**NO.**

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2023**

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**PATRICK ABOITE,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

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**On Petition for Writ of Certiorari to the**
**United States Court of Appeals**
**for the Eleventh Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether 18 U.S.C. § 922(g)(1), the federal statute that prohibits a person from possessing a firearm if he has been convicted of "a crime punishable by imprisonment for a term exceeding one year," *ibid.,* complies with the Second Amendment?

## INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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# PETITION FOR WRIT OF CERTIORARI

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Patrick Aboite ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINION BELOW

The Eleventh Circuit's opinion affirming the district court's sentence, *United States v. Aboite,* 2023 WL 6803462 (11th Cir. Oct. 16, 2023), is included in the Appendix at A-1.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Petitioner's sentence was entered on October 16, 2023. This petition is timely filed pursuant to Sup. Ct. R. 13.1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### 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.

### 18 U.S.C. § 922(g)(1)

> (g) It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

## STATEMENT OF THE CASE

### Statement of Facts and Course of Proceedings

Mr. Aboite was charged with two counts of possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). *See United States v. Patrick Aboite,* Case No. 21-20385-Cr-King, DE 1 (S.D. Fla). Count 1 charged that from March 29, 2021 through April 1, 2021, Mr. Aboite possessed a Smith and Wesson .40 caliber pistol and ammunition. In Count 2, Mr. Aboite was charged with the March 30, 2021 possession of a Colt .380 caliber pistol and ammunition. Mr. Aboite pled guilty to possessing the .380 caliber pistol. While there was no written plea agreement, the government agreed to dismiss the charge related to the .40 caliber firearm. (DE 21:2; DE 54:3,19-20).[1]

A presentence investigation report (PSI) was prepared. Using the gun guidelines set forth in U.S.S.G. § 2K2.1, the probation officer calculated Mr. Aboite's advisory guidelines range based on the dismissed gun charge: the .40 caliber pistol was "capable of accepting a large capacity magazine," pursuant to § 2K2.1(a)(3); the .40 caliber gun had been reported stolen, pursuant to § 2K2.1(b)(4)(A); and the .40 caliber gun had been used "in connection with another felony offense," pursuant to § 2K2.1(b)(6)(B). Based on the enhancements for the dismissed gun charge, Mr. Aboite's advisory guidelines range was 70 to 87 months' imprisonment.

[1] Mr. Aboite was charged in state court with offenses related to the possession of the .40 caliber pistol.

Mr. Aboite filed objections to the calculation of his guidelines based on the dismissed count of the indictment, and argued that there was no evidence that he used the .380 pistol in connection with any other felony offenses. (DE 25). However, at his August 24, 2022 sentencing, the district court determined that Mr. Aboite's two gun offenses were "part of the same course of conduct," and overruled his objections. (DE 56:64-65). The district court thereupon imposed a sentence of 87 months' imprisonment. (DE 46). Mr. Aboite objected to the sentence. He did not object to the constitutionality of 18 U.S.C. § 922(g)(1).

**The Opinion Below**

Mr. Aboite appealed his sentence. He argued that the district court erred when it applied a four-level enhancement to his offense level because it found that his possession of a .380 caliber gun was "in connection with" another felony offense—a shooting that occurred the day before with a .40 caliber firearm. Mr. Aboite argued that there was no evidence that the .380 caliber gun found in his waistband on the day of his arrest "facilitated" that shooting or that he was in possession of the .380 pistol on the day of the shooting. He argued there were no common factors between the shooting and the possession of a different gun on a different day—no common victims, accomplices, or purposes, and no similar *modus operandi*. There was therefore no common scheme or plan. Nor were the offenses part of the same course of conduct since they were not at all similar.

Mr. Aboite also argued that the 87-month sentence imposed by the district court was unreasonable. Not only was his base offense level based on the dismissed

count of the indictment, his offense level was increased by six levels for conduct solely associated with the dismissed count of the indictment—that the gun was stolen and had been used in connection with another felony offense. These enhancements more than doubled the sentencing range Mr. Aboite faced based on his offense of conviction.

