No. _____

In The Supreme Court Of The United States

Edell Jackson,

Petitioner,

vs.

United States of America,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Daniel L. Gerdts
Counsel of Record for Petitioner
331 Second Avenue South, Suite 705
Minneapolis, Minnesota 55401
(612) 800-5086
daniel@danielgerdtslaw.com

Question Presented for Review

Whether 18 U.S.C. § 922(g)(1), the statute prohibiting possession of firearms by persons convicted of a crime punishable by imprisonment for a term exceeding one year, violates the Second Amendment as applied to Petitioner Edell Jackson.

Proceedings Directly Related to this Case

United States vs. Edell Jackson, 21-Cr-51 (DWF/TNL), District Of Minnesota, Judgment entered on 1 September 2022.

United States vs. Edell Jackson, No. 22-287, Eighth Circuit Court of Appeals, Judgment entered on 2 June 2023.

United States vs. Edell Jackson, No. 22-287, Eighth Circuit Court of Appeals (Order Denying Petition for En Banc Rehearing), Order entered on 30 August 2023.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Citations of the Opinions and Orders Entered Below

The order of the Eighth Circuit Court of Appeals denying the petition for *en banc* rehearing below is reported at 85 F.4th 468. The panel opinion of the court of appeals is reported at 69 F.4th 495. The district court order and memorandum denying Petitioner's motion to dismiss is not officially reported, but is unofficially reported at 2022 WL 4226229.

Jurisdictional Statement

The judgment of the Eighth Circuit court of appeals was entered in this case on 2 June 2023. A timely petition for *en banc* rehearing was denied by the court of appeals on 30 August 2023. This Petition for Certiorari is timely filed within the meaning of Rule 13 of the rules of this Court. This Court has jurisdiction to review the decision of the court of appeals pursuant to a writ of certiorari under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved in the Case

18 U.S.C. § 922(g)(1):

> It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

U.S. Const. Amend. II:

> 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.

Statement

1. This case arises from a federal grand jury indictment charging Petitioner Jackson with a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

2. Petitioner Jackson was convicted after trial in federal district court in the district of Minnesota. He had served time in the custody of the Minnesota Department of Corrections after his previous felony convictions for the street-level sales of a few grams

of cocaine. At the time of his arrest in this case, he knowingly possessed a pistol. He believed he had been relieved of his status as a felon, and returned to full citizenship, after completion of his prison sentence and upon discharge from all required supervision. His belief was based on his discharge paperwork that included a notice informing him of the restoration of his civil rights. That notice included a caveat that the right to possess a firearm was not restored for persons who had been convicted of "crimes of violence." Because his cocaine sales did not involve violence, he presumed the restoration of his civil rights to be complete. He was mistaken, however, because the Minnesota statute defining crimes of violence includes virtually all felony drug offenses regardless how they might be committed.

3. After his trial, but before sentencing, this Court issued its opinion in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) and Petitioner promptly filed a motion to dismiss the indictment as based on a statute that was unconstitutional in violation of the Second Amendment both facially and as applied. The district court orally denied the motion to dismiss at Petitioner's

sentencing hearing, and later filing a supplemental order and memorandum explaining the reasons for its decision to deny the motion to dismiss. Those reasons included reliance on the dicta in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), that the longstanding prohibitions on the possession of firearms by felons were "presumptively lawful." Appendix, at A-32-33 (citing *Heller* at 626-27 & n.26, 635; and *McDonald* at 786). The district court further concluded that "those who commit *serious* crimes – whether violent or nonviolent – forfeit their right to possess firearms." Appendix, at A-37.

4. Petitioner timely filed a notice of appeal, and the court of appeals had jurisdiction from the district court's final judgment pursuant to 28 U.S.C. § 1291. Among other issues raised in the court of appeals, Petitioner specifically defended his claim that 18 U.S.C. § 922(g)(1) was unconstitutional as applied to Petitioner, in violation of the Second Amendment.

5. In its opinion filed on 2 June 2023, the Eighth Circuit disagreed, finding that "legislatures traditionally employed status-based restrictions to disqualify categories of persons from

possessing firearms," and that "Congress acted within the historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons." Appendix, at A-22.

