NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

NAREY PEREZ-QUIBUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Second Amendment methodology set forth in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), as clarified in *United States v. Rahimi*, 602 U.S. 680 (2024), 18 U.S.C. § 922(g)(1) is unconstitutional.

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

Petitioner Perez-Quibus was the defendant in the district court and appellant below.

Respondent United States of America was the plaintiff in the district court and appellee below.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court: *United States v. Perez-Quibus*, 2024 WL 4524712 (11th Cir. Oct. 18, 2024).

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Current Statutes and Rules

Early Statutes

Other Authorities

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Narey Perez-Quibus respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 23-10465 in that court on October 18, 2024, *United States v. Perez-Quibus*, 2024 WL 4524712 (11th Cir. Oct. 18, 2024).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in Appendix A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The United States Court of Appeals had jurisdiction over this cause pursuant to 28 U.S.C. § 1291. The decision of the court of appeals was entered on October 18, 2024, *United States v. Perez-Quibus*, 2024 WL 4524712 (11th Cir. Oct. 18, 2024). On December 20, 2024, Justice Thomas granted an application to extend the due date for the Petition by 30 days, until February 15, 2025. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, U.S. Const. amend. II, 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.

Title 18, United States Code § 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 possess in or affecting commerce, any firearm or ammunition . . .

STATEMENT OF THE CASE

I. Legal Background

In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court recognized that based on the text of the Second Amendment and history, the amendment conferred an individual right to possess handguns in the home for self-defense. *Id*. at 581-82, 592-95. Soon thereafter, in *United States* v. *Rozier*, 598 F.3d 768 (11th Cir. 2010), the Eleventh Circuit was asked to pass on the constitutionality of 18 U.S.C. § 922(g)(1), the federal felon-in-possession ban, as applied to a defendant with non-violent drug priors who possessed the firearm in his home for self-defense. And the Eleventh Circuit held that "statutes disqualifying felons from possessing a firearm *under any and all circumstances* do not offend the Second Amendment." *Id.* at 771 (emphasis added). Simply "by virtue of [any] felony conviction," the court held, Rozier could be constitutionally stripped of his Second Amendment right to possess a firearm even for self-defense in his home, and the circumstances of such possession were "irrelevant." *Id*.

Notably, the Eleventh Circuit reached that conclusion without considering the Second Amendment's "plain text," including *Heller*'s specific determination that the Framers' reference to "the people" in the Second Amendment must be interpreted consistently with the interpretation of that same term in other amendments, to include all members of the "national community," not an "unspecified subset." 554 U.S. at 579-81. Instead, *Rozier* relied entirely upon dicta in *Heller* about "presumptively lawful" "longstanding prohibitions" against felons possessing firearms, *id.* at 626 & n. 26, even though there was no question about § 922(g)(1) in *Heller*, and the Court acknowledged it had not engaged in an "exhaustive historical analysis" on the point. *Compare Heller*, *id.* at 626 ("we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment") *with Rozier*, 598 F.3d at 768 (ignoring the latter caveat; finding

dispositive, *Heller*'s comment, 554 U.S. at 626, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons").

Over a decade later, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court clarified *Heller*'s text-and-history approach which had been uniformly misunderstood by the lower courts, and set forth a two-step "test" for deciding the constitutionality of all firearm regulations going forward. At "Step One," *Bruen* held, courts may consider *only* whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. at 17. If it does, *Bruen* held, "the Constitution presumptively protects that conduct." *Id.* And regulating presumptively protected conduct is unconstitutional unless the government, at "Step Two" of the analysis, can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation"—that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Id.* at 37.

After *Bruen* but prior to this Court's decision in *United States v. Rahimi*, 602 U.S. 680 (2024), the Eleventh Circuit decided *United States v. Dubois*, 94 F.4th 1284 (11th Cir. Mar. 5, 2024), *pet. for cert. filed* Oct. 8, 2024 (No. 24-5744), *cert. granted, judgment vacated, remanded*, ___ S.Ct. ___, 2025 WL 76413 (U.S. Jan. 13, 2024). In *Dubois*, the Eleventh Circuit continued to follow its pre-*Bruen* approach in *Rozier*. It declined to conduct *Bruen*'s two-step analysis for Second Amendment challenges—viewing that as "foreclose[d]" by *Rozier*, 94 F.4th at 1291, and rejecting the suggestion that *Bruen* had abrogated *Rozier*. *Id.* Rather, the Eleventh Circuit cited as determinative the dicta from *Heller* referenced above. *See Dubois, id.* at 1291-93 (stating the Court "made it clear" in *Heller, id.* at 626-27 & n. 26, that its holding "did not cast doubt" on felon-in-possession prohibitions," which were "presumptively lawful;" and in *Bruen,* 597 U.S. at 17, that its holding was "'[i]n keeping with *Heller*'").

In the view of the Eleventh Circuit, *Bruen* did not abrogate the *Rozier* approach because "*Bruen* repeatedly stated that its decision was faithful to *Heller*." *Dubois*, 94 F.4th at 1293. Therefore, the Eleventh Circuit held, *Rozier* remained good law, and felons remained "*categorically 'disqualified*' from exercising their Second Amendment right." *Id*. at 1293 (quoting *Rozier*, 598 F.3d at 770–71) (emphasis added).

Although the Eleventh Circuit technically left the door open to reconsideration after this Court decided *Rahimi*, by stating: "We require clearer instruction from the Supreme Court before we may reconsider the constitutionality of section 922(g)(1)," 94 F.4th at 1293, it soon shut that door—definitively. After this Court handed down its decision in *Rahimi*, Petitioner asked the Eleventh Circuit to reconsider *Rozier/Dubois* in light of *Rahimi* in his case. But the Eleventh Circuit found its pre-*Bruen* approach precluding all challenges to § 922(g)(1) continued to govern even post-*Rahimi*. *United States v. Perez-Quibus*, 2024 WL 4524712 (11th Cir. Oct. 18, 2024); Appendix A-1. Prior to that ruling, another petitioner before this Court asked the full Eleventh Circuit to recognize that *Rahimi* confirmed *Rozier/Dubois* no longer controlled Second Amendment analysis, and these prior circuit precedents had been abrogated. But the Eleventh Circuit denied rehearing en banc. *United States v. Rambo*, 2024 WL 3534730 (11th Cir. July 25, 2024), *pet. for reh'g en banc denied* (11th Cir. Oct. 23, 2024), *pet. for cert. filed* Dec. 5, 2024 (No. 24-6107). Not one judge on the Eleventh Circuit dissented from the denial of rehearing en banc in *Rambo*.

II. Factual and Procedural Background

In June 2022, the United States charged Petitioner Narey Perez-Quibus with one count of violating 18 U.S.C. § 922(g)(1), for knowingly possessing a firearm and ammunition, while knowing that he had been convicted of a crime punishable by a term of imprisonment exceeding

one year, and a second count of knowingly possessing additional ammunition knowing that he had previously been convicted of a crime punishable by a term of imprisonment exceeding one year. Appendix A-2. Petitioner pled guilty to those charges, and was sentenced to 45 months imprisonment as to each count to be served concurrently, followed by 36 months supervised release.