The Eleventh Circuit disagreed with Mr. Aboite's analysis of the guidelines, finding that the use of the word "any" in U.S.S.G. § 2K2.1(b)(6)(B), as well as its case law holding that "any firearm truly means any firearm," confirms that the .40 caliber firearm could properly be considered by the district court in Mr. Aboite's guidelines calculation. *See United States v. Aboite,* 2023 WL 6803462 at *2 (11th Cir. Oct. 16, 2023). The Court went on to hold that the possession of the .40 caliber firearm was "relevant conduct" to the unlawful possession conviction, either because the two gun possession offenses were part of the same course of conduct or because it occurred during the offense of conviction. 2023 WL 6803462 at **3-4.

Finally, the Court found that it was within the district court's discretion "to weigh the factors of deterrence and protection of the public more seriously than the other factors." The district court "was also permitted to consider . . . the conduct beyond the count to which Aboite pleaded guilty." As such, the 87-month sentence was not unreasonable. 2023 WL 6803462 at *6. The Eleventh Circuit affirmed Mr. Aboite's sentence.

This petition follows.

## REASONS FOR GRANTING THE PETITION

Title 18 U.S.C. § 922(g)(1), the felon-in-possession statute, is facially unconstitutional. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), the Supreme Court established a two-part test for assessing the constitutionality of firearms restrictions, "rooted in the Second Amendment's text, as informed by history." *Id.* at 19. Under the first step of the test, where "the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. If the first part of the test is satisfied, the burden shifts to the government to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* If the government fails to meet its burden, the regulation on protected conduct may not stand. *See id.* at 27.

Mr. Aboite's conduct—possessing a handgun and ammunition in public—falls within the plain text of the Second Amendment. Mr. Aboite was born in this country, and "the people," as used in the Second Amendment, includes all Americans. Nor can the government demonstrate that § 922(g)(1) is consistent with the nation's "historical tradition of firearm regulation" dating to the Founding. Without such a showing, *Bruen* dictates that § 922(g)(1) be declared unconstitutional, and Mr. Aboite's conviction be vacated.

In *Range v. Attorney General United States,* 69 F.4th 96 (3rd. Cir. 2023) (*en banc*), the Third Circuit, following the two-part test set forth in *Bruen,* found § 922(g)(1) unconstitutional.[2] However, both the Eighth and Tenth Circuits have found § 922(g)(1) to be constitutional. *See United States v. Jackson,* 69 F.4th 495 (8th Cir. 2023); *Vincent v. Garland,* 80 F.4th 1197 (10th Cir. 2023). Before *Bruen* was decided, the Eleventh Circuit held that § 922(g)(1) does not violate the Second Amendment. *See United States v. Rozier,* 598 F.3d 768 (11th Cir. 2010).

Circuit courts have also found other portions of § 922(g) violative of the Second Amendment. In *United States v. Rahimi,* 61 F.4th 443 (5th Cir. 2023), the Fifth Circuit held that § 922(g)(8), which prohibits the possession of a firearm by a person subject to a domestic violence restraining order, is inconsistent with the Second Amendment. This Court granted the government's petition for certiorari in *Rahimi,* and oral argument was held on Nov. 7, 2023. *See Rahimi, cert. granted,* 143 S. Ct. 2688 (2023). In *United States v. Daniels,* 77 F.4th 337 (5th Cir. 2023), the Fifth Circuit found that § 922(g)(3), which prohibits the possession of a firearm while an unlawful user of a controlled substance, also violated the Second Amendment.[3]

The clear circuit conflict as to the constitutionality of § 922(g)(1), as well as the fact that the Court is currently considering closely related Second Amendment issues in *Rahimi*, should result in the grant of the instant petition. However, Mr. Aboite

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[2] Presently pending before this Court is the government's petition for a writ of certiorari. *See Garland v. Range, pet. for cert. filed,* (U.S. Oct. 5, 2023) (No. 23-374).

[3] Also pending before the Court is the government's petition for certiorari in *Daniels. See United States v. Daniels, pet. for cert. filed,* (U.S. Oct. 10, 2023) (No. 23-376).

requests that the Court hold his petition pending the possible certiorari grant in *Range,* and any other case addressing this issue.

## I. Title 18 U.S.C. § 922(g)(1) is Unconstitutional on its Face.

Strict application of the two-step Second Amendment test set forth in *Bruen* requires a finding that 18 U.S.C. § 922(g)(1) is unconstitutional, and Mr. Aboite's conviction cannot stand. In *District of Columbia v. Heller,* 554 U.S. 570 (2008), this Court recognized that based on the text of the Second Amendment and history, the amendment "conferred an individual right" "to possess and carry weapons in case of confrontation." *Id.* at 576, 582, 592-595.

But, in *Heller,* the Court did not go any further than resolving the specific Second Amendment claim raised in that case. It did not definitively establish a test for evaluating other Second Amendment claims, define the broader contours of the fundamental Second Amendment right, or delimit the outer bounds of that right. *See Silvester v. Becerra,* 138 S.Ct. 945, 948 (2018) (Thomas, J., dissenting from denial of certiorari) (acknowledging that the Supreme Court had not "definitely resolve[d] the standard for evaluating Second Amendment claims").

It was only in *Bruen* that the Court set forth an actual "test" for deciding the constitutionality of all firearm regulations. At Step One of *Bruen*'s Second Amendment test, courts are to consider only whether "the Second Amendment's plain text covers an individual's conduct." *Bruen,* 597 U.S. at 17. If it does, "the Constitution presumptively protects that conduct." *Id.* Regulating presumptively protected conduct is unconstitutional unless the government, at Step Two of the analysis, can

"justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation"—that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Id.* at 17, 37.

For the reasons set forth below, § 922(g)(1) fails both steps of *Bruen*'s Second Amendment test.

### A. *Bruen* Step One: The Second Amendment's "plain text" protects Mr. Aboite's public possession of a handgun and ammunition.

The plain text of the Second Amendment guarantees the right (1) "of the people," (2) "to keep and bear," (3) "arms." *Heller,* 554 U.S. at 579-595. Mr. Aboite and his conduct fall squarely within these elements.

First, as an American citizen and life-long member of the national community, Mr. Aboite is part of "the people" protected by the Second Amendment. This Court was clear in *Heller* that "the people" as used in the Second Amendment "unambiguously refers" to "all Americans"—that is, "all members of the political community," "not an unspecified subset." *Id.* at 579-581.

In so holding, the Court reasoned first that "the people" must have the same meaning in the Second Amendment, as in the First Amendment's Assembly-and-Petition Clause, the Fourth Amendment's Search-and-Seizure Clause, and in the Ninth and Tenth Amendments. *Id.* at 579-580 (citing *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990) (noting that "the people" was a "term of art"[4]

[4] Dictionaries at the time defined "the people" as "[t]he body of persons who compose a community, town, city, or nation"—a term "comprehend[ing] all classes of

which had the same meaning as in other parts of the Bill of Rights)).

Moreover, the Court also found significant in *Heller* that the use of the term "the people" in the Second Amendment's operative clause "contrasts markedly with the phrase 'the militia' in the prefatory clause," given that, at the time the Amendment was drafted, "the militia" was only comprised of a "subset" of the community: namely, able-bodied males within a certain age range. 554 U.S. at 580-581. Since well-recognized rules of constitutional construction require reading words in context, and giving different meanings to different terms within a single provision, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at 167-168 (2012), Congress' use of the different terms "militia" and "people" within separate clauses of the same constitutional provision confirms that under the "plain text" of the Second Amendment, "the people" is a much broader term, encompassing all Americans (including felons, who notably were not exempted from militia duty).

