No. 23-374

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

BRYAN DAVID RANGE,

Respondent.

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 922(g)(1), which generally prohibits firearm acquisition and possession by anyone who has been convicted of "a crime punishable by imprisonment for a term exceeding one year," is subject to as-applied Second Amendment challenges.

2. Whether 18 U.S.C. § 922(g)(1) is unconstitutional as applied to Respondent, who was convicted in 1995 of making a false statement to obtain government benefits.

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The opinion of the en banc court of appeals (Pet. App. 1a–98a) is reported at 69 F.4th 96. The opinion of the three-judge panel of the court of appeals (Pet. App. 99a–140a) is reported at 53 F.4th 262. The district court's opinion (Pet. App. 145a–158a) is reported at 557 F. Supp. 3d 609.

JURISDICTION

The en banc court of appeals issued its judgment on June 6, 2023. Justice Alito extended the time to file a petition for a writ of certiorari on August 25, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This case presents an important and recurring issue of constitutional law that is the subject of a clear split of authority in the circuit courts: whether the federal law generally prohibiting firearm acquisition and possession by individuals who have been convicted of a crime punishable by imprisonment for a term exceeding one year is subject to as-applied Second Amendment challenges. The court below, the Third Circuit sitting en banc, answered yes, and held that Section 922(g)(1) cannot constitutionally be applied to Respondent, who, based on his failure to include lawnmowing income on a food stamp application, was convicted in 1995 of making a false statement to obtain government assistance. The Eighth and Tenth Circuits recently have answered no, holding that Section 922(g)(1) is constitutional in all applications and therefore not subject to as-applied challenges.

The recent split in authority between the Third Circuit, on the one hand, and the Eighth and Tenth

Circuits, on the other, demonstrates that the pre-existing circuit split on this issue was not resolved by this Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), and that it therefore remains necessary for this Court to resolve the disagreement in the lower courts. This Court accordingly should grant certiorari and resolve this important and recurring issue forthwith.

The pendency of *United States v. Rahimi*, No. 22-915, before this Court makes this a particularly apt time to grant review. While *Rahimi* presents the issue of whether and in what circumstances the government may disarm an individual who is alleged to be violent but who has not been criminally convicted, this case presents the issue of whether and in what circumstances the government may disarm an individual who has been criminally convicted but who all agree "has never engaged in violence, nor has . . . ever threatened anyone with violence." Joint Appendix 171, *Range v. Att'y Gen.*, No. 21-2835 (3d Cir. Dec. 21, 2021) ("JA"). These issues are complementary and important, and it would be beneficial for the Court's decision making to consider both during the same Term.

After granting review, this Court should affirm the judgment below. A straightforward application of *Bruen* demonstrates that Section 922(g)(1) is unconstitutional as applied to Respondent. As a matter of plain text, the Second Amendment protects "all Americans." *See District of Columbia v. Heller*, 554 U.S. 570, 581 (2008); *accord Bruen*, 142 S. Ct. at 2156. As a matter of history, "the Government has not shown"—and cannot show—"that our Republic has a longstanding history and tradition of depriving people like [Respondent] of their firearms." Pet. App. 19a–

20a. That is because history *at most* shows that "the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting). There is no historical foundation for disarming an individual whose criminal offense is not in any way related to violent behavior.

Section 922(g)(1), in its current form, is an innovation of the second half of the 20th century that was designed to be a "sweeping prophylaxis . . . against misuse of firearms." *Lewis v. United States*, 445 U.S. 55, 63 (1980). This sweeping prophylaxis departs from our historical traditions, and foreclosing the possibility of as-applied challenges would improperly relegate the Second Amendment to second class status. "It is not uncommon in constitutional law to create rules that prophylactically over-protect constitutional rights," but "[l]ess common, indeed unprecedented, is the attempt to create a judicial rule that prophylactically *under-protects* individual constitutional rights." *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 713 (6th Cir. 2016) (Sutton, J., concurring in most of the judgment). This Court should "not go down that road," *id.*, and it should grant certiorari and affirm.

STATEMENT

Respondent Bryan Range pleaded guilty in 1995 to a misdemeanor charge of welfare fraud under 62 PA. CONS. STAT. § 481(a) for making false statements to acquire food stamp assistance. Pet. App. 2a. His crime of conviction carried a maximum penalty of five years' imprisonment, 18 PA. CONS. STAT. § 1104, but Range was sentenced to considerably less than the

maximum, Pet. App. 3a. He served three years' probation, paid $2,458 in restitution, $288.29 in costs, and a $100 fine. *Id*. As a result of this single, nearly thirty-year-old conviction, it is unlawful for Range to "possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(1).

Range filed this suit in the Eastern District of Pennsylvania in 2020, seeking to vindicate his right to possess a firearm and secure a judgment that Section 922(g)(1) violates the Second Amendment as applied to him. Pet. App. 4a. The government expressly "admit[ted]" that "Range has never engaged in violence, nor has he ever threatened anyone with violence." JA 171. Applying the Third Circuit's then-binding precedent, the district court denied Range's motion for summary judgment and granted summary judgment to the government, finding that his offense of conviction qualified as a "serious" crime warranting the deprivation of his Second Amendment rights. Pet. App. 141a, 145a, 157a–158a.

While the case was on appeal, this Court decided *Bruen*, which eliminated the two-part interest balancing approach adopted in several courts of appeals following *Heller* and dictated that all Second Amendment challenges should be resolved exclusively with reference to "the Second Amendment's text, as informed by history." 142 S. Ct. at 2127. The Third Circuit panel ordered supplemental briefing on *Bruen* and, finding that the relevant factual record was fully developed, applied *Bruen* to Range's challenge and held Section 922(g)(1) was constitutional. The panel reasoned that anyone who had "demonstrated

disregard for the rule of law through the commission of felony and felony-equivalent offenses, whether or not those crimes are violent" could be disarmed consistent with the Second Amendment. Pet. App. 100a.