On appeal, Petitioner argued for the first time that his § 922(g)(1) convictions were unconstitutional under the new two-step Second Amendment methodology set forth in *Bruen*. He noted that *Bruen* dictated that at Step One of Second Amendment analysis, the court asks only whether the Second Amendment's plain text covers the individual's conduct. And if it does, the Constitution presumptively protects that conduct, and the burden falls on the government at Step Two to justify its regulation by demonstrating it is consistent with the Nation's historical tradition of firearm regulation—that is, the tradition in existence when the Bill of Rights was adopted in 1791. Petitioner argued § 922(g)(1) failed both steps of *Bruen*.

Here, he argued, his conduct—possessing a handgun and ammunition on his person and within a car on the curtilage of his home—fell within the plain text of the Second Amendment. And, he argued, although he was not an American citizen, as a longtime Cuban emigre who had been living in this country since 2001 and had never been removed, he was part of our "national community," or at least had a "sufficient connection to this country," that he should be deemed part of "the people" covered by the Second Amendment. On that point, he noted with significance that as this Court recognized in *Heller*, 554 U.S. 570, 580 (citing *United States v. Verdugo-Urguidez*, 494 U.S. 259, 265 (1990)), when the Bill of Rights was drafted "the people" was a term of art used in several amendments to refer to our "national community" or those with "sufficient connection to this country" to be deemed part of the national community. Plainly, he argued, as

the Court explained in *Heller*, "the people" as used in the Second Amendment, must be interpreted consistently with the same term in other amendments such as the Fourth, which does not apply only to citizens, but to non-citizens as well.

As the government had not questioned in his motion to suppress proceeding below that he was part of "the people" with Fourth Amendment rights, he argued that there should likewise be no question here that he was also part of "the people" with Second Amendment rights. As the Eleventh Circuit recognized in *United States v. Jimenez-Shilon*, 34 F.4th 1042 (11th Cir. 2022), he noted, the Framers could not have understood the same term—"the people"—to "vary from one provision of the Bill of Rights to another." Indeed, as per *Jimenez-Shilon*, even "dangerous felons" were "indisputably part of 'the people'" for Second Amendment purposes. *Id.* at 1046. What was significant in his case, he underscored, was that while born in Cuba, he had been living in this country since 2001. He had never been removed due to the United States' special treatment of Cuban emigres who are protected as a class. And therefore, he argued, he easily met the *Heller/Verdugo-Urquidez* "national community-focused definition of 'the people.'"

Accordingly, Petitioner argued, at the first step of *Bruen*'s newly-dictated analysis, he had shown that § 922(g)(1) was "presumptively unconstitutional." And in such a case, *Bruen* clarified, the government bears a heavy burden at the second step of the analysis to prove that the statute in question is consistent with the nation's "historical tradition of firearm regulation" dating to the Founding. Here, he argued, the government could not meet that burden because there was no ban on any felons (even violent felons) possessing firearms until the early twentieth century. And, since there clearly was nothing distinctly or relevantly similar to § 922(g)(1) at or near the Founding, the government could not meet its *Bruen* Step Two burden of showing a consistent

tradition of felon disarmament in this country since the Founding. Without such a showing, he argued, *Bruen* dictates that § 922(g)(1) be declared unconstitutional and his convictions be vacated.

In response, the government did not dispute that Petitioner was indeed part of the "national community" under the *Heller/Verdugo-Urquidez* test for "the people." It argued, simply, that the court's binding precedent in *Rozier* precluded Petitioner's post-*Bruen* challenge, and under "plain error" analysis the Court needed to go no further than that. But even if felon possession *were* presumptively protected under *Bruen*, the government argued, the "historical record supports Congress' ability to restrict possession rights of those proven to live outside the law," and "Perez-Quibus' conviction can be affirmed under either prong of *Bruen*'s analysis." *United States v. Perez-Quibus*, DE 27 (11th Cir. Aug. 17, 2023).

After the government filed its Answer Brief, this Court granted certiorari in *Rahimi*. Petitioner immediately moved the Eleventh Circuit to stay the appellate briefing schedule pending issuance of the decision in *Rahimi*, because *Rahimi* could narrow the issues in his case regarding proper application of *Bruen*. In fact, he noted, some of the same *Bruen* Step Two arguments the government had raised in its Answer Brief, were made by the government in its *Rahimi* petition for certiorari. The Eleventh Circuit entered the requested stay—allowing Petitioner 30 days after *Rahimi* issued to file his Reply Brief.

While the stay was in place, before *Rahimi* issued, the Eleventh Circuit issued its decision in *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024) adhering to *Rozier*. But once *Rahimi* issued, Petitioner filed his Reply Brief arguing *inter alia*, that (1) *Rahimi* had confirmed that *Bruen* dictates a completely different mode of Second Amendment analysis from the dicta-based mode of analysis in *Rozier* and *Dubois*, and those decisions no longer controlled: (2) with regard to the "people" question in *Bruen* Step One, *Rahimi* had confirmed that the Court meant what it said in

Heller that the right of "the people" was not limited to an "unspecified subset" of "law-abiding, responsible citizens," and (3) *Rahimi* had finally confirmed that the government could not meet its *Bruen* Step Two burden of showing § 922(g)(1) is consistent with the nation's "historical tradition of firearm regulation" because there is no longstanding tradition of actual *regulation* dating to the Founding that was *both* "comparably justified" *and* imposed a "comparable burden" of lifetime disarmament—as was required to find the statute constitutional under the Second Amendment. *United States v. Perez-Quibus*, DE 35 (11th Cir. July 22, 2024).

With regard to the government's argument that plain error review applied, Petitioner argued that under the Eleventh Circuit's precedent in *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011), a challenge to the constitutionality of a statue is a jurisdictional challenge, not waived by a plea, and reviewable *de novo*. And indeed, Petitioner argued, the plain error cases the government had relied upon were distinguishable in multiple regards. However, even *if* the government were correct that plain error reviewed to the Second Amendment challenge here, Petitioner argued, an error could become "plain" while a case is on appeal. And that was precisely what had occurred here due to the intervening decision in *Rahimi*.

Without hearing oral argument, on October 18, 2024 the Eleventh Circuit affirmed Petitioner's conviction. *United States v. Perez-Quibus*, 2024 WL 4524712 (11th Cir. Oct. 1, 2024) (Appendix A-1). It held:

> We review the constitutionality of a statute *de novo*. *United States v. Wright*, 607 F.3d 708, 718 (11th Cir. 2010). But challenges raised for the first time on appeal are reviewed for plain error. *Id.* To establish plain error, a defendant must show an error, that was plain, that affected his substantial rights, and that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* An error is plain if it is contrary to precedent from this Court or the Supreme Court. *United States v. Hoffman*, 710 F.3d 1228, 1232 (11th Cir. 2013).
>
> The prior-precedent rule requires us to follow our precedent unless it is overruled by this Court en banc or by the Supreme Court. *United States v. White*, 837 F.3d

1225, 1228 (11th Cir. 2016). Under this rule, an intervening Supreme Court decision "must be clearly on point" and must "actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel." *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (citations and internal quotation marks omitted). And to do so, "the later Supreme Court decision must 'demolish' and 'eviscerate'" each of the prior precedent's "fundamental propos." *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024) (internal quotation marks omitted).

