No. _____

In the

Supreme Court of the United States

_____

Joshua Sutherland,
Petitioner,

v.

United States of America,
Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Does 18 U.S.C. §922(g)(1) comport with the Second Amendment?

Does 18 U.S.C. §3583(g) comport with the Sixth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Joshua Sutherland, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua Sutherland seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is found at *United States v. Sutherland,* No. 24-10677, 2025 WL 799346 (5th Cir. March 13, 2025). It is reprinted in Appendix A to this Petition. The Petition arises from two judgments, one of conviction and sentence, and another of revocation and sentence; they are attached as Appendix B.

JURISDICTION

The court of appeals issued an opinion affirming the district court judgments on March 13, 2025. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Section 922(g)(1) of Title 18 reads in relevant part:

> (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.

The Second Amendment reads:

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. §3583(g) reads:

(g) Mandatory Revocation for Possession of Controlled Substance or Firearm or for Refusal To Comply With Drug Testing.—If the defendant—
(1) possesses a controlled substance in violation of the condition set forth in subsection (d);
(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;
(3) refuses to comply with drug testing imposed as a condition of supervised release; or
(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;
the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

> the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

In 2015, Petitioner Joshua Sutherland pleaded guilty to one violation of 18 U.S.C. § 2119, "carjacking." The district court imposed 87 months imprisonment and a two-year term of supervised release. After his release from prison, but during the pendency of his term of release, police found a gun and methamphetamine in his car. He pleaded guilty to one count of possessing a firearm after a felony conviction, 18 U.S.C. § 922(g)(1), pursuant to a plea agreement that waived his appeal save for certain express exceptions not at issue here. He also pleaded true to gun possession, drug use, and missing drug tests and restitution payments as violations of the terms of supervised release. The Petition to revoke his supervised release stated that revocation was mandatory due to the defendant's possession of a controlled substance, possession of a firearm, and failure to comply drug testing. *See* 18 U.S.C. § 3583(g).

At sentencing, the court imposed a 70-month term of imprisonment for the § 922(g)(1) offense, a consecutive 18-month term of imprisonment for the revocation of supervised release, and a new three-year term of supervised release. ROA.24-10589.200-201.

B. Appellate Proceedings

Petitioner appealed, arguing that 18 U.S.C. §922(g)(1) violated the Second Amendment, and that the mandatory revocation provisions of 18 U.S.C. §3583(g) violated the Fifth and Sixth Amendments. He conceded that the claims were reviewed only for plain error and foreclosed by circuit precedent. The court of appeals affirmed in an unpublished opinion, finding the claims foreclosed by circuit precedent. *See* [Appx. A]; *United States v. Sutherland*, No. 24-10589, 2025 WL 799346, at *1 (5th Cir. Mar. 13, 2025)(citing *United States v. Diaz*, 116 F.4th 458, 471-72 (5th Cir. 2024), and *United States v. Garner*, 969 F.3d 550, 551-53 (5th Cir. 2020)).

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to resolve the profound uncertainty, including an acknowledged circuit split, regarding the constitutionality of 18 U.S.C. §922(g)(1) under the Second Amendment.

In New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), this Court held that when a firearm restriction contravenes the text of the Second Amendment, it is valid only to the extent that it is consistent with the nation's history and tradition of valid firearm regulation. *See Bruen*, 597 U.S. at 19. It rejected the notion that firearm regulations understood to be outside the power of government at Founding may be affirmed today based on a sufficiently compelling governmental interest. *See id.*

Section 922(g)(1) of Title 18 forbids the possession of firearms by most persons convicted of an offense punishable by more than a year's imprisonment. Since *Bruen*, "Section 922(g)(1)'s constitutionality has divided courts of appeals and district courts." Supplemental Brief for the Federal Parties in Nos. 23-374, *Garland v. Range* 23-683, at 2 (June 24, 2024)("Supplemental Brief in *Range*"), *available at https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf , last visited May 22, 2025*. As the Ninth Circuit recently observed *en banc*, "[f]our circuits have upheld the categorical application of § 922(g)(1) to all felons." *United States v. Duarte*, No. 22-50048, 2025 WL 1352411, at *3 (9th Cir. May 9, 2025)(*en banc*)(citing *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024); *Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th

Cir. 2025), and *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, 145 S.Ct. 1041 (2025)). The *en banc* Ninth Circuit joined this group in a decision that produced four separate opinions, including a partial dissent. *See Duarte*, 2025 WL 1352411, at *14. In so doing, it overruled a panel opinion that had found the statute unconstitutional as applied to a person with prior convictions for vandalism, drug possession, and evading arrest. *See United States v. Duarte*, 101 F.4th 657, 661 (9th Cir. 2024), *reh'g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. 2024), *different results on rehearing* 2025 WL 1352411, at *3 (9th Cir. May 9, 2025)(*en banc*). This brings the total number of courts rejecting all constitutional challenges to the statute to five.

But as the *en banc* Ninth Circuit court also recognized, two more circuits, including the court below, "have left open the possibility that § 922(g)(1) might be unconstitutional as applied to at least *some* felons," *Duarte*, 2025 WL 1352411, at *3 (citing *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024), and *United States v. Williams*, 113 F.4th 637, 661–62 (6th Cir. 2024))(emphasis in original), while the *en banc* Third Circuit has actually held the statute unconstitutional as applied to a man with a prior felony conviction for making a false statement to obtain food stamps, *see Range v. Att'y Gen.*, 124 F.4th 218, 222–23 (3d Cir. 2024)(*en banc*). Many district courts, though not the majority, have also found the statute unconstitutional in individual cases. *See* Supplemental Brief in *Range*, at *4-5, nn.1-3 (collecting cases); *see also United States v. Gomez*, __F.Supp.2d__, 2025 WL 971337 (N.D. TX March 25, 2025)(marijuana possession), *appeal pending*. As the government observed last year,

moreover, "[s]ome of those decisions have involved felons with convictions for violent crimes, such as murder, manslaughter, armed robbery, and carjacking." *Id.* at **4-5, & n.1.

Further, the courts of appeals have acknowledged extensive disagreement and uncertainty regarding certain methodological issues relevant to the resolution of *Bruen* challenges. These include the relevance of laws at Founding that did not directly regulate firearms, such as capital punishment and estate forfeiture, ***compare*** *Range*, 124 F.4th at 231 (capital punishment and estate forfeiture for non-violent crime not relevant), **with** *Diaz*, 116 F.4th at 469-470 (giving dispositive weight to the availability of capital punishment for crimes analogous to the defendant's prior conviction); the status of pre-*Bruen* circuit precedent, ***compare*** *Vincent*, 127 F.4th at 1265–66 (circuit precedent unaffected, and collecting cases), ***with*** *Williams*, 113 F.4th at 648 (*Bruen* displaces earlier circuit precedent), and the significance of *dicta* in *Heller*, *Bruen*, and *Rahimi* regarding "presumptively valid" restrictions on firearm ownership, ***compare*** *Duarte*, 2025 WL 1352411, at **4-6 (relying heavily on such passages to affirm §922(g)(1)) ***with*** *Diaz*, 116 F.4th at 465-466 (declining to give them controlling weight). And circuit opinions resolving challenges to §922(g)(1) frequently generate dissenting and concurring opinions, attesting to the pervasive uncertainty and disagreement in the area. *See Range*, 124 F.4th at 221 (six opinions, one dissent); *Duarte*, 2025 WL 1352411, at *1 (four opinions, one partial dissent)(reversing panel); *Williams*, 113 F.4th at 642

(concurring opinion from Judge concurring only in judgment in panel decision); *Atkinson v. Garland*, 70 F.4th 1018, 1019 (7th Cir. 2023)(dissent from panel decision).

The issue merits intervention by this Court. There is a clear and acknowledged circuit split on the constitutionality of a federal statute. At least seven circuits have weighed in, and there is relative balance as between those maintaining that the statute is always constitutional, and those acknowledging its constitutional vulnerabilities. The split will therefore not resolve spontaneously. And as can be seen above, a substantial volume of lower court opinions provide an ample resource to assist this Court in the resolution of the matter.

The matter is profoundly weighty. Two circuits (the Third and Ninth) have dealt with the issue *en banc*, demonstrating that it meets the standards for discretionary review. And these two *en banc* treatments of the issue drew nine *amici*, further attesting to its importance. *See Range*, 124 F.4th at 221; *Duarte*, 2025 WL 1352411, at *1. More than 6,000 people suffered conviction for violating this statute in Fiscal Year 2024 alone, almost all of whom went to prison. *See* United States Sentencing Commission, *Quick Facts*, *18 U.S.C. §922(g) Firearms Offenses*, at 1, *last visited May 22, 2025, available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY24.pdf . And of course most states have comparable statutes, which means that the true number of persons incarcerated each year for possessing a firearm after a felony conviction may be many times this number. *See*

e.g. Alaska Stat. §11.61.200(a)(1), (b)(1)-(3); Ariz. Rev. Stat. Ann. §§13-904(A), (B); 13-905; 13-906; Cal. Penal §§ 12021, 4852.17; Col. Rev. Stat. §18-12-108.

The lack of clear answers about the constitutionality of this statute (and its state analogues) is intolerable for many reasons. First, there is a strong possibility that substantial numbers of Americans are in prison, and that more will go to prison, for the exercise of a fundamental constitutional right. That should be anathema in a free constitutional republic. Second, and conversely, the lack of clarity as to the scope of the Second Amendment right to own a firearm after a felony conviction may deter lawful prosecutions of criminal activity, jeopardizing public safety. Third, this lack of clarity may deter constitutionally protected conduct, or encourage reliance on mistaken beliefs about the scope of a constitutional right, resulting in illegal conduct and imprisonment. *See United States v. Schnur*, 132 F.4th 863, 871 (5th Cir. 2025)(Higginson, J., concurring)(expressing concern about the notice problems that flow from uncertainty regarding the constitutional status of §922(g)(1)).

In the present case, the defendant did not raise a Second Amendment challenge and district court, and there is some question as to whether his appeal waiver would bar his appeal of a conviction for constitutionally protected conduct. As such, this case may not be an appropriate candidate for a plenary grant of certiorari. Nonetheless, this Court should promptly grant certiorari to determine the constitutionality of §922(g)(1). In that event, it should hold the instant petition and remand for reconsideration if another case casts doubt on the constitutionality of the statute of conviction. *See Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia,

J., dissenting)("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided."). Procedural obstacles to reversal – such as the consequences of non-preservation, or the enforceability of an appeal waiver where the statute of conviction criminalizes constitutionally protected conduct – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam) (GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres- Valencia v. United States*, 464 U.S. 44 (1983) (per curiam) (GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the court of appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990) (Stevens, J., dissenting) (speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945) (remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the court of appeals).

II. This Court should hold the instant Petition pending any plenary grant of certiorari addressing the question presented, which was reserved by the plurality in *United States v. Haymond*, 588 U.S. 634 (2019).

The Fifth and Sixth Amendments to the United States Constitution require that any fact that increases the defendant's maximum or minimum range of punishment must be proven to a jury beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Alleyne v. United States*, 570 U.S. 99 (2013). Section 3583(g) of Title 18 compels the district court to impose a term of imprisonment when a defendant on supervised release uses or possesses drugs, misses drug tests, possesses a firearm, or tests positive more than three times for drug use in a year. A straightforward application of *Alleyne*, therefore, would tend to show that any of these facts must be proven to a jury beyond a reasonable doubt. Alternatively, a reviewing court might conclude that Congress would have preferred to sever and excise the mandatory revocation provision to compelling a full-blown jury trial for every allegation of refusal to comply with required drug testing. *See United States v. Booker*, 543 U.S. 220 (2005).

Nonetheless, at least five Justices in *United States v. Haymond*, 588 U.S. 634 (2019), concluded that some revocation proceedings fall outside the simple rules of *Apprendi* and *Alleyne*. *See Haymond*, 588 U.S. at 657-658 (Breyer, J., concurring); *id.* at 667 (Alito, J., dissenting). Under the view propounded by Justice Breyer's concurrence, facts determined in a revocation proceeding should instead be compared more globally to a "traditional element." *See id.* at 2385-2386 (Breyer, J., concurring). This analysis considers whether the fact in question sets forth an independent

criminal offense, whether it triggers a mandatory minimum, and the length of the mandatory minimum. *See id.* at 658-659 (Breyer, J., concurring).

A four-Justice plurality expressly reserved the question at issue in this case: whether 18 U.S.C. 3583(g) violates the Fifth and Sixth Amendment, cautioning:

> Just as we have no occasion to decide whether § 3583(k) implicates *Apprendi* by raising the ceiling of permissible punishments beyond those authorized by the jury's verdict, see n. 4, supra, we do not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*. Nor do we express a view on the mandatory revocation provision for certain drug and gun violations in § 3583(g), which requires courts to impose "a term of imprisonment" of unspecified length.

Id. at 652, n.7 (Gorsuch, J.)(plurality op.). Such reservations have previously foreshadowed grants of certiorari on the reserved issue. ***Compare*** *Blakely v. Washington*, 542 U.S. 296, 305, n.9 (2004)("The Federal Guidelines are not before us, and we express no opinion on them.") ***with*** *United States v. Booker*, 543 U.S. 220 (2005)(rendering a holding on this question); ***compare*** *Voisine v. United States*, 579 U.S. 686, 694, n.4 (2016)("Like *Leocal*, our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether §16 includes reckless behavior.") ***with*** *Borden v. United States*, 593 U.S. 420 (March 2, 2020)(deciding this question in the context of 18 U.S.C. §924(e), which contains a clause similarly worded to 18 U.S.C. §16); ***see also*** *Voisine*, 579 U.S. at 689 ("…we expressly left open whether a reckless assault also qualifies as a "use" of force—so that a misdemeanor conviction for such conduct would trigger §922(g)(9)'s firearms ban. . . . The two cases before us now raise that issue.")(internal citations omitted)(*citing United States v. Castleman*, 572 U.S. 157 (2014)).

Petitioner did not challenge the constitutionality of the mandatory revocation statute at the district court. This likely presents an insurmountable vehicle problem for a plenary grant in the present case. Nonetheless, the issue is worthy of certiorari.

In the event that the Court chooses to address this issue while the instant case remains on direct appeal, the outcome may be affected. Although the error was not preserved in district court, which compels review for plain error only, *see* Fed. R. Crim. P. 52(b), the "plain-ness" of error may be established by change of precedent on before the judgment is final. *See Henderson v. United States*, 568 U.S. 266 (2013). Accordingly, Petitioner requests that the Court hold his petition pending any case that presents the issue reserved in *Haymond*, and then grant the petition, vacate the judgment below, and remand for reconsideration. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163 (1996).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 11th day of June, 2025.

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