No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN GARCIA,
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 the government may deprive citizens of their Second Amendment rights because they were previously convicted of a non-violent crime.
2. Whether the government's prosecution of petitioner under 18 U.S.C. § 922(g)(1), based on his non-violent prior conviction for transporting aliens in violation of 8 U.S.C. § 1324, violates the Second Amendment.
3. Whether application of 18 U.S.C. § 922(g)(1) to petitioner violated the Commerce Clause where the only proof of a nexus between his firearm possession and interstate commerce consisted of the fact that the firearm had crossed a state line at some point before coming into petitioner's possession.

## 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. Garcia*, No. 22-cr-479, U.S. District Court for the Southern District of Texas. Judgment entered December 22, 2023.
- *United States v. Garcia*, No. 23-40705, U.S. Court of Appeals for the Fifth Circuit. Judgment entered February 28, 2025.

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### CONSTITUTIONAL PROVISION



### STATUTES AND RULES

## PETITION FOR WRIT OF CERTIORARI

Petitioner Jonathan Garcia petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, the Court should hold this petition for *Diaz v. United States*, S. Ct. No. 24-6625.

## OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-2a) is unreported but available at 2025 WL 655053. The district court did not issue a written order.

## JURISDICTION

The Fifth Circuit issued its opinion and judgment on February 28, 2025. *See* Pet. App. A. This petition is filed within 90 days of that date. *See* Sup. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides that:

Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

***

The Second Amendment to the United States 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.

***

18 U.S.C. § 922(g)(1) provides:

(g) It shall be unlawful for any person—

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

## STATEMENT OF THE CASE

Petitioner was prosecuted in federal district court for violating 18 U.S.C. § 922(g)(1), which prohibits those who have been "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" from possessing a firearm.[1] The indictment alleged that petitioner's predicate crime was "Transporting an Alien within the United States for private financial gain" and that petitioner "knowingly and unlawfully possess[ed] in and affecting interstate and foreign commerce a firearm, namely, a Smith & Wesson pistol, Model M&P, 40mm in caliber." C.A. ROA.27-28.

Petitioner filed a motion to dismiss the indictment, arguing that § 922(g)(1) was unconstitutional under this Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). C.A. ROA.195-217. The district court denied petitioner's motion in an oral ruling. C.A. ROA.89-91.

In September 2023, petitioner pleaded guilty to the indictment, pursuant to a plea agreement that did not waive his right to appeal. C.A. ROA.107-109, 119, 157-158. The prosecutor proffered the following facts to support the guilty plea:

> On October 25, 2022, Edinburg Police Department [officers] conducted a traffic stop on a 2011 black Ford. Officers made contact with the vehicle and could smell a strong odor of marijuana emitting from the vehicle. Officers attempted to remove the occupants and then officers removed the front passenger, identified as the defendant. Officers located a black and silver Smith & Wesson pistol, Model M&P, [??] caliber, stuck in his waistband. In a post-*Miranda* interview, the defendant admitted to being convicted of transporting an alien in the United States and [that he] knew that he could not possess firearms and[/]or ammunition due to his felony conviction. The firearm was manufactured outside of the state of Texas and

[1] The basis for federal jurisdiction in the district court was 18 U.S.C. § 3231.

> therefore affected Interstate and Foreign Commerce, and the defendant was previously convicted of [a] crime punishable by imprisonment for a term exceeding one year, 8 United States Code, Section 1324, in United States District Court in the Southern District of Texas, McAllen Division on March 27, 2018[,] in Cause No. 7:17-CR-1633-01[.]

C.A. ROA.117-118 (bracketed question marks in original; italics added). Petitioner preserved his argument that § 922(g)(1) violates the Second Amendment but admitted to the conduct as described by the government. C.A. ROA.118-119. In December 2023, the district court sentenced petitioner to time served (420 days), to be followed by two years of supervised release, and a $100 special assessment. C.A. ROA.71-76.