Perez-Quibus argues we should review his conviction *de novo* because he raises a jurisdictional issue. But we have rejected this kind of attempt to reframe a constitutional attack as jurisdictional. *See United States v. Alfonso,* 104 F.4th 815, 829 n. 18 (11th Cir. 2024). Because Perez-Quibus did not raise his Second Amendment challenge in the district court, we review his argument for plain error. *See Wright*, 607 F.3d at 715.

Our precedent forecloses Perez-Quibus's argument. In *United States v. Dubois*, we reaffirmed that, under *District of Columbia v. Heller*, 554 U.S. 570 (2008), section 922(g)(1) does not violate the Second Amendment. 94 F.4th at 1291-93 (citing *United States v. Rozier*, 598 F.3d 768,771 (11th Cir. 2010)). We rejected the argument that *Bruen* abrogated *Rozier* because *Bruen* "repeatedly stated that its decision was faithful to *Heller*." *Id.* at 1293. And the recent decision in *United States v. Rahimi* did not "demolish" or "eviscerate" the "fundamental props" of *Rozier* or *Dubois*. *Dubois,* 94 F.4th at 1293. To the contrary, *Rahimi* reiterated that prohibitions on the "possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *Rahim*i, 144 S.Ct. at 1902 (quoting *Helle*r, 554 U.S. at 626, 627 n. 16).

2024 Wl 4524712, at *1.

REASONS FOR GRANTING THE PETITION

I. The Lower Courts are Divided on Whether, Under the *Bruen/Rahimi* Second Amendment Methodology, § 922(g)(1) is Facially Unconstitutional.

A. Although the Fourth and Eighth Circuits have found § 922(g)(1) constitutional in all circumstances under *Bruen/Rahimi*, the Eleventh Circuit (alone among the circuits) continues to so hold under its pre-*Bruen* mode of Second Amendment analysis—refusing to even attempt a *Bruen/Rahimi* analysis for § 922(g)(1). The Eleventh Circuit is the only Circuit in the country at this juncture that refuses to *even try* to apply the new Second Amendment methodology set forth in *Bruen* and clarified in *Rahimi*. Although the Tenth Circuit, like the Eleventh Circuit, had initially continued to adhere to a post-*Heller* precedent analogous to *Rozier* after *Bruen*, *see Vincent v. Garland*, 80 F. 4th 1197 (10th Cir. 2023), after the GVR in *Vincent* for reconsideration in light of *Rahimi*, the Tenth Circuit asked for full supplemental briefing by both parties as to the impact of *Rahimi*. Even the Eighth Circuit, which has definitively precluded all as-applied challenges after *Rahimi*, at least justified that result by identifying what it believes are appropriate analogues for Step Two of the *Bruen* analysis. *See United States v. Jackson*, 110 F.4th 1120, 1126-27 (8th Cir. 2024) (*Jackson II*) (relying on disarmament of various groups, including religious minorities, loyalists, and Native Americans in colonial America). And, although the Fourth Circuit in *United States v. Hunt*, 123 F.4th 697, 702-04 (4th Cir. Dec. 18, 2024) was initially inclined after *Rahimi* to still follow its pre-*Bruen* precedent relying upon the "longstanding" and "presumptively lawful" prohibitions dicta in *District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n. 26 (2008), the Fourth Circuit—unlike the Eleventh—did not stop its post-*Rahimi* analysis there. Ultimately, it ruled in the alternative that it was in complete agreement with the Eighth Circuit in *Jackson II* as to why § 922(g)(1) was facially constitutional under the *Bruen/Rahimi* test. *See id.* at 705-08 (citing certain "assurances" in *Rahimi*, in agreeing with the Eighth Circuit that

"history" showed "categorical disarmament of people 'who have demonstrated disrespect for legal norms of society'"—even if not violent; concluding that since § 922(g)(1) was similarly justified as "an effort to address a risk of dangerousness," "there is no need for felony-by-felony litigation;" citing *Jackson II*, 110 F.4th at 1125-29).

While Petitioner disputes the correctness of the Eighth Circuit's *Bruen* Step Two analysis for the reasons stated by the dissenters from rehearing en banc in *Jackson II*, *see* 121 F.4th 656 (8th Cir. Nov. 5, 2024) (Stas, J., joined by Erickson, Grasz, and Kobes, JJ., dissenting from rehearing en banc), at least the *Jackson II* panel recognized that *Bruen* and *Rahimi* do in fact dictate a new methodology applicable to all Second Amendment claims which requires searching for a relevantly similar, Founding-era historical analogue. And the Fourth Circuit in *Hunt* ultimately went through what it believed to be a proper Step Two analysis as well—at least as an alternative basis to uphold the facial constitutionality of § 922(g)(1).

As such, as of this writing, the Eleventh Circuit remains the only circuit in this country that does not even attempt to conduct the *Bruen/Rahimi* Second Amendment analysis, even in the alternative. It is the only circuit that continues to base its denials of well-founded Second Amendment challenges based on its pre-*Bruen* mode of analysis which reflexively followed dicta in *Heller*, over *Heller*'s holding on plain text, history, and tradition. The true outlier today, only the Eleventh Circuit refuses to engage in any *Bruen/Rahimi* analysis. Other circuits, as detailed below, have harshly criticized and rejected the Eleventh Circuit's approach. And while prior to *Rahimi*, several district courts had already held § 922(g)(1) facially unconstitutional, *Rahimi*'s clarification of the *Bruen* methodology should compel such a finding now.

For the reasons outlined below, the Eleventh Circuit is wrong in all regards.

B. After *Bruen/Rahimi*, the Third, Fifth and Sixth Circuits have rightly found § 922(g)(1) presumptively unconstitutional at Step One of the now-required analysis. In *Heller*, the Court reaffirmed its prior holding in *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990) that "the people" was a term of art used in several amendments to refer to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of the community." *Heller*, 554 U.S. at 580 (citing *Verdugo-Urquidez*, 494 U.S. at 265). Notably, in re-confirming that "the people" in the Second Amendment is a broadly-encompassing term rather than a narrow "unspecified subset" of the population, *Heller* not only adhered to *Verdugo-Urquidez* in reasoning that "the people" must have the same meaning in the Second Amendment, as in the First Amendment's Assembly-and-Petition Clause, the Fourth Amendment's Search-and-Seizure Clause, and in the Ninth and Tenth Amendments. *Id.* at 579-80. *Heller* also found significant that the use of the term "the people" in the Second Amendment's operative clause "contrasts markedly with the phrase 'the militia' in the prefatory clause," given that, at the time the Amendment was drafted, "the militia" was only comprised of a "subset" of the community: namely, able bodied males within a certain age range. 554 U.S. at 580-81. Since well-recognized rules of constitutional construction require reading words in context, and giving different meanings to different terms within a single provision, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at 167-68 (2012), Congress' use of the different terms "militia" and "people" within separate clauses of the same constitutional provision confirms that under the "plain text" of the Second Amendment, "the people" is a much broader term encompassing more than the narrow subset of citizens who would have qualified for the militia.