The Third Circuit granted en banc review, vacated the panel decision, and reversed and remanded, applying *Bruen* and holding that "people like Range," *id*. at 19a, could not be disarmed "consistent with the Nation's historical tradition of firearm regulation." *Id*. at 13a (quoting *Bruen*, 142 S. Ct. at 2130). The government's petition for certiorari followed.

ARGUMENT

I. The Court should grant certiorari because this case involves a clear circuit split over the validity of a federal statute impacting fundamental rights.

As the government points out in its petition, the Third Circuit below held that Section 922(g)(1) is not consistent with the Second Amendment in all applications and therefore is subject to as-applied challenges, but two other Circuits—the Eighth and the Tenth—have held precisely the opposite. Pet. 22–23. If anything, the government *understates* the degree to which the courts of appeals are divided over this issue; the split is, in the government's own estimation, likely to deepen soon and in fact these recent decisions merely represent the persistence of an older pre-*Bruen* split in authority.

A. In *Bruen*, this Court made clear that *any* challenge to a law under the Second Amendment must proceed through the same analysis. If a law restricts conduct falling within the "plain text" of the Second

Amendment, it is "presumptively" unconstitutional and can be saved only if the government, which bears the burden, proves "that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126.

The Tenth Circuit, however, in holding that Section 922(g)(1) comports with the Second Amendment, did not conduct a *Bruen* analysis. Instead, it reaffirmed its own pre-*Bruen* precedent under which as-applied challenges to the law were treated as entirely foreclosed by this Court's statement, in *Heller*, that "nothing in [this] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" which it identified as an exemplary "presumptively lawful" regulatory measure. *Vincent v. Garland*, 80 F.4th 1197, 1201 (10th Cir. 2023) (quoting *Heller*, 554 U.S. at 626–27 & n.26). Although the Tenth Circuit had not, in its earlier decision, analyzed any historical restrictions to hold Section 922(g)(1) constitutional in all its applications, *see id.* ("In *McCane*, we relied solely on this language from *Heller*."), the court decided the historical work prescribed by *Bruen* was still unnecessary because "six of the nine Justices pointed out that *Bruen* was not casting any doubt on this ['presumptively lawful'] language in *Heller*," and "*Bruen* apparently approved the constitutionality of regulations requiring criminal background checks before applicants could get gun permits," which, the court reasoned, "implied that it was constitutional to deny firearm licenses to individuals with felony convictions," *id.* at 1201–02. In addition to authoring the majority opinion, Judge Bacharach wrote separately, noting that there is "judicial disagreement over historical analogues for the federal

ban" but reiterated that the disagreement was immaterial in the Tenth Circuit where pre-*Bruen* precedent remained in force. *Id.* at 1204 (Bacharach, J., concurring).

The Eighth Circuit reached the same result. It too placed primary importance on the "presumptively lawful" language from *Heller*, though it did also discuss the historical analysis mandated by *Bruen*. *United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023). The *Jackson* panel, like Judge Bacharach, noted that there "appear to be two schools of thought" on what sort of historical justification would validly permit the government to deny individuals the right to keep and bear arms based on past convictions: (1) "that legislatures have longstanding authority and discretion to disarm citizens . . . who are 'unwilling to obey the government and its laws, whether or not they had demonstrated a propensity for violence,' " *id.* at 502 (quoting *Range v. Att'y Gen.*, 53 F.4th 262, 269 (3d Cir. 2022)), or (2) that "dangerousness is considered the traditional *sine qua non* for dispossession." *Id.* at 504. The Eighth Circuit considered that "the better interpretation of the history may be debatable" but "conclude[d] that either reading supports the constitutionality of § 922(g)(1) as applied to . . . convicted felons," *id.* at 502, because in either case, it supported the rule that "legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms." *Id.* at 505.

Judge Stras, dissenting from the denial of rehearing en banc in *Jackson*, criticized the court for inappropriately placing the burden on the defendant to prove he had Second Amendment rights and for getting the history wrong. *United States v. Jackson*, No.

22-2870, 2023 WL 5605618, at *1–2 (8th Cir. Aug. 30, 2023) (Stras, J., dissenting from denial of reh'g en banc). Comprehensively surveying the historical background in a way that the panel did not, Judge Stras noted that Founding-era history disclosed that "[p]eople considered dangerous lost their arms[,] [b]ut being a criminal had little to do with it." *Id.* at *4. And he criticized the panel for assuming that, even if "dangerousness" were the historical benchmark, then across-the-board felon disarmament was appropriate. Founding-era restrictions on dangerous people "were underinclusive" but the modern prohibition on felons is overinclusive: while "[m]urderers are almost always dangerous . . . people who utter obscenities on the radio [or] read another person's email . . . not so much." *Id.* at *8.

B. The decisions of the Eighth and Tenth Circuits are incompatible with the decision below. The Third Circuit held that as-applied challenges to Section 922(g)(1) are permissible under the Second Amendment and that, for individuals "like Range," the statute is unconstitutional. Pet. App. 19a. Sitting en banc, the court first addressed a question that was assumed by the Eighth and Tenth Circuits: "whether Range is one of 'the people' who have Second Amendment rights[,]" *id.* at 8a. The court concluded that Range is part of the people for a litany of reasons, including that this Court in *Heller* stated that "the people" includes "all Americans" and equated "the people" protected by the Second Amendment with "the people" protected by the First and Fourth Amendments. *Id.* at 9a–10a. The more coherent way of understanding the right, the court reasoned, was that " 'all people have the right to keep and bear arms,' though the

legislature may constitutionally 'strip certain groups of that right' " based on *historical* limitations. *Id.* (quoting *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting)). The question remained, however, was Range part of a group that could be so stripped?

