No. _____

In the Supreme Court
of the United States

Zavien Canada,
Petitioner,
v.
United States of America,
Respondent.

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

Petition for a Writ of Certiorari

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Question Presented

Whether 18 U.S.C. § 922(g)(1), which prohibits firearm possession by anyone convicted of "a crime punishable by imprisonment for a term exceeding one year," violates the Second Amendment on its face.

Related Proceedings

United States v. Canada, No. 6:20-cr-471-HMH, United States District Court for the District of South Carolina. Judgment entered September 2, 2022.

United States v. Canada, No. 22-4519, United States Court of Appeals for the Fourth Circuit. Judgment entered June 3, 2024.

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Introduction

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022), this Court held that when the Second Amendment's "plain text" covers a challenger's conduct, a statute proscribing that conduct is unconstitutional unless the government shows that the statute "is consistent with the Nation's historical tradition of firearm regulation." Petitioner Zavien Lenoy Canada argued below that under *Bruen*'s new framework, 18 U.S.C. § 922(g)(1)—which criminalizes possessing a firearm following conviction for a crime punishable by more than one year in prison—violates the Second Amendment on its face. The Fourth Circuit rejected that challenge. But rather than explaining why, the court merely hypothesized a number of *possible* legal theories that *might* support § 922(g)(1)'s constitutionality—e.g., that felons are not among "the people," that there exists "a history and tradition of disarming dangerous people"—but declined to endorse, commit to, or provide analytical support for any of them. App.22. No matter which "path" it chose, the Fourth Circuit wrote, the court would end up at the same conclusion: § 922(g)(1) is constitutional "in at least *some* set of circumstances." App.22 (emphasis in original). The court therefore refused to "resolve" any of the legal questions, arising at *Bruen*'s first or second steps, that bear on whether § 922(g)(1) is consistent with the Second Amendment. App.22.

This reasoning is problematic on its own terms. If a court holds a statute is constitutional, it should be able to provide reasons for that conclusion. Rejecting a Second Amendment challenge without even bothering to offer a justification treats the right to keep and bear arms as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70.

But even if the Fourth Circuit's decision were not deeply flawed, it does not survive this Court's intervening opinion in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). In resolving a Second Amendment challenge to a related statute, 18 U.S.C. § 922(g)(8), *Rahimi* offered guidance for lower courts that fatally undermines the Fourth Circuit's analysis below (to the extent there was any). Specifically, *Rahimi* teaches that (1) the government cannot disarm American citizens merely by applying to them hazy labels like "irresponsible" or "dangerous," and (2) lower courts should adhere to the holdings of this Court's opinions, rather than their unexplained dicta, in deciding Second Amendment challenges. Each of the hypothesized legal bases on which the Fourth Circuit relied below is inconsistent with these lessons. This Court should therefore grant the petition for a writ of certiorari, vacate the judgment, and remand (GVR) the case to the Fourth Circuit

for further consideration in light of *Rahimi*.[1]

Opinions Below

The district court orally denied Canada's Second Amendment motion at sentencing, and therefore its ruling is not reported. The ruling is reproduced in the appendix. App.9-10. The Fourth Circuit's opinion is reported at 103 F.4th 257 (4th Cir. June 3, 2024) and is reproduced in the appendix. App. 20-24.

Jurisdiction

The court of appeals' decision issued on June 3, 2024. App. 20. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Second Amendment to the U.S. Constitution 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."

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[1] Unless otherwise indicated, quotations in this petition omit citations, brackets, internal quotation marks, and other characters that do not affect the meaning of the cited language.

18 U.S.C. § 922(g)(1) provides: "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."

Statement of the Case

Canada's claim is intertwined with the development of this Court's and the Fourth Circuit's Second Amendment case law. Understanding his claim of error therefore requires some brief background on how Second Amendment jurisprudence has evolved over the last 16 years.

I. After this Court recognizes an individual right to keep and bear arms, the Fourth Circuit holds in 2012 that § 922(g)(1) is "presumptively lawful."

In *District of Columbia v. Heller*, 554 U.S. 570, 576-628 (2008), this Court held for the first time that the Second Amendment codified a pre-existing individual right to keep and bear arms for lawful purposes like self-defense. The Court recognized, however, that "the right secured by the Second Amendment is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. For example, the Court

wrote, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* Without identifying any historical support, the Court then enumerated certain categories of firearms restrictions that it deemed "presumptively lawful":

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27 & n.26.