Notably, after *Heller* but prior to *Bruen*, the Eleventh Circuit itself embraced this broad reading of "the people" in *United States v. Jimenez-Shilon*, 34 F.4th 1042 (11th Cir. 2022). In fact, in that pre-*Bruen* case, the Eleventh Circuit not only embraced the *Heller/Verdugo-Urquidez* "construct" for "the people;" it added further textual and contextual justification for it, by noting:

> Th[e] "national community-focused definition of "the people" also found support in Founding-era dictionaries. *See* Noah Webster, *American Dictionary of the English Language* 600 (1st ed. 1828) ("The body of persons who compose a community, town, city, or nation."); 2 Samuel Johnson, *A Dictionary of the English Language* 305 (6th ed. 1785) ("A nation; those who compose a community."). And we don't see any textual, contextual, or historical reason to think that the Framers understood the meaning of the phrase to vary from one provision of the Bill of Rights to another. *See United States v. Emerson*, 270 F.3d 203, 227-28 (5th Cir. 2001); *cf. IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 [] (2005) (explaining the cardinal rule of interpretation "that identical words used in different parts of the same statute are generally presumed to have the same meaning"). The Constitution's text shows that when the Framers meant to limit a provision's application to "Citizen[s]" *per se*, they did so expressly. *See* U.S. Const. art. I, § 2, cl. 2 (right to hold office in the House of Representatives); *id.* art. I, § 3, cl. 3 (same in Senate); *id.* art. II, § II, § 1, cl. 5 (same for Presidency); *id.* art. IV, § 2, cl. 1 (Privileges and Immunities Clause). Likewise, when they meant to extend a provision's reach more broadly to encompass all "person[s]" in the United States, they did so expressly. *See* U.S. Const. amend. V; *Plyler v. Doe*, 457 U.S. 202, 210 [] (1982). It appears then, at least as a general matter, that the phrase "the people" sits somewhere in between—it has "broader content then 'citizens,' and ... narrower content than 'persons.'" *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168 (10th Cir. 2012); *see also* 1 William Blackstone, *Commentaries on the Laws of England* 366 (1765)(considering "sub persons as fall under the denomination of the *people*" to include "aliens and natural-born subjects," but observing, importantly, that the two groups held different sets of rights); 4 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 556 (2d ed. 1836) (statement of James Madison suggesting that at least some "aliens" are entitled to the "protection and advantage" of the Constitution").

34 F.4th at 1045.

While the *Jimenez-Shilon* court was ultimately not sure "where ***illegal*** aliens fit within *Verdugo-Urquidez'*s two part construct," *id.*—and ultimately left that question for another day," *id*. at 1045-46—Petitioner, as a Cuban emigre, is differently situated from the indisputably-illegal, and previously-deported alien from Mexico who came before the court on an 18 U.S.C. §

922(g)(5)(A) violation in *Jimenez-Shilon*. Indeed, given our government's special policy regarding Cuban nationals at the time of Petitioner's immigration (known as "wet-foot dry-foot") and longstanding practice of paroling Cubans convicted of crimes here back into the country rather than returning them to Cuba, it can fairly be said that Petitioner is among a special class of non-citizens "entitled to the 'protection and advantage' of the Constitution"—a group that has become part of our "national community," or at least, has a "sufficient connection to this country to be considered part of that community."

In addition to the many textual reasons above for why Petitioner should indeed be deemed part of "the people" protected by the Second Amendment, *Bruen* notably provided another: namely, just as *Bruen* found dispositive that the Second Amendment does not "draw . . . a home/public distinction with respect to the right to keep and bear arms," 597 U.S. at 32, it should be dispositive here—as a textual matter—that the Second Amendment likewise does not draw a felon/non-felon distinction. That is why, even prior to *Bruen*, the Eleventh Circuit in *Jimenez-Shilon*, and the Seventh Circuit in *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015) as well had expressly recognized that the term "people" in the Second Amendment is *not* textually limited to law-abiding citizens. *See Jimenez-Shilon*, 34 F.4th at 1046 (noting that even "dangerous felons" are "indisputably part of 'the people'" for Second Amendment purposes); *Meza-Rodriguez*, 798 F.3d at 671 (a person's criminal record is irrelevant in determining whether he is among "the people" protected under the Second Amendment; the amendment "is not limited to such on-again, off-again protections").

But indeed, *if* there even *could* have been doubt on that point prior to *Rahimi*, there *cannot* be after *Rahimi*. That is because this Court in *Rahimi* squarely rejected the Solicitor General's proffered limitation of "the people" to the narrower subset of "law-abiding, responsible citizens."

Justice Thomas—who disagreed with the *Rahimi* majority *only* as to *Bruen* Step Two—left no doubt about the implication of *Heller*/*Bruen/Rahimi* for "the people" question in § 922(g)(1), by confirming that "Not a single Member of the Court adopts the Government's [law-abiding, responsible citizen] theory." 602 U.S. at 773. In short, as Justice Thomas has now definitively exposed, the "law-abiding, responsible citizen" theory unanimously rejected by *Rahimi* "is the Government's own creation, designed to justify every one of its existing regulations. It has no doctrinal or constitutional mooring." *Id.* at 774. And since that necessarily abrogates the assumptions underlying *Rozier* and *Dubois, Rahimi* should have compelled the Eleventh Circuit to conclude that this Court meant what it said when it declared in *Heller* that the Second Amendment defined "the people" broadly such that the right belongs to all members of the "national community." 554 U.S. at 580.