The court of appeals further concluded "that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)," and expressed its concern that "declaring the statute unconstitutional as applied to all but those who have committed 'violent' felonies would substantially invalidate the provision enacted by Congress." Appendix, at A-12 and n.2. Chief Judge Smith concurred with the panel opinion, specifically concluding that *Heller* "remains the relevant precedent we are bound to apply." Appendix, at A-23.

6. Four days later, the Third Circuit issued its opinion in *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023) (*en banc*), concluding directly contrary to the Eighth Circuit's conclusion that "because the Government has not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, § 922(g)(1) cannot

constitutionally strip him of his Second Amendment rights." *Id*. at 106.

7. Petitioner thereafter timely filed a petition for *en banc* rehearing in the court of appeals. On 30 August 2023, the court of appeals issued an order denying the petition for *en banc* rehearing, but that order was accompanied by a 19-page dissent from four of the active judges on the court. The dissent criticized the *Jackson* opinion for flipping the burden on to the Defendant to "'show . . . that his prior felony conviction is insufficient to justify the' stripping of Second Amendment Rights." Appendix, at A-41-42. It also argued that the Jackson opinion gave "'second-class' treatment to the Second Amendment," and "create[d] a group of second-class citizens: felons who, *for the rest of their lives*, cannot touch a firearm, no matter the crime they committed or how long ago it happened." Appendix, at A-40-41 (emphasis added).

Argument In favor of Granting the Petition

Petitioner seeks this Court's review of the decision of the court of appeals because the United States Court of Appeals for the Eighth Circuit has entered a decision in direct conflict with the

decision of the Third Circuit Court of Appeals on the same important constitutional question, and the split of authorities continues to grow by the day, involving decisions arising within the geographic territories of the Third, Fifth, Seventh, Eighth, and Tenth circuit courts of appeals.

A. *Bruen's* Directive.

"We start . . . with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). The text of the amendment itself plainly protects the right of the people to possess and to carry firearms. U.S. CONST. AMEND. II ("the right of the people to keep and bear Arms, shall not be infringed"). And "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," whose parameters already were understood at the time of its adoption. *Heller*, 554 U.S. at 592.

For those reasons, in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), this Court held that a firearms regulation that infringes an individual's Second Amendment rights

will not be deemed constitutional unless the Government successfully carries a significant burden of proof. It "must 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." *Bruen*, at 2127. *Bruen* was careful to distinguish the proof it required from the means-end balancing tests adopted by the courts of appeals:

> when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. 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."

Bruen, at 2126.

The *Bruen* Court also acknowledged that

> [w]hen confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar."

Id. at 2132. The Court further set forth what it called the two "*central*" considerations when engaging in an analogical inquiry: "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Bruen*, 142 S. Ct. at 2133.

The lack of consensus on what *Bruen* requires, however, and on how to apply the directive in individual cases, has created a growing split of authority in the lower courts, notwithstanding *Bruen's* assessment that "reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable," than a balancing test. *Id*. at 2130.

B. The Growing Split of Authority.

1. The Eighth Circuit.

The court of appeals in this case dismissed Petitioner's argument after finding, based on its review and interpretation of the historical record, "that legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms" and that "Congress acted within the historical tradition

when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons." Appendix, at A-22. It cited the now common references to the historical analogues regarding the disarming of Catholics, enslaved people, Native Americans, and those who refused to take oaths of loyalty. It also repeatedly cited the same observations from the already vacated panel opinion in *Range v. Att'y Gen. United States*, 53 F.4th 262 (3d Cir. 2022), *reh'g en banc granted, opinion vacated*, 56 F.4th 992 (3d Cir. 2023).

What it did *not* do was conduct an analysis of the first "central consideration" required by *Bruen* when engaging in the required analogical inquiry: "whether modern and historical regulations impose a comparable *burden* on the right of armed self-defense." This was not lost on the dissenters from the order denying *en banc* rehearing: "history certainly does not support *Jackson*'s unbending rule that felons can *never* win an as-applied challenge, no matter how non-violent their crimes may be or how long ago they happened." Appendix, at A-60.