He was not, the Third Circuit explained, because none of the proposed historical analogues to Section 922(g)(1) identified by the government would have permitted him to be. As an initial matter, the Third Circuit rejected the notion that *Heller*'s statement about "longstanding prohibitions" answered the question. The court reasoned that it was a "dubious" proposition that the federal ban (which dates to 1938 in its earliest version), could really be considered "longstanding" for purposes of *Bruen*, given this "Court's emphasis on Founding- and Reconstruction-era sources" and that the putatively "longstanding" 1938 version of the law was irrelevant anyway, since it "applied only to *violent* criminals" and "Range would not have been a prohibited person under that law." Pet. App. 14a–15a. Analyzing other historical restrictions on the right, the Third Circuit rejected reliance on laws that " 'used status-based restrictions' to disarm certain groups of people" earlier in our history, noting that many of those laws "now would be unconstitutional under the First and Fourteenth Amendments" and that any analogy between Range and those distrusted or discriminated-against groups "like Loyalists, Native Americans, Quakers, Catholics, and Blacks . . . . would be 'far too broad[ ].' " *Id.* at 16a (quoting *Bruen*, 142 S. Ct. at 2134) (brackets in original). The Third Circuit also rejected as unpersuasive comparisons to laws that punished some nonviolent crimes with death because "[t]he greater does not

necessarily include the lesser" and the availability of the death penalty "does not mean the State, then or now, could constitutionally strip a felon of his right to possess arms if he was not executed." *Id.* at 17a. Finally, laws that "prescribed the forfeiture of the weapon used to commit a firearms-related offense" were not analogous because such laws did not "affect[] the perpetrator's right to keep and bear arms generally." *Id.* As such, Range was one of "the people" with Second Amendment rights, and the government had failed to show "that our Republic has a longstanding history and tradition of depriving people like Range of their firearms[.]" *Id.* at 19a–20a. Therefore, the court held, Section 922(g)(1) is unconstitutional as applied to Range.

C. In addition to the clear 2-1 post-*Bruen* split of authority over the question of whether a plaintiff can maintain an as-applied challenge to Section 922(g)(1), these cases demonstrate deeper disagreements over how (and whether) to apply this Court's decision in *Bruen* to questions related to the categorical and permanent exclusion of certain people from the scope of the Second Amendment's protections. Indeed, in both cases holding Section 922(g)(1) facially constitutional in all circumstances, the key factor in the courts of appeals' analyses was not any aspect of our country's "historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2126, but rather language from this Court's *Heller* opinion that several jurists have noted "is far from clear" in meaning. *United States v. McCane*, 573 F.3d 1037, 1063 (10th Cir. 2009) (Tymkovich, J., concurring); *see also Kanter*, 919 F.3d at 453 (Barrett, J., dissenting) ("[B]ecause [*Heller*] explicitly deferred analysis of this issue, the scope of its assertion is

unclear."); *Folajtar v. Att'y Gen.*, 980 F.3d 897, 913 (3d Cir. 2020) (Bibas, J., dissenting) (noting that "*Heller* limited its remark to 'longstanding' bans[] [but] [l]ongstanding bans are centuries old, not within living memory. The federal felon-in-possession ban, however, did not begin to reach beyond violent crimes until 1961." (citation omitted)).

The split identified here is not a new development, but rather the post-*Bruen* persistence of an intractable division among the lower courts that has existed since shortly after *Heller* was decided. *See United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (permitting as-applied challenges to Section 922(g)(1)); *Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019) (same); *Holloway v. Att'y Gen.*, 948 F.3d 164, 178 (3d Cir. 2020) (same); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (citing *McCane*, 573 F.3d at 1047) (foreclosing them); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (same); *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017) (same); *see also United States v. Darrington*, 351 F.3d 632, 633–34 (5th Cir. 2003) (suggesting as-applied challenges are not available); *Stimmel v. Sessions*, 879 F.3d 198, 202–03 (6th Cir. 2018) (same). And at its root is uncertainty over the question of how to treat *Heller*'s reference to certain "presumptively lawful" regulations. That question has gained a dimension since this Court explained in *Bruen* that conduct falling within the scope of the plain text is "presumptively protect[ed]" so that laws impacting that conduct are presumptively *unlawful*, 142 S. Ct. at 2126, but it has not been expressly resolved.

The issue of disarmament based on a criminal conviction has also long been a subject of significant

scholarly analysis, *see, e.g.*, C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 708 (2009), and it has been thoroughly ventilated and is ripe for review. The clear persistence of this split after this Court's decision in *Bruen* demonstrates that it will not be resolved without this Court intervening and deciding this specific issue. The government anticipates the split deepening further very soon, highlighting *Zherka v. Garland*, No. 22-1108 (argued May 8, 2023), currently pending before the Second Circuit. *See* Pet. 27. In addition, the Seventh Circuit has also confronted a post-*Bruen* challenge to Section 922(g)(1). It remanded to the district court with instruction to conduct a "proper, fulsome analysis of the historical tradition supporting § 922(g)(1)." *Atkinson v. Garland*, 70 F.4th 1018, 1022 (7th Cir. 2023). That reasoning alone is at odds with the approach of the Eighth and Tenth Circuits, since in so holding the Seventh Circuit rejected the argument that the "presumptively lawful" language in *Heller* resolved the case, noting that "[n]othing allows us to sidestep *Bruen* in the way the government invites." *Id.*