In *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024), the Sixth Circuit found that as the Court recognized in *Heller*, the phrase "the people" in the plain text of the Second Amendment must have the same meaning as in both the First and Fourth Amendments, because the protections provided in those Amendments do not evaporate when the claimant is a felon. *Id.* at 649. *Id*. Excluding a felon from "the people" in the Second Amendment would exclude him from the First and Fourth Amendments too, the Sixth Circuit reasoned, which is "implausible under ordinary principles of construction" since "[c]ourts presume that words are used in a consistent way across provisions." *Id.* (citing *Hurtado v. California*, 110 U.S. 516, 533-34 [] (1884) ("The conclusion is equally irresistible, that when the same phrase was employed [elsewhere], . . . it was used in the same sense and with no greater extent"); *Pulsifer v. United States*, 601 U.S. 124, 149 [] (2024)); and Scalia & Garner, *Reading Law* 170-171 (2012) (explaining in a given statute, the same term usually has the same meaning). In *United States v. Goins*, 118 F.4th 794 (7th Cir. 2024), the Sixth

Circuit reiterated post-*Rahimi* that there was "no textual basis to distinguish probationers from other felons." 118 F.4th at 798 n.3

The Sixth Circuit also rightly determined that its pre-*Bruen*, pre-*Rahimi* precedent was no longer viable because *Bruen* and *Rahimi* "supersede[d] our circuit's past decisions on 922(g)." 113 F.4th at 646. Expressly disagreeing with the Eleventh Circuit in *Dubois*, the Sixth Circuit held—just as Petitioner argued to the Eleventh Circuit—that pre-*Bruen* circuit precedent is not binding because:

> Intervening Supreme Court precedent demands a different mode of analysis. *Heller*, to be sure, said felon-in-possession statutes were "presumptively lawful." But felon-in-possession statutes weren't before the Court in *Heller* or *McDonald*. And while *Bruen* didn't overrule any aspect of *Heller*, it set forth a new analytical framework for courts to address Second Amendment challenges. Under *Bruen*, courts must consider whether a law's burden on an individual's Second Amendment rights is "consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898. Specifically, courts must study how and why the founding generation regulated firearm possession and determine whether the application of a modern regulation "fits neatly within" those principles. *Id*. at 1901.
>
> Our circuit's pre-*Bruen* decisions on § 922(g)(1) omitted any historical analysis. They simply relied on *Hell*er's one-off reference to felon-in-possession statutes. Those precedents are therefore inconsistent with *Bruen*'s mandate to consult historical analogs. Indeed, applying *Heller*'s dicta uncritically would be at odds with *Heller* itself, which stated courts would need to "expound upon the historical justifications" for firearm-possession restrictions when the need arose. 554 U.S. at 635. Thus, this case is not as simple as reaffirming our pre-*Bruen* precedent.

Williams, 113 F.4th at 648.

Thereafter, the Fifth Circuit reasoned similarly in *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024). Indeed, it agreed that not only is a new Second Amendment methodology required after *Bruen* and *Rahimi*; but indeed, as a matter of "plain text" felons are part of "the people"—and any prior precedent relying on the *Heller* dicta without conducting the newly-mandated historical analysis no longer controls. *See Diaz*, 116 F.4th at 465-67 (pre-*Bruen* circuit precedents no longer control because *Bruen* "established a new historical paradigm for analyzing Second Amendment

claims;" the mention of felons in prior Supreme Court cases was "mere dicta" which "cannot supplant the most recent analysis set forth by the Supreme Court in *Rahimi*, which we apply today;" squarely rejecting the government's "familiar argument" that for the *Bruen* Step One "plain text" analysis, felons are not part of "the people").

Most recently, in *Range v. Att'y Gen.*, 124 F.4th 218 (3d Cir. Dec. 23, 2024) (en banc) (*Range II*)—upon remand from this Court to consider in light of *Rahimi* its post-*Bruen* as-applied ruling in *Range v. Att'y Gen.*, 69 F.4th 96 (3d Cir. 2023) (en banc), *pet. for cert. filed sub nom. Garland v. Range,* Oct. 5, 2023 (No. 23-374), *cert granted, judgment vacated, remanded*, 144 S.Ct. 2706 (2024) (*Range I*)—the en banc Third Circuit reached the exact opposite conclusion from the Eleventh, Fourth, and Eighth Circuits. First, after considering *Rahimi*, the 10-judge *Range II* majority reaffirmed its prior rulings that *Bruen* had abrogated its post-*Heller* Second Amendment jurisprudence; *Bruen* dictated an entirely new analysis; and under the "plain text" analysis for *Bruen* Step One, felons and those with felon-equivalents like Range were part of "the people" protected by the Second Amendment. 124 F.4th at 225-28. On the latter point, the *Range II* majority—as it had in *Range I*, but now with additional support from *Rahimi*—squarely rejected the government's contention (accepted by the Eleventh Circuit even post-*Rahimi*) that any type of criminal conduct removes individuals from "the people" protected by the Second Amendment because that right had only belonged to "law-abiding responsible citizens." *Id.* at 226-28. Instead, the *Range II* majority articulated four reasons for its express agreement with Range that the references to "law-abiding citizens" in *Heller* "should not be read as rejecting *Heller*'s interpretation of 'the people,'" 554 U.S. at 580-81: (1) the criminal histories of the plaintiffs in *Heller* and *Bruen* "were not at issue," so the references to "law-abiding citizens" in those cases were dicta which should not be over-read; (2) there was no reason to adopt a reading of "the

people" that excluded certain persons in this country only from the Second Amendment when other constitutional provisions refer to "the people" and felons "retain their constitutional rights in other contexts," (3) even if "the people" had a right to keep and bear arms, that would not prohibit legislatures from constitutionally stripping certain people of that right (the view of then-Judge Barrett in *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting); and (4) as the government even conceded in its post-GVR en banc brief, *Rahimi* made clear that the term "responsible" was too vague a term that did not "derive from [Supreme Court] case law." And the same was true, the *Range II* majority found, for the phrase "law-abiding." 124 F.4th at 226-27 (citing *Rahimi*, 602 U.S. at 701).

The reasoning of these three circuits is consistent with *Heller*, and correct on these points. For the reasons stated above, the Court should clarify for the Eleventh Circuit that: (1) a pre-*Bruen* circuit precedent like *Rozier*, or a post-*Bruen* circuit precedent like *Dubois* that did *not* apply the plain text-and-historical tradition test, does not control after *Bruen/Rahimi*; (2) applying the Court's new methodology, felons are indeed part of "the people" covered by the Second Amendment's plain text; (3) Petitioner has thus met the new *Bruen* Step One; and (4) as the Third, Fifth, and Sixth Circuits have rightly recognized, as per *Bruen* and *Rahimi*, this establishes a presumption that § 922(g)(1) is unconstitutional, and shifts the burden to the government to show at Step Two a tradition of at least "relevantly similar" regulation (in terms of both the "why" and "how") dating to the Founding. The government cannot do so, however, as there was no relevantly similar Founding-era regulation.

C. After *Bruen/Rahimi*, the government cannot meet its Step Two burden because there is no historical tradition of *lifetime* felon disarmament dating to the Founding, which is necessary to uphold § 922(g)(1). Admittedly, just because the Second Amendment protects all

members of the national community, that does not mean that the right to bear arms is "unlimited." *See Bruen*, 597 U.S. 21. Indeed, even prior to *Bruen*, the plurality in *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), had recognized that individuals with Second Amendment rights "may nonetheless be denied possession of a firearm," *id.* at 355 (Ambro, J.)—an approach embraced thereafter in then-Judge Barrett's dissenting opinion in *Kanter*, 919 F.3d at 452 (explaining that "all people have the right to keep and bear arms," though the legislature may constitutionally "strip certain groups of that right"), and by the *Range II* majority.

