NO. ______

IN THE

# Supreme Court of the United States

_________ TERM, 20__

AARON CHRISTOPHER LINDSEY,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

**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 both facially and as applied to any defendant, no matter the case-specific circumstances?

## 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 Southern District of Iowa and the United States Court of Appeals for the Eighth Circuit:

*United States v. Lindsey,* 4:22-cr-00138-001, (S.D. Iowa) (criminal proceedings) judgment entered August 1, 2023.

*United States v. Lindsey,* 23-2871 (8th Cir.) (direct criminal appeal), judgment entered May 16, 2024.

*Lindsey v. United States,* 24-5328 (Supreme Court) (direct criminal appeal), judgment entered November 4, 2024.

*United States v. Lindsey,* 23-2871 (8th Cir.) (direct criminal appeal), judgment entered December 16, 2024.

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 Aaron Lindsey 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The Eighth Circuit's unpublished opinion in Mr. Lindsey's case is available at 2024 WL 5114599 and is reproduced in the appendix to this petition at Pet. App. p. 18.

## JURISDICTION

The Eighth Circuit entered judgment in Mr. Lindsey's case on December 16, 2024. Pet. App. p. 16. This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

18 U.S.C. § 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;
> >
> > ***
> >
> > 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 v. Bruen*, 142 S. Ct. 2111 (2022), the 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."

After *Bruen*, courts across the country have dealt with Second Amendment challenges to the various subsections of 18 U.S.C. § 922(g). Initially, the Eighth Circuit took an aggressive approach and preemptively rejected all Second Amendment challenges, both facial and as applied, to prosecutions under 18 U.S.C. § 922(g)(1). *United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023) (*Jackson I*).

Soon thereafter, this Court decided *United States v. Rahimi*, 144 S. Ct. 1889 (2024). In the aftermath, the Court granted, vacated, and remanded multiple Eighth Circuit cases involving Second Amendment challenges to § 922(g)(1), including *Jackson I*. Three days after *Jackson I* was reopened at the Eighth Circuit, the court issued an opinion, without requesting supplemental briefing or arguments. *United States v. Jackson*, 110 F.4th 1120 (8th Cir. 2024) (hereinafter *Jackson II*). The circuit

reaffirmed its prior holding, finding *Rahimi* did not change the analysis. The court found the "law abiding citizen" language from *Heller* was sufficient to reject all Second Amendment challenges to § 922(g)(1) prosecutions, and *Rahimi* did not change that.

Since *Rahimi*, the Eleventh Circuit and Fourth Circuits have joined the Eighth Circuit in continuing to reject all Second Amendment challenges, including as-applied challenges, to § 922(g)(1). *United States v. Dial*, No. 24-10732, 2024 WL 5103431 (11th Cir. Dec. 13, 2024); *United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024). However, the Third, Fifth, and Sixth Circuits will evaluate whether a prosecution for felon in possession violates a defendant's Second Amendment rights as applied to them. *United States v. Moore*, 111 F.4th 266 (3d Cir. 2024); *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024); *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024).

More guidance is necessary from this Court on how to address Second Amendment challenges to 18 U.S.C. § 922(g)(1). This Court should grant the petition to address the circuit split and ensure that lower courts are interpreting Second Amendment challenges consistent with *Bruen* and *Rahimi*

**B. Proceedings below**

On September 22, 2022, Mr. Lindsey was indicted on one count of false statements to a financial institution, in violation of 18 U.S.C. § 1014, one count of possession of device-making equipment, in violation of 18 U.S.C. §§ 1029(a)(4) &

1029(c)(1)(A)(ii), and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). R. Doc. 2.

Mr. Lindsey filed a motion to dismiss his felon in possession of a firearm charge based upon *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). R. Doc. 23. He asserted that 18 U.S.C. § 922(g)(1) was facially unconstitutional, and alternatively unconstitutional as applied to him specifically. R. Doc. 23-1. The prosecution resisted, arguing that "*Bruen* certainly did not disturb the [Supreme] Court's previous language regarding prohibitions on firearm possession by felons." R. Doc. 24.

The district court denied the motion. R. Doc. 25; Pet. App. pp. 1-7. First, the court rejected Mr. Lindsey's facial challenge to the statute. R. Doc. 25; Pet. App. p. 6. The court agreed with the prosecution's argument that *Bruen* did not reject the Supreme Court's statement in *Heller* that the Court was not disturbing "longstanding prohibitions" on the possession of firearms by felons. R. Doc. 25; Pet. App. p. 6.

Next, the court rejected Mr. Lindsey's as-applied challenge, for similar reasons. R. Doc 25; Pet. App. p. 7. The court noted that multiple other courts had rejected as applied challenges, even if the predicate felony is nonviolent. R. Doc. 25; Pet. App. p. 7. Finally, the court noted that forgery was historically treated as a serious offense, including being treated as a capital crime. R. Doc. 25; Pet. App. pp. 6-7.