Petitioner timely appealed and argued that his § 922(g)(1) conviction violated the Second Amendment and the Commerce Clause. Def. C.A. Br. 5-40 (ECF No. 19); Def. C.A. Reply Br. 6-27 (ECF No. 55). After a stay to await this Court's decision in *United States v. Rahimi*, 602 U.S. 680 (2024), the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's judgment. Pet. App. 1a-2a. The Fifth Circuit relied on its earlier decision in *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), to reject his Second Amendment challenge. Pet. App. 2a. In *Diaz*, the Fifth Circuit held that a person with a previous conviction for vehicle theft could be subjected to § 922(g)(1)'s permanent, lifetime ban on firearm possession consistent with the Second Amendment because founding era laws punished horse theft with the death penalty. *See Diaz*, 116 F.4th at 468-69. The Fifth Circuit also relied on circuit precedent to reject petitioner's as-applied Second Amendment challenge as unpreserved and to reject his Commerce Clause challenge as foreclosed. Pet. App. 1a-2a.

## REASONS FOR GRANTING THE PETITION

The Court should hold this petition for *Diaz v. United States*, S. Ct. No. 24-6625, or 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. The federal courts of appeals, including two sitting en banc, have issued conflicting decisions about how to conduct this analysis in the context of 18 U.S.C. § 922(g)(1) prosecutions, and this Court's intervention is necessary to resolve the conflict.

The separate question of whether § 922(g)(1)'s application to petitioner violated the Commerce Clause—because the statute permitted petitioner's conviction based solely upon proof that his firearm at some point moved across state lines—independently warrants review. This Court should take this opportunity to resolve the longstanding tension between this Court's modern Commerce Clause jurisprudence and the comparatively minimal interstate-commerce nexus needed to establish § 922(g)(1)'s jurisdictional element under *Scarborough v. United States*, 431 U.S. 563 (1977).

### I. The Court should hold the petition for *Diaz v. United States* or grant the petition to resolve the circuit split about the appropriate analysis for Second Amendment challenges to 18 U.S.C. § 922(g)(1) and settle the important questions of constitutional law that have arisen in the wake of the Court's decision in *Bruen* and *Rahimi*.

The Fifth Circuit relied on its earlier decision in *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), to reject petitioner's Second Amendment challenge. Pet. App. 2a. This Court should, therefore, hold this petition for *Diaz v. United States*, S. Ct. No. 24-6625

(cert. filed Dec. 17, 2024). Alternatively, if the Court denies the petition in *Diaz*, the Court should grant this petition to resolve the circuit split about the appropriate analysis for Second Amendment challenges to 18 U.S.C. § 922(g)(1) and to settle the important questions of constitutional law that have arisen in the wake of the Court's decisions in *Bruen* and *Rahimi*.

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

In *Bruen* and *Rahimi*, this Court established a new framework for Second Amendment litigation. 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 courts of appeals, including two sitting en banc, have issued conflicting decisions about how to resolve Second Amendment challenges to 18 U.S.C. § 922(g)(1) after *Bruen* and *Rahimi*.

As recently recognized by the en banc Ninth Circuit, the courts of appeals have taken different, conflicting approaches to resolving Second Amendment challenges to 18 U.S.C. § 922(g)(1) in the wake of *Bruen* and *Rahimi*. *See United States v. Duarte*, ___ F.4th ___, No. 22-50048, 2025 WL 1352411, at *2-*3 (9th Cir. May 9, 2025) (en banc). This Court's intervention is necessary to resolve the divisions among the lower courts and to settle important questions of constitutional law.

The lower courts are intractably divided on how to analyze Second Amendment challenges after *Bruen* and *Rahimi*, and two courts of appeals sitting en banc have now reached opposite conclusions. The en banc Third Circuit invalidated § 922(g)(1) as applied

to a person convicted of food stamp fraud who did not "pose[] a physical danger to others." *Range v. Att'y Gen.*, 124 F.4th 218, 232 (3d Cir. 2024) (en banc).[2] The Third Circuit held that *Bruen* abrogated its prior Second Amendment precedent and that, despite Range's prior felony conviction, he was part of "the people" protected by the Second Amendment. *Id.* at 224-26. The court thus required the government to show "a longstanding history and tradition of depriving people like Range of their firearms," and held that the government did not meet its burden by pointing to founding era laws that "disarmed groups [the governments] distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks." *Id.* at 229-30, 232. The court further rejected the government's "dangerousness" principle, which would "cover all felonies and even misdemeanors that federal law equates with felonies." *Id.* at 230. The court found that principle to be "far too broad," operating "at such a high level of generality that it waters down the right." *Id.* (quoting *Rahimi*, 602 U.S. at 740) (Barrett, J., concurring)).

