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NO. \_\_\_\_\_

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IN THE

**Supreme Court of the United States**

\_\_\_\_\_ TERM, 20\_\_

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SYLVESTER CUNNINGHAM,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Whether, as the Eighth Circuit held, 18 U.S.C. § 922(g)(1) (which prohibits any felon from possessing firearms) is invariably constitutional as applied to any defendant, no matter the case-specific circumstances?<sup>1</sup>

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<sup>1</sup> A petition for writ of certiorari was filed on the same issue in *Edell Jackson v. United States*, 23-6170.

## **PARTIES TO THE PROCEEDINGS**

The caption contains the names of all parties to the proceedings.

## **DIRECTLY RELATED PROCEEDINGS**

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

*United States v. Cunningham*, 1:20-cr-00104-CJW, (N.D. Iowa) (criminal proceedings) judgment entered December 28, 2021.

*United States v. Cunningham*, 22-1080 (8th Cir.) (direct criminal appeal), judgment entered June 13, 2023.

*United States v. Cunningham*, 22-1080 (8th Cir.) (direct criminal appeal), Order denying petition for rehearing en banc and rehearing by the panel entered August 30, 2023.

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

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Sylvester Cunningham respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

### OPINIONS BELOW

The Eighth Circuit's published opinion in Mr. Cunningham's case is available at 70 F.4th 502 and is reproduced in the appendix to this petition at Pet. App. pp. 83-89.

### JURISDICTION

The Eighth Circuit entered judgment in Mr. Cunningham's case on June 13, 2023, Pet. App. p. 90, and denied Mr. Cunningham's petition for rehearing *en banc* on August 30, 2023. Pet. App. p. 91. This Court granted two extension requests to file a petition for writ of certiorari. This Court has jurisdiction over these cases under 28 U.S.C. § 1254(1).

### RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

#### 18 § 922(g)(1)

(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;

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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.

## U.S. CONST. AMEND. II

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.

### STATEMENT OF THE CASE

#### A. Introduction

Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court has made clear that the Second Amendment presumptively “belongs to all Americans.” In *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), this Court confirmed that the Second Amendment is not a second-class right. *Bruen* held that when analyzing firearm regulations, courts must look to the plain text of the amendment to determine if it protects the regulated conduct. If it does, the regulation is constitutional only if it is “consistent with this Nation’s historical tradition of firearm regulation.” *Bruen*’s holding is an explicit rejection of the “means-end” test employed by most Circuit courts, including the Eighth Circuit. The test in *Bruen* establishes a more stringent burden for firearm regulations than the means-end test.

After *Bruen*, courts across the country have dealt with as-applied Second Amendment challenges to the various subsections of 18 U.S.C. § 922(g). The Eighth Circuit has taken an aggressive approach and preemptively rejected all as-applied Second Amendment challenges to prosecutions under 18 U.S.C. § 922(g)(1). *United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023). Under *Jackson*, it does not matter what felony an individual was convicted of; the government is always justified in prohibiting that individual from possessing firearms, with severe consequences for defying this lifelong disarmament. Oddly, before the more stringent test in *Bruen*,



but after *Heller*, the Eighth Circuit had refused to preemptively reject all as-applied Second Amendment challenges to prosecutions under 18 U.S.C. § 922(g)(1). *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014). The Tenth Circuit also more summarily decided that *Bruen* did not change the analysis and refused to conduct an as-applied analysis under 18 U.S.C. § 922(g)(1). *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023).

The approach taken by the Eighth and Tenth Circuit conflicts with the analysis of other circuit courts. *See Range v. Attorney General*, 69 F.4th 96 (3d Cir. 2023) (en banc). It also conflicts with this Court’s analysis in *Bruen*. This Court should grant the petition for certiorari and address how to analyze as-applied Second Amendment challenges moving forward.

## **B. Proceedings below**

Mr. Cunningham was charged by superseding indictment with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), one count of possession with intent to distribute cocaine base and cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and possession of a firearm during and in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). R. Doc 29.<sup>2</sup> Mr. Cunningham filed a motion to dismiss the felon in possession of a firearm count of the indictment. R. Doc 16. The indictment asserted Mr.

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<sup>2</sup> In this petition, the following abbreviation will be used: “R. Doc.” -- district court clerk’s record, followed by docket entry and page number, where noted.

Cunningham was convicted of the following crimes punishable by imprisonment for a term exceeding one year:

1. Driving under the influence of alcohol, in the Circuit Court for the Fourteenth Judicial Circuit, Henry County, Illinois, on or about April 21, 2005, in case number 04CF160; and
2. Being a prohibited person (felon) in possession of a firearm, in the United States District Court for the Northern District of Iowa, on or about August 16, 2012, in case number 12-CR-00002.