D. This case is independently worthy of certiorari because the Third Circuit has held a federal statute unconstitutional, and this Court's ordinary practice is to grant certiorari in such circumstances, even in the absence of a circuit conflict. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Morrison*, 529 U.S. 598 (2000); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993). That practice is consistent with the reality that declaring a statute unconstitutional is the "gravest and most delicate" of judicial tasks. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion

of Holmes, J.). That is especially true here. The law the Third Circuit held to be unconstitutional is "no minor provision," *Rehaif v. United States*, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting), but rather "by far the most frequently applied of Section 922(g)'s disqualifications," Pet. 24. This Court has already granted certiorari in *Rahimi*, in which the Fifth Circuit held Section 922(g)(8) unconstitutional. In contrast to the, on average, 26 convictions under Section 922(g)(8) every year, *Federal Weapons Prosecutions Rise for Third Consecutive Year*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, SYRACUSE UNIV. (Nov. 29, 2017), https://bit.ly/3QiEiHM, each year there are more than 7,600 convictions (almost 300x more) under Section 922(g)(1). *See Quick Facts: Felon in Possession of a Firearm*, U.S. SENT'G COMM'N (July 2023). If *Rahimi* was deserving of this Court's attention, this case is much more deserving.

II. Section 922(g)(1) is unconstitutional as applied to Respondent.

A. No decision of this Court precludes as-applied challenges to Section 922(g)(1).

The Third Circuit's decision in this case, permitting as-applied challenges by individuals like Range, is a faithful application of this Court's precedent and accurately reflects the history of firearm regulation in this country. In arguing otherwise, the government first—embracing the rationales of the Eighth and Tenth Circuits—argues that this Court already has recognized that disarming individuals based on past convictions is *per se* constitutional, relying on the "longstanding" and "presumptively lawful" language

from *Heller*, as well as the fact that *Bruen* frequently referred to the plaintiffs in that case as "law-abiding citizens." Pet. 9–10. But this overreads both *Heller* and *Bruen*.

Bruen made clear that *every* Second Amendment challenge must be judged based on the text and history of the Second Amendment. 142 S. Ct. at 2126 ("*Only if* a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." (internal quotation marks omitted) (emphasis added)). In light of this language and the fact that *Heller* did not itself address a law restricting the rights of people with criminal convictions, its statement that bans on felons possessing firearms were "presumptively lawful" can be understood only as an expression of the Court's expectation that, *when properly analyzed*, such a law would turn out to be lawful to some extent. "*Heller* stopped short of saying [such laws] are always constitutional, no matter the felon. After all, a measure can be presumptively constitutional and still have constitutionally problematic applications. *As-applied challenges exist for exactly this reason*." *Jackson*, 2023 WL 5605618, at *9 (Stras, J., dissental) (emphasis added). And as for *Bruen*'s reference to the plaintiffs in that case as "law-abiding," there is nothing odd about that—everyone agreed they *were* law-abiding. The question of what rights under the Second Amendment could be claimed by an individual who had not always been law-abiding was not presented in *Bruen*, and that way of describing the plaintiffs was merely a way of signaling an issue that was not before the Court. Nothing in either case suggests that *Heller*'s

"presumptively lawful" language offers the government a way around carrying its burden under *Bruen* and proving that Section 922(g)(1) is constitutional in light of the history of firearm regulation in this country. *See Atkinson*, 70 F.4th at 1022; *Jackson*, 2023 WL 5605618, at *9 (Stras, J., dissental) ("Reading the tea leaves from dicta in three separate opinions is no substitute for faithful application of a majority opinion that commanded six votes."). And while in *Bruen* "the Court seemed to find no constitutional fault with a state requiring a criminal background check before issuing a public carry permit. . . . in no way did the Court suggest that its observation resolved cases like the one [plaintiff] brought challenging § 922(g)(1)." *Atkinson*, 70 F.4th at 1022.

In fact, to the extent *Heller*'s dictum regarding "longstanding prohibitions on the possession of firearms by felons" has any significant bearing on this case, it is rather to demonstrate why as-applied challenges to this broad prohibitory statute should be permitted, not foreclosed. As the Third Circuit noted below, the original federal ban (the arguably "longstanding" one) dated to 1938 and only applied against those who committed certain *violent* felonies. Pet. App. 23a–24a. The modern version has existed only since the 1960s and is significantly broader, sweeping in people like Range, who would not have been impacted by the original law. So even if *Heller* meant that the *original* ban on violent felons possessing firearms should be entirely insulated from review and analysis under *Bruen* (and it should not be read that way), that still leaves a significant question as to whether the ways in which the modern law are *broader* than its predecessor are equally compatible with the Second

Amendment. Nothing in *Heller* precludes Plaintiffs from bringing as-applied challenges to test that proposition, and there is every reason to suspect—even before conducting the historical analysis—that in at least some cases the broader prohibition cannot be squared with the right to keep and bear arms.

At the time the modern version of Section 922(g)(1) was passed, many erroneously considered the Second Amendment *not* to enshrine an individual right to own firearms, and the legislative history demonstrates that the intention of its drafters would be highly suspect if such a right *had* been understood to exist. *See Scarborough v. United States*, 431 U.S. 563, 572 (1977) ("Congress sought to rule broadly to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." (internal quotation marks omitted)). The rule is, in effect, a "sweeping prophylaxis" against ownership of firearms by a large group of people, *Lewis*, 445 U.S. at 63—but while it "is not uncommon in constitutional law to create rules that prophylactically over-protect constitutional rights," it is "unprecedented" to apply a "rule that prophylactically *under-protects* individual constitutional rights." *Tyler*, 837 F.3d at 713 (Sutton, J., concurring in most of the judgment). In legislating an unprecedented, broad prohibition on the purchase and possession of firearms by individuals with certain criminal convictions, there is every reason to suspect Congress passed a law that, at least in some circumstances, is unconstitutional—and nothing in this Court's precedent forecloses affected individuals from bringing as-applied challenges to vindicate their rights.

