No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE PAZ MEDINA-CANTU,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether courts must conduct a historical analysis to decide a Second Amendment challenge to a prosecution under 18 U.S.C. § 922(g)(5).
2. Whether the government's prosecution of petitioner under § 922(g)(5) violates the Second Amendment.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED PROCEEDINGS

- *United States v. Medina-Cantu*, No. 22-cr-426, U.S. District Court for the Southern District of Texas. Judgment entered May 31, 2023.
- *United States v. Medina-Cantu*, No. 23-40336, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 27, 2024. Court order denying petition for rehearing en banc entered September 30, 2024.

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PRAYER

Petitioner Jose Paz Medina-Cantu prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case is attached to this petition as Appendix A. The Fifth Circuit's order denying the petition for rehearing en banc is attached as Appendix B. The district court's order denying the motion to dismiss Count One of the indictment is attached as Appendix C.

JURISDICTION

The Fifth Circuit issued its opinion and judgment on August 27, 2024. *See* Pet. App. A. The Fifth Circuit denied petitioner's timely petition for rehearing en banc on September 30, 2024. *See* Pet. App. B. Petitioner filed a timely application for extension of time to file a petition for a writ of certiorari, and the Court granted that application, extending the time to file the petition to January 28, 2025. *See* Sup Ct. R. 13.5; *Medina-Cantu v. United States*, No. 24A600. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

U.S. Const. amend. II.

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In relevant part, 18 U.S.C. § 922(g) provides:

> (g) It shall be unlawful for any person—
>
> . . .
>
> (5) who, being an alien—
>
> (A) is illegally or unlawfully in the United States; or
>
> (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
>
> . . .
>
> 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.

18 U.S.C. § 922(g)(5).

STATEMENT OF THE CASE

Petitioner was charged in a two-count indictment with (1) possession of a firearm and ammunition as an illegal alien, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2) and (2) being found unlawfully present in the United States, in violation of 8 U.S.C. § 1326(a) and (b). *United States v. Medina-Cantu*, 113 F.4th 537, 539 (5th Cir. 2024). Petitioner filed a motion to dismiss Count One of the indictment, arguing that § 922(g)(5) was unconstitutional under this Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). The district court denied petitioner's motion. Pet. App. B. Petitioner appeared before the district court in February 2023 and pleaded guilty to the indictment, without a plea agreement. *Medina-Cantu*, 113 F.4th at 539. At the hearing, he expressly preserved his argument that § 922(g)(5) violates the Second Amendment. *Id.* The district court sentenced petitioner in May 2023 to 15 months' imprisonment, to be followed by two years of supervised release. *Id.*

Petitioner timely appealed, and argued that the district court erred by denying his motion to dismiss. *Id.* In August 2024, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's judgment. The Fifth Circuit held that this Court's decisions in *Bruen* and *United States v. Rahimi*, 602 U.S. 680 (2024), did not "unequivocally abrogate" the circuit's holding in *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011), "that the phrase 'the people' in the Second Amendment does not include aliens unlawfully present in the United States." *Medina-Cantu*, 113 F.4th at 539-42. The Fifth Circuit "acknowledged that there are reasonable arguments as to why *Portillo-Munoz* should be reconsidered post-*Bruen* and *Rahimi*," including that *Portillo-Munoz* "notably did not

include a historical analysis, relying instead on the Supreme Court's language in [*District of Columbia v. Heller*, 554 U.S. 570 (2008)]." *Medina-Cantu*, 113 F.4th at 542. But the court concluded that, "absent clearer indication that *Portillo-Munoz* has been abrogated, only the Supreme Court—or this court sitting *en banc*—can overturn [the circuit's] precedent." *Id.*

One judge concurred in the judgment, explaining first his view that "no Supreme Court precedent compels the application of the Second Amendment to illegal aliens—and certainly not [*Bruen*] or [*Rahimi*]. That should be the end of the matter. We should not extend rights to illegal aliens any further than what the law requires." *Id.* at 542. Second, "it's already well established that illegal aliens do not have Second Amendment rights." *Id.* at 543 (discussing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)).

Petitioner filed a timely petition for rehearing en banc. With no judge requesting that the court be polled, the petition for rehearing en banc was denied. Pet. App. B.