As the *Range II* majority recognized, *Bruen* established strict rules for determining in what circumstances those pre-existing Second Amendment rights may be "stripped." Specifically, *Bruen* held, where as here an individual's conduct—possessing a firearm and ammunition inside a car parked on the curtilage of one's home—is shown to be presumptively protected by the Second Amendment's plain text, a regulation restricting that fundamental right can only stand where the Government shows it "is consistent with the Nation's historical tradition of firearm regulation," that is, the tradition in existence "when the Bill of Rights was adopted in 1791." 597 U.S. at 37.

And here, the government cannot meet that burden as to § 922(g)(1), because not only were there no felon disarmament regulations at or near the Founding; there were no Founding-era laws specifically disarming *any member of the population*—even for past firearm misuse or expected future misuse—in all circumstances *for life*.

1. The Government bears the burden of showing a tradition.

As a preliminary matter, *Bruen* prescribed two ways of conducting the required historical tradition inquiry. Where a modern statute is directed at a "longstanding" problem that "has persisted since the 18th century," *Bruen* directed a "straightforward" inquiry: if there is no historical tradition of "distinctly similar" regulation, the regulation is unconstitutional. *Id.* at 26-

28 (conducting this "straightforward" inquiry to strike down New York's restriction on public carry of firearms). However, if the statute is directed at "unprecedented societal concerns or dramatic technological changes," or problems "unimaginable at the founding," then and only then *Bruen* held, are courts empowered to reason "by analogy." *Id.* at 28. Courts in such a case ask only whether historical analogues are "*relevantly* similar." *Id.* at 29 (emphasis added). Notably, the "central considerations" in a "relevantly similar" inquiry are what *Bruen* called the "*how* and *why:"* "whether modern and historical regulations impose a *comparable burden* on the right of armed self-defense and whether that burden is *comparably justified*." *Id.* (emphasis added).

If there were any lack of clarity about this prior to *Rahimi*, this Court confirmed in *Rahimi* that *both* a comparable burden *and* a comparable justification for Founding-era regulations are required in a "relevantly similar" analysis; a comparable justification alone does *not* suffice. *See* 602 U.S. at 694-99 (finding, from among the multitude of purported "analogues" the government proffered in its brief, *see* Brief for the United States, *United States v. Rahimi*, 2023 WL 5322645, at **13-27 (U.S. Aug. 14, 2023), that *only* "*two distinct legal regimes" "specifically addressed firearms violence*"—namely, only the surety and going-armed laws were "'relevantly similar' *in both why and how it burden*s the Second Amendment;" explaining "the penalty" is "another relevant aspect of the burden," and "[t]he burden that Section 922(g)(8) imposes on the right to bear arms also fits within the Nation's regulatory tradition") (emphasis added); *see also id.* at 709 (Gorsuch, J., concurring) (reiterating the important methodological point that the government must show *both* a "comparable justification" *and* a comparable burden").

In contrast to the modern problem of gun violence by domestic abusers which *Rahimi* analyzed under the "relevantly similar" standard, *see* 602 U.S. 692, the colonies were heavily populated with felons sent from England in 1791, and thus, the problem of felon gun violence

addressed by § 922(g)(1) was "longstanding."[1] Thus, the Court should rightly analyze § 922(g)(1) under the "straightforward" analysis used in both *Heller* and *Bruen,* where the challenged statutes likewise aimed to prevent interpersonal gun violence. *See id.* at 750 (Thomas, J., dissenting).

However, even *if* the Court were to employ the more nuanced "relevantly similar" analysis used in *Rahimi* to assess whether the government has met its burden to "establish the relevant tradition of regulation" for § 922(g)(1), *Bruen* dictates—and *Rahimi* confirms—that this Court must hold the government to four additional rules:

First, to establish a true "*tradition*" of "historical regulation," the government must point to *actual early regulations*, that is, laws or statutes—not proposals or vague "understandings" never enacted into law. *See Rahimi*, 602 U.S. at 692 (focusing on the burdens imposed by "regulations" and "laws at the founding"); *id.* at 757 (Thomas, J., dissenting) (explaining that under *Bruen*, rejected proposals "carry little interpretive weight").

Second, the government must then show the same type of regulation was actually *prevalent* in the country at the Founding, that is, the firearm regulation(s) on which it relies were "well-established and representative." *"*[A] single law in a single State" is not enough; instead, a "widespread" historical practice "broadly *prohibiting*" the conduct in question is required. *Bruen*, 597 U.S. at 36, 38, 46, 65 (expressing doubt that regulations in even *three* of the thirteen colonies "could suffice") (emphasis added).

[1]*See, e.g.*, Encyclopedia Virginia, "Convict Labor during the Colonial Period," *available at* encyclopediavirginia.org/entries/convict-labor-during-the-colonial-period/(last accessed January 28, 2025) (noting that as of 1776, Virginia alone housed at least 20,000 British convicts). Notably, in 1751, Ben Franklin even wrote a satirical article entitled "Rattle-Snakes for Felons," criticizing the way England had been ridding itself of its felons by sending them to the colonies to grow their population, and suggesting that rattlesnakes be sent back to England as "suitable returns for the human serpents sent us by our Mother Country." Bob Ruppert, "The Rattlesnake Tells the Story," *Journal of the American Revolution* (Jan. 2015).

Third, a "*longstanding*" tradition is required, and that accounts for time. Per *Bruen*, "when it comes to interpreting the Constitution, not all history is created equal" because "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them," which in the case of the Second Amendment, was in 1791. *Id.* at 34. Courts must "guard against giving postenactment history more weight than it can rightly bear." *Id.* at 35. As the historical evidence moves past 1791, the less probative it becomes.

Finally, the government "bears the burden" of "affirmatively prov[ing] that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. Consistent with "the principle of party presentation," courts are "entitled to decide a case based on the historical record compiled by the parties." *Id.* at 25, n. 6. They "are not obliged to sift the historical materials for evidence to sustain [a] statute." *Id.* at 60. If "history [is] ambiguous at best," the statute is unconstitutional. *Id.* at 39-40.

In short, to meet the *Bruen* Step Two inquiry, the government must affirmatively present evidence of actual historical regulations that were: *not only* "comparably justified" to § 922(g)(1), *but also* imposed a "comparable burden;" sufficiently prevalent to constitute a true "tradition;" and date to the Founding. While the government was able to make such a showing in *Rahimi* because surety and "going armed" laws established a tradition of "*temporarily* disarm[ing]" an "individual *found* by a court to *pose a credible threat* to the physical safety of another," 602 U.S. at 702 (emphasis added), for the reasons described below, the government cannot meet its burden for § 922(g)(1) with any longstanding "relevantly similar" regulations.

2. The Government cannot meet its burden for § 922(g)(1) because there is no longstanding tradition of depriving felons from possessing a firearm.

The government cannot meet its *Bruen* Step Two burden in this case for multiple reasons.