Finally, the Third Circuit dismissed the government's argument that § 922(g)(1)'s "de facto permanent disarmament" was justified by founding era laws that harshly punished criminal offenses like fraud with death or estate forfeiture. *Id.* at 230-31. The court reasoned that "the Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here—de facto lifetime disarmament for all felonies and felony-equivalent misdemeanors—is rooted in

[2] Though the government received an extension of time to file a petition for writ of certiorari in *Range*, it ultimately did not file one. *See Bondi v. Range*, No. 24A881 (extension granted to April 22, 2025).

our Nation's history and tradition." *Id.* at 231. The court acknowledged the Fifth Circuit's decision in *Diaz* but disagreed with its broad reasoning as misreading *Rahimi*. *Id.* As for estate forfeiture, the court noted that, unlike the lifetime ban imposed by § 922(g)(1), a felon subject to estate forfeiture in the founding era "could acquire arms after completing his sentence and reintegrating into society." *Id.*

By contrast, the en banc Ninth Circuit held that (1) its pre-*Bruen* precedent concluding that § 922(g)(1) was presumptively constitutional remained good law and (2) § 922(g)(1) may be constitutionally applied to non-violent felons. *Duarte*, 2025 WL 1352411, at *2-*4. The Ninth Circuit majority expressly aligned itself with four other circuits—the Fourth, Eighth, Tenth, and Eleventh. *See Vincent v. Bondi*, 127 F.4th 1263, 1265-66 (10th Cir. 2025), *cert. petition filed*, No. 24-1155; *United States v. Hunt*, 123 F.4th 697, 700 (4th Cir. 2024), *cert. petition filed*, 24-6818; *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024), *cert. denied*, 24-6517; *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, *case remanded*, 145 S. Ct. 1041 (2025). Those circuits have also continued to follow their pre-*Bruen* precedent, treating Second Amendment challenges as foreclosed. *See, e.g.*, *Hunt*, 123 F.4th at 700 (holding that "neither *Bruen* nor *Rahimi* meets this [c]ourt's stringent test for abrogating otherwise-controlling precedent and that [the court's] precedent on as-applied challenges thus remains binding"). They have upheld that § 922(g)(1) is constitutional in all its applications. *See, e.g.*, *Hunt*, 123 F.4th at 700 (§ 922(g)(1) "would survive Second Amendment scrutiny even if [it] had the authority to decide the issue anew").

The Ninth Circuit recognized the Third Circuit's contrary decision in *Range*. *Duarte*, 2025 WL 1352411, at *3. But the Ninth Circuit agreed with the government's arguments that "(1) legislatures may disarm those who have committed the most serious crimes; and (2) legislatures may categorically disarm those they deem dangerous, without an individualized determination of dangerousness." *Id.* at *9. As to the first argument, the Ninth Circuit agreed with the Fifth Circuit's *Diaz* opinion that, "if the greater punishment of death and estate forfeiture was permissible to punish felons, then the lesser restriction of permanent disarmament is also permissible." *Id.* at *10 (footnote omitted). But the Ninth Circuit went even further and rejected the argument that the application of § 922(g)(1) should be limited to "felonies that at the time of the founding were punishment with death, a life sentence, or estate forfeiture." *Id.* at *12. Rather, the Ninth Circuit held that legislatures have broad discretion to define what constitutes a felony, and that any conduct a current legislature labeled a felony could serve as the basis for a § 922(g)(1) prosecution, regardless of its similarity to founding era laws. *See id.* at *11-*12.