Finally, in the same way that *Bruen*—considering *only* the plain text of the Second Amendment at Step One of its analysis—found dispositive that "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms," 597 U.S. at 32, it should be dispositive here that the Second Amendment likewise does not draw a felon/non-felon distinction. Indeed, even prior to *Bruen,* circuit courts had recognized that the term "people" in the Second

inhabitants." II Noah Webster, *An American Dictionary of the English Language* (1828).

Amendment is *not* textually limited to law-abiding citizens. *See United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (noting that even "dangerous felons" are "indisputably part of 'the people'" for Second Amendment purposes); *see also United States v. Meza-Rodriguez*, 798 F.3d 664, 671 (7th Cir. 2015) (holding that a person's criminal record is irrelevant in determining whether he is among "the people" protected under the Second Amendment; noting that the amendment "is not limited to such on-again, off-again protections"). Under *Brue*n's newly-dictated "plain text" analysis for Step One, Mr. Aboite is unquestionably part of "the people" covered by the Second Amendment.

As to the other textual elements in the Second Amendment's operative clause, *Bruen* has confirmed that the right to "keep" and "bear" arms includes the right to possess/carry arms outside the home. 597 U.S. at 32-33. And, "arms" plainly includes both handguns, like a pistol, and ammunition. *See Heller*, 554 U.S. at 582 & 629 (handguns are "the quintessential self-defense weapon"); *see also Bruen*, 597 U.S. at 28, 47; *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. of N.J.*, 910 F.3d 106, 116 (3d Cir. 2018); *Jackson v. City of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("without bullets, the right to bear arms would be meaningless").

Accordingly, the Second Amendment's plain text covers, and thus "presumptively protects," the conduct criminalized in § 922(g)(1) and Mr. Aboite's specific conduct of possessing/carrying a loaded handgun and other ammunition in public. Thus, he has satisfied Step One of *Bruen*'s Second Amendment analysis.

### B. *Bruen* Step Two: The government cannot meet its burden of showing that § 922(g)(1) is consistent with the nation's "historical tradition of firearm regulation."

At the second step of Second Amendment analysis, *Bruen* requires the government to establish that § 922(g)(1)'s lifetime ban on felons possessing any firearms or ammunition "is consistent with the Nation's historical tradition of firearm regulation"—that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Bruen,* 597 U.S. at 17, 37. The government cannot meet that heavy burden.

As a threshold matter, because § 922(g)(1) is directed at a longstanding societal problem that "has persisted since the 18th century," *id.* at 26—felons' access to guns, and the danger of interpersonal violence therefrom—the statute is unconstitutional unless the government can show a robust tradition of "distinctly similar" regulations as of 1791, when the Second Amendment was ratified. *Id.* But, as jurists and commentators have repeatedly recognized, there were *no* felon disarmament regulations at the time of the Founding. *See, e.g.*, *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting). In fact, the first felon-in-possession laws similar to § 922(g)(1) did not appear until the 20th century.

What is today § 922(g)(1) traces its origins to 1938, when Congress passed a statute, the Federal Firearms Act, prohibiting certain felons from "receiving" firearms. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (*en banc*) (citing c. 850, § 2(f), 52 Stat. 1250, 1251 (1938)). At that time, the statute "covered only a few violent offenses," *id.*, prohibiting firearm "receipt" by those convicted of crimes such as murder, rape, and kidnapping. *United States v. Booker*, 644 F.3d 12, 24 (1st Cir.