B. Section 922(g)(1) impacts people who have Second Amendment rights.

The government argues that Respondent should not be permitted to bring an as-applied challenge to Section 922(g)(1) because those disqualified by the statute are not "among 'the people' protected by the Second Amendment." Pet. 11. This argument is flatly contradicted by this Court's previous interpretations of the Second Amendment and, if accepted, would have troubling implications for other constitutional rights.

In *Heller*, this Court explained that the Second Amendment protects a right of "the people," a phrase that it said includes "all Americans." 554 U.S. at 580–81. It noted that "the people" is "a term of art" that appears two other times in the Bill of Rights—in the First Amendment and the Fourth Amendment—and in all three cases "refers to all members of the political community." *Id.* at 579–80. Any lesser reading—for example, treating "the people" who have Second Amendment rights as a smaller group than "the people" who are free from unreasonable searches and seizures under the Fourth Amendment, is incompatible with this Court's repeated assurance that the right to keep and bear arms is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (Alito, J., plurality op.); *see also Bruen*, 142 S. Ct. at 2156 (same).

The government's contrary arguments are unpersuasive. It claims that "the people" does not include individuals convicted of felonies because "they

have forfeited their membership in the political community." Pet. 12. But it is important to read "the political community" in context to see that what *Heller* was suggesting with that phrase was not some group *narrower* than "citizens of the United States," *e.g.*, only those with the right to vote, but one that was potentially *broader*, indicating that individuals who were not yet citizens but had "developed sufficient connection with this country to be considered part of [the national] community," such as lawful permanent residents, may well also have Second Amendment rights. 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). It is inappropriate to try to use this language to *narrow* the Second Amendment to exclude an individual who is a citizen.

The government's attempt to gerrymander "the people" to exclude classes of people it would like to disarm suffers from a deeper flaw: because *Heller* equated "the people" protected by the Second Amendment to "the people" who have other constitutional rights, the necessary implication of the government's argument is that the government would have the authority to deprive individuals convicted of felonies or misdemeanors it deems equivalent to felonies of a host of fundamental rights. The government's attempt to get around this troubling implication is unconvincing. It concedes that, yes, *Heller* did say that "the people" is a "term of art," 554 U.S. at 580, used in the Bill of Rights and that, yes, "the people" in the Second Amendment should be read, just as it is in the First Amendment and Fourth Amendment, to refer to "the political community," *but*, it claims, what "political community" means is something that "varies from

provision to provision." Pet. 13. This is an argument that would make a sophist blush. It flies in the face of *Heller*'s insistence that the phrase should be construed to mean the same thing each time it appears. *Heller*, 554 U.S. at 580.

Finally, the government claims that felons are not part of "the political community" (and therefore, "the people") because they lawfully can be excluded from the franchise, from holding public office, and from serving on juries. But as noted above, the "political community" is not a reference to only those with voting rights. That losing civil rights such as the right to vote does not remove one from the "political community" is obvious from the fact that individuals who have been disenfranchised due to a criminal conviction still have the right to be free from unreasonable searches and seizures once they have repaid their debt to society in full. And furthermore, the implied equivalency between the right to keep and bear arms to the rights to vote, serve on juries, and hold public office is fallacious. The latter are "civic rights," which are exercised "in a collective manner for distinctly public purposes." *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting) (internal quotation marks omitted). "*Heller*, however, expressly rejects the argument that the Second Amendment protects a purely civic right," *id.* at 463, rather it protects "*an individual right* to keep and bear arms." *Heller*, 554 U.S. at 595 (emphasis added). And the sorts of exclusions that can be applied to civic rights "don't apply to the Second Amendment." *Kanter*, 919 F.3d at 463 (Barrett, J., dissenting). There is, therefore, no basis to assume that because a felon could be prohibited from voting by reason of his

conviction, he also, *as a function of his conviction*, could be prohibited from keeping and bearing arms.

C. History supplies no support for applying Section 922(g)(1) against Respondent.

Having failed to show that Range is excluded from the "plain text" of the Second Amendment, the government offers two different historical justifications to support the application of Section 922(g)(1) in all circumstances: that "the Second Amendment has historically been understood to protect law-abiding individuals, not convicted felons" or, alternatively, that it "has historically been understood to protect only responsible individuals, and felons, as a category, are not responsible." Pet. 11. Neither of these broad justifications is historically supported.

1. As to the claim that only "law-abiding" people are protected from disarmament, the government first points to the historical practice of imposing a death sentence for the commission of a felony, noting that a condemned felon would be disarmed prior to his execution (and obviously, afterward, would have had no rights). Pet. 14. The Third Circuit correctly rejected this argument because "[t]he greater does not necessarily include the lesser." Pet. App. 17a. Even if—Eighth Amendment aside—the government could execute an individual for a non-violent felony (or, in Respondent's case, a non-violent misdemeanor) today, it does not follow that it could deprive him of his other rights in exchange for its forbearance. One of the purposes for which the Second Amendment was included in the Bill of Rights was to protect "the inherent right of self-defense." *Heller*, 554 U.S. at 628. An executed

felon plainly has no need to defend himself, but if he is alive, then the right still inheres in him. *See Kanter*, 919 F.3d at 461–62 ("The obvious point that the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society."). The historic execution of some non-violent felons does not meet *Bruen*'s requirement that historical analogues burden the right in similar ways and for similar reasons. 142 S. Ct. at 2133.