Having determined that the Second Amendment protects an individual right, the Court in *Heller* struck down District of Columbia statutes that prohibited the possession of handguns in the home and required that any other guns in the home be kept inoperable. *Id.* at 628-34. The Court noted that the District's handgun ban "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense. *Id.* at 628. And the law extended "to the home, where the need for defense of self, family, and property is most acute." *Id.* "Few laws in the history of our Nation," the Court wrote, "have come close to the severe restriction of the

District's handgun ban," and "some of those few have been struck down." *Id.* at 629. In addition, the Court observed, the handgun ban could not survive means-ends scrutiny of the type applied to other constitutional rights: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to 'keep' and use for protection of one's home and family would fail constitutional muster." *Id.* at 628-29.

Two years later, in *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), the Fourth Circuit considered a Second Amendment challenge to 18 U.S.C. § 922(g)(9), which prohibits firearm possession by anyone who has been convicted of a "misdemeanor crime of domestic violence." Citing *Heller*'s allusion to "standards of scrutiny," *Chester* held courts should resolve Second Amendment challenges by applying "an appropriate form of means-end scrutiny." 628 F.3d at 680. This analysis involved two steps. At the first step, courts asked "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," as it was understood "at the time of ratification." *Id.* If it did, then at step two courts subjected the law to either strict or intermediate scrutiny, weighing the government's justifications for the law against the burden it imposed on the right to keep and bear arms. *Id.* at 680-83.

In 2012, the Fourth Circuit for the first time addressed a Second Amendment challenge to a statute—§ 922(g)(1)—that is among the "presumptively lawful regulatory measures" identified in *Heller*. *See United States v. Moore*, 666 F.3d 313 (4th Cir. 2012). The Fourth Circuit in *Moore* noted that *Heller* had said "'nothing in [that] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons,'" which *Heller* had characterized as "'presumptively lawful regulatory measures.'" *Id.* at 317-18 (quoting 554 U.S. at 626-27 & n.26). The Fourth Circuit admitted uncertainty about what *Heller*'s "presumptively lawful" language meant—i.e., whether felon-disarmament laws were presumed lawful because "they regulate conduct outside the scope of the Second Amendment" or instead because "they pass muster under any standard of scrutiny." *Id.* at 318.

But the court found it unnecessary to resolve that question, because "[w]hichever meaning the Supreme Court had in mind negates a facial challenge to a felon in possession statute like § 922(g)(1)." *Id.* at 318. This conclusion rested solely on *Heller*'s description of felon-disarmament laws as "presumptively lawful." Because "the presumption of constitutionality . . . govern[ed]," the Fourth Circuit did "not pursue an analysis of the historical scope of the Second Amendment right," as it otherwise would have at step one of the framework

previously announced in *Chester*. *United States v. Pruess*, 703 F.3d 242, 246 n.3 (4th Cir. 2012) (discussing *Moore*).

The *Moore* court noted, however, that *Heller* had described felon-disarmament laws as only "'*presumptively* lawful,'" which suggested such statutes "could be unconstitutional in the face of an as-applied challenge." 666 F.3d at 319 (emphasis in original). To prevail on an as-applied challenge, *Moore* held, a § 922(g)(1) defendant had to overcome the presumption of constitutionality by showing that "his factual circumstances remove his challenge from the realm of ordinary challenges." *Id.* And to do that, a defendant had to demonstrate that he was a "law-abiding responsible citizen." *Id.* The Fourth Circuit lifted that descriptor from *Heller*, where this Court had written that "whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635; *see Moore*, 666 F.3d at 319-20.

II. Canada is charged with violating 18 U.S.C. § 922(g)(1).

In August 2020, a grand jury in the District of South Carolina returned an indictment charging Canada with one count of being a felon in possession of a firearm, under 18 U.S.C. § 922(g)(1); one count of possessing cocaine base with intent to distribute, under 21 U.S.C. §§ 841(a)(1), (b)(1)(C); and one count of

possessing a firearm in furtherance of a drug trafficking crime, under 18 U.S.C. § 924(c). J.A.20-21.[2] Canada proceeded to trial, where a jury convicted him of the felon-in-possession charge and acquitted him of the drug-distribution charge. J.A.101. The § 924(c) charge was dismissed on the government's motion. J.A.101.

