No. _____

In the

Supreme Court of the United States

Eric Gerard McGinnis,

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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QUESTIONS PRESENTED

I. Most circuits, including the Fifth Circuit below, apply a form of means-end scrutiny when evaluating challenges to a statute under the Second Amendment. Should this approach be replaced by a framework that focuses instead on the Second Amendment's text, history, and tradition?

II. Can 18 U.S.C. § 922(g)(8) survive a text-history-tradition analysis given that there is no historical analogue for a protective-order exception to firearms possession?

PARTIES TO THE PROCEEDING

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

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020)
- *United States v. McGinnis*, No. 3:17-cr-499-M-1 (N.D. Tex. Feb. 13, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric Gerard McGinnis seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals is *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020). It is reprinted in Appendix A to this Petition. The district court did not issue a written opinion.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on July 9, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This petition involves 18 U.S.C. § 922(g)(8):

> It shall be unlawful for any person … who is subject to a court order that—
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical

> > > force against such intimate partner or child that would reasonably be expected to cause bodily injury …
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(8).

STATEMENT OF THE CASE

In 2017, Eric Gerard McGinnis, Petitioner, was found in possession of an unregistered firearm and ammunition while subject to an active state protective order. The government indicted Mr. McGinnis on two firearms-related counts. Count One alleged that Mr. McGinnis possessed an unregistered, short-barreled rifle in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. Count Two alleged that Mr. McGinnis possessed ammunition while under a domestic-violence protective order, in violation of 18 U.S.C. § 922(g)(8). Mr. McGinnis elected to proceed to trial, which began on June 19, 2018.

The Trial and Motions for Judgment of Acquittal

The trial lasted for two days, over which the government called ten witnesses to testify. After the government rested its case-in-chief, defense counsel moved for a judgment of acquittal, arguing that the evidence was insufficient to prove that Mr. McGinnis was aware of the characteristics of the firearm and that the protective order's terms were insufficient to satisfy the three requirements of § 922(g)(8). The district court denied the motion but, at the same time, took the issues under advisement post-verdict.

After the jury returned a verdict of guilty on both counts, defense counsel reasserted its motion for a judgment of acquittal. The district court denied the motion as to Count One (possession of an unregistered firearm) but allowed additional briefing on Count Two (possession of a firearm while under a protective order).

Defense counsel filed a written brief in support of its motion for judgment of acquittal on July 11, 2018, raising three issues related to Count Two: (1) the sufficiency of the protective order to satisfy the elements of § 922(g)(8); (2) an as-applied constitutional challenge to § 922(g)(8); and (3) a facial challenge to the constitutionality of § 922(g)(8). The government filed a written response on July 25, 2018, arguing: (1) the protective order was sufficient to satisfy § 922(g)(8); (2) Mr. McGinnis's constitutional challenges were untimely; and (3) Mr. McGinnis's constitutional challenges, if timely, were without merit.

On October 16, 2018, the district court issued a written order denying Mr. McGinnis's post-verdict motion for a judgment of acquittal. In doing so, the district court held: (1) the protective order was sufficient to support the jury's verdict on Count Two; (2) the as-applied constitutional challenge was untimely because it deprived the government of an opportunity to properly develop the record; and (3) the facial challenge failed on the merits.

Sentencing

On February 13, 2019, the district court sentenced Mr. McGinnis to 96 months imprisonment on both counts, to run concurrently, and imposed a three-year term of supervised release.

The Appeal and Disposition

Mr. McGinnis's appeal focused on three issues: (1) a facial constitutional challenge to § 922(g)(8); and (2) the sufficiency of the protective order to satisfy the elements of § 922(g)(8); and (3) a portion of the written special conditions of

supervised release that prohibited Mr. McGinnis from entering or traveling by "other places frequented by" Ms. Thrash. The Court of Appeals for the Fifth Circuit rejected Mr. McGinnis's constitutional challenge, applying intermediate scrutiny under the two-step framework it adopted in *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives ("NRA")*, 700 F.3d 185 (5th Cir. 2012). *United States v. McGinnis*, 956 F.3d 747, 758-59 (5th Cir. 2020). The court also believed that its constitutional holding was "supported, if not dictated" by its pre-*Heller* holding in *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001). Finally, the court rejected Mr. McGinnis's sufficiency challenge but remanded for the limited purpose of removing a portion of one of the conditions of supervised release. *McGinnis*, 956 F.3d at 761.