Further, "[d]uring the period leading up to the founding, the connection between felonies and capital punishment started to fray" and lesser sentences were frequently imposed. *Kanter*, 919 F.3d at 459 (Barrett, J., dissenting). As this connection frayed, "[o]utside the capital context," the related concept of "civil death applied exclusively to life sentences and only if authorized by statute." *Id.* at 461. The government's reliance on civil death for support of Section 922(g)(1) therefore fails. *See* Pet. 15. In any event, civil death was premised on the concept that "someone who has committed a felony should no longer possess any rights growing out of organized society." *Id.* (internal quotation marks omitted). But as explained above, unlike civic rights, the right to keep and bear arms is an *individual* right that does not "grow out of organized society." And true to the government's characterization, the version of civil death that was embraced in America " 'deprived a felon of many, but not all, rights' " and "for felons sentenced to less than life, the courts understood [those] rights as 'merely *suspended* during the term of the sentence.' " *Folajtar*, 980 F.3d at 920–21 (Bibas, J., dissenting) (quoting *Kanter*, 919 F.3d at 460–61 (Barrett, J., dissenting)).

The very few laws the government cites which made disarmament a valid punishment for a criminal conviction also do not advance its case. The first, a 1605 English law providing a person could not "keep arms" if he failed to attend "service[s] of the church of England," Pet. 15 (internal quotation marks omitted), is a species of the type of religious discrimination laws that were discussed in *Heller* as motivating the inclusion of a right to arms in the English Declaration of Rights (in 1689), which has "long been understood to be the predecessor to our Second Amendment." *Heller*, 554 U.S. at 593. Rather than demonstrating a valid limitation on the scope of the right, such a source is better read as demonstrating an infringement of it. The same can be said of a 1624 Virginia law, which disarmed individuals who were convicted for "base and opprobrious speech." Pet. 15 (internal quotation marks omitted). At the very least, since both long precede the enactment of either the English Declaration of Rights or the Second Amendment they have "little bearing on" the meaning of the right. *See Bruen*, 142 S. Ct. at 2139. Furthermore, both laws would be recognized as unconstitutional today quite apart from the Second Amendment because of the ways they violate the free speech and free exercise clauses of the First Amendment. It is a strange feature of the government's argument that it seeks to rely on such laws to inform our understanding of the scope of the right to keep and bear arms.

The government also points to a 1775 Connecticut law that provided for disarmament as a punishment for any person who "shall libel or defame" the acts of the Continental Congress or the Connecticut General Assembly "made for the defence or security of

the rights and privileges" of the colony. 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM MAY, 1775, TO JUNE, 1776, at 193 (Charles J. Hoadley ed., 1890). On its plain terms, this law was not targeted at those who were insufficiently "law-abiding"; it was a wartime measure designed to take firearms from those who appeared disloyal to the Revolutionary cause. It targeted a group that "posed a danger," because they "were likely to aid the British, or possibly even join their ranks" and "use their arms to kill others, including their fellow citizens." *Jackson*, 2023 WL 5605618, at *4 (Stras, J., dissental); *see also Kanter*, 919 F.3d at 457 (Barrett, J., dissenting). Such a law cannot support disarming someone with a nonviolent, non-dangerous predicate conviction. Pet. App. 5a.

Last of all, the government relies on two historical documents which were not laws disarming individuals at all but rather statements that law-abiding citizens must be afforded the right to keep and bear arms. Pet. 16. The most significant of the two was a proposal by Anti-Federalist dissenters from the Pennsylvania ratifying convention which suggested adding language to the Constitution specifying that "no law shall be passed for disarming the people or any of them *unless for crimes committed, or real danger of public injury from individuals*." 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665 (1971) (emphasis added). But even granting the government's assumption that such a proposal *could* provide useful information about the scope of the right under *Bruen*, the Founding generation would not have considered the phrase "crimes committed" in the proposal "to support the disarmament of literally all criminals, even nonviolent

misdemeanants." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting). A more reasonable interpretation of the phrase, which is "both internally coherent and consistent with founding-era practice," would read it to "refer[] only to a subset of crimes," defined by the succeeding language of "real danger of public injury," *i.e.*, those who have committed *dangerous* crimes. *Id.* (internal quotation marks omitted). Indeed, both Blackstone and Webster demonstrate that the word "crime" at the Founding could be understood to refer not to all crimes but rather to those "of a deeper and more atrocious" kind. 4 WILLIAM BLACKSTONE, COMMENTARIES 180 (1769); *Crime*, WEBSTER'S DICTIONARY (1828). The government's ahistorical reading of the phrase, on the other hand, proves too much. It *cannot* be that the government can disarm individuals for "crimes committed," no matter how trivial.

Perhaps more importantly, the government's premise that such a proposal can provide support at all should not be granted. In *Bruen*, the Court looked to actual laws, that had actually been enforced, to inform its understanding of the scope of the right. *See, e.g.*, 142 S. Ct. at 2149. And in *Heller*, the Court expressly reasoned that it was "dubious" to rely on "the various proposals in the state conventions" to interpret the Second Amendment, which codified "a pre-existing right." 554 U.S. at 603. A proposal that "was suggested by a minority of the Pennsylvania ratifying convention that failed to persuade its own state, let alone others. . . . is too dim a candle to illumine the Second Amendment's scope." *Folajtar*, 980 F.3d at 915 (Bibas, J., dissenting). The same is true of the similar resolution, adopted by Williamsburg, Massachusetts over a decade before the Second Amendment was

ratified, which proclaimed the "essential priviledge to keep Arms in Our houses for Our Own Defence and while we Continue honest and Lawful Subjects of Government we Ought Never to be deprived of them." *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*, at 624 (Oscar Handlin & Mary Handlin eds., 1966). It would be bizarre to view such a statement in favor of the right, with language that does not track the language that was eventually adopted, as providing some implicit limitation on the Second Amendment.