In August 2021, the district court sentenced Canada to 220 months' imprisonment, to be followed by 5 years of supervised release. J.A.14. Canada appealed, arguing the district court had erred by failing to orally pronounce the length of his supervised-release term at sentencing. C.A. Petr. Br. 2. In May 2022, the Fourth Circuit granted a government motion to remand the case to the district court for resentencing. J.A.17; C.A. Petr. Br. 2.

III. Canada moves to dismiss the § 922(g)(1) count under *Bruen*.

On June 23, 2022, while Canada was awaiting resentencing on remand, this Court issued its opinion in *Bruen*. The question presented in *Bruen* was whether "ordinary, law-abiding citizens have a . . . right to carry handguns publicly for their self-defense." 597 U.S. at 9. In a case that heralded "a sea-change in Second Amendment jurisprudence," the Court concluded they do. *United States v. Dorsey*, 105 F.4th 526, 530 (3d Cir. 2024).

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[2] The district court exercised jurisdiction over Canada's case under 18 U.S.C. § 3231. *See* Sup. Ct. R. 13(g)(ii).

The Court explained that the means-ends scrutiny employed by the Fourth Circuit in *Chester*—and around which other lower courts had "coalesced"—was inconsistent with *Heller*. *Bruen*, 597 U.S. at 17. Rather than asking whether a law is "narrowly tailored to achieve a compelling governmental interest" or is "substantially related to the achievement of an important governmental interest," *Bruen* directed courts to consider only "the Second Amendment's text, as informed by history." *Id.* at 18-19. *Bruen*'s framework comprises two steps. First, courts ask whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 24. If not, the challenge fails. But if the challenger's conduct does come within the Second Amendment's plain text, then "the Constitution presumptively protects that conduct." *Id.* To rebut the presumption, the government bears the burden, at step two, of showing that its regulation "is consistent with the Nation's historical tradition of firearm regulation." *Id.* If the government fails to establish that "historical precedent from before, during, and . . . after the founding evinces a comparable tradition of regulation," then the challenged law is unconstitutional. *Id.* at 27.

Applying this standard, the Court in *Bruen* held unconstitutional a New York law providing that, to obtain a permit to carry a concealed handgun in public, an applicant had to demonstrate "proper cause," i.e., "a special need for self-

protection distinguishable from that of the general community." *Id.* at 12. The Court held, first, that the Second Amendment's plain text covered the petitioners and their proposed course of conduct. *Id.* at 31-33. It was "undisputed," the Court noted, that handguns are protected "Arms" and that the petitioners—"two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects." *Id.* at 31-32. And the Court "ha[d] little difficulty concluding" that "carrying handguns publicly for self-defense" qualified as "bear[ing]" arms. *Id.* at 32-33. At step two, the Court concluded the state had failed to carry its burden of "show[ing] that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 34; *see id.* at 38-71.

On August 24, 2022, Canada filed a motion asking the district court to dismiss the § 922(g)(1) count of which he had been convicted. J.A.24-49. He argued the statute was unconstitutional under the new analysis articulated by *Bruen*. J.A.24-29. On August 30, 2022, the district court denied Canada's motion and resentenced him to 220 months' imprisonment. App.9-10, J.A.97, J.A.102. Canada noted a timely appeal. J.A.111.

IV. In the Fourth Circuit, Canada argues § 922(g)(1) is facially inconsistent with the Second Amendment.

Canada contended on appeal that § 922(g)(1) violates the Second Amendment on its face. C.A. Petr. Br. 5-49. At *Bruen* step one, he argued the Second Amendment's "plain text" covers his conduct because (1) the firearm he possessed is an "Arm[]," (2) possessing that firearm constitutes "keep[ing]" it, and (3) he is one of "the people" who enjoy Second Amendment rights. *Id.* at 15-22. On the last point, he noted that *Heller* construed "the people" as "'unambiguously refer[ring] to *all* members of the political community, *not an unspecified subset*.'" *Id.* at 16 (quoting 554 U.S. at 580) (emphasis in brief). He pointed out that *Heller* said "the people" refers to all "'persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community,'" and he explained that *Heller* read "the people" to have the same meaning it has in the First, Fourth, and Ninth Amendments, which protect all American citizens. *Id.* at 16-18. Finally, he emphasized that *Heller* held, and *Bruen* reaffirmed, that "the people" protected by Second Amendment comprise "'*all* Americans.'" *Id.* at 16 (quoting *Heller*, 554 U.S. at 581) (emphasis in brief); *id.* at 21 (quoting *Bruen*, 597 U.S. at 70) (emphasis in brief).