A Call for En Banc Review

A noteworthy aspect of the disposition of this case is that two of the three panel judges joined in a concurring opinion calling for *en banc* review to reconsider the Fifth Circuit's application of a two-step means-end scrutiny analysis for challenges under the Second Amendment. *Id*. at 761-62 (Duncan, J., concurring, joined by Jones, J.) ("I would support *en banc* review in this case or any appropriate future case to reassess our Second Amendment analysis."). A sizable number of other judges on the Fifth Circuit have done so in recent years. *E.g., Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting from denial of rehearing *en banc*, joined by Jones, Smith, Willett, Ho, Duncan, and Engelhart, JJ.).

A Signal to this Court

Ultimately, however, the court declined to review the case *en banc*—despite wide support—perhaps signaling that any change must come from this Court. This case presents a valuable opportunity for this Court to align the analysis of lower courts with *Heller*, *McDonald*, and—most importantly—the text, history, and tradition of the Second Amendment.

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REASONS FOR GRANTING THIS PETITION

I. Courts are in stark disagreement—both externally and internally—about how to consider a challenge to a statute under the Second Amendment. It is necessary for this Court to provide additional guidance.

A. There is an entrenched circuit split over how to approach challenges under the Second Amendment.

This case involves a facial constitutional challenge to 18 U.S.C. § 922(g)(8) under the Second Amendment. The Fifth Circuit, consistent with its precedent, applied a two-step means-end scrutiny framework for approaching such challenges. *United States v. McGinnis*, 956 F.3d 747, 756-57 (5th Cir. 2020). Two other circuits—the Fourth and Tenth—use the same approach in a similar way. *United States v. Chapman*, 666 F.3d 220, 225-30 (4th Cir. 2012); *United States v. Mahin*, 668 F.3d 119, 123-26 (4th Cir. 2012); *United States v. Reese*, 627 F.3d 792, 800-05 (10th Cir. 2010). The Eighth Circuit, however, does not apply means-end scrutiny when evaluating § 922(g)(8). *United States v. Bena*, 664 F.3d 1180, 1182-85 (8th Cir. 2011). In its place, it uses a somewhat amorphous version of what Justice Kavanaugh first proposed in his dissent in *Heller II*. *See Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1269-96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

B. The Fifth Circuit—like other circuits—has been calling for additional guidance, which must come from this Court.

The two judges concurring in the opinion below called for reconsideration of the means-end framework through which courts evaluate challenges under the Second Amendment. *McGinnis*, 956 F.3d at 761-62 (Duncan, J., concurring, joined by Jones, J.). Five other judges on the Fifth Circuit have made similar calls previously.

Mance v. Sessions, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting from denial of rehearing *en banc*, joined by Jones, Smith, Willett, Ho, Duncan, and Engelhart, JJ.). Multiple Justices on this Court have recently expressed frustration with lower courts' misapplication of *Heller* and *McDonald*. *See N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527-44 (2020) (Kavanaugh, J., concurring) (Alito, J., dissenting, joined by Gorsuch, J., joined in part by Thomas, J.). It appears that nothing can change short of this Court granting certiorari and clarifying the important, preserved questions presented by this case.

II. This Court should explicitly adopt a framework for constitutional challenges that focuses on the Second Amendment's text, history, and tradition.

A. A text-history-tradition framework is more consistent with *Heller* and *McDonald* than the two-step means-end scrutiny analysis adopted by the Fifth Circuit and others.

In *Heller*, the Supreme Court adopted an individual-rights theory of the Second Amendment based on its text and role in our country's early history. *Heller*, 554 U.S. 570, 605 (2008). In striking down a ban on handguns in the home, the Court held that the right to keep and bear arms for defense of self and home struck at the core of the Second Amendment. *Id.* at 629-30. The Court reiterated this view two years later in *McDonald v. City of Chicago*, emphasizing that a person's right to bear arms for self-defense is a "fundamental right[] necessary to our system of ordered liberty." 561 U.S. 742, 778 (2010).

While the Court was clear in *Heller* that the Second Amendment was amenable to "longstanding prohibitions" and well-crafted regulations, the Court was equally

clear that any limitations imposed should be consistent with "historical justifications." *See Heller*, 554 U.S. at 626-27, 635. "While courts may be free to 'presume' that many regulations (including those listed) will ultimately be declared lawful, it does not eliminate the need to conduct a careful constitutional analysis." *United States v. Tooley*, 717 F. Supp. 2d 580, 585 (S.D.W. Va. 2010).