The fact of the matter is, the government has failed to show that individuals convicted of felonies at the Founding were presumptively disarmed for life (and the same, or course, goes for the broader range of offenses now treated as predicate offenses under Section 922(g)(1)). The government tries to explain away this failure by claiming "early legislatures had little occasion to enact laws explicitly disarming persons convicted of" felonies because they were generally executed. Pet. 15. That is inconsistent with the fact that not all felons were executed at the Founding and that the Founding generation *was* concerned with regulating the voting rights of felons. Indeed, "[b]y 1820, ten states' constitutions included provisions excluding or authorizing the exclusion of those who had committed crimes, particularly felonies or so-called infamous crimes from the franchise," but [s]tate constitutions protecting the right to bear arms do not follow a similar pattern," *Kanter*, 919 F.3d at 463 (Barrett, J., dissenting) (internal quotation marks omitted). The plain conclusion, therefore, is not that there was no occasion to regulate the rights of those convicted of felonies, but rather that a bare felony conviction was not

understood to result in forfeiture of the right to keep and bear arms.

2. The government claims that a separate tradition, identified in its brief in *Rahimi*, permits the government to "disarm irresponsible individuals" without a case-by-case finding of dangerousness. Pet. 16–17. The government's arguments on this point have been thoroughly answered by briefs in *Rahimi*. *See, e.g.*, Br. of *Amicus Curiae* Ctr. for Human Liberty in Supp. of Respondent at 6–24, *United States v. Rahimi*, No. 22-915 (U.S. Oct. 4, 2023) (discussing proposed analogues for Section 922(g)(8) from before the Founding to the 20th century); Br. of *Amicus Curiae* FPC Action Found. in Supp. of Respondent at 27–28, *United States v. Rahimi*, No. 22-915 (U.S. Oct. 4, 2023) ("[T]he Government provide[s] no examples of anyone disarmed for being irresponsible or breaking the law who was not also dangerous."); *see also, e.g.*, *State v. Hogan*, 58 N.E. 572, 575 (Ohio 1900) (noting that one type of law cited by the government here, those targeting "vagrants," were understood as restrictions only on "go[ing] about with [a gun] or any other dangerous weapon to terrify and alarm a peaceful people" but did not bar one from "carry[ing] a gun for any lawful purpose").

3. The upshot of the government's historical arguments, it claims, is that "individuals who have been convicted of crimes that satisfy the common definition of a felony," can be disarmed for life. Pet. 19. The problem is the government has *not* shown that sufficiently "serious" crimes resulted in disarmament. Rather, the evidence shows that the common thread running through all the government's purported analogues, whether they involved the commission of a crime or

not, is *at most* that *dangerous* people can be disarmed, not those who have broken sufficiently "serious" laws. *See generally*, Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibition*, 16 DREXEL L. REV. (forthcoming 2023); *see also Kanter*, 919 F.3d at 464 (Barrett, J., dissenting); *Folajtar*, 980 F.3d at 913 (Bibas, J., dissenting) ("Historically, limitations on the right were tied to dangerousness."). Indeed, "it was only in 1961, just 62 years ago, that the federal government finally abandoned dangerousness as the litmus test for disarmament in enacting § 922(g)(1)'s predecessor." *Jackson*, 2023 WL 5605618, at *4 (Stras, J., dissental). To try and buttress its argument, the government emphasizes that the duration of conviction is elsewhere used to inform the applicability of certain constitutional rights that provide procedural protections to those accused of crimes. *See* Pet. 19. But that reality is based on the specific history and tradition underlying the procedural rights in question. That history demonstrates, for example, a longstanding tradition of exempting "petty offenses" from the jury trial requirement, and to determine whether a crime is petty a key indicator is "the maximum prison term authorized." *See Lewis v. United States*, 518 U.S. 322, 326 (1996). But such a distinction is divorced from any historical line drawn with respect to the right to keep and bear arms between those who could and could not be disarmed. Again, there is no historical foundation for disarming those convicted of purportedly "serious" crimes. And "dangerous" "is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).

4. The government complains that permitting as-applied challenges would be "unworkable in practice." Pet. 20. Of course, that is a problem of the government's own making. It is the government that has established a scope of disarmament so broad to include many offenses (like Respondent's) that cannot plausibly be tied to a threat of violent misuse of firearms. And under *Bruen*, it is the government's burden to justify limitations on Second Amendment rights. If the government cannot establish an administrable line to separate the validly from the invalidly disarmed, that should count *against*, not in favor of, the constitutionality of its law.

The government's administrability argument also is objectionable because it is impossible to square with the seriousness with which this Court has demanded the government treat constitutional rights. It is hard to imagine that the government would argue, in a First Amendment case, that it is just too hard to respect an individual's First Amendment rights and so it must be permitted to act overbroadly to deprive some speech of constitutional protection. The argument should sound just as jarring in this context. *Bruen* establishes that, if the government cannot find historical support for its law, it can be no answer that the restriction it is defending is sufficiently important, or that acting another way would be burdensome on the government. 142 S. Ct. at 2131. Therefore, just as in the First Amendment context, the courts must "fac[e] up to the tough individual problems of constitutional judgment involved in every" Second Amendment case. *See Miller v. California*, 413 U.S. 15, 29–30 (1973).

In any event, the government's concerns are overstated. It argues that permitting as-applied challenges to Section 922(g)(1) will "distort the separation of powers" since the legislative branch is in charge of determining the consequences of criminal convictions and the executive branch is the only one with the power to grant clemency. Pet. 20. But it is fundamental to our system that the Constitution, and the Bill of Rights specifically, places certain hard limits on the sorts of consequences that the legislative branch can impose. *See Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008). In challenging Section 922(g)(1) as-applied to himself, Respondent is not arguing the Court should grant him *clemency* for his past conviction, but rather rule that it never provided the government a basis on which to disarm him in the first place. In this way, the government's comparison to the inoperative method by which Congress provided that felons could petition to have their firearm rights reinstated, *see* Pet. 21, misses the point. Respondent's principal argument is not that he wants his rights back; it is that he never rightly lost them. That is not to say that the Second Amendment would not require a process for restoring the rights of those whose rights were validly forfeited at some point (and Range reserves the right to make that argument in the alternative), but addressing that issue should not be necessary to decide this case.