Petitioner now asks this Court to resolve important questions about whether courts must conduct a historical analysis to determine whether § 922(g)(5) is constitutional, and whether the government's prosecution of petitioner under § 922(g)(5) violates the Second Amendment.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

The petition raises important questions of federal law that U.S. courts of appeals have decided in a way that conflicts with this Court's decisions and should be settled by this Court.

The Court should grant the petition to settle important questions of constitutional law that have arisen in the wake of the Court's decisions in *Bruen* and *Rahimi*. Those decisions established a new framework for Second Amendment challenges by imposing a burden on the government to justify its modern firearms restrictions by pointing to sufficiently analogous historical restrictions on firearms. Yet, in the context of a prosecution under 18 U.S.C. § 922(g)(5), courts of appeals have continued to apply prior precedent that lacks any historical analysis. This Court's intervention is necessary to resolve the conflict.

A. This Court's decisions in *Bruen* and *Rahimi* established a new framework for Second Amendment litigation.

This Court established a new framework for Second Amendment litigation in *Bruen* and *Rahimi*. The Second Amendment to the United States Constitution mandates that 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 *District of Columbia v. Heller*, the Court held that the Second Amendment codified an individual right to possess and carry weapons, the core purpose of which is self-defense in the home. 554 U.S. 570, 628 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (holding "that individual self-defense is the central component of the Second Amendment right").

After *Heller*, federal courts of appeals "adopted a two-step inquiry for analyzing laws that might impact the Second Amendment." *Hollis v. Lynch*, 827 F.3d 436, 446 (5th Cir. 2016). In the first step, courts would ask "whether the conduct at issue falls within the scope of the Second Amendment right." *United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020) (quoting *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012)). This involved determining "whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." *Id.* at 754. If the regulated conduct was outside the scope of the Second Amendment, then the law was constitutional. *Id.* Otherwise, courts proceeded to the second step to determine whether to apply strict or intermediate scrutiny. *Id*. This Court has now repudiated that framework. *See Bruen*, 597 U.S. at 19.

In *Bruen*, this Court announced a new framework for analyzing Second Amendment claims, abrogating the two-step inquiry adopted by the lower courts. The Court rejected the second step of that framework because "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *See Bruen*, 597 U.S. at 19. The Court reasoned that "[s]tep one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 597 U.S. at 19.

The Court elaborated that, under the new framework, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 24. The government "must then demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

Only then may a court conclude that the individual's conduct falls outside of the Second Amendment's "unqualified command." *Id.* (citation omitted).

In *Rahimi*, the Court confirmed that the *Bruen* framework applies to prosecutions under 18 U.S.C. § 922 and clarified the government's burden. As the Court had "explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 692. The government must demonstrate that "the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances." *Id.* (quoting *Bruen*, 597 U.S. at 29 & n.7). "Why and how the regulation burdens the right are central to this inquiry." *Id.* (citing *Bruen*, 597 U.S. at 29). The government "need not [present] a 'dead ringer' or a 'historical twin'" to be successful, but the law must be struck down under the Second Amendment if the government does not present a sufficiently analogous historical precursor. *Id.* (quoting *Bruen*, 597 U.S. at 30).

The particular statutory provision at issue in *Rahimi* was 18 U.S.C. § 922(g)(8)(C)(i), which prohibits individuals from possessing a firearm when they are subject to a domestic violence restraining order that "includes a finding that he 'represented a credible threat to the physical safety of [an] intimate partner,' or a child of the partner or individual." *Rahimi*, 602 U.S. at 685 (quoting § 922(g)(8)). The Court carefully analyzed surety and going armed laws from the founding era, and held that § 922(g)(8)(C)(i) was sufficiently analogous to those laws. *Id.* at 693-98. Surety laws "authorized magistrates to require individuals suspected of future misbehavior to post a bond"; "could be invoked to

prevent all forms of violence, including spousal abuse"; and, "[i]mportantly for this case, . . . also targeted the misuse of firearms." *Id.* at 695-96. Going armed laws prohibited "riding or going armed, with dangerous or unusual weapons, to terrify the good people of the land," punishable with arm forfeiture and imprisonment. *Id.* at 697.