R. Doc. 29.

Mr. Cunningham raised an as-applied challenge to the 18 U.S.C. § 922(g)(1) charge, arguing the prosecution violated his Second Amendment rights. R. Doc. 16. The prosecution resisted, although it acknowledged that (at the time) the Eighth Circuit had left open the possibility of an as-applied challenge to § 922(g)(1). R. Doc. 22. The district court ultimately denied the motion to dismiss. R. Doc. 37, R. Doc. 46; Pet. App'x pp. 1-49; 50-82.

Mr. Cunningham appealed to the Eighth Circuit. As relevant to this petition, he argued that the felon in possession charge violated his Second Amendment rights, as applied to his own conduct. During the briefing process, this Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

In a 2-1 decision, the panel rejected Mr. Cunningham's as-applied challenge. The majority held: "This contention is foreclosed by *United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023), where we concluded that there is no need for felony-by-felony determinations regarding the constitutionality of § 922(g)(1) as applied to a

particular defendant.” *United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023). Judge Stras dissented, indicating that more was to come after the panel’s decision in *Jackson*. *Id.* at 507 (Stras, J., dissenting).

Mr. Cunningham filed a petition for rehearing *en banc*. The Eighth Circuit denied the petition. Pet. App’x p. 91. Four judges voted to grant the petition. Pet. App’x p. 91.

## REASONS FOR GRANTING THE WRIT

### **I. The Eighth Circuit’s ruling rejecting all as-applied Second Amendment challenges is inconsistent with *Bruen*. Courts disagree on how to apply *Bruen* to as-applied challenges to 18 U.S.C. § 922(g)(1).**

*Bruen* provided Courts with a new two-step analysis for firearm regulations. The first step is straightforward: “[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” 142 S. Ct. at 2126. The Court was also clear “that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.” *Id.* at 2134. *Bruen* expanded upon *Heller*, which held that the Second Amendment protected an individual’s right to possess a firearm in their home.

If the Second Amendment’s text covers the conduct, then courts should move on to step two, where the “government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2129-30. The government must provide a “representative historical analogue, not a historical twin.” *Id.* at 2132.

The Eighth Circuit has taken this two-step approach and twisted it to limit the Second Amendment right. Starting with the first step—whether the conduct is covered by the plain text—*Jackson* held that the conduct under 18 U.S.C. § 922(g)(1) is not covered because the Second Amendment only protects law-abiding citizens. Under step two, *Jackson* found the historical-analogue requirement satisfied because (1) Congress has in the past prohibited certain groups from possessing firearms, and, alternatively, (2) Congress has indicated it believes all convicted felons are dangerous and should be prohibited from possessing firearms. The Eighth Circuit’s approach under each step is inconsistent with Supreme Court precedent and the recent *en banc* decision from the Third Circuit. Certiorari is appropriate to address this conflict.

**A. *Bruen*’s “step one” focused on analyzing protected conduct. Instead of analyzing conduct prohibited, the Eighth Circuit held that felons are never subject to Second Amendment protections, in direct disagreement with other circuits.**

First, the Eighth Circuit’s approach to step one is inconsistent with this Court’s precedent. *Bruen* instructed courts to analyze whether the regulated conduct was protected. Instead of analyzing the conduct prohibited—firearm possession—the Eighth Circuit found that the Second Amendment did not protect individuals charged under this statute because felons do not receive Second Amendment protection whatsoever. *Jackson*, 69 F.4th at 501-02. The Circuit relied upon dicta from *Heller*, finding that the Second Amendment only protects “law-abiding citizens.” *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) (noting that the constitutionality of the felon in possession statute was not before the Court in *Heller*).

*Jackson* erred in thinking *Bruen* did not change the analysis for felon in possession challenges. *United States v. Rahimi*, 61 F.4th 443, 450-51 (5th Cir. 2023), *cert. granted*, 143 S.Ct. 2688 (2023) (“*Bruen* clearly ‘fundamentally change[d]’ our analysis of laws that implicate the Second Amendment . . . rendering our prior precedent obsolete.” (internal quotation marks omitted)). The Tenth Circuit has also agreed with this reasoning, finding *Bruen* did not overrule its prior precedent upholding the constitutionality of the felon in possession statute and rejecting the need to do a case-by-case analysis based upon the felony predicates. *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023).