Nor is there any issue with treating "the right to possess arms differently from other rights that criminals forfeit upon conviction." *Id*. As explained above, the right to keep and bear arms *is* different from the rights to vote or serve on juries. And though the government objects that permitting as-applied challenges to Section 922(g)(1) would "pose serious problems of

judicial administration," that concern is unfounded. Courts make assessments of "dangerousness" all the time. As even the dissenters in *Binderup v. Attorney General* recognized, "[e]very day judges decide whether to grant bail, impose prison time, or revoke a period of supervised release—and all these determinations touch on dangerousness." 836 F.3d 336, 401 n.168 (3d Cir. 2016) (en banc) (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). As Judge Bibas noted in *Folajtar*, it would be possible for legislatures (or judges) to "use careful rules of thumb to classify some felonies as dangerous," because, for example, "though residential burglary and drug dealing are not necessarily violent, they are dangerous because they often lead to violence." 980 F.3d at 922 (Bibas, J., dissenting). And there would be no need for the Second Amendment analysis to follow the categorical approach of the Armed Career Criminal Act that has so bedeviled courts seeking to apply the residual clause of that statute. Indeed, it is that interpretation of the Armed Career Criminal Act, not any difficulty in identifying violent criminal offenses as such, that led to the Court finding the residual clause unconstitutionally vague. *See Johnson v. United States*, 576 U.S. 591, 597–99, 604–05 (2015).

III. This case should be heard alongside *Rahimi*.

Respondent is in the unusual position of agreeing with the government that this case is worthy of certiorari. Indeed, there is little doubt, given the enduring division of authority, the importance of the federal statute being challenged, and the well-developed historical record on which to decide the issue that this

Court would agree, with or without Respondent's input. Respondent diverges with the government, however, to the extent that the government asks that this petition not be acted on until this Court has decided *Rahimi*. Pet. 25–26. The government claims that "[t]his case substantially overlaps with *Rahimi*" since both cases "concern Congress's authority to prohibit a category of individuals from possessing firearms" and both require application of the standard this Court announced in *Bruen*. *Id.* at 26. Rather than counseling in favor of holding this case, these similarities provide good reasons to hear both cases this term.

As explained in detail above, even if history "demonstrates that legislatures have the power to prohibit dangerous people from possessing guns," "dangerous people" "is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness." *Kanter*, 919 F.3d at 451, 454 (Barrett, J., dissenting). This case and *Rahimi* separately present the two halves of this dichotomy. The question in *Rahimi* is whether, or how, the government can preclude a dangerous person *without* a predicate conviction from possessing a firearm. This case asks the complementary question: can the government *always* preclude a person (even a non-dangerous one) from possessing a firearm *just because* he has a predicate conviction? Neither question is likely to supply a definitive answer for the other, and the judiciary will be significantly helped by dispositive answers to both from this Court.

It is hard to take seriously the government's suggestion that *Rahimi* may resolve issues central to this case, given that despite *Bruen*'s repeated insistence

that every Second Amendment challenge must be resolved through analysis of the Second Amendment's text and the history of firearms regulation in this country, both the Eighth and the Tenth Circuits, in this context, eschewed a careful study of history and resolved similar challenges to this one based on dicta in *Heller* that remains a source of confusion, at best. *See Vincent*, 80 F.4th at 1201 n.4. *Heller*'s "presumptively lawful" language is not implicated directly in *Rahimi*, so that case is unlikely to resolve any significant part of the division among the circuits identified here. If this case is held for *Rahimi*, there is little doubt the same fault lines would emerge again without much, if any, additional clarity being added to the issues.

The government also claims that holding this case may provide time for "a better vehicle" to come along, noting that Judge Roth suggested below that Range may lack standing "because he had failed to plead that the particular firearms he wishes to possess satisfy Section 922(g)(1)'s interstate-commerce element." Pet. 27. There is nothing to this fig-leaf objection with which the government itself does not agree, and which failed to attract the vote of any of the other fourteen judges who heard this case en banc. *Id.*; Pet. App. 88a.

That the government would ventilate such a baseless objection underscores the degree to which it is interested in keeping *Rahimi* alone as the singular Second Amendment case before the Court this term. Whatever the reason for that—it is hard not to suspect it is because the government views Rahimi as a much less sympathetic target for its arguments in favor of firearm prohibition than Range, a person who not

even the government alleges is a danger to anyone—the government's position is incompatible with this Court's oft-repeated assurance that the Second Amendment does not enshrine a "second-class right." It is commonplace for the Court to hear more than one—sometimes many more than one—case involving a single constitutional right per term. For example, this Court heard four First Amendment cases in the 2013 term, *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Harris v. Quinn*, 573 U.S. 616 (2014); *McCullen v. Coakley*, 573 U.S. 464 (2014), and hears more than one such case almost every year. The same has often been true for the other Amendments in the Bill of Rights over the last ten years: that same term the Court heard two Fourth Amendment cases, *Fernandez v. California*, 571 U.S. 292 (2014); *Navarette v. California*, 572 U.S. 393 (2014), and it has also heard multiple Fifth and Sixth Amendment cases in single terms in the last decade. There is no reason why the Second Amendment should not receive as much attention. In fact, given the unsettled nature of so many areas of Second Amendment law there is good reason it should receive *more*. That this Court has already granted review in *Rahimi* is not a reason not to grant review here as well.

CONCLUSION

For the foregoing reason, the Court should grant the petition for certiorari.

Respectfully submitted,

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