The Court found that, taken together, these "founding era regimes" were sufficiently analogous to § 922(g)(8)(C)(i) "in both why and how it burdens the Second Amendment right." *Id.* at 698. Like the historical laws, § 922(g)(8)(C)(i) "applies to individuals found to threaten the physical safety of another"; "restricts gun use to mitigate demonstrated threats of physical violence"; and imposes a temporary restriction. *Id.* at 698-99. Surety laws "were not a proper historical analogue" for the New York licensing regime at issue in *Bruen* because New York's law "effectively presumed that no citizen had . . . a right [to carry a firearm], absent a special need." *Id.* at 699. By contrast, surety laws were a sufficient historical precursor for § 922(g)(8)(C)(i) because "it presumes, like the surety laws before it, that the Second Amendment right may only be burdened once a defendant has been found to pose a credible threat to the physical safety of others." *Id.* at 700.

Finally, the Court rejected the government's argument that it could disarm a person "simply because he is not 'responsible.'" *Id.* at 701. The government's primary argument in *Rahimi* was that the Second Amendment permits Congress to disarm persons who are not "law-abiding, responsible citizens." Br. for the United States 10-27 (No. 22-915). The government created that rule from dicta in *Heller*, *McDonald*, and *Bruen*. The Court disagreed with the government's proposed rule for two reasons. First, "responsible" was "a vague term," and so it was "unclear what such a rule would entail." *Rahimi*, 602 U.S. at

701. Second, contrary to the government's position, "such a line" did not "derive from [the Court's] case law." *Id.* Rather, the Court used the term "responsible" in *Heller* and *Bruen* "to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right." *Rahimi*, 602 U.S. at 701-02. "But those decisions did not define the term and said nothing about the status of citizens who were not 'responsible.' The question was simply not presented." *Id.* at 701-02.

The Court did not address the "law-abiding" portion of the government's proposed rule because the government disclaimed reliance on it at oral argument. *See* Tr. of Oral Arg. 8-9. But the government invoked the same passages from *Heller* and *Bruen* for both the "law-abiding" and "responsible" portions of its proposed rule, *see* Br. for the United States 11-12 & n.1, and so the Court's rejection of the government's view of those passages, at a minimum, casts serious doubt as to a rule derived from either term. In his dissenting opinion, Justice Thomas agreed with the majority's rejection of the government's proposed rule, observing that "[n]ot a single Member of the Court adopts the Government's theory" that "the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding.'" *Rahimi*, 602 U.S. at 772-73 (Thomas, J., dissenting).

B. The Fifth Circuit's decision below conflicts with *Bruen* and *Rahimi*.

In petitioner's case, the Fifth Circuit entered a decision that conflicts with this Court's decisions in *Bruen* and *Rahimi*. The Fifth Circuit held that it was bound to follow its precedent pre-dating *Bruen* and *Rahimi*, despite recognizing that its prior precedent did not conduct any historical analysis.

In *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011), the Fifth Circuit upheld the constitutionality of § 922(g)(5). In that decision, the Fifth Circuit did not conduct a historical analysis, and instead primarily relied on the language in *Heller* about "law-abiding citizens" and the Second Amendment belonging to "all Americans" as "invalidat[ing] [the defendant's] attempt to extend the protections of the Second Amendment to illegal aliens." *Portillo-Munoz*, 643 F.3d at 440. It also considered caselaw holding that treating illegally present aliens differently from citizens or lawfully present aliens did not violate the right to equal protection or to due process. *Id.* at 440-42. Absent from the opinion is any mention of the historical record.

Petitioner argued below that *Bruen* and *Rahimi* abrogated *Portillo-Munoz*, but the government contended that *Portillo-Munoz* remained good law. *Medina-Cantu*, 113 F.4th at 538-39. The court agreed with the government. *Id.* at 539. The court recognized that *Bruen* "clarified the proper framework for adjudicating Second Amendment challenges." *Medina-Cantu*, 113 F.4th at 540. But the court concluded that "*Portillo-Munoz* survived *Bruen*." *Id.* at 541. The court noted that the Eighth Circuit in *United States v. Sitladeen*, 64 F.4th 978 (8th Cir. 2023), had reached the same conclusion. *Medina-Cantu*, 113 F.4th at 541 n.2. [1] Turning to *Rahimi*, the court found that "*Rahimi*, like *Bruen*, did not unequivocally abrogate" *Portillo-Munoz*. *Medina-Cantu*, 113 F.4th at 541.