Canada devoted six pages of his opening brief to explaining the meaning of

"the people" because numerous courts had concluded post-*Bruen* that the term is limited to "law-abiding, responsible citizens," a phrase that those courts held to exclude anyone convicted of a felony. *Id.* at 16-22. As Canada explained, *id.* at 20, courts took this view because *Bruen* at several points describes the petitioners in that case by using the words "law-abiding," "responsible," and their variants, *see, e.g.*, 597 U.S. at 26 ("The Second Amendment is the very *product* of an interest balancing by the people and it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense." (emphasis in original)); *id.* at 38 ("Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense."); *id.* at 60 ("None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose."); *id.* at 70 ("Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to 'demonstrate a special need for self-protection distinguishable from that of the general community' in order to carry arms in public." (citation omitted)). But, Canada argued, those descriptors were not part of *Bruen*'s holding, and using them to restrict the scope of the Second Amendment would conflict with this Court's

conclusion that "all Americans" presumptively enjoy the right to keep and bear arms. C.A. Petr. Br. 19-22.

At *Bruen* step two, Canada argued the government would be unable to show that § 922(g)(1) squares with America's tradition of firearms regulation. *Id.* at 22-41. He explained that felon-disarmament laws did not appear in the United States until the 20th century—too late for *Bruen* purposes—and that laws from the Founding era were too dissimilar to discharge the government's burden. *Id.* at 24-33. He also argued the government could not carry its burden by positing a generalized historical tradition of disarming "dangerous" groups, since that label was too broad—too elastic and manipulable—to comport with *Bruen*, which required a more granular focus on the specific "how" and "why" of historical firearms regulations. *Id.* at 33-41.

Finally, Canada asserted that the Fourth Circuit's prior opinion in *Moore*—which upheld § 922(g)(1) based solely on *Heller*'s reference to "presumptively lawful" felon-disarmament laws—did not survive *Bruen*. *Id.* at 41-49.

The government disagreed with Canada on each of these questions. It argued that (1) "the people," as used in the Second Amendment, is limited to "law-abiding, responsible citizens," and therefore does not include felons, C.A. Gov't Br. 19-24; (2) § 922(g)(1) is consistent with America's tradition of firearms

regulations, including a purported history of disarming "untrustworthy" groups in order to "protect society" from "violence," *id.* at 28-35; and (3) *Bruen* did not abrogate the Fourth Circuit's post-*Heller* opinion in *Moore* upholding § 922(g)(1), *id.* at 12-18.

V. The Fourth Circuit holds § 922(g)(1) facially constitutional but expressly refuses to say why.

On June 3, 2024, the Fourth Circuit issued a published opinion rejecting Canada's facial challenge to § 922(g)(1). App.20-24; *see United States v. Canada*, 103 F.4th 257 (4th Cir. 2024). But the court declined to say why the statute was constitutional. Instead, the court identified several theories on which the statute's constitutionality might be sustained, and said it need not endorse any of them because "[n]o matter which analytical path" it chose, "they all lead to the same destination: Section 922(g)(1) is facially constitutional." App.22. As the Fourth Circuit put it:

> We . . . need not—and thus do not—resolve whether Section 922(g)(1)'s constitutionality turns on the definition of the "people" at step one of *Bruen*, a history and tradition of disarming dangerous people considered at step two of *Bruen*, or the Supreme Court's repeated references to "law-abiding citizens" and "longstanding prohibitions on the possession of firearms by felons." See, *e.g.*, *Bruen*, 597 U.S. at 9, 38 n.9; *District of Columbia v. Heller*, 554 U.S. 570, 625, 626 (2008). We likewise do not decide whether *Bruen* sufficiently unsettled the law in this area to free us from our otherwise-absolute obligation to follow this Court's post-*Heller* but pre-*Bruen* holdings rejecting constitutional challenges to this same statute. See, *e.g.*, *United States v. Moore*, 666 F.3d 313, 318 (4th Cir. 2012).