Stirred by Supreme Court guidance, courts evaluating Second Amendment challenges since *Heller* have largely taken a two-step approach. Under the first step, courts consider whether the particular restriction burdens conduct that falls within the scope of the Second Amendment. *See NRA*, 700 F.3d at 194-95. Courts, however, disagree over what the second step entails. The majority of circuits, including the Fifth Circuit below, have adopted a means-end scrutiny analysis as the second step. *Id.* at 195 ("If the challenged law burdens conduct that falls outside the Second Amendment's scope, then the law passes constitutional muster … If the law burdens conduct that falls within the Second Amendment's scope, we then proceed to apply the appropriate level of means-ends scrutiny."). Other courts have considered, as the second step, a text-history-tradition analysis described by Justice Kavanaugh in his dissent in *Heller II*. *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1269-96 (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). The text-history-tradition approach is more faithful to *Heller* and *McDonald* and is the approach this Court should adopt.

Heller's gaze was on the Second Amendment's text, history, and tradition. *Heller* suggests that contemplating the full scope of the Second Amendment would require "an exhaustive historical analysis." *Heller*, 554 U.S. at 626. When allowing for firearms regulations, *Heller* identified those which fit within this country's "historical tradition." *Id*. at 627. This approach, according to *Heller*, "accords with the historical understanding of the scope of the right." *Id*. at 625. Such rights, *Heller* continues, "are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or … judges think that scope too broad." *Id*. at 634-35.

If *Heller* were not clear enough, *McDonald* repeatedly emphasizes that questions surrounding the Second Amendment should be pursued historically, including questions surrounding its importance and scope. *See McDonald*, 561 U.S. at 768-78. Justice Alito, who joined the majority in *Heller* and wrote the majority opinion in *McDonald*, recently reflected on *Heller*'s analysis as follows: "We based [the *Heller*] decision on the scope of the right to keep and bear arms as it was understood at the time of the adoption of the Second Amendment." *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1540 (Alito, J., dissenting). The Justice then went on to criticize the New York City travel restriction on this basis: "History provides no support for a restriction of this type." *Id*. at *31. Because the opinion below applied means-end scrutiny rather than conducted a true historical account of the type of restriction imposed by 18 U.S.C. § 922(g)(8), it remains undetermined whether the statute is constitutional under the correct analytical framework.

It is telling enough that *Heller* did not apply any level of means-end scrutiny in its majority opinion. It never examined whether the D.C. restriction was narrowly tailored to serve a compelling state interest, nor whether it was substantially related to an important governmental interest. But more can be gleaned, implicitly, by reading the majority and dissenting opinions in dialogue.

In his dissent in *Heller*, Justice Breyer proposed a Second Amendment balancing test while looking to First Amendment cases, among others. *See Heller*, 554 U.S. at 689-90, 704-05, 714 (Breyer, J., dissenting). It is noteworthy that a primary case upon which Justice Breyer relied was *Turner Broadcasting*, which itself applied a form of intermediate scrutiny. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) ("We begin where the plurality ended in *Turner,* applying the standards for intermediate scrutiny enunciated in *O'Brien*."). Although Justice Breyer did not characterize his proposed test explicitly as a form of means-end scrutiny, the interplay between government interests, its ability to advance those interests, and reasonable alternatives are all present in his proposed test:

> The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative.

Heller, 554 U.S. at 689-90 (Breyer, J., dissenting) (cleaned up).

In response, the *Heller* majority rejected Justice Breyer's "interest-balancing inquiry." *Heller*, 554 U.S. at 634-35. In doing so, the Court asserted that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis which the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. The Court further observed that the Second Amendment "is the very product of an interest balancing by the people" that courts should not "conduct for them anew." *See Heller*, 554 U.S. at 635.

Two years after *Heller*, *McDonald* underscored the centrality of *Heller*'s focus on the Second Amendment's text, history, and tradition. Not only did this Court again reject balancing tests, it went on to explicitly reject the weighing of "costs and benefits of firearms restrictions." *See McDonald*, 561 U.S. at 790-91 ("Finally, Justice Breyer is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion."). This rejection, as Justice Kavanaugh noted in *Heller II*, "is flatly incompatible with a strict or intermediate scrutiny approach to gun regulations." *Heller II*, 670 F.3d at 1278 (Kavanaugh, J., dissenting).