After the denial of his motion to dismiss, Mr. Lindsey entered a conditional guilty plea to one count of possession of device-making equipment and one count of

possession of a firearm as a felon. R. Doc. 29. As part of the plea, Mr. Lindsey preserved the ability to challenge the denial of his motion to dismiss on appeal. R. Doc. 29.

The case proceeded to sentencing. The presentence investigation report ("PSR") applied the firearm Guideline, USSG §2K2.1, as this resulted in a higher guideline range than the false statement to a financial institution Guideline, USSG §2B1.1. PSR pp. 9-10. Under the firearm Guideline, Mr. Lindsey's advisory Guideline range was 41-51 months of imprisonment, based upon a total offense level of 21 and a criminal history category of II. PSR ¶ 121. If sentenced under the false statement Guideline, Mr. Lindsey's advisory Guideline range would be 15 to 21 months of imprisonment, based upon a total offense level of 15 and criminal history category of II. PSR pp. 9-10.

At sentencing, the parties did not dispute the advisory Guideline range of 41 to 51 months of imprisonment. Sent. Tr. pp. 5-6. Ultimately, the district court sentenced Mr. Lindsey to 48 months of imprisonment on each count, to be run concurrently to one another. Sent. Tr. p. 20. The district court did not make any statements indicating that Mr. Lindsey's sentence would be the same if the firearm count was vacated or if Mr. Lindsey was sentenced solely under the false statement Guideline. The court did acknowledge that the firearm Guideline is what ultimately drove Lindsey's sentence: "So what I'm faced with here is a gun charge that completely eclipses a serious fraud charge. The fraud charge really adds nothing to

the sentencing guidelines here. It's entirely eaten up by the gun charges." Sent. Tr. p. 20.

Mr. Lindsey appealed to the Eighth Circuit. He raised his Second Amendment challenge. He argued that the felon in possession statute was both facially unconstitutional and also that the prosecution violated his Second Amendment rights, as applied to his own conduct.

The panel rejected Mr. Lindsey's facial and as-applied challenge. *United States v. Lindsey*, No. 23-2871, 2024 WL 2207445 (8th Cir. May 16, 2024). The panel determined that Mr. Lindsey's facial and as applied challenges were foreclosed by the Court's prior decisions, most notably *Jackson I*.

After the Eighth Circuit denied Mr. Lindsey's appeal, this Court decided *United States v. Rahimi*, 144 S. Ct. 1889 (2024). In *Rahimi*, this Court held that (1) *Bruen* indeed set forth a new methodology for Second Amendment analysis that lower courts must follow, and (2) *Rahimi* "clarified" that methodology. *See* 144 S. Ct. at 1898 (Roberts, C.J., writing for the majority) ("As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance stuck by the founding generation to modern circumstances.'") (internal citations to *Bruen* omitted; emphasis added).

After *Rahimi*, this Court granted the pending petitions in *Jackson I* and related cases, vacated the decisions, and remanded to the Eighth Circuit for reconsideration. The mandate was issued and the case reopened in *Jackson* on August 5, 2024. Within three days, the original panel in *Jackson* reissued their decision. *United States v. Jackson*, 110 F.4th 1120 (8th Cir. 2024) (hereinafter *Jackson II*). The panel did not request supplemental briefing or argument before issuing the opinion.

*Jackson II* held that *Rahimi* did not alter its prior holding preemptively rejecting any and all as-applied challenges to 18 U.S.C. § 922(g)(1). *Id.* at 1129. The panel pointed to *Heller*, where this Court stated that nothing "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* (internal quotation marks omitted). The Eighth Circuit did not point to any specific historical analogues that were consistent with § 922(g)(1), but instead vaguely discussed the disarmament of individuals who were "dangerous" or not "law abiding." *Id.*

Mr. Lindsey filed a petition for writ of certiorari to this Court. This Court granted, vacated, and remanded for further consideration by the Eighth Circuit after *Rahimi*, as the Eighth Circuit had decided his case pre-*Rahimi*. Pet. App. p. 15.

The Eighth Circuit reopened Mr. Lindsey's appeal. Shortly thereafter, the Eighth Circuit summarily affirmed. *United States v. Lindsey*, 23-2871, 2024 WL

5114599 (8th Cir. 2024); Pet. App. pp. 18-19. The court noted it held in *Jackson II* that *Rahimi* did not change its analysis. Pet. App. p. 19.

## REASONS FOR GRANTING THE WRIT

### I. The Eighth Circuit's ruling rejecting all Second Amendment challenges is inconsistent with *Bruen* and *Rahimi*.

*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 II* 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 II* 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. Further, the Eighth Circuit did not engage in the "how" analysis—specifically whether these historical analogues also allowed for lifetime disarmament. The Eighth Circuit's approach under each step is inconsistent with Supreme Court precedent. Certiorari is appropriate to address this conflict.