[1] The Eighth Circuit panel in *Sitladeen* held that it remained bound by that circuit's pre-*Bruen* precedent in *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011), a single-paragraph opinion that cited only *Heller* and *Portillo-Munoz*.

However, the court "acknowledge[d] that there [we]re reasonable arguments as to why *Portillo-Munoz* should be reconsidered post-*Bruen* and *Rahimi*." *Medina-Cantu*, 113 F. 4th at 542. First, "*Portillo-Munoz*'s textual interpretation of the Second Amendment notably did not include a historical analysis, relying instead on the Supreme Court's language in *Heller*." *Medina-Cantu*, 113 F.4th at 542. Second, "*Rahimi*'s discussion of the term 'responsible' provides some indication that the Supreme Court may, in future cases, reject other arguments that the Second Amendment's reference to 'the people' excludes certain individuals." *Id.* "But, absent clearer indication that *Portillo-Munoz* has been abrogated, only the Supreme Court—or this court sitting *en banc*—can overturn [the circuit's] precedent." *Id.* The Fifth Circuit had an opportunity to rehear petitioner's case en banc, but instead denied the petition without any judge requesting a poll. *See* Pet. App. B. Thus, the conflict between the court of appeals and this Court's decisions will remain until this Court intervenes.

C. The decision below is wrong.

Had the Fifth Circuit conducted the proper historical analysis now required by this Court's precedent, it would have found that the government failed to meet its burden to show that § 922(g)(5) is "relevantly similar" to founding era laws in "both why and how it burdens the Second Amendment right. *Rahimi*, 602 U.S. at 698 (quoting *Bruen*, 597 U.S. at 29). The historical record shows that unlawfully present aliens were not a group that was historically stripped of their Second Amendment rights, and there is no historical tradition, particularly from the founding era, of disarmament based on that status. Before the Fifth Circuit's decision in petitioner's case, a district court carefully analyzed the historical

sources identified by the government as analogous to § 922(g)(5), and concluded that § 922(g)(5) did not pass constitutional muster. *See United States v. Sing-Ledezma*, 706 F. Supp. 3d 650 (W.D. Tex. 2023), *rev'd in part*, No. 24-50022, 2024 WL 5318254 (5th Cir. Nov. 6, 2024).

As an initial matter, this Court's brief mention of the Second Amendment in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), did not settle the questions presented. The issue in that case was whether the Fourth Amendment applied when federal agents searched and seized property owned by a nonresident alien and located abroad. *Id.* at 261. After examining the historical record as it related to the Fourth Amendment, the Court concluded that the Fourth Amendment did not apply extraterritorially, when "the place searched was located in Mexico" and the property owner "was a citizen and resident of Mexico with no voluntary attachment to the United States." *Id.* at 274-75. The Court had no occasion to examine the historical record as it relates to the Second Amendment. And in the single paragraph where the Court mentioned the Second Amendment, it acknowledged that its "textual exegesis [was] by no means conclusive." *Id.* at 265. The Court in *Verdugo-Urquidez* did not examine the Nation's historical tradition of firearms restrictions, since it had no occasion to do so.

Under this Court's framework for examining Second Amendment challenges, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19; *Rahimi*, 602 U.S. at 696 ("*[i]mportantly for this case*," the founding era law "targeted the misuse of firearms") (emphasis added). "Constitutional rights are enshrined with the

scope they were understood to have *when the people adopted them*." *Bruen*, 597 U.S. at 34 (quoting *Heller*, 554 U.S. at 634-35). "Historical evidence that long predates" the Second Amendment's adoption in 1791 "may not illuminate the scope of the right if linguistic or legal conventions change in the intervening years." *Id.* Similarly, courts "must also guard against giving postenactment history more weight than it can rightly bear." *Id.* at 35. The Court expressed skepticism about reliance on laws passed long after the passage of the particular Constitutional Amendment and explained, "to the extent later history contradicts what the text says, the text controls." *Id.* at 36. In *Rahimi*, the Court continued to adhere to this guidance from *Bruen* by considering only the "founding era regimes" of surety and going armed laws. *Rahimi*, 602 U.S. at 693-99.