The Third Circuit recently rejected Eighth and Tenth Circuit’s position, creating a circuit split. *Range*, 69 F.4th at 101. Instead, the Third Circuit relied on *Bruen* to find that felons are part of “the people” and retain their Second Amendment rights. *Range*, 69 F.4th at 101. The court noted the vagueness issues with the language “law-abiding, responsible citizens.” *Id.* at 102. “Law abiding” does not explain what types of offenses or conduct would make someone *not* law abiding. *Id.* The Third Circuit acknowledged that the modifier “responsible” causes even more issues: “In our Republic of over 330 million people, Americans have widely divergent ideas about what is required for one to be considered a ‘responsible’ citizen.” *Id.*

Other courts have held that felons fall within the definition of “the people” under the Second Amendment. *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022); *United States v. Carrero*, 635 F. Supp. 3d 1210, 1212 (D. Utah 2022).

The focus should be on whether the regulation covers protected *conduct*. As another district court has succinctly stated:

*Bruen*'s first step asks a strictly textual question with only one answer: the Second Amendment's plain text covers possession of a firearm. Because the Constitution presumptively protects possessing a firearm, § 922(g)(1)'s constitutionality hinges on whether regulations prohibiting felons from possessing a firearm are consistent with the Nation's historical tradition of firearm regulation.

*United States v. Charles*, 633 F. Supp. 3d 874, 877 (W.D. Tex. 2022).

This Court should grant certiorari to address this disagreement.

**B. The Eighth Circuit relied upon a now overturned Third Circuit decision for a flawed analysis on whether there is a “historical analogue” for felon in possession.**

Second, the Eighth Circuit determined a case-by-case analysis of Second Amendment challenges was unnecessary because a “historical analogue” exists for 18 U.S.C. § 922(g)(1). *Jackson*, 69 F.4th at 502-04. The circuit first noted that at the time of the amendment's adoption, status-based prohibitions on firearm possession were common. *Id.* Alternatively, even if “dangerousness” was a requirement for prohibition, the Court believed that history supported treating all felons as dangerous and removing their Second Amendment rights forever. *Id.* at 504-06. The Eighth Circuit relied heavily on the now vacated panel decision in *Range* for this part of its analysis. *Id.*

This analysis is no longer the law of the Third Circuit; the court recognized *en banc* that this analysis was flawed. *Range*, 69 F.4th 104-06. Instead, after taking the case *en banc*, the Third Circuit found that any historical analogues focused on

*violent* criminals. *Id.* The court also noted that holding that status-based prohibitions are valid because, historically, Congress has banned certain groups from possessing firearms is “far too broad.” *Id.* at 105 (internal quotation marks omitted).

This Court should grant certiorari and address whether there is a historical analogue that justifies the disarmament of *all* felons, no matter their prior conviction. Mr. Cunningham asserts there is not. Indeed, “[f]ounding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons.” *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting) (noting “[t]he only evidence coming remotely close [to bans on possession of firearms based on criminality] lies in proposals made in the New Hampshire, Massachusetts, and Pennsylvania ratifying conventions,” and those proposals related to dispossessing those who were “in actual rebellion” or not “peaceful citizens” or potentially “of real danger of public injury”; concluding “[t]he concern common to all three is not about felons in particular or even criminals in general; it is about threatened violence and the risk of public injury”).

**II. Mr. Cunningham’s case is an excellent vehicle to address this frequently occurring issue.**

Mr. Cunningham’s case is a proper vehicle for review of this important question. The issue was preserved with a motion to dismiss at the district court and further raised on appeal before the Eighth Circuit. Mr. Cunningham’s predicate felonies also illustrate the need to address the Eighth Circuit’s complete rejection of all as-applied challenges. His prior felony offenses are nonviolent. R. Doc. 16, Def. Ex A, B. This Court’s precedent establishes that driving under the influence is a

nonviolent offense. *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Further, his prior felon in possession of a firearm conviction is a status-based offense. The possession of a firearm in and of itself is not necessarily violent—if so, it would not make sense for it to be a constitutionally protected activity.

The question of how to analyze as-applied Second Amendment challenges to 18 U.S.C. § 922(g)(1) will not go away. In fiscal year 2022, 8,688 individuals were sentenced for § 922(g) offenses. U.S. Sentencing Commission, *Quick Facts: 18 U.S.C. § 922(g) Offenses*, available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon\\_In\\_Possession\\_FY22.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf). Of those 8,688 sentencings, 87.8% were convicted of felon in possession of a firearm. *Id.* With the frequency of felon in possession prosecutions in federal court, this Court should address the frequently reoccurring issue of how to address Second Amendment challenges to § 922(g)(1).



## CONCLUSION

For the reasons stated herein, Mr. Cunningham respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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