Justice Alito, the author of the majority opinion in *McDonald*, has given more insight recently, when directly criticizing lower courts that have misapplied the guidance of *Heller* and *McDonald*. *See N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at

1544 (Alito, J., dissenting) ("We are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern."). The published opinion below is certainly vulnerable to Justice Alito's critique. This further highlights the importance of this issue—not only in 2008 or 2010, but today.

B. 18 U.S.C. § 922(g)(8) cannot survive the text-history-tradition framework because there is no historical analogue for a protective-order exception to firearms possession.

While the outer contours of the Second Amendment's scope may blur, at its core, the Second Amendment protects an individual's right to possess a firearm (or ammunition) in one's home for purposes of self-defense. *McDonald*, 561 U.S. at 767 ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller,* we held that individual self-defense is 'the *central component*' of the Second Amendment right."); *id*. ("[T]he need for defense of self, family, and property is most acute in the home"). Based on *Heller* and *McDonald*, 18 U.S.C. § 922(g)(8)—which criminalizes the possession of any firearm or ammunition, including in the home—clearly burdens conduct that falls within the scope of the Second Amendment. The Tenth Circuit was correct in this conclusion:

> Applying [the two-step] approach here, there is little doubt that the challenged law, § 922(g)(8), imposes a burden on conduct, i.e., Reese's possession of otherwise legal firearms, that generally falls within the scope of the right guaranteed by the Second Amendment. Thus, we must proceed to the second part of the analysis and "evaluate [§ 922(g)(8)] under some form of means-end scrutiny."

Reese, 627 F.3d at 801 (citing *United States v. Marzzarella* 614 F.3d 85, 89 (3d Cir. 2010)). The operative question then becomes whether there is a textual-historical-traditional precedent for such a restriction.

Heller explained that "presumptively lawful" "longstanding" prohibitions on the right to bear arms were not to be cast in doubt. *Heller*, 554 U.S. at 626-27. Based on such language, in the context of a broader reading of both *Heller* and *McDonald*, Justice Kavanaugh advocated for evaluating challenges to restrictions on gun ownership based solely on the Second Amendment's "text, history, and tradition." *Heller II*, 670 F.3d at 1271-75 (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). Under this text-history-tradition approach, "analysis of whether … gun regulations are permissible must be based on their historical justifications." *Id.* at 1272 (internal quotations omitted). While the Justice cautioned that his approach does not require a precise weapon or restriction to have existed in 1787, 1791, or even 1868, there must, at least, be an analogous corollary. *Id.* at 1275 ("[T]he proper interpretive approach is to reason by analogy from history and tradition."). If this Court were to adopt the text-history-tradition framework, § 922(g)(8) is unconstitutional because there is no historical precedent, in the historical record or by analogy, for disarming protective-order respondents.

First, § 922(g)(8) is a relatively recent invention. It originated with three bills first introduced in 1993 and—after a period of vigorous debate between political

parties, policy groups, and special interests—was signed into law on September 13, 1994. Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L.J. 525, 538-44 (March 2003). And there was nothing like it before in federal law.

Second, protective orders are a modern approach to addressing domestic violence. Although nearly every state and U.S. territory today has enacted a protective-order statute, there were no such statutes before 1970. Melvin Huang, *Keeping Stalkers at Bay in Texas*, 15 Tex. J. on C.L. & C.R. 53, 68 (Fall 2009) ("[P]rotective orders first came into existence in 1970 when the District of Columbia passed its Intrafamily Offenses Act. … Pennsylvania became the first state to authorize orders when it passed its Protection from Abuse Act in 1976. Within four short years, forty-five states implemented similar legislation.").

Third, there is no historical analogy for disarming citizens based on no-contact orders, and thin or conflicting evidence of disarmament for domestic violence. *Skoien*, 614 F.3d at 651 (Sykes, J., dissenting) ("We simply cannot say with any certainty that persons convicted of a domestic-violence misdemeanor are wholly excluded from the Second Amendment right as originally understood."); David B. Kopel & Joseph G. S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis L.J. 193, 244 (Winter 2017) ("[T]here is simply no tradition - from 1791 or 1866 - of prohibiting gun possession (or voting, jury service, or government service) for people convicted of misdemeanors or subject to civil protective orders.").

As a result, under a text-history-tradition framework, disarmament of protective-order respondents is unconstitutional because it is not supported by the

text, history, or tradition of the Second Amendment. Under the proper analysis, § 922(g)(8) cannot survive the demands of *Heller* and *McDonald*.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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