Regarding the second argument, the Ninth Circuit relied on the very historical laws disarming disfavored groups, such as Catholics, Native Americans, Blacks, and Loyalists, that the Third Circuit rejected in *Range*. *See Duarte*, 2025 WL 1352411, at *12. Despite recognizing that "these laws reflect overgeneralized and abhorrent prejudices that would not survive legal challenges today," the Ninth Circuit determined that those laws would only be unconstitutional under "*other* parts of the Constitution" and so could be relied upon to categorically disarm citizens under the Second Amendment. *Id.* at *13.

Judge VanDyke, joined by Judges Ikuta and Nelson, concurred in part and dissented in part. *See id.* at *22-*49. Judge VanDyke believed the court should not have reached the merits of Duarte's claim but rather affirmed his conviction under the plain-error standard of review. *See id.* at *27. On the merits, Judge VanDyke dissented from the majority's view at nearly every turn and criticized the majority for "deepen[ing] a circuit split, intentionally taking the broadest possible path to uphold § 922(g)(1)" in all its applications. *Id.* at *28.[3] While acknowledging that some other circuits had also continued to adhere to their pre-*Bruen* precedent, Judge VanDyke thought that the Ninth Circuit should have made clear that *Bruen*'s text-history-and-tradition approach supplanted the court's pre-*Bruen* precedent and should not have relied on dicta in *Heller*. *Id.* at *30-*32.

Turning to the majority and the government's "greater includes the lesser" rationale, Judge VanDyke identified at least three flaws. First, the historical sources relied upon by the majority were "even sparser than that which *Bruen* found inadequate." *Id.* at *33. Second, Judge VanDyke agreed with then-Judge Barrett's determination that the historical argument that death was the standard penalty for serious crimes in the founding era was "shaky" and that "[t]he obvious point that the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society." *Id.* at *34-*35 (quoting *Kanter v. Barr*, 919 F.3d 437, 458, 462 (7th Cir. 2019) (Barrett, J., dissenting)). Third, Judge VanDyke found that the majority "bulldoze[d] right over" the "glaring problem" that many

[3] Judge VanDyke only agreed with the majority that Duarte's felon status did not remove him from "the people" covered by the Second Amendment's text. *Id.* at *29 n.4.

modern felonies were classified as misdemeanors or not even criminal offenses at common law and the founding. *Id.* at *37-*38. Although Judge VanDyke disagreed with the Fifth Circuit's reliance in *Diaz* on founding era death penalty laws, he agreed with *Diaz*'s reasoning that a "shifting benchmark" of whatever Congress decides to label a felony "should not define the limits of the Second Amendment, without further consideration of how that right was understood when it was first recognized." *Id.* at *38 (quoting *Diaz*, 116 F.4th at 469). The majority's deference to the legislature not only "neuters any judicial oversight of the legislative determinations as to who can be permanently disarmed—effectively stripping them of their Second Amendment rights altogether" but also "necessarily returns right back to a regime of deference to legislative interest-balancing rejected by the Supreme Court in *Bruen*." *Id.* at *45 (citing *Range*, 124 F.4th at 228).

Meanwhile, the Sixth Circuit has forged a unique path for Second Amendment litigation in *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024). The Sixth Circuit interpreted the historical record as supporting the disarmament of groups of people deemed to be dangerous but with an opportunity for individuals to "demonstrate that their particular possession of a weapon posed no danger to peace." *Id.* at 650-57. The Sixth Circuit tasked district courts with making this individualized dangerousness determination when considering as-applied challenges to § 922(g)(1) and imposed the burden on the individuals to demonstrate that they are not dangerous, and "thus fall[] outside § 922(g)(1)'s constitutionally permissible scope." *Id.* at 657. The Sixth Circuit did not attempt to square its imposing the burden one individuals being prosecuted by the government with this Court's decisions in *Bruen* and *Rahimi*, which clearly impose the burden on the

government to justify the firearm restriction. *Rahimi*, 602 U.S. at 681 ("When firearm regulation is challenged under the Second Amendment, the Government must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation.'") (quoting *Bruen*, 597 U.S. at 24).

Given this variation among the circuits, the scope of Second Amendment rights currently depends on the happenstance of geography. This Court's intervention is necessary to resolve the conflict and restore uniformity.