The dissenters, of course, also protested that the cited analogues were not relevantly similar enough to support a conclusion

that the burden on Second Amendment rights was comparably justified: "Disarmament is about dangerousness, not virtue. We know that because colonial and post-ratification gun laws targeted rebellion and insurrection, not criminality. There have always been criminals, but there is no suggestion in any 'historical analogue' that criminality alone, unaccompanied by dangerousness, was reason enough to disarm someone." *Id.*

2. The Third Circuit.

The Third Circuit, in contrast, after substituting its *en banc* opinion for the vacated panel opinion relied on by the Eighth Circuit, found § 922(g)(1) to be unconstitutional as applied to Mr. Range. It flatly disagreed with the Eighth Circuit's reasoning in *Jackson*, concluding that the proffered historical analogues were *not* relevantly similar:

> The Government's attempt to identify older historical analogues also fails. The Government argues that "legislatures traditionally used status-based restrictions" to disarm certain groups of people. Apart from the fact that those restrictions based on race and religion now would be unconstitutional under the First and Fourteenth Amendments, the Government does not successfully analogize those groups to Range and his individual circumstances. That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans,

> Quakers, Catholics, and Blacks does nothing to prove that Range is part of a similar group today.

Range, 69 F.4th at 104–05 (cleaned up). It concluded that the Government had failed to carry the burden required by *Bruen*: "we hold that the Government has not shown that the Nation's historical tradition of firearms regulation supports depriving Range of his Second Amendment right to possess a firearm." *Id.*, at 106.

Because the Third Circuit found the government to have fallen short in its proof of relevantly similar analogues that might demonstrate § 922(g)(1) to be comparably justified as part of the Nation's historical tradition of firearm regulation, it also did not decide whether such analogues might support its required proof as to the first "central consideration": whether § 922(g)(1)'s lifetime ban on possession of firearms was a comparable *burden* on the right of armed self-defense as that imposed by any of the proffered historical analogues.

3. The Tenth Circuit.

The Tenth Circuit also has weighed in on the question, finding § 922(g)(1) to be constitutional, but without actually conducting any *Bruen* analysis at all. Prior to *Bruen*, the Tenth Circuit already had

concluded that § 922(g)(1) was constitutional without relying on the ends-means analysis disapproved of by *Bruen*. *See United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009). When it recently decided a new challenge to the law after *Bruen*, it concluded only that *Bruen* had not abrogated its pre-*Bruen* precedent in affirming the constitutionality of § 922(g)(1): "we conclude that *Bruen* did not indisputably and pellucidly abrogate our precedential opinion in *McCane*." *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023).

The *Vincent* Court determined that *Bruen* had "implied" its approval of disarming felons and that the lower courts could otherwise "infer" from its language that the Second Amendment does not apply to felons: "In preserving 'shall-issue' regimes and related background checks, the Court arguably implied that it was constitutional to deny firearm licenses to individuals with felony convictions. *Bruen*'s language thus could support an inference that the Second Amendment doesn't entitle felons to possess firearms." *Id.*, at 1202.

4. The Fifth Circuit.

The Fifth Circuit is still considering a challenge to § 922(g)(1)'s constitutionality as this Petition is being drafted, inasmuch as the government has appealed from Judge Reeves district court decision finding § 922(g)(1) unconstitutional under *Bruen's* new analytical framework:

> The federal felon-in-possession ban was enacted in 1938, not 1791 or 1868—the years the Second and Fourteenth Amendments were ratified. The government's brief in this case does not identify a "well-established and representative historical analogue" from either era supporting the categorical disarmament of tens of millions of Americans who seek to keep firearms in their home for self-defense.

United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *2 (S.D. Miss. June 28, 2023). "The government's arguments for permanently disarming Mr. Bullock . . . rest upon the mirage of dicta, buttressed by a cloud of law review articles that do not support disarming him." *Id.*

The *Bullock* decision noted that the court had

> reviewed dozens of the government's proffered post-*Bruen* cases. All have found § 922(g)(1) constitutional.
>
> The most common mode of reasoning goes like this:
> • *Heller* protected only the Second Amendment rights of "law-abiding, responsible" citizens.

> • *Heller* said that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."
> • *McDonald* said the same thing.
> • *Bruen* didn't overrule either case.
> • Because the defendant is a felon, under *Heller, McDonald*, and *Bruen*, their motion to dismiss fails.

Bullock, at *14. "With great respect, this Court is not convinced that these analyses are correct." *Id.* at *15.