The government cannot meet its burden because there is no historical tradition, particularly from the founding era, of disarming all aliens illegally present in the United States. To the contrary, historian Patrick J. Charles, author of numerous books and articles on the Second Amendment's history and current Research Division supervisor for the Air Force Historical Research Agency, has explained that "[f]irearms regulations based on alienage did not become prevalent (and certainly were not widespread) in the statute and ordinance books until the early to mid-twentieth century." Patrick J. Charles, *The Fugazi Second Amendment: Bruen's Text, History, and Tradition Problem and How to Fix It*, 71 Clev. St. L. Rev. 623, 682 (2023), https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=4216&context=clevstlrev.[2] The criminal offenses of misdemeanor unlawful

[2] In *Bruen*, Charles filed an amicus brief in support of neither party, and the statement of interest noted that he is the "author of three books and more than twenty articles on the history of

entry and felony illegal reentry did not exist until 1929. *See United States v. Barcenas-Rumualdo*, 53 F.4th 859, 862 (5th Cir. 2022); Eric S. Fish, *Race, History, and Immigration Crimes*, 107 Iowa L. Rev. 1051, 1053-54, 1056, 1080-89 (2022). And "the first prevalent firearms restrictions based on alienage were part of the Capper Bill and later the Uniform Firearms Act," Charles, 71 Clev. St. L. Rev. at 718 n.388, which were model laws presented to state lawmakers from 1922 to 1930, with "fewer than half the states" enacting "some version of either the [Uniform Firearms Act] or the Capper Bill" by the mid-20th century, Br. of *Amicus Curiae* Patrick J. Charles In Support of Neither Party at 14-16. Possession of a firearm by an illegally present alien did not become a federal crime until 1968. *See United States v. Orellana*, 405 F.3d 360, 367-68 (5th Cir. 2005).

Laws enacted in the 20th century are much too late under the proper historical analysis. *See Bruen*, 597 U.S. at 66 & n.28 (criticizing "respondents' reliance on late-19th-century laws" due to "their temporal distance from the founding" and explaining in a footnote that the Court would "not address any of the 20th-century historical evidence brought to bear by respondents or their amici"). From the absence of a historical record of disarmament based on alienage, Charles concluded that, under the analysis required by *Bruen*, "all firearms regulations based on alienage must be nullified and ruled unconstitutional." Charles, 71 Clev. St. L. Rev. at 682.

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the Second Amendment, firearms and weapons laws, and the use of history as a jurisprudential tool. *Amicus curiae*'s scholarship has been cited and relied upon by six Circuit Courts of Appeals and by [the Supreme Court] in *McDonald*." Br. of *Amicus Curiae* Patrick J. Charles In Support of Neither Party at 1, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, S. Ct. No. 20-843 (July 19, 2021).

Moreover, the history of immigration law and policy around the time of the founding shows that the distinction between legally and illegally present was not in place at that time. The Declaration of Independence itself identifies restrictions on migrants and immigration to the colonies as a key grievance, including as one of the King of Great Britain's "history of repeated injuries and usurpations" the fact that "[h]e has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands." *The Declaration of Independence* (U.S. 1776). In the decades following the ratification of the Constitution, "immigration to the United States was generally free and unrestricted." Erika Lee, *At America's Gates* 2 (2003). It was not until the Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, that the United States "stopped being a nation of immigrants that welcomed foreigners without restrictions, borders, or gates." Lee at 6. "For the first time in its history, the United States began to exert federal control over immigrants at its gates and within its borders, thereby setting standards, by race, class, and gender, for who was to be welcomed into the country." *Id.* In fact, today's "mechanisms used to regulate immigration, enforce national borders, and distinguish U.S. citizens, legal immigrants, and illegal immigrants, such as the U.S. Immigration and Naturalization Service, U.S. passports, 'green cards,' and illegal immigration and deportation policies, can all be traced back to the Chinese exclusion era." *Id.* at 10.

None of the historical precursors on which the government relied below are sufficiently analogous to § 922(g)(5), as recognized by the court in *Sing-Ledezma*.

