922(n) is unconstitutional.

Because § 922(n) encroaches on the right of the people to keep and bear arms, it presumptively violates the Second Amendment's unqualified command that this right shall not be infringed. *See Bruen*, 142. S. Ct. at 2156. Section 922(n) applies to any "person," which Congress elsewhere defined to include "any individual." 18 U.S.C. § 921(a)(1). Consequently, the "person" targeted by § 922(n) forms part of "the people" protected by the Second Amendment's plain text.

The government cannot affirmatively prove that § 922(n) is part of the historical tradition that delimits the outer bounds of the Second Amendment. "Indictment has historically had a limited effect on an individual's constitutional rights." *United States v. Laurent*, 861 F. Supp. 2d 71, 91 (E.D.N.Y. 2011). And the impact on an indicted person's rights has generally been limited to detention or certain pre-trial conditions only after a judicial determination that such conditions are necessary. *Id.* at 90–93 (citing *United States v. Salerno*, 481 U.S 739, 764 (1987); 18 U.S.C. § 3142). Indeed, per se infringements on the rights of indicted individuals, including restrictions on the possession of firearms, violate Due Process. *See United States v. Torres*, 566 F. Supp. 2d 591, 594–99 (W.D. Tex. 2008); *United States v. Arzberger*, 592 F. Supp. 2d 590, 603 (S.D.N.Y. 2008); *Cf. United States v. Kennedy*, 593 F. Supp. 2d 1221, 1231 n.4 (W.D. Wash. 2008) (expressing concern that upholding a mandatory condition of release prohibiting the possession of firearms means "this constitutional right would be taken away not because of a conviction, but merely

because a person was charged"). If a per se infringement on possession triggers a constitutional violation, certainly a per se infringement on firearm receipt—the natural corollary to firearm possession—cannot be part of this nation's history and tradition.

It was not until 1938 that Congress first passed a law prohibiting transporting firearms for individuals under indictment for a crime of violence. *See* Federal Firearms Act of 1938, 75 Cong. Ch. 850, § 2(e), 52 Stat. 1250, 1251 (repealed). In1961, Congress expanded the prohibition to include all individuals under indictment. *See* Act of Oct. 3, 1961, Pub. L. No. 87–342, 75 Stat. 757 (repealed). The statute was again clarified in 1968, to include indictments in state and federal court, but only for those crimes punishable by more than one year in prison. *See* Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921–928).

The lack of a regulation from the time the Second Amendment was framed and adopted that is "distinctly similar" to a complete ban on receipt of firearms by individuals under indictment—a process enshrined in the Fifth Amendment—proves § 922(n)'s unconstitutional. *See Bruen*, 142 S. Ct. at 2131 ("When a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."). The predecessors to § 922(n) date to the post-enactment history period *Bruen* specifically cautioned could be irrelevant to interpreting the Second Amendment. *See* 142 S. Ct. at 2154 n.28 ("We will not address any of the 20th-century

historical evidence . . . [it] does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence."). The Amendment plainly states "the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. Like the historical evidence discarded by *Bruen*, § 922(n)'s late-in-time predecessors contradict the text and thus do not provide insight into the outer bounds of the Second Amendment's unqualified command. And where late in time "history contradicts what the text says," *Bruen* says "the text controls." 142 S. Ct. at 2137.

In any event, the government's attempts to demonstrate historical and modern regulations as "relevantly similar" by referencing concepts as nebulous as "dangerousness" and "public safety," fail. Such recasting of the historical analogue test comes dangerously close to shoving means-end scrutiny—the framework *Bruen* explicitly rejected—back into Second Amendment jurisprudence. *See* 142 S. Ct. at 2127–31. "The Second Amendment is the very product of an interest balancing by the people," "and . . . [i]t is this balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.* at 2131. To justify modern regulations by generally referencing "dangerousness" blurs the outer limits of the right to an unacceptable degree. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Heller*, 554 U.S. at 634. So too it takes out of the hands of the legislature the power to decide what counts as "dangerous" enough to strip an individual of his firearm. Otherwise "[a] constitutional guarantee subject to future judges' assessments of its

usefulness"—or a future legislature's judgment on what constitutes as "dangerous"—"is no constitutional guarantee at all." *Id.*

Absent evidence of a distinctly similar historical tradition of restriction of firearms by individuals under indictment, § 922(n) cannot stand.

III. This case presents an issue of exceptional importance.

Bruen's application to criminal statutes will continue to plague lower courts until this Court provides guidance. This Court may get its first chance to address the problem in *United States v. Rahimi*, No. 21-11001. The United States has sought review in this Court of the Fifth Circuit's decision in *United States v. Rahimi*, 59 F.4th 163, 169 (5th Cir. 2023), which held that, under *Bruen*, 18 U.S.C. § 922(g)(8) (prohibiting possession of firearms by persons subject to domestic violence restraining orders) is unconstitutional. *United States v. Rahimi*, No. 21-11001 (petition for writ of certiorari filed Mar. 17, 2023). Multiple amici support this Court's intervention. Although *Rahimi* concerns a different federal criminal statute, this Court's analysis would no doubt provide considerable guidance to lower courts confronted with § 922(n) and other criminal prohibitions.

And *United States v. Quiroz*, Case No. 22-50834, currently pending on an expedited schedule before the Fifth Circuit, presents the exact issue posed here. In that case, after oral argument, the Court of Appeals made the unique request for supplemental briefing from the Solicitor General, noting "the significance of the issues" presented. Letter Request, *United States v. Quiroz*, No. 22-50834 (Feb. 15, 2023). The court requested briefing on five issues, including whether there are colonial, state, federal, or common law analogues to 18 U.S.C. § 922 or 18 U.S.C.

§ 3142(c)(1)(B)(viii) (part of the Bail Reform Act); whether there was an actual practice by colonial, state, or federal courts imposing restrictions on the receipt or possession of firearms after a defendant was accused; whether there were conditions or qualifications on the sale or transfer of a firearm to a defendant accused of a felony or serious crime while he or she was released pending trial or adjudication; and whether these questions, and the historical record compiled by the parties, present questions of law or fact. *Id.* This request shows that Mr. Morrison's petition raises an important question of federal law that has not been, but should be, settled by this Court.

Moreover, the issue before the Court implicates the prosecution and incarceration of thousands. As of May 25, 2023, the Bureau of Prisons reported that it imprisons 159,387 people.[4] 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.[5] "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[.]"[6] In fiscal year 2021,

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[4] *Statistics*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited June 1, 2023).

[5] *Statistics- Inmate Offenses*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited June 1, 2023).

[6] *Fiscal Year 2021 Overview of Federal Criminal Cases* at 4, United States Sentencing Commission (April 2022), https://www.bop.gov/about/statistics/population_statistics.jsp

"[c]rimes involving firearms were the third most common federal crimes[.]"[7] Of the 57,287 individuals sentenced, 8,151 were firearm cases—a 14.2% share.[8] 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.[9]

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). The scale of the question presented warrants this Court's attention.

CONCLUSION

Petitioner submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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[7] *Id.* at 19.
[8] *Id.* at 1, 5.
[9] *Id.* at 2.

Respectfully submitted,

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