### A. ***Bruen's*** "step one" focused on analyzing protected conduct. ***Rahimi*** rejected relying on dicta referencing "responsible" citizens as justification for limiting the scope of the Second Amendment. The Eighth Circuit's analysis is inconsistent with these decisions.

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 II*, 110 F.4th at 1125-29. The Circuit relied upon dicta from *Heller*, finding that the Second Amendment only protects "law-abiding citizens." *See 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*).

*Rahimi* specifically rejected that those with prior felony convictions are not among "the people" protected by the Second Amendment and that the Second Amendment somehow allows Congress to disarm anyone who it deems not "responsible" and "law-abiding." In *Rahimi*, the government argued that § 922(g)(8)(C)(i) passed constitutional scrutiny because the Second Amendment "protects only law-abiding, responsible citizens." Gov't Br. 12, *United States v. Rahimi*, No. 22-915 (U.S. Aug. 14, 2023). In doing so, the government cited several references to the phrase "law-abiding, responsible citizens" in *Heller* and *Bruen*, claiming that the Supreme Court's "precedents recognize that Congress may disarm persons who are not law-abiding, responsible citizens." *Id.* at 12.

This Court rejected that argument. *Rahimi*, 144 S. Ct. at 1903 (citing page 6 of the government's brief, which asserted: "As this Court recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and reiterated in *NYSRPA v. Bruen*, 142 S. Ct. 2111 (2022), the Second Amendment allows Congress to disarm persons who are not law-abiding, responsible citizens.").[1] In doing so, the Court made clear that drawing such broad, amorphous categories was inappropriate under Second Amendment analysis. Indeed, the Court explained, the term "responsible" is a "vague term," and it is "unclear what such a rule would entail." *Id.*

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[1] *See also id.* at 1944 (Thomas, J., dissenting) ("The Government … argues that the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding.' Not a single Member of the Court adopts the Government's theory.").

Not only did this Court reject the Eighth Circuit's holding of mass-divestment for broad and ill-defined categories of people it perceives as not "responsible citizens," the Court also rejected the premise that *Heller* supported such a theory. In *Rahimi*, the Court explicitly stated that the government's argument did not "derive from [its] case law." *Rahimi*, 144 S. Ct. at 1903. It noted that *Heller* and *Bruen* used the term "responsible" to "describe the class of ordinary citizens who undoubtedly enjoy the right," but neither decision purported to establish a limit on Second Amendment protection through that reference. *Id.*; *see also id.* at 1944 (Thomas, J., dissenting) ("The Government's claim that the Court already held the Second Amendment protects only 'law-abiding, responsible citizens' is specious at best.").

True, *Rahimi* did not specifically address the "law-abiding" adjective. But both "responsible" and "law-abiding" derive from the same source: *Heller*'s and *Bruen*'s use of those words to describe the challengers in those cases. And just as the "responsible" question "was simply not presented" in *Heller* or *Bruen*, those cases did not address the "law-abiding" question either. *Rahimi*, 144 S. Ct. at 1903.

Indeed, Justice Thomas made that clear in a portion of his dissent—not disputed by the majority—where he explained:

> The Government, for its part, tries to rewrite the Second Amendment to salvage its case. It argues that the Second Amendment allows Congress to disarm anyone who is not 'responsible' *and 'law-abiding.' Not a single Member of the Court adopts the Government's theory.* Indeed, the Court disposes of it in half a page—and for good reason. *Ante*, at ___. The Government's argument lacks any basis in our precedents and would eviscerate the Second Amendment altogether.

> The Government's position is a bald attempt to refashion this Court's doctrine. ... The Government's claim that the Court already held [in *Heller* and *Bruen*] the Second Amendment protects only '*law-abiding*, responsible citizens' is specious at best. ...
>
> [T]he Government's '*law-abiding*, dangerous citizen' test—and indeed any similar, principle-based approach—would hollow out the Second Amendment of any substance.

*Id*. at 1944 (emphasis added). As thus confirmed, and importantly for this case, *Rahimi* puts the "law-abiding, responsible citizen" principle expressly followed by *Jackson I* & *II*, to rest once and for all.

Although in one instance toward the end of the *Rahimi* majority opinion, Chief Justice Roberts acknowledged the "presumptively lawful" dicta in *Heller* (followed in *Jackson*), consideration of the full statement and context are crucial to assess the significance of this single reference. The Chief Justice stated:

> Rahimi argues *Heller* requires us to affirm, because Section 922(g)(8) bars individuals subject to restraining orders from possessing guns in the home, and in *Heller* we invalidated an 'absolute prohibition on handguns ