NO. 24-1155

In the Supreme Court of the United States

MELYNDA VINCENT,

Petitioner,

v.

PAMELA J. BONDI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE NORTHERN DISTRICT OF OKLAHOMA

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Interest of *Amicus Curiae*[1]

The Office of the Federal Public Defender for the Northern District of Oklahoma (FPD-NDOK) is a United States governmental entity under the Administrative Office of the United States Courts. It was created pursuant to the Criminal Justice Act of 1964 and the Criminal Justice Act Revision of 1984, 18 U.S.C. § 3006A, by the United States District Court for the Northern District of Oklahoma. FPD-NDOK is tasked with representing indigent criminal defendants charged with crimes in the United States District Court for the Northern District of Oklahoma. FPD-NDOK is within the statutory jurisdiction of the United States Court of Appeals for the Tenth Circuit, from which the decision below originates.

Whether individuals previously convicted of felony offenses, particularly non-violent offenses, may be perpetually prohibited from possessing firearms is of particular interest to FPD-NDOK. Since this Court's decision in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), FPD-NDOK has represented numerous clients charged under 18 U.S.C. § 922(g)(1), and it continues to do so. Many of those clients are facing or are serving sentences of imprisonment.

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[1] No counsel for a party authored this Brief in whole or in part, and no person other than *Amicus* or its counsel made a monetary contribution to its preparation or submission. On May 28, 2025, all counsel of record were given timely notice of *Amicus's* intent to file this Brief.

An abbreviated list of cases in which FPD-NDOK is currently litigating the constitutionality of 18 U.S.C. § 922(g)(1), as applied to the defendant, includes:

- *United States v. William Forbis*, 10th Cir. No. 24-5097
- *United States v. Daniel Smith*, 10th Cir. No. 24-5106
- *United States v. Makale Lewis*, 10th Cir. No. 25-5045
- *United States v. Phillip Wallace Jr.*, 10th Cir. No. 25-5074
- *United States v. Kyle Smith*, 10th Cir. No. 25-5081

Due to the Tenth Circuit's decision below, FPD-NDOK's clients are left without an avenue for relief for what FPD-NDOK believes is an unconstitutional application of 18 U.S.C. § 922(g)(1). Within the Tenth Circuit, the decision below is used as binding authority to deny motions challenging the constitutionality of 18 U.S.C. § 922(g)(1). *See, e.g.*, *United States v. Warner*, 131 F.4th 1137 (10th Cir. 2025); *United States v. Graves*, 24-7051, 2025 WL 1096984, at *1 (10th Cir. April 14, 2025) (unpublished); *United States v. Samuels*, 24-6018, 2025 WL 946416, at *2 (10th Cir. March 27, 2025) (unpublished) ("We are bound to follow *Vincent* and

affirm the constitutionality of prohibitions on felons possessing firearms.").

As *Amicus Curiae*, FPD-NDOK believes the most appropriate result would be for this Court to grant the Petition for Writ of Certiorari, vacate the decision below, and remand for further consideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024). However, as explained below, due to the Tenth Circuit's published decision in *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024), FPD-NDOK believes it is necessary for the remand order to indicate, in some fashion, that this Court's decision in *District of Columbia v. Heller*, 554 U.S. 554 U.S. 570 (2008), does not establish the outer boundaries of the Second Amendment because it did not examine the full scope of the Second Amendment's protections. *See Rahimi*, 602 U.S. at 702.

Summary of the Argument

FPD-NDOK advocates for two related outcomes in this case. First, this Court should grant the Petition for Writ of Certiorari, vacate the decision below, and remand for further consideration of this Court's decision in *United States v. Rahimi*, 602 U.S. 680 (2024). This Court has done so with the Eleventh Circuit's post-*Rahimi* decisions that relied upon the same rationales as the decision below. Specifically, both the Eleventh Circuit and the Tenth Circuit have concluded that this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), rendered statutes that prohibit felons from possessing firearms to be presumptively reasonable and this Court's subsequent decision in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), did not abrogate that conclusion. Since this Court has already demonstrated its belief that the circuits should apply the *Bruen* test rather than treat *Heller* as the final authority on restrictions concerning the possession of firearms by felons, this Court should remand this case so the Tenth Circuit can do precisely that.

However, FPD-NDOK believes that the remand order should take an additional step. While such an order implies repudiation of the rationale utilized by the Tenth Circuit, it risks the Tenth Circuit falling back and simply following another published precedent that reaches the same outcome.

In *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024), the Tenth Circuit declared that *Heller* established a "safe harbor" for certain laws regulating firearms. *Id.* at 118–19. Per that decision, any law that falls within this safe harbor necessarily fails to satisfy the first step of the *Bruen* test. *Id.* at 119–20. Among those regulations within the safe harbor are laws restricting firearm possession by felons. *Id.* at 118–19. Unless this Court directs that the Tenth Circuit stop treating *Heller* as the final authority on whether felons may possess firearms, it is practically inevitable that any decision on remand will simply defer to *Polis* on the basis that its published status renders it binding on subsequent panel decisions. Thus, a decision on remand would only apply *Bruen* insofar as concluding that prohibitions on felons possessing firearms survives the first step of the *Bruen* test because *Heller* created a "safe harbor" for such regulations.

To ensure that remand is not futile, its purpose defeated, this Court should explicitly state in its remand order that *Heller* did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Rahimi*, 602 U.S. at 702 (quoting *Bruen*, 597 U.S. at 31). This should signal to the Tenth Circuit that *Heller* does not provide the final authority on the scope of the Second Amendment with respect to the possession of firearms by individuals with prior felony convictions.

As a final matter, FPD-NDOK addresses the various approaches taken in the circuits to resolve the rights of some (though not all) felons to possess firearms. It is FPD-NDOK's position that the tests employed by the Third, Fifth, and Sixth Circuits risk creating vague standards that invite law enforcement to arrest first and let courts sort it out later. This exposes individuals to the stigma, trauma, and expense of being arrested, jailed, and forced to litigate their constitutional rights to obtain their freedom. Even if they prevail, the fact of their arrest and charges will remain with them for the rest of their lives. FPD-NDOK believes that any test concerning which felons (if not all of them) may possess firearms must be predictable and determinable without requiring every person with a prior felony conviction to go to court or be exposed to risk of arrest.

FPD-NDOK agrees with Judge Bibas of the Third Circuit that "[a]s an original matter, the Second Amendment's touchstone is dangerousness." *Folajtar v. Att'y Gen.*, 980 F.3d 897, 924 (3d Cir. 2020) (Bibas, J., dissenting). But how do we assess dangerousness? The Fifth Circuit has begun to walk down the path FPD-NDOK believes is most appropriate: The test should ask whether the individual's prior offense[s] are violent or are uniquely dangerous (such as offenses like burglary, robbery, and kidnapping). *See United States v. Schnur* 132 F.4th 863, 869–70 (5th Cir. 2025).

In its own cases, FPD-NDOK has advocated for a form of the categorical (and modified-categorical) approach. While such a test presents its own challenges, it would ensure three things: First, only those prior felony offenses that actually demonstrate an individual has a proclivity to engage in uniquely dangerous or violent criminal acts will be prohibited from having firearms. This conforms with the historical tradition first discussed by Justice Barrett in her oft-cited dissent while sitting on the Seventh Circuit in *Kanter v. Barr*. *See* 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting). Second, it provides an actual test that can be used by an individual (or their counsel), law enforcement, and prosecutors to determine if the individual may possess a firearm. Thus, it is less likely that those who may legally possess firearms will be charged with criminal offenses for doing so. And third, there is a significant body of law explaining the test, and that body of law applies the test to numerous federal and state statutes. Each time a statute's effect on firearm possession is litigated, that statute's status is effectively resolved moving forward. Thus, over time, the law will develop to such a degree that there will be fewer questions as to whether a particular conviction permits permanent disarmament of an individual under the Second Amendment.

ARGUMENT

I. This Court should grant the Petition, vacate the decision below, and remand for further consideration of *United States v. Rahimi*, 602 U.S. 680 (2024).

Recently, this Court has taken this same action as to four petitions for writ of certiorari arising from the Eleventh Circuit. *See Dial v. United States*, No. 24-6569, --- S. Ct. ---, 2025 WL 1426660 (Mem.) (2025); *Whitaker v. United States*, 145 S. Ct. 1165 (2025); *Rambo v. United States*, 145 S. Ct. 1163 (2025); *Dubois v. United States*, 145 S. Ct. 1041 (2025). In each of those cases, the Eleventh Circuit's analysis mirrored that of the Tenth Circuit in the decision below.

For brevity, FPD-NDOK will use *United States v. Dial*, No. 24-10732, 2024 WL 5103431 (11th Cir. Dec. 13, 2024), as the exemplar case. There, the Eleventh Circuit relied upon its prior-precedent rule, which directs that an "intervening Supreme Court decision abrogates our precedent only if the intervening decision is both clearly on point and clearly contrary to our earlier decision." *Id.* at *3 (quoting *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *certiorari granted, judgment vacated*, 145 S. Ct. 1041 (2025)). The Eleventh Circuit has previously explained that a decision of this Court must "demolish and eviscerate each of [the] fundamental props" of the prior precedent. *Dubois*, 94 F.4th at 1293. Under that rule, if the Supreme Court did not specifically discuss

the Eleventh Circuit's prior precedent, or did not discuss the precise issue before the panel, that panel's precedent remains binding on future panels. *Dial*, 2024 WL 5103431, at *3.

Using the prior-precedent rule, the *Dial* panel held that it was bound by the Eleventh Circuit's precedential decision in *United States v. Rozier*, which held that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id.* at *2–3 (quoting 598 F.3d 768 770–71 (11th Cir. 2010)). The *Dial* panel concluded that neither of this Court's decisions in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), or *Rahimi*, 602 U.S. 680, displaced its prior precedential decisions concerning the possession of firearms by felons. *Dial*, 2024 WL 5103431, at *3. As a result, it held that the ruling in *Rozier* remained binding authority that precluded the Eleventh Circuit from even applying the *Bruen* test to a challenge to regulations prohibiting felons from possessing firearms. *Id.*

The Eleventh Circuit's decisions in both *United States v. Whitaker*, No. 24-10693, 2024 WL 3812277 (11th Cir. Aug. 14, 2024), and *United States v. Rambo*, No. 23-13772, 2024 WL 3534730 (11th Cir. July 25, 2024), adopted very similar approaches to resolving the constitutionality of restrictions on felons possessing firearms. *See also Dubois*, 94 F.4th at 1291–93 (holding this Court's decision in *Bruen* did not abrogate prior precedent holding 18 U.S.C. § 922(g)(1) constitutional). This Court granted

certiorari, vacated those decisions, and remanded them for further consideration in light of *Rahimi*. *Whitaker*, 145 S. Ct. 1165; *Rambo*, 145 S. Ct. 1163; *Dubois*, 145 S. Ct. 1041.

In the decision below, the Tenth Circuit adopted a rationale that looks nearly identical to that of the Eleventh Circuit. Following this Court's decision in *Bruen*, the Tenth Circuit issued its original decision in *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023). In that case, the Tenth Circuit panel relied upon a two-sentence analysis set forth in *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), to conclude that Section 922(g)(1) is constitutional as applied to all felons. 80 F.4th at 1199 & 1202. The panel declared that a later panel of the Tenth Circuit may disregard a prior precedent opinion of the circuit only when a Supreme Court decision "indisputably and pellucidly abrogated" that prior precedential opinion. *Id.* at 1200.

This Court's decision in *Bruen* indisputably created a new test, and that test held conduct to be presumptively protected when it falls within the plain text of the Second Amendment. 597 U.S. at 24. Yet the panel in *Vincent v. Garland* held that *McCane* remained binding precedent even though *McCane* applied no test and treated felon-in-possession regulations as presumptively lawful rather than presumptively unlawful. *See* 573 F.3d at 1047.

Following this Court's decision in *Rahimi*, this Court granted certiorari, vacated the *Vincent v. Garland* panel's decision, and remanded for further consideration in light of *Rahimi*. *Vincent v. Garland*, 144 S. Ct. 2708 (2024).

On remand, the Tenth Circuit issued the decision below. In an even shorter opinion, the panel explained that *McCane* "relied on *Heller*'s instruction that felon dispossession laws are presumptively valid." *Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025). It concluded that "[t]his presumption was reaffirmed in *Rahimi*. So *Rahimi* doesn't clearly abrogate the presumptive validity of § 922(g)(1)." *Id.* (internal citation omitted). Subsequently, the panel held "that *McCane* remains binding." *Id.* at 1266.

The declaration in *McCane* (that felon-in-possession restrictions are presumptively lawful) simply cannot coexist with the test set forth in *Bruen* (holding conduct covered by plain text of Second Amendment to be presumptively protected). A test that would find 18 U.S.C. § 922(g)(1) presumptively unlawful and require the United States to carry its historical tradition burden *must* override an earlier circuit decision declaring that same statute presumptively lawful. Therefore, the decision below is unambiguously wrong, and this Court should vacate it. The Tenth Circuit has begun using it as a vehicle to reject challenges to 18 U.S.C. § 922(g)(1). *See, e.g.*, *United States v. Warner*, 131 F.4th 1137, 1148 (10th Cir. 2025) (holding that Tenth Circuit's decision in *Vincent v. Bondi* governs challenges to 18 U.S.C. §

922(g)(1)); *United States v. Graves*, 24-7051, 2025 WL 1096984, at *1 (10th Cir. April 14, 2025) (unpublished) ("Given *Vincent*'s holding that *McCane* remains binding, we affirm the district court's judgment."); *United States v. Elwell*, 23-1407, 2025 WL 1088540, at *1 (10th Cir. April 11, 2025) (unpublished) ("We very recently concluded that *McCane* remains binding. In light of *Vincent*, we cannot conclude that the district court plainly erred by applying § 922(g)(1)." (internal citation omitted)); *United States v. Samuels*, 24-6018, 2025 WL 946416, at *2 (10th Cir. March 27, 2025) (unpublished) ("We are bound to follow *Vincent* and affirm the constitutionality of prohibitions on felons possessing firearms.").

Just as in *Dial*, *Whitaker*, *Rambo*, and *Dubois*, the appropriate course of action is to grant Petitioner's request for writ of certiorari, vacate the decision below, and remand for further consideration in light of *Rahimi*. However, for reasons discussed more extensively below, this Court should specifically note in its remand order the statement in *Rahimi* indicating that *Heller* did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Rahimi*, 602 U.S. at 702 (quoting *Bruen*, 597 U.S. at 31).

II. This Court's standard remand order will not compel a deeper analysis by the Tenth Circuit. The Tenth Circuit has another binding precedent that inevitably leads to the same outcome, but in a different manner.

This Court's standard remand order, as used in *Dial*, *Whitaker*, *Rambo*, and *Dubois* will only invite the same error by the Tenth Circuit. This is because it has a published, precedential opinion independent of the decision below that reaches the same result in a different manner. On November 5, 2024, the Tenth Circuit issued its published decision in *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024). No party filed a petition for writ of certiorari following that decision.

To begin, the *Polis* panel describes the first step of the *Bruen* test as follows: "At step one, the plaintiff is tasked with establishing that the Second Amendment's explicit text, 'as informed by history,' encompasses the conduct they seek to engage in." *Polis*, 121 F.4th at 113 (quoting *Bruen*, 597 U.S. at 17, 19). This "as informed by history" component is nowhere found in the *Bruen* explanation of step one. Instead, that phrasing is used only to explain that a test—which this Court would establish later in the opinion—must be "rooted in the Second Amendment's text, as informed by history." *Bruen*, 597 U.S. at 19.

But the meat of the problem comes later in *Polis*. After explaining its understanding of the *Bruen* test, the panel determined that *Heller* created a "safe harbor" that makes certain regulations of firearms presumptively lawful. 121 F.4th at 118–19. Put simply, the *Polis* panel concluded that if a law falls within this so-called safe harbor provision in *Heller*, then any challenge to that law will fail at the first step of the *Bruen* analysis. *Id.* at 119–20 (declaring Colorado statute's regulation "falls outside the scope of the Second Amendment" based on nothing more than fact it was within the "safe harbor"). Naturally, the *Polis* panel concluded that the safe harbor includes those regulations prohibiting felons from possessing firearms. *Id.* at 118–19. The Fifth Circuit referred to the analysis in *Polis* as "a category error," noting that there are "baleful implications of limiting the right [to possess firearms] at the outset by means of narrowing regulations not implied in the text." *Reese v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 127 F.4th 583, 590 & n.2 (5th Cir. 2025).

This safe harbor concept is simply without support in either *Bruen* or *Rahimi* given the manner in which both cases explicitly describe the test to be applied to Second Amendment challenges. Neither *Bruen* nor *Rahimi* contemplate the proposition that *Heller* created a safe harbor for certain regulations.

The panel in *Polis* sought to explain that regulations within the safe harbor do not implicate Second Amendment rights, but it contradicts itself later in the opinion when it acknowledges that a law

within this safe harbor *would* fall within the plain text of the Second Amendment, and therefore satisfy the first step of the *Bruen* analysis, if the law is "employed for abusive ends." 121 F.4th at 128. But a law either does, or does not, burden conduct covered by the plain text of the Second Amendment. Whether a law is applied in an abusive manner has nothing to do with the conduct that law aims to regulate and punish. The *Polis* panel's approach simply defies reality and logic when it categorically excludes conduct that plainly and unambiguously falls within the plain text of the Second Amendment.

The first step of the test, as this Court knows well, is simple: Look to the plain text of the Second Amendment and ask if the conduct to be regulated falls within that text. If it does, the conduct is presumptively protected, and courts must advance to the second step. The first step does not ask about the purpose of the law or if its manner of application is abusive. *See Bruen*, 597 U.S. at 24.

The *Polis* panel's approach is strangely reminiscent of the now-defunct *Lemon* test, which turned on the law's purpose, its primary effect, and whether it fostered excessive government entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) *abrogation recognized by Groff v. DeJoy*, 600 U.S. 447, 460 (2023). This Court has referred to that test as an "abstract" and "ahistorical" approach to resolving Establishment Clause cases. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). The *Polis* approach represents a

return to constitutional analysis that considers the motives both of legislators in creating a law and of those charged with enforcing it. This approach is simply wrong.

Polis is not before this Court. Nonetheless, as *Amicus Curiae*, FPD-NDOK believes it is necessary to draw this Court's attention to that decision and its flaws. If this Court remands this case to the Tenth Circuit for further consideration in light of *Rahimi*, without more direction, the panel on remand will have no choice but to adhere to the binding, precedential decision of *Polis* and its safe harbor rationale. Further, other cases currently pending in the Tenth Circuit are equally bound by its precedential holding.

In *Polis*, the panel recognized this Court's decision in *Rahimi*, and explicitly concluded that it did not abrogate its approach: "Because the presumptively lawful regulatory measures language, first stated in *Heller,* has not been abrogated, it remains good law." 121 F.4th at 119 (internal quotation marks omitted). "*Rahimi* did not address presumptively lawful regulations in any way that dictates a different course than the one set out in *Bruen*." *Id.* at 123.

As the Tenth Circuit explained in *Vincent v. Garland*, its panels consider themselves bound by prior published opinions unless a decision of this Court "indisputably and pellucidly abrogated" that prior published opinion. 80 F.4th at 1200. Thus, any remand order must at least convey the idea that *Heller* does not provide the outer boundaries of the

Second Amendment. A bare remand order will simply invite the same errors in more cases through decisions that find *Polis* binding.

FPD-NDOK believes reference to *Rahimi*'s language specifically noting that *Heller* did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," would be adequate. 602 U.S. at 702 (quoting *Bruen*, 597 U.S. at 31). However, this Court is in the best position to determine a course of action that ensures the Tenth Circuit follows its directives.

III. The circuits have not adequately analyzed potential tests to determine which felons may possess firearms. The touchstone of such a test should be "dangerousness," but it must also avoid creating vagueness problems for law enforcement, courts, and citizens.

FPD-NDOK agrees with Petitioner that a showdown in this Court is inevitable. The circuits are hopelessly split in determining whether at least some felons may possess firearms. But, to date, only one circuit has presented something that resembles a functioning test to determine which prior felony convictions may function to prohibit a person from possessing a firearm. This Court's review is best served by having multiple options to consider. Thus, FPD-NDOK believes the best outcome in this case is a remand with instructions instead of a full merits review.

So far, five circuits have upheld categorical application of regulations prohibiting felons from possessing firearms. *See United States v. Duarte*, No. 22-50048, --- F.4th ---, 2025 WL 1352411, at *2 (9th Cir. 2025) (en banc) (citing *Vincent v. Bondi*, 127 F.4th at 1265–66); *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024); *United States v. Dubois*, 94 F.4th at 1293). The Fourth, Eighth, and Ninth Circuits reached the second step of the *Bruen* analysis to conclude that the Nation's historical tradition of firearms regulation supported such

categorical prohibitions. *Duarte*, 2025 WL 1352411, at *14; *Hunt*, 123 F.4th at 704–08; *Jackson*, 110 F.4th at 1126–29.

Three circuits have concluded that these prohibitions may be unconstitutional as to *some*, but not all, convicted felons. *See United States v. Schnur*, 132 F.4th 863, 869–70 (5th Cir. 2025); *Range v. Att'y Gen.*, 124 F.4th 218, 222–23 (3d Cir. 2024) (en banc); *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024); *United States v. Williams*, 113 F.4th 637, 661–62 (6th Cir. 2024).

The Third Circuit rejected the application of blanket prohibitions based simply on felon status. *Range*, 124 F.4th at 228–30. Instead, it tied prohibitions on possessing firearms to dangerousness, and it noted that not all felonies are created equal. *Id.* at 230. But the Third Circuit declined to provide a methodology to this approach except to imply that a predicate offense must demonstrate dangerousness. *Id.* at 231–32.

The Sixth Circuit split the baby. It concluded that historical tradition supported class-based disarmament of dangerous people, but it held that history also requires individuals to have an avenue to demonstrate they are not dangerous. *Williams*, 113 F.4th at 661–62. The Sixth Circuit would place this burden on an individual, not the government. *Id.* at 657–58.

The Fifth Circuit has seemingly recognized two approaches: One premised on dangerousness, the other premised on historical availability of the death penalty. In *Diaz*, the Fifth Circuit required the United States to "demonstrate that the Nation has a longstanding tradition of disarming someone with a criminal history analogous to" the defendant. 116 F.4th at 467. The Fifth Circuit concluded that *Bruen*'s historical tradition test requires that the predicate felony which serves as the basis of a Section 922(g)(1) charge be analogous to a felony offense punishable by death at the founding. *Id.* at 469–70.

In a more recent decision, the Fifth Circuit also concluded that predicate felony offenses demonstrating a history of violent criminal behavior may also support disarmament. *Schnur*, 132 F.4th 863, 869–70. There, the Fifth Circuit concluded that a prior "crime of violence" conviction justified disarmament because it provided the necessary evidence that a person posed a threat to society if armed. *Id.* at 870.

FPD-NDOK believes that the *Schnur* decision is trending in the correct direction. FPD-NDOK agrees with Judge Bibas of the Third Circuit that "[a]s an original matter, the Second Amendment's touchstone is dangerousness." *Folajtar v. Att'y Gen.*, 980 F.3d 897, 924 (3d Cir. 2020) (Bibas, J., dissenting). This aligns with Justice Barrett's dissent in *Kanter v. Barr* while on the Seventh Circuit:

> The historical evidence . . . support[s] a . . . proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This 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 v. Barr, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting).

But the question remains: How do we determine dangerousness? No matter what approach is ultimately taken to resolve the "dangerousness" question, it must provide clear, predictable answers that allow courts to provide consistent outcomes and, more significantly, to allow law enforcement, prosecutors, and citizens to determine if conduct is properly prohibited by law and subject to criminal punishment. If prohibitions on the possession of firearms by felons came with mere civil penalties, a looser approach to the dangerousness analysis might be appropriate. But these prohibitions impose criminal penalties. For example, a person convicted under 18 U.S.C. § 922(g)(1) faces potential imprisonment up to fifteen years. These criminal penalties compel a higher standard for clarity in determining whether a person's conduct is protected or may be prohibited. The absence of a clear standard

risks creating a new constitutional problem: vagueness.

The Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This Court's vagueness jurisprudence initially emphasized the need for notice to citizens: A law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Later, that emphasis shifted to risks of arbitrary or standardless enforcement. *Kolender v. Lawson*, 461 U.S. 353, 357–58 (1983). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108–09.