5. The Seventh Circuit.

The Seventh Circuit court of appeals has yet to enter the fray with its own *definitive* opinion, but it found the Government's arguments earlier this summer to be impressively unpersuasive:

> The government's brief before us includes some historical analysis, but nothing close to what would satisfy the demanding standard set forth in *Bruen*. In addition to some Founding-era commentary, the government mentions that felons like Atkinson were historically subject to execution and estate forfeiture, as well as the loss of other civic rights.
>
> No doubt these historical details may prove relevant on remand. But the government's analysis as a whole falls well short of *Bruen*'s demands.

Atkinson v. Garland, 70 F.4th 1018, 1022 (7th Cir. 2023).

Since that time, at least one district court in the Seventh Circuit has found the statute here at issue to be unconstitutional as applied to a defendant whose only criminal history consisted of

possession of a controlled substance and delivery of a controlled substance (like Petitioner Jackson). In that case, the court's analysis of course proceeded by analogy because "[t]here is no evidence of any law categorically restricting individuals with felony convictions from possessing firearms at the time of the Founding or ratification of the Second or Fourteenth Amendments." *United States v. Daniel*, No. 20 CR 002, 2023 WL 7325930, at *5 (N.D. Ill. Nov. 7, 2023).

The *Daniel* Court *did* find that the Government successfully had proved up a set of "relevantly similar" historical analogues of categorical firearms dispossession laws, but found them to fall far short of proving a comparable *burden* on the second amendment rights of those groups. Other courts considering the issue – including the Eighth Circuit as noted above – have not focused on this required metric. As highlighted by *Bruen*, the *central* considerations when engaging in an analogical inquiry are "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Bruen*, 142 S. Ct. at 2133. It referred to

these twin considerations as "two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*.

The *Daniel* Court concluded that the Government fell short in its proof of a historical analogue demonstrating a comparable burden of a total, lifetime ban on the possession of firearms:

> Although the historical record discussed above demonstrates this nation's tradition of "comparably justified" categorical dispossession statutes, the government has failed to meet its burden of providing evidence of a dispossession statute with a "comparable burden" to § 922(g)(1). Specifically, this court is not persuaded that the government has met its burden to show a "distinctly similar," or even a "relevantly similar," historical analogue to § 922(g)(1)'s permanent prohibition on firearm possession by felons, which can be lifted only by expungement, federal pardon, or other method of restoring civil rights that lifts the underlying offense from a "conviction" under § 922(g).

Daniel, No. 20 CR 002, 2023 WL 7325930, at *8. It noted that

> although Catholics, enslaved people, and Native Americans were prohibited from firearm possession, individuals within these groups could possess firearms under certain circumstances. For example, Catholics who were " 'willing to swear undivided allegiance to the sovereign' were permitted to keep their arms" when they pledged allegiance to the United States or a particular state. Enslaved people could possess firearms if they had permission from their master.

> Moreover, the government does not provide evidence that Native Americans were prohibited from possessing firearms, except one Rhode Island law from 1677 that allowed the confiscation of guns owned by Native Americans if they did not have the necessary "ticket or order." Instead, state legislatures typically prohibited the sale of firearms to Native Americans, not possession itself.

Daniel, at *7 (cleaned up). It also observed that

> loyalty oath laws, which are the strongest analogue to § 922(g)(1), allowed individuals deemed "untrustworthy" to regain their right to keep and bear arms by swearing an oath to a state or the United States, or by renouncing their faith. There is no similar opportunity under § 922(g)(1) for felons to regain their rights after demonstrating their ability to abide by the rule of law.

Id. at *9.

It concluded that "this court is unable to uphold § 922(g)(1) as constitutional due to *Bruen*'s instruction that the government must provide evidence of a historical analogue that is both comparably justified and comparably burdensome of the right to keep and bear arms." *Id*. at *11.

The courts that have concluded to the contrary, including the *Jackson* opinion of the court of appeals below, have failed even to conduct this required analysis regarding the comparable burden of

historical analogues vis-à-vis the permanent, lifetime ban of § 922(g)(1).

C. Rejection of the Scope-of-The-Right Approach.

No court in the growing split of authorities discussed above has accepted the Government's repeated attempts to avoid altogether the issue of how to employ *Bruen's* new analytical framework by simply defining "felons" as not part of the "people" protected by the Second Amendment. But there is a split of authority in how they have approached the issue. The Third Circuit assumed the issue required resolution, for example, while the Eighth Circuit did not acknowledge the issue at all.