App.22. Regardless of which of these theories was correct, the Fourth Circuit held, § 922(g)(1) "may constitutionally be applied in at least *some* set of circumstances," such as when a defendant has previously "been convicted of a drive-by-shooting, carjacking, armed bank robbery, or even assassinating the President of the United States." App.22 (emphasis in original). The court therefore concluded the statute was facially constitutional. App.22-23.

Reasons for Granting the Writ

This Court should GVR Canada's case to the Fourth Circuit for reconsideration in light of the Court's recent opinion in *Rahimi*. The Fourth Circuit's opinion is inconsistent with key aspects of *Rahimi*, including (1) its rejection of the government's argument that American citizens can be disarmed based solely on their (supposed) membership in a class defined by "vague," "unclear" descriptors like "irresponsible," and (2) its insistence that lower courts should decide Second Amendment challenges based on the holdings of, rather than dicta in, this Court's cases.

Pursuant to 28 U.S.C. § 2106, this Court "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate

judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." This statute "confer[s] upon this Court a broad power to GVR." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996). The Court has exercised that power "when intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (ellipsis in original). Among other things, this Court "ha[s] GVR'd in light of . . . [its] own decisions" that "the lower court had no opportunity to consider." *Lawrence*, 516 U.S. at 166, 169; *see also id.* at 168 ("GVR orders are premised on matters that we have reason to believe the court below did not fully consider.").

Under these standards, a GVR in light of *Rahimi* is appropriate.

Rahimi rejected a facial Second Amendment challenge to 18 U.S.C. § 922(g)(8)(C)(i), which criminalizes firearm possession by people subject to domestic-violence restraining orders if those orders contain "a finding that the defendant 'represents a credible threat to the physical safety' of his intimate partner or his or his partner's child." 144 S. Ct. at 1895-96, 1898-99. The Court in *Rahimi* did not expressly address *Bruen*'s first step, instead appearing to take it for

granted that § 922(g)(8)(C)(i) "regulates arms-bearing conduct" and therefore implicates the Second Amendment's plain text. *See id.* at 1897. At *Bruen*'s second step, the Court held § 922(g)(8)(C)(i) "is consistent with the principles that underpin our regulatory tradition." *Id.* at 1898. The Court cited two traditions to support this conclusion. The first was "surety laws," which "authorized magistrates to require individuals . . . to post a bond" if they went "armed offensively," thereby giving a victim "reasonable cause to fear that the accused would do him harm or breach the peace." *Id.* at 1900. The second tradition was "'going armed' laws," which punished—with arms forfeiture and imprisonment—anyone who "r[ode] or [went] armed, with dangerous or unusual weapons, to terrify the good people of the land." *Id.* at 1901.

Although the Court upheld § 922(g)(8)(C)(i), it "reject[ed]" a different "contention" the government had made to defend the statute: "that Rahimi [could] be disarmed simply because he [wa]s not 'responsible.'" *Id.* at 1903. The responsible-irresponsible "line," the Court wrote, does not "derive from our case law." *Id.* True, *Heller* and *Bruen* "used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right," but those cases "did not define the term and said nothing about the status of citizens who were not 'responsible.'" *Id.* That question "was simply not presented" in

Heller or *Bruen*. *Id.* In addition, the Court explained, "'[r]esponsible is a vague term" that cannot demarcate the bounds of the Second Amendment, since "[i]t is unclear what such a rule would entail." *Id.*; *see also id.* at 1945 (Thomas, J., dissenting) ("[The government] argues that the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding.' Not a single Member of the Court adopts the Government's theory. . . . The Government's argument lacks any basis in our precedents and would eviscerate the Second Amendment altogether.").

Rahimi's rejection of an "irresponsible" metric undermines each potential basis of facial constitutionality on which the Fourth Circuit relied to uphold § 922(g)(1).

First, as explained above, the government argued in the Fourth Circuit that "the people" protected by the Second Amendment's plain text are limited to "law-abiding, responsible citizens." C.A. Gov't Br. 22. That argument was based on what the Fourth Circuit called "[this] Court's repeated references to 'law-abiding citizens'" in *Heller* and *Bruen*. App.22. The Fourth Circuit wrote that if this Court's cases supported the government's reading of "the people," that fact would establish § 922(g)(1)'s facial constitutionality. *See* App.22. But *Rahimi* rejected the use of a "responsible" filter to restrict Second Amendment rights, and

it did so for reasons that are equally applicable to "law-abiding," the second half of the government's proposed limitation.