2011). It was not until 1961 that Congress amended that statute to prohibit "receipt" "by all felons." *Skoien*, 614 F.3d at 640 (citing Pub. L. 87-342, 75 Stat. 757 (1961)) (noting that under the statute, "possession" was evidence of "receipt"). And it was not until 1968, that Congress formally "changed the 'receipt' element of the 1938 law to 'possession,' giving 18 U.S.C. § 922(g)(1) its current form." *Id.*

Thus, the first firearm regulation in America broadly prohibiting *all felons* from possessing firearms was not enacted until *almost two centuries after the Nation's founding*, when the modern version of § 922(g)(1) became law. *See Kanter*, 919 F.3d at 464 n.12 (Barrett, J., dissenting) ("[T]he first general prohibition on felon gun possession was not enacted until 1961…"); *id.* at 462 ("[S]cholars have not identified eighteenth or nineteenth century laws depriving felons of the right to bear arms…").

Section 922(g)(1) is the *first law* in our Nation's history to broadly prohibit *all felons* from possessing a firearm. There was nothing before the 20th century, even in individual colonies or states. *See* Carlton F.W. Larson, *Four Exceptions in Search of a Theory*, 60 Hastings L.J. 1371, 1376 (2009) ("state laws prohibiting felons from possessing firearms or denying firearm licenses to felons date from the early part of the twentieth century"). As *Bruen* makes clear, such "belated innovations . . . come too late to provide insight into the meaning of the Constitution in [1791]." 597 U.S. at 36-37 (citing with approval the Chief Justice's pre-*Heller* dissent in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 312 (2008)); *see also id.* at 66 n.28 (declining to "address any of the 20th century historical evidence brought to bear by [the government] or their *amici*").

In sum, there was *no* "historical tradition," circa 1791, of gun regulations "distinctly similar" to § 922(g)(1). *Bruen,* 597 U.S. at 24-26. The "Founders themselves could have adopted" laws like § 922(g)(1) to "confront" the "perceived societal problem" of violence posed by felons possessing firearms. *Id.* at 27. But they declined to do so, and that inaction indicates § 922(g)(1) "[i]s unconstitutional." *Id.*

Finally, and quite importantly, felons were not only *permitted* to possess firearms at the time of the Founding due to the absence of any laws specifically prohibiting them from doing so; felons were affirmatively *required* to possess firearms as members of the militia. Notably, in *Heller,* the Supreme Court recognized that "the Second Amendment's prefatory clause"—*i.e.*, "A well regulated Militia, being necessary to the security of a free State"—"announce[d] the purpose for which the right was codified: to prevent elimination of the militia." 554 U.S. at 599. Given that preventing elimination of the militia was the purpose of the Second Amendment, it is reasonable that the Second Amendment's protections would at least have extended to those who would have been in the militia at the time of the Founding. And historical evidence from that period, which is the most relevant period as *per Bruen*, confirms that this group most definitely included felons.

As noted above, *Heller* specifically defined the term "militia" in the Second Amendment's prefatory clause to mean "all males physically capable of acting in concert for the common defense." 554 U.S. at 595. And indeed, statutory law from the Founding era demonstrates that "all males" required to serve in the militia encompassed felons. Specifically, in the first Militia Act enacted one year after the

Second Amendment's ratification, Congress was clear that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years . . . *shall* severally and respectively be enrolled in the militia." *See* Federal Militia Act of May 8, 1792, § 1, 1 Stat. 271 (Emphasis added).

The Act of 1792 further stipulated that "every citizen so enrolled . . . *shall*, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt," and various other firearm accoutrements, including ammunition. *Id.* (Emphasis added). Although the Act "exempted" many classes of people from these requirements (*e.g.*, "all custom-house officers," "all ferrymen employed at any ferry on the post road"), felons notably were *not* among those exempted. *Id.* § 2, 1 Stat. 271.

This early federal statute is crucial historical evidence that cannot be ignored under *Bruen.* It confirms that in the Founding era, felons were legally *required* to possess *firearms* as militia members. The fact that Founding era militia statutes (including state statutes) *did not* exclude felons, and *did* require all militia members to possess firearms, confirms that the government cannot meet its heavy burden at *Bruen* Step Two of showing that § 922(g)(1) is "consistent with the Nation's historical tradition of firearm regulation." *Bruen,* 597 U.S. at 17.