The Third Circuit expressed frustration with how to identify "law-abiding, responsible persons" in the first place:

> the phrase "law-abiding, responsible citizens" is as expansive as it is vague. Who are "law-abiding" citizens in this context? Does it exclude those who have committed summary offenses or petty misdemeanors, which typically result in a ticket and a small fine? No. We are confident that the Supreme Court's references to "law-abiding, responsible citizens" do not mean that every American who gets a traffic ticket is no longer among "the people" protected by the Second Amendment. Perhaps, then, the category refers only to those who commit "real crimes" like felonies or felony-

equivalents?

Range, 69 F.4th at 102. And ultimately, it rejected the Government's argument on the basis that it simply put too much power in the hands of legislators to strip citizens of their Second Amendment rights by applying an arbitrary label:

> At root, the Government's claim that only "law-abiding, responsible citizens" are protected by the Second Amendment devolves authority to legislators to decide whom to exclude from "the people." We reject that approach because such "extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label." And that deference would contravene *Heller*'s reasoning that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."
>
> In sum, we reject the Government's contention that only "law-abiding, responsible citizens" are counted among "the people" protected by the Second Amendment. *Heller* and its progeny lead us to conclude that Bryan Range remains among "the people" despite his 1995 false statement conviction.

Id. at 102–03 (cleaned up).

The Government made the same argument in the *Daniel* case:

> From the government's perspective, § 922(g)(1) remains constitutional under Bruen's text and history test because individuals with felony convictions are not protected by the Second Amendment's textual purview. The government argues that Heller demonstrates that felons do not fall within "the people" contemplated by the Second Amendment, and consequently their "right

> ... to keep and bear Arms" is not infringed by § 922(g)(1)'s prohibition on their firearm possession.

Daniel, No. 20 CR 002, 2023 WL 7325930, at *4. The argument was rejected in *Daniel* as well: "The court agrees with defendant that Heller and Bruen did not hold that the Second Amendment categorically protects only law-abiding citizens, despite their repeated use of such qualified language as "law abiding citizens." *Id*.

The Eighth Circuit's *Jackson* opinion was correct to ignore the same argument also made there. The Court in *Heller* never really left room for such an approach in the first place, finding that "in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. As noted at the beginning of this argument, "We start . . . with a strong presumption that the Second Amendment right is exercised individually and belongs to *all Americans*." *Id*. at 581 (emphasis added).

D. *Rahimi* Does not Afford the Court the Opportunity to Consider *Bruen's* First Central Metric in the Context of a Law that Imposes a Unique Lifetime Ban on the Possession of Firearms, and Therefore Cannot Resolve the Split of Authority Regarding the Constitutionality of § 922(g)(1).

The Court already has granted review, and is presently considering, the Fifth Circuit's decision in *United States v. Rahimi*, 61 F.4th 443, 455 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023). While that case raises issues that may also be relevant to resolving the split of authorities concerning the constitutionality of § 922(g)(1), it will not and *cannot* entirely resolve that growing split of authorities on the far more commonly prosecuted law at issue in this case. It cannot do so because of the first of the central metrics identified by *Bruen* as essential to its framework of analysis by historical analogy. Section 922(g)(1), simply put, is unique in the heavy burden it imposes on a person's Second Amendment rights: it imposes a total, *lifetime* ban on the possession of all firearms and all ammunition by any person convicted of a crime punishable by a term of more than a year in prison.

The statute at issue in *Rahimi*, in stark contrast, imposes a burden on Second Amendment rights that is as a rule only

temporary – one that is directly contingent on the validity and duration of a civil, domestic violence restraining order – an order that is subject to appeals, rescission, and durational limits imposed by law.

Because *Rahimi* provides no occasion to consider whether a lifetime ban on the exercise of Second Amendment rights is a burden that is comparable to, and fits within, the historical tradition of firearms regulations that delimits the outer bounds of the right to keep and bear arms, it provides no means to resolve the split of authority regarding whether § 922(g)(1) is a constitutional firearms regulation.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for certiorari.

Dated: 28 November 2022

Respectfully submitted,

/s/ *Daniel L. Gerdts*

Daniel L. Gerdts
Counsel of Record
331 Second Avenue South
Suite 705
Minneapolis, MN 55401
(612) 800-5086
daniel@danielgerdtslaw.com