Rahimi did not specifically address the "law-abiding" portion of the government's argument because the government did not claim § 922(g)(8) was justified by Congress' power to disarm the non-"law-abiding." Instead, the government relied only on a (purported) government power to deny firearms to those who are not "responsible." *See United States v. Rahimi*, No. 22-915, Gov't Br. 27-29 (arguing § 922(g)(8) defendants are "not 'responsible'" and suggesting, by contrast, that felons and illegal immigrants are not "law-abiding"). But both prongs of the government's proposed test—"responsible" and "law-abiding"—derive from the same source: *Heller*'s and *Bruen*'s use of those words to describe the challengers in those cases. And just as the "responsible" question "was simply not presented" in *Heller* or *Bruen*, those cases did not address the "law-abiding" question either. *Rahimi*, 144 S. Ct. at 1903. A "law-abiding"/non-"law-abiding" line, therefore, does not "derive from [this Court's] case law," as the Fourth Circuit thought it might. *Rahimi*, 144 S. Ct. at 1903.

The term "law-abiding," moreover, is just as "vague" and "unclear" as the term "responsible." *Id.* Neither provides a coherent, workable metric for deciding who is and is not among "the people." *See Range v. Att'y Gen.*, 69 F.4th 96, 102 (3d

Cir. 2023) (en banc) ("[T]he phrase 'law-abiding, responsible citizens' is as expansive as it is vague."), *certiorari granted, judgment vacated sub nom. Garland v. Range*, No. 23-374, ____ S. Ct. ____, 2024 WL 3259661 (U.S. July 2, 2024); *United States v. Duarte*, 101 F.4th 657, 670 (9th Cir. 2024) (same), *vacated by reh'g en banc*; *United States v. Coleman*, 698 F. Supp. 3d 851, 861 (E.D. Va. 2023) ("[T]he Government's reliance on the Supreme Court's various references to 'law-abiding' persons as support for its contention that felons fall outside the scope of the Second Amendment does not persuade this Court. A phrase that malleable cannot be the peg that the Court references to determine who falls within or beyond the protections guaranteed by the Constitution."). Thus any claim that Second Amendment protections are availably only to "law-abiding" citizens must fail in the wake of *Rahimi*.

Second, the Fourth Circuit surmised that § 922(g)(1) might find support in "a history and tradition of disarming dangerous people considered at step two of *Bruen*." App.22. In rejecting the government's "responsible" line, however, this Court also rejected the view that legislatures can disarm American citizens based only on a determination that they are "dangerous."

The term "responsible," as used by the government in *Rahimi*, was simply a synonym for "dangerous." The government's brief argued there was a historical

tradition of disarming those who are not "responsible," by which it meant anyone who "would *endanger* himself or others." *Rahimi*, Gov't Br. 29 (emphasis added); *see also id.* at 27 ("In this context, a person is not '*responsible*' if his possession of a firearm would pose a *danger* of harm to himself or others." (emphasis added)); *id.* at 28 ("Congress need not require case-by-case findings of *dangerousness* like those required by Section 922(g)(8). Congress may make categorical judgments about *responsibility*." (emphasis added)); *id.* at 29 ("Because persons who are subject to domestic-violence protective orders pose an obvious *danger* to others, they are not '*responsible*' individuals.") (emphasis added). At oral argument, the government confirmed that it was simply "using 'responsible' as a placeholder for dangerous with respect to the use of firearms." *United States v. Rahimi*, No. 22-915, Tr. of Oral Arg. 10. The government stressed that it was "not using the term 'not responsible' to describe colloquially anyone who you might describe as . . . demonstrating irresponsibility." *Id.* at 9-10. Rather, the government's view was that "the principle of responsibility" was "intrinsically tied to the danger you would present if you have access to firearms." *Id.* at 10; *see also id.* at 11 (positing there was "no daylight at all . . . between not responsible and dangerous").

It was *this* argument—i.e., dangerousness equals irresponsibility, which justifies disarmament—that the Court "reject[ed]" in *Rahimi*. 144 S. Ct. at 1903. It

necessarily follows that a purported tradition of disarming "dangerous" groups is insufficient to carry the government's burden at *Bruen* step two.