At the most relevant time period under *Bruen*, namely, the time period immediately preceding and post-dating adoption of the Second Amendment, *see Bruen*, 597 U.S. at 34 ("Constitutional rights are enshrined with the scope they were

understood to have when the people adopted them"), all white, able-bodied citizen/felons between the ages of 18-45 were required to serve in both the National and many State Militias. And because of their militia obligation, these citizen/felons were required to possess firearms.

For the above reasons, the government cannot show a historical tradition of gun regulation "distinctly similar" to § 922(g)(1). And in those circumstances, *Bruen* dictates that § 922(g)(1) be deemed facially unconstitutional, and Mr. Aboite's conviction be vacated.

## II. The Circuits have issued conflicting opinions as to the constitutionality of 18 U.S.C. § 922(g)(1).

Following this Court's *Bruen* decision, the *en banc* Third Circuit held § 922(g)(1) unconstitutional. *See Range v. Attorney General United States*, 69 F.4th 96 (3rd. Cir. 2023). First, the Court found that Range was among "the people" protected by the Second Amendment, rejecting the government's argument that only "law-abiding responsible citizens" are covered by the Second Amendment. *Id.* at 103. Then, the Court conducted an extensive analysis of the historical traditions relevant to the felon-in-possession law, and came to the conclusion that "the Government ha[d] not carried its burden" of demonstrating that § 922(g)(1) was "consistent with the Nation's historical tradition of firearm regulation." *Id.* (citing *Bruen,* 597 U.S. at 17). In so doing, the Third Circuit specifically declined to follow the Eleventh Circuit's decision in *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010), which was decided pre-*Bruen,* and upheld the constitutionality of § 922(g)(1).

The government's petition for certiorari in *Range* is currently pending before this Court. *See Garland v. Range, pet. for cert. filed,* (U.S. Oct. 5, 2023) (No. 23-374). Since the *Range* decision, two other Circuits have held that § 922(g)(1) complies with the Second Amendment. In *United States v. Jackson,* 69 F.4th 495 (8th Cir. 2023), the Eighth Circuit reasoned—contrary to the Third Circuit—that "history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society." *Jackson,* 69 F.4th at 504. According to the Court, history also demonstrates that Congress may prohibit "possession by categories of persons based on a conclusion that the category as a whole present[s] an unacceptable risk of danger if armed." *Id.*

The Tenth Circuit, too, has held that § 922(g)(1) is constitutional. Before *Bruen,* the Tenth Circuit determined that § 922(g)(1) complied with the Second Amendment based on *Heller*'s assurances regarding the constitutionality of "longstanding prohibitions on the possession of firearms by felons." *See United States v. McCane,* 573 F.3d 1037, 1047 (10th Cir. 2009) (citation omitted). Then, in *Vincent v. Garland,* 80 F.4th 1197, 1197-1202 (10th Cir. 2023), the Court determined that *Bruen* had not superseded its earlier decision upholding the constitutionality of § 922(g)(1).

Not only is there a circuit conflict as to whether the felon-in-possession law violates the Second Amendment, there are conflicts in the district courts, with some district courts dismissing indictments brought under § 922(g)(1). *See United States v. Quailes,* ___ F.Supp.3d ___, 2023 WL 5401733 (M.D. Pa. Aug. 22, 2023); *United States v. Bullock,* ___ F.Supp.3d ___, 2023 WL 4232309 (S.D. Miss. June 28, 2023); *United*

*States v. Prince,* ___ F.Supp.3d ___, 2023 WL 7220127 (N.D. Ill. Nov. 2, 2023); *United States v. Taylor,* ___ F.Supp.3d ___, 2024 WL 245557 (S.D. Ill. Jan. 22, 2024).

There is thus uncertainty about the constitutionality of § 922(g)(1) throughout the country, and significant practical consequences resulting from its differing applications. Due to its far-ranging import, the Court should consider Mr. Aboite's Second Amendment claim.