First, federal law has only included a general prohibition on firearm possession by individuals convicted of crimes punishable by over a year—meaning, for all felons—since 1961. *See* Act To Strengthen The Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961). And, a law passed 170 years after the Second Amendment's ratification cannot meet the "longstanding" requirement of *Bruen*. *See id.* at 36-37 (emphasizing "belated innovations" from the 20th century "come too late to provide insight into the meaning of the Constitution in [1791];" citing with approval the Chief Justice's dissent in *Sprint Communications Co. v. APCC Services, Inc*., 554 U.S. 269, 312 (2008)); *see also Bruen*, *id.* at 66 n.28 (declining to "address any of the 20th century historical evidence brought to bear by [the government] or their *amici*").

Second, even the earliest version of § 922(g)(1), which applied exclusively to certain types of *violent criminals*, and prohibited them from "*receiving*" firearms, was only enacted in 1938, well after the Bill of Rights was adopted (1791)—and also, to the extent it is relevant, well after the Fourteenth Amendment was enacted (1868). The Federal Firearms Act of 1938, Pub. L. No. 75-785, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938). And indeed, it was not until even later—1968—that Congress gave § 922(g)(1) its current form, prohibiting *all felons* from possessing firearms.

Third, as scholars and historians have long pointed out, "no colonial or state law in eighteenth century America formally restricted"—much less prohibited, *permanently and under pain of criminal punishment*—"the ability of felons to own firearms."[2] Indeed, even before *Bruen*,

[2]Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1374 (2009); *accord* C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009); Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous"*, 25 Tex. Rev. L. & Pol. 245, 291 (2021); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009).

judges—including then-Judge Barrett in *Kanter*—had so recognized. *See* 919 F.3d at 451, 458 (Barrett, J., dissenting) ("Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons," and "no[] historical practice supports a legislative power to categorically disarm felons because of their status as felons").

Finally, the lack of any longstanding tradition in this country of permanently disarming felons may well be explicable by the fact that at the Founding, felons—unlike many other classes of citizens—were *not* exempted from militia service. And indeed, as militia members, they were not simply *permitted* to possess arms; they were actually *required* to purchase and possess arms for militia service. *See* Federal Militia Act of May 8, 1792, §§ 1-2, 1 Stat. 272 ("each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years ... *shall* severally and respectively be enrolled in the militia, and that every citizen so enrolled "s*hall*, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt," and various other firearm accoutrements, including ammunition; exempting many classes of people from this requirement—such as "all custom-house officers"—but *not* felons). Moreover, the militia statutes of eight states (Pennsylvania, Massachusetts, New York, Georgia, New Hampshire, Delaware, Maryland and Connecticut), passed shortly before or after 1791, contained similar requirements, and similarly did not exempt felons.[3]

[3]*See* Mitchell, Statutes at Large of Pennsylvania, Act of March 20, 1780, §§ III, XXI, at 146, 154 (1700-1809); Wright and Potter, 7 Acts and Laws of the Commonwealth of Massachusetts, 1780-1805, ch. 14, at 381-82,389-90 (1898); Thomas Greenleaf, Laws of the State of New-York, Act of April 4, 1786, at 227-28, 232-33 (1792); Marbury, Digest of Laws of the State of Georgia, Act of December 24, 1792, §§ 9-10, at 350 (1802); Constitution and Laws of the State of New-Hampshire, Act of Dec. 28, 1792, at 251-52, 256 (1805); Laws of the State of Delaware, ch. XXXVI, §§ 1, 2, 4, at 1134-36 (1797); Herty, Digest of the Laws of Maryland, "Militia," §§ 7, 15, 19, 20, at 367-70 (1799); and Public Statute Laws of the State of Connecticut, Title CXII, ch. I, §§ 1, 10, at 499-500, 505-06 (1808).

Given this primary historical evidence, the government cannot show a historical tradition dating to the Founding of gun regulation either "distinctly" or "relevantly" similar to § 922(g)(1).

3. The historical analogues that supported § 922(g)(8) in *Rahimi* cannot support § 922(g)(1) because they were not "comparably justified," nor did they impose a "comparable burden" of disarmament for life.

Even *if* the government is permitted to reason "by analogy" under the "relevantly similar" standard from *Rahimi*, it still cannot meet its heavy burden here because there was no historical tradition of *any* analogous regulation in the Founding era that was *not only* "comparably justified" to § 922(g)(1), *but also* posed a "comparable burden" (*lifetime disarmament*), as *Bruen/Rahimi* requires.

The surety and going-armed statutes that *Rahimi* found proper "analogues" to the temporary ban in § 922(g)(8)(C)(i) based on a "credible threat," are ***not*** proper analogues for §922(g)(1)'s all-felon lifetime ban—for obvious reasons. As a threshold matter, § 922(g)(8)(C)(i) "restricts gun use to mitigate demonstrated threats of physical violence" and applies only once a court has made an individualized finding that "a credible threat" exists. *Rahimi*, 602 U.S. at 698. By contrast, § 922(g)(1) is a categorical ban, prohibiting every person convicted of a felony from possessing a gun—without an individualized finding and whether or not they threaten others. And although a person subject to a surety bond received "significant procedural protections" and "could obtain an exception if he needed his arms for self-defense," *id.* at 697, that is never allowed for a felon.

Importantly for the *Bruen/Rahimi* "comparable justification" analysis, surety statutes were intended to mitigate "demonstrated threats of physical violence"—just like § 922(g)(8)—which is why they required "individualized" findings. 602 U.S. at 698. But § 922(g)(1) contains *no* requirement that a felon pose a threat. And "going-armed" laws likewise "provided a mechanism

for punishing those who had menaced others with firearms." *Id.* at 681. Indeed, "going-armed" laws required a judicial determination that "a particular defendant ... had *threatened another with a weapon. Id.* at 699 (emphasis added). In other words, both of these early legal regimes criminalized specific—and serious—misconduct with a gun either in the past, or expected in the near future. Section 922(g)(1), on the other hand, bans a category of people from possessing firearms whether or not they have "terrif[ied] the good people of the land," *id.* at 697, or in fact, whether they have ever used or misused a gun.

Finally, and important for the separately-required "comparable burden" analysis—the "how" metric in *Bruen*—the Court was clear in *Rahimi* that the "penalty" is a crucial component of the burden imposed by a statute. *Id.* at 699. That is why the Court repeatedly underscored that § 922(g)(8)'s restriction is "temporary"—it exists only "so long as the defendant 'is' subject to a restraining order." *Id.* And in stark contrast, § 922(g)(1)'s categorical ban is *for life*. Thus, both analogue regimes *Rahimi* relied on to hold § 922(g)(8) fits within our Nation's tradition of firearm regulation are distinguishable in both the "why" ***and*** the "how" from § 922(g)(1). They therefore cannot serve as proper analogues for upholding § 922(g)(1) here.

Notably, the government at no time, in any case before any court at any level in this country, has *ever* been able to identify *any* Founding-era analogue that, like the surety and going-armed laws, "importantly . . . targeted the misuse of firearms," 602 U.S. at 696, ***and also*** categorically disarmed any citizen or any group of citizens, ***for life***. Thus, the government will not be able to satisfy both the "why" and the "how"—that is, the "comparable justification" ***and*** "comparable burden"—components of the "relevantly similar" analysis, which *Bruen* held, and *Rahimi* has confirmed, is the minimum requirement for every Second Amendment case going forward. As such, § 922(g)(1) is facially unconstitutional under *Bruen/Rahimi*. Unlike §

922(g)(8)(C)(i) it violates the Second Amendment in all circumstances. *Rahimi*, 602 U.S. at 693.