Additionally, "dangerous" is every bit as "vague" and "unclear" as "responsible." *Id.* The "dangerous" label is therefore too nebulous to define a historical tradition that courts must invoke to determine who may and may not exercise the right to keep and bear arms. As in *Rahimi*, it is "unclear what such a rule would entail." *Id.*; *see also id.* at 1945 (Thomas, J., dissenting) ("[T]he Government's 'law-abiding, dangerous citizen' test—and indeed any similar, principle-based approach—would hollow out the Second Amendment of any substance. Congress could impose any firearm regulation so long as it targets 'unfit' persons. And, of course, Congress would also dictate what 'unfit' means and who qualifies."). Accordingly, *Rahimi* puts to rest the "dangerousness" theory that the Fourth Circuit said supported—or rather, *might* support—§ 922(g)(1).

Third, the Fourth Circuit proposed that § 922(g)(1) might be constitutional because of this Court's "repeated references to . . . 'longstanding prohibitions on the possession of firearms by felons.'" App.22 (quoting *Heller*, 554 U.S. at 626). *Rahimi* undermines this reasoning as well. *Heller*'s reference to "presumptively lawful" felon-disarmament laws "is dicta," *Rahimi*, 144 S. Ct. at 1944 n.7 (Thomas, J., dissenting), and *Rahimi*'s rejection of the "responsible" metric made

clear that courts should not decide Second Amendment claims based on dicta in this Court's prior opinions when those dicta relate to questions that "w[ere] simply not presented," *id.* at 1903 (majority op.). As a result, *Heller*'s statement about felon-disarmament laws—which the Court made without "an exhaustive historical analysis . . . of the full scope of the Second Amendment," 554 U.S. at 626—cannot establish § 922(g)(1)'s facial constitutionality.

Fourth, and finally, the Fourth Circuit floated the possibility that it remained bound by its "post-*Heller* but pre-*Bruen* holdings rejecting constitutional challenges to [§ 922(g)(1)]," such as *Moore*. App.22. But *Moore* held § 922(g)(1) facially constitutional based solely on *Heller*'s dictum about felon-disarmament laws. 666 F.3d at 317-18. And as just explained, *Rahimi* steers lower courts away from reliance on that dictum, which addressed a "question [that] was simply not presented" in *Heller*. *Rahimi*, 144 S. Ct. at 1903.

In short, *Rahimi*—which the Fourth Circuit "had no opportunity to consider," *Lawrence*, 516 U.S. at 169—undercuts each of the legal theories that the court said might establish § 922(g)(1)'s facial constitutionality. The Fourth Circuit's opinion, therefore, rests upon "premise[s] that the lower court would reject if given the opportunity for further consideration." *Wellons*, 558 U.S. at 225. And even if *Rahimi* eroded only some, rather than all, of the Fourth Circuit's

suggested theories of constitutionality, a GVR would still be appropriate. The Fourth Circuit expressly refused to endorse any of those theories, writing that it "need not—and thus d[id] not—resolve" whether they were valid. App.22. It is therefore impossible to conclude the Fourth Circuit would once again hold § 922(g)(1) facially constitutional in light of *Rahimi*, since the court gave no indication that it finds persuasive any of its legal justifications that (assumedly) survive *Rahimi*. Accordingly, the Fourth Circuit's "redetermination" of the question presented "may determine the ultimate outcome of the matter." *Wellons*, 558 U.S. at 225.

This Court has already GVR'd multiple Second Amendment challenges to § 922(g)(1) in light of *Rahimi*, including in cases that held the statute constitutional. *See Jackson v. United States*, No. 23-6170, ____ S. Ct. ____, 2024 WL 3259675 (U.S. July 2, 2024) (GVR'ing to Eighth Circuit, which had held § 922(g)(1) constitutional in all its applications); *Doss v. United States*, No. 23-6842, ____ S. Ct. ____, 2024 WL 3259684 (U.S. July 2, 2024) (same); *Vincent v. Garland*, No. 23-683, ____ S. Ct. ____, 2024 WL 3259668 (U.S. July 2, 2024) (GVR'ing to Tenth Circuit, which had held § 922(g)(1) constitutional in all its applications); *Garland v. Range*, No. 23-374, ____ S. Ct. ____, 2024 WL 3259661 (U.S. July 2, 2024) (GVR'ing to Third Circuit, which had held statute

unconstitutional as applied). The Court should take the same course here.

Conclusion

The Court should grant the petition for a writ of certiorari, vacate the judgment of the Fourth Circuit, and remand to that court for further consideration in light of *Rahimi*.

Respectfully submitted,

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