**C. This case presents an excellent vehicle for resolving the conflict.**

Petitioner's case presents an excellent vehicle for resolving the widespread, persistent conflict in approaches to Second Amendment litigation among the lower courts. Further percolation of the issue is unnecessary with two en banc courts of appeals issuing detailed, thorough opinions on the matter and reaching opposite conclusions, along with several other courts of appeals having also weighed in. These opinions demonstrate the lower courts' struggles to determine how to analyze Second Amendment challenges in the wake of *Bruen* and *Rahimi*.

Moreover, petitioner's case squarely implicates the conflict. The government prosecuted him in the district court solely on the basis of his non-violent prior conviction for transporting aliens within the United States for private financial gain, in violation of 8 U.S.C. § 1324. C.A. ROA.27-28, 117-118. In an attempt to satisfy the Fifth Circuit's *Diaz* test, the government made the preposterous argument on appeal that petitioner's § 1324 conviction was analogous to a "slave trader named Nathaniel Gordon [who] was executed pursuant to an 1823 version of the [federal] law" prohibiting participation in the

transatlantic slave trade, Gov't C.A. Br. 16-17 (ECF No. 48)—indicating both the weakness of the government's argument that petitioner can be constitutionally disarmed and the likelihood of petitioner's success if he happened to reside within the Third Circuit, rather than the Fifth.

Nor does the fact that the court below reviewed petitioner's as-applied claim for plain error stand in the way of this Court's granting the petition. In district court, petitioner filed a motion to dismiss the indictment, arguing that § 922(g)(1) was unconstitutional under this Court's decision in *Bruen*, and the district court denied petitioner's motion in an oral ruling. C.A. ROA.89-91, 195-217. The district court litigation concluded before this Court issued its decision in *Rahimi*, and the Fifth Circuit stayed petitioner's case for several months, on the government's motion, to await issuance of *Rahimi*. Petitioner's arguments have obviously evolved during the course of the litigation. But this Court in *Rahimi* considered the merits of respondent's as-applied challenge to § 922(g)(8)(C)(i) even though respondent had raised solely a facial challenge below. *See Rahimi*, 602 U.S. at 700; *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir.) ("Zackey Rahimi levies a facial challenge to § 922(g)(8)."), *rev'd and remanded*, 602 U.S. 680 (2024).

Furthermore, this Court has granted certiorari in past cases where the central legal question was not even raised in the district court. For example, in *Tapia v. United States*, 564 U.S. 319 (2011), the Court addressed the merits of the legal question presented—whether sentences could permissibly be imposed or lengthened to further rehabilitative or treatment purposes—and, deciding that question in petitioner's favor, remanded the case to the Ninth Circuit for that court to apply the remaining prongs of plain-error review in

the first instance. *See id.* at 335. On remand to the Ninth Circuit, the government conceded that the error was "plain"—presumably based on this Court's decision in Ms. Tapia's own case, since the law in the Ninth Circuit had previously been to the contrary—and the Ninth Circuit ultimately granted relief even on plain-error review. *See United States v. Tapia*, 665 F.3d 1059, 1061, 1063 (9th Cir. 2011). That outcome comports with this Court's later holding that "whether a legal question was settled or unsettled at the time of trial, it is enough that an error be plain at the time of appellate consideration" for the second-prong of plain-error review to be satisfied. *Henderson v. United States*, 568 U.S. 266, 279 (2013). In a similar vein, the Court has granted certiorari and decided important merits questions and then remanded the case for the court of appeals to decide in the first instance the question of harmless error. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 414 (2010). Because petitioner's case implicates significant constitutional matters on which the courts of appeals will remain divided until this Court intervenes, the Court should grant certiorari on the first two questions presented.

## II. The Court should grant the petition to resolve the longstanding tension between this Court's modern Commerce Clause jurisprudence and the lower courts' holdings that § 922(g)(1) does not exceed Congress's power under the Commerce Clause.

The third question presented—whether application of 18 U.S.C. § 922(g)(1) to petitioner violated the Commerce Clause where the only proof of a nexus between his firearm possession and interstate commerce consisted of the fact that the firearm had crossed a state line at some point before coming into petitioner's possession—is an important question that independently warrants this Court's review. Numerous judges have

flagged the apparent tension between the Court's modern Commerce Clause jurisprudence and the comparatively minimal effect on commerce that this Court deemed sufficient to satisfy § 922(g)(1)'s jurisdictional element in *Scarborough v. United States*, 431 U.S. 563 (1977). This Court's intervention is necessary to resolve that tension, as lower court judges have refused to heed calls to revisit the issue.