Beginning with the English Bill of Rights, the court found that "the English Bill of Rights' limitation of the right to bear arms to 'Subjects' does not share a common method and purpose with § 922(g)(5)(A) and is thus not a relevantly similar historical analogue." *Id.*, 706 F. Supp. 3d at 662-63. Particularly, the Framers did not adopt concrete language limiting the Second Amendment and instead, "the People ratified the unqualified directive: 'shall not be infringed.'" *Id.* at 663 (citation omitted). Furthermore, the Second Amendment uses the phrase "the people" rather than the term "subjects," and that use of "meaningfully different language" makes the English Bill of Rights a "poor basis to determine whether § 922(g)(5)(A) comports" with the Second Amendment. *Id.*

Turning to the government's proffered "laws from the American Colonies and early Republic," the court briefly surveyed the history of immigration in the United States and then determined that the state ratification convention proposals, state constitutional provisions, danger-based disarmament laws, and restrictions on militia membership cited by the government all failed to satisfy the government's burden. *Id.* at 664-72. For the state ratification proposals, the court observed that this Court was "[c]onfronted with similar evidence in *Heller*" and found reliance on such sources to be "dubious." *Sing-Ledezma*, 2023 WL 8587869, at 667 (quoting *Heller*, 554 U.S. at 603). The court reasoned that, "[i]f anything, the fact that these proposals were rejected cuts against the [g]overnment's contention." *Id.* That same reasoning applied to the state constitutional provisions that explicitly restricted the right to bear arms to "citizens": Amendments to include a similar restriction in the Second Amendment to the United States Constitution "were proposed by at least two states' delegates and rejected." *Id.*

As for danger-based disarmament laws, the court determined that laws "prohibiting Native Americans, Catholics, and British Loyalists from possessing guns" were insufficient for the government to meet its burden because § 922(g)(5)(A) "sweeps much more broadly than the proffered historical laws, each of which is narrowly tailored towards a particular group with which the United States was in active conflict." *Id.* at 668. The court compared both the "why" and the "how" for § 922(g)(5)(A) and each type of danger-based disarmament law, and concluded that they were much too different for the latter to serve as appropriate historical analogues for the former. *Id.* at 668-71. For example, laws requiring loyalty oaths were "enacted in the context of the Revolutionary War to prevent those loyal to Great Britain from supporting the British war efforts." *Id.* at 671. And while some states forced "'non-associators'" to "'voluntarily exclude themselves from the body politic,'" no state "enacted a blanket ban on aliens owning guns." *Id.* at 671 (quoting Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139, 157 (2007))

Finally, the court found that the historical record on whether unlawfully present aliens would be eligible for militia membership to be "unclear." *Id.* at 672. But the court went on to reason that, regardless, this Court in *Bruen* had "squarely rejected the notion that one's right to bear arms depends on whether they would be required to serve in the militia, notwithstanding the first clause of the Second Amendment." *Id.* at 673 (citing *Bruen*, 597 U.S. at 20). For all of these reasons, had the Fifth Circuit reconsidered § 922(g)(5) using the proper historical analysis from *Bruen* and *Rahimi*, it would have

found that the government had not met its burden. This Court's intervention is therefore necessary.

D. This case is an ideal vehicle for deciding the questions presented.

This case presents an ideal vehicle for the Court to resolve the questions presented. No procedural hurdles hinder review by this Court. The issue was litigated in the district court by a motion to dismiss the indictment, and the same challenge was made and decided on appeal. *See Medina-Cantu*, 113 F.4th at 539. Moreover, the fact that petitioner completed serving his prison sentence does not moot his challenge to the constitutionality of his conviction. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 439 (2011) ("release from prison does not moot a *criminal* case because 'collateral consequences' are presumed to continue") (citing *Sibron v. New York*, 392 U.S. 40, 55-56 (1968)). Petitioner continues to face collateral consequences from his § 922(g)(5) conviction, including exposure to a higher imprisonment range under the United States Sentencing Guidelines. *See* USSG § 2L1.2 (establishing a six-level increase to the offense level if, "after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in . . . a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month"). The petition should be granted to decide the important questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: January 28, 2025

Respectfully submitted,

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