Notably, even prior to *Rahimi*, three district judges strictly applying *Bruen*'s dictates found that § 922(g)(1) was indeed facially unconstitutional. *See, e.g., United States v. Prince*, 700 F.Supp.3d 663 (N.D. Ill. Nov. 2, 2023) (Gettleman, J.); *United States v. Hale*, 717 F.Supp.3d 704, 701 n.1 (N.D. Ill. Feb. 14, 2024) (citing other opinions by Judge Gettleman); *United States v. Taylor*, No. 23-cr-40001, 2024 WL 245557 (S.D. Ill. Jan. 22, 2024) (Yandle, J.); *United States v. Martin*, 718 F.Supp.3d 899 (S.D. Ill. Feb. 22, 2024) (Yandle, J.); *United States v. Neal*, 715 F. Supp.3d 1084 (N.D. Ill. Feb. 7, 2024)(Ellis, J.).

And while admittedly, no circuit court has yet found § 922(g)(1) facially unconstitutional post-*Rahimi*, the clarification of *Bruen*'s methodology in *Rahimi*—and the absence of any Founding-era analogue disarming felons for life—compels a conclusion of facial unconstitutionality here. *See United States v. Brown*, 2024 WL 4665527, at *5 (S.D. Ill. Nov. 4, 2024) (Yandle, J.) (recognizing post-*Rahimi* that none of the historical "analogues" offered by the government imposed a "comparable burden" on the Second Amendment right of felons to keep and bear arms; distinguishing loyalty oath statutes which did not result in permanent disarmament, and laws authorizing capital punishment and estate forfeiture for certain felonies, which were severe penalties imposed for criminal conduct, but "not for status crimes that arose from otherwise lawful conduct by felons who had completed their sentences;" as such, finding § 922(g)(1) unconstitutional, both facially and as applied to the defendant). *See also Range II*, 124 F.4th at 230-31 (squarely rejecting the government's contention that permanent disarmament under § 922(g)(1) was "relevantly similar" to Founding-era laws that (1) imposed the death penalty for *some* nonviolent crimes (like forgery or counterfeiting) but not for crimes like false statement or embezzlement, or (2) required forfeiture of felons' weapons or estates); *id.* at 250 (Phipps, J.,

concurring) (opining that "any law imposing a permanent restriction on the 'right of the people to keep and bear arms' is constitutionally suspect as a facial matter").

II. This Case Presents an Important and Recurring Constitutional Question for § 922(g)(1) Defendants.

The post-*Bruen* Second Amendment facial challenge raised herein has been raised by scores of § 922(g)(1) defendants in the wake of *Bruen* and *Rahimi*. It was meticulously briefed by Petitioner before the court of appeals. And notably, this is not a case like *Dubois v. United States*, ___ S.Ct. ___, 2025 WL 7651 (U.S. No. 24-5744), where a remand was necessary to allow the court of appeals to consider the impact of *Rahimi* in the first instance. The Eleventh Circuit panel below had a full and fair opportunity already to consider the impact of *Bruen* and *Rahimi* here, and found they made no difference in Second Amendment analysis for § 922(g)(1).

Nor is it necessary for the Court to await en banc consideration of the impact of *Bruen* and *Rahimi* by the Eleventh Circuit, as that court has already been presented with a petition for rehearing en banc in *Rambo*, No. 24-6107. And in *Rambo*, it refused to reconsider its continued adherence to its post-*Heller* approach in *Rozier*, in light of *Bruen* and *Rahimi*.

As noted in the petitions for writ of certiorari in *Rambo*, and *United States v. Whitaker*, No. 24-5997, at this time there is a deep conflict among the circuits on multiple sub-issues relevant to as-applied challenges. While many petitioners have sought and will seek certiorari to resolve that deeply-entrenched conflict by asking the Court to consider the specifics of their cases—and indeed, a grant of certiorari in an as-applied case could well resolve the circuit conflict as to *Bruen* Step One discussed *supra*—the Court may not be able to definitively resolve the broader issue of facial constitutionality in a case asking it to resolve only an as-applied challenge.

Since the issue of facial constitutionality impacts all § 922(g)(1) defendants, in the interests of judicial economy the Court should take a facial challenge case as a companion to whichever

case(s) will be used to resolve the post-*Rahimi* circuit conflict on as-applied challenges. And, if the Court chooses to resolve the facial constitutionality of § 922(g)(1) in a preserved challenge case like *Gray v. United States*, *pet. for cert.* filed Jan. 30, 2025 (U.S. No. 24-6451), Petitioner asks that the Court hold his case pending its resolution of such case. For indeed, a holding of facial unconstitutionality in any case would render the error below "plain" and reversible even under the most deferential standard of review possible here. *See Henderson v. United States*, 568 U.S. 266, 272-74 (2013) ("plainness" is assessed at the time of review, and an error that was not clear below can become "plain" on appeal once the applicable law has been clarified).

However, *if* the Court believes that Petitioner's right to relief could be dependent upon whether plain error review applies, or instead, whether a challenge to the constitutionality of § 922(g)(1) is jurisdictional and reviewable *de novo*, the Court should at least hold this Petition pending disposition of the petition for writ of certiorari in *United States v. Alfonso*, 104 F.4th 815, 829 n. 18 (11th Cir. 2024), *pet. for cert filed* Dec. 17, 2024 (No. 24-6177). That is because, in affirming Petitioner's conviction under the plain error standard, the court below followed as binding precedent its prior decision in *Alfonso* finding (in Part B. of the decision) that a challenge to the constitutionality of a statute is not a jurisdictional error subject to *de novo* review, but instead, is subject to plain error review. *See Perez-Quibus*, 2024 WL 4524712, at *1 (citing *Alfonso*, 104 F.4th at 829 n. 18). While the Petitioner in *Alfonso* has not challenged the Eleventh Circuit's plain error ruling in Part B. of the decision before this Court, but instead has pressed his different—preserved—challenge addressed in Part A. of the decision, *see* Petition for Writ of Certiorari, *Alfonso v. United States* (U.S. Dec. 17, 2024) (No. 24-6177) at 5, on January 13, 2025 this Court requested a response from the Solicitor General in *Alfonso* after an initial waiver. And indeed, if certiorari is granted in *Alfonso* and the Eleventh Circuit's decision is ultimately vacated,

then the court's plain error ruling in Part B. of the decision—relied upon by the court below to affirm here—would no longer be of any precedential force and effect in the circuit. And the decision below should rightly be revisited for that reason.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted. Alternatively, the Court should hold this petition pending its decision in any other case(s) that will resolve or have bearing on resolution of the issue presented herein.

Respectfully submitted,

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