In *Scarborough*, this Court held, as a matter of statutory interpretation, that the government could satisfy the interstate commerce element of § 922(g)'s predecessor, 18 U.S.C. § 1201(a) (repealed 1986), by proving that the firearm had traveled across state lines at any prior point, even if the defendant's possession occurred all in one state. *See* 431 U.S. at 577. Eighteen years later, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down a statute that made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," 18 U.S.C. § 922(q)(1)(A), reasoning that the law violated the Commerce Clause because it "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce." 514 U.S. at 551. *Lopez* clarified that, for a law that regulates neither the channels nor the instrumentalities of commerce to nevertheless comport with the Commerce Clause, the regulated activity must "substantially affect" interstate commerce. *Id.* at 559. Section 922(q) failed that test because there was no evidence that the intrastate, non-commercial act of possessing a gun in close proximity to a school had the requisite "substantial" impact on interstate economic activity, and the statute "contain[ed] no jurisdictional element which would ensure, through

case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." *Id.* at 561.

In the following years, numerous jurists have identified the tension between *Lopez* and *Scarborough*, as interpreted in the lower courts, and called on this Court to resolve that tension. Justice Thomas, for instance, has observed that "*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook" that, like § 922(g)'s jurisdictional element, "seems to permit Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines." *Alderman v. United States*, 131 S. Ct. 700, 702, 703 (2011) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari). That result, Justice Thomas explained, is not only inconsistent with the *Lopez* framework but "could very well remove any limit on the commerce power" if taken to its logical extension. *Id.* at 703.

Despite similarly perceiving *Scarborough* as "in fundamental and irreconcilable conflict with the rationale" of *Lopez*, *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting), the prevailing view of the courts of appeals is that *Scarborough* "implicitly assumed the constitutionality of" § 922(g)'s predecessor statute, *United States v. Alderman*, 565 F.3d 641, 645 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 700 (2011), and that "[a]ny doctrinal inconsistency between *Scarborough* and [this] Court's more recent decisions is not for [the lower courts] to remedy." *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006), *cert. denied*, 549 U.S. 1213 (2007); *see United States v. Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (Jones, J., for half of the equally

divided court) ("not[ing] the tension between" *Scarborough* and *Lopez* but observing that the Fifth Circuit has felt constrained to nevertheless "continue to enforce § 922(g)(1)" because a court of appeals is "not at liberty to question the Supreme Court's approval of [Section 922(g)'s] predecessor statute"). The courts of appeals have therefore made clear their intention to follow *Scarborough* "until the Supreme Court tells [them] otherwise." *Patton*, 451 F.3d at 648. And nine of those courts have specifically upheld the constitutionality of § 922(g)(1) based on *Scarborough*'s minimal-nexus test. *See United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *United States v. Lemons*, 302 F.3d 769, 771-72 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d 1456, 1461-62, 1462 n.2 (9th Cir. 1995); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010).

In urging the Fifth Circuit to reconsider this issue en banc, Judge Ho emphasized that the "constitutional limits on governmental power do not enforce themselves." *United States v. Seekins*, 52 F.4th 988, 989 (5th Cir. 2022) (Ho, J., dissenting from the denial of rehearing en banc). The interpretation of § 922(g)(1)'s jurisdictional element that the circuits understand *Scarborough* to require effectively "allows the federal government to regulate any item so long as it was manufactured out-of-state—without any regard to when, why, or by whom the item was transported across state lines." *Id.* at 990. That broad conception of federal regulatory authority is at odds with the *Lopez* framework. Only this

Court can "prevent [that framework] from being undermined by a 1977 precedent that d[id] not squarely address the constitutional issue." *Alderman*, 131 S. Ct. at 703 (Thomas, J., dissenting from the denial of certiorari).

## CONCLUSION

The petition should be granted.

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