While the *Diaz* approach (whether the crime was historically punishable by death) seems appealing, it captures non-dangerous criminal conduct like forgery and counterfeiting. *Folajtar*, 980 F.3d at 905 (noting that such offenses were punishable by death at the founding). The United States has begun to point this out in its favor when addressing challenges to 18 U.S.C. § 922(g)(1). *See, e.g.*, *United States v. Smith*, No. 24-5106, Opening Brief of United States, Doc. 19, at 21 (10th Cir. March 28, 2025). Thus, that approach captures conduct broader than what is historically supported as a basis for disarmament under threat of criminal punishment. Further, the *Diaz* approach

invites the vagueness problem: Whether a particular modern offense has a historical analogue that enables permanent prohibition is difficult to discern without subjecting individuals to arrest and lengthy court proceedings. *See, e.g.*, *United States v. Gomez*, --- F. Supp. 3d ---, 2025 WL 971337 (N.D. Tex. 2025) (holding, after extensive analysis, that persons convicted of felony possession of marijuana could not be prohibited from possessing firearms).

Instead, *Schnur* started down the correct path. The test should ask whether the individual's prior offense[s] are violent or are uniquely dangerous (such as offenses like burglary, robbery, and kidnapping). This approach aligns with Congress's earliest attempt to prohibit the possession of certain firearms by certain people. *See* Federal Firearms Act of 1938, Pub. L. 75-785, 52 Stat. 1250. Thus, FPD-NDOK proposes that the categorical and modified-categorical approaches provide the best test to avoid the constitutional vagueness problem while also capturing conduct that demonstrates an individual has a proclivity to engage in violent criminal behavior.

There is much jurisprudence surrounding this test, so it becomes easier to apply than other tests. Crimes that are categorically violent include as an element the use, attempted use, or threatened use of physical force against the person of another. *See, e.g.*, *United States v. Taylor*, 596 U.S. 845, 848 (2022); *Johnson v. United States*, 576 U.S. 591, 594 (2015). Where the prior offense has different manners in which it may be committed, and those different

manners are themselves elements of the offense, the modified-categorical approach may be used to determine if the offense is a violent felony. *See Mathis v. United States*, 579 U.S. 500, 505–06 (2016).

And for other offenses that may not necessarily be violent, but nonetheless demonstrate the person poses a unique danger to society if armed, the generic versions of those crimes, along with the categorical approach, can separate the truly dangerous offenses from the non-dangerous offenses. For example, generic burglary can rightly be considered a uniquely dangerous offense because it involves "a crime 'contain[ing] the following elements: an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime.' " *Id.* at 504. But not all burglaries satisfy this definition, and therefore not all burglaries should automatically disqualify a person from ever possessing a gun (and subjecting them to criminal penalties if they do possess a gun).

In Oklahoma, Second-Degree Burglary may be committed by breaking into a vending machine or similar coin-operated device. Okla. Stat. tit. 21, § 1435 (2022). Those who break into a vending machine are not as dangerous as those who break into a building with the intent to commit a crime therein, and they should not be subject to the same limitations on their Second Amendment rights. Precisely which generic offenses should lead to permanent disarmament may best be left to further historical analysis, but it should be those offenses which demonstrate a proclivity to

engage in violent criminal behavior or which pose a unique danger that violence will result from the offense.

This approach allows properly-trained law enforcement and prosecutors to determine whether an individual is violating the law or acting within their Second Amendment rights when they possess a firearm. If law enforcement incorrectly arrests someone, courts are well-equipped to quickly resolve the error and dismiss the charges under this test. Further, citizens are positioned to obtain legal advice about whether their possession would be protected. Any other test leads to guesswork, protracted litigation, and individuals sitting in jail cells for conduct that is protected by the Constitution.

This approach has not been explored by the circuits, and FPD-NDOK believes that the circuits should be given an opportunity to consider it so that this Court may have the benefit of their analysis.

CONCLUSION

For the reasons stated herein, this Court should grant the Petition for Writ of Certiorari, vacate the decision below, and remand for further consideration in light of this Court's decision in *United States v. Rahimi* and this Court's recognition therein that *Heller* did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." 602 U.S. at 702 (quoting *Bruen*, 597 U.S. at 31).

Respectfully submitted,

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