### III. This Court should hold this certiorari petition pending the possible certiorari grant in *Range,* and any other case addressing this issue.

The Third Circuit's decision in *Range,* which held an Act of Congress unconstitutional, the conflicts with decisions of other courts of appeal, and the consequences resulting from the differing applications of § 922(g)(1), would ordinarily warrant this Court's review. *See, e.g., Iancu v. Brunetti,* 588 U.S. ___, 139 S. Ct. 2294, 2298 (2019) (noting that this Court's "usual" approach is to grant review "when a lower court has invalidated a federal statute"). But, this Court is already considering closely related Second Amendment claims in *United States v. Rahimi,* 61 F.4th 443 (5th Cir. 2023), where the Fifth Circuit held that § 922(g)(8), which prohibits the possession of a firearm by individuals subject to domestic violence restraining orders, is unconstitutional. *See Rahimi, cert. granted,* 143 S. Ct. 2688 (2023). Oral argument was held on November 7, 2023, and an opinion is forthcoming.

In the government's petition for a writ of certiorari in *Range,* the Solicitor General advised the Court that there is a direct conflict between the Third, Eighth, and Tenth Circuits as to the constitutionality of § 922(g)(1), but then urged the Court

to "hold" the petition in *Range* pending issuance of *Rahimi* before deciding whether to grant certiorari, vacate, and remand, or grant plenary review. *See Garland v. Range, pet. for cert. filed,* (U.S. Oct. 5, 2023) (No. 23-374). The Solicitor explained that *Rahimi* will necessarily impact resolution of the *Bruen* challenge to § 922(g)(1) because that issue "substantially overlaps with *Rahimi*." *Range,* petition for certiorari, at 26. Both *Range* and *Rahimi* "concern Congress's authority to prohibit a category of individuals from possessing firearms." In each case, the government relies on statements in *Heller* and *Bruen* that "the right to keep and bear arms belongs to law-abiding, responsible citizens," and "each case also raises similar methodological questions about how to apply the historical test set forth in *Bruen." Range, Id.*

The government also filed a petition for a writ of certiorari in *United States v. Daniels,* 77 F.4th 337 (5th Cir. 2023), a case in which the Fifth Circuit held that § 922(g)(3), which prohibits the possession of firearms by unlawful users of controlled substances, is unconstitutional. *See United States v. Daniels, pet. for cert. filed,* (U.S. Oct. 10, 2023) (No. 23-376). Petitions concerning other status-based disqualifications could also come before this Court. Recently, in *National Rifle Association v. Bondi,* 61 F.4th 1317 (11th Cir. 2023), the Eleventh Circuit upheld the constitutionality of a state statute barring the purchase of firearms by 18-to-20-year olds under a *Bruen* analysis. However, that opinion has been vacated, and the Eleventh Circuit will consider the issue on *en banc* review. *See National Rifle Association v. Bondi,* 72 F.4th 1346 (11th Cir. 2023).

Finally, the Court is likely to receive additional petitions concerning the constitutionality of § 922(g)(1). The Second Circuit recently held oral argument in a case involving whether an individual convicted of a non-violent financial felony was among "the people" to whom the Second Amendment applies, and whether he had a due process right under the Fifth Amendment to a hearing to determine his current dangerousness and the ability to have his right to possess firearms restored. *See Zherka v. Garland,* 595 F.Supp.3d 73 (S.D.N.Y. March 23, 2022), *appeal docketed,* No. 22-1108 (2nd Cir. May 20, 2022).

Because all of these cases concern Congress' authority to prohibit a category of individuals from possessing firearms under the Second Amendment, Mr. Aboite requests that the Court hold his petition pending the possible certiorari grant in *Range,* and any other cases addressing this issue.

## CONCLUSION

The Court should hold this case pending its decisions in *Rahimi* and *Range,* and grant certiorari, vacate the decision below, and remand this case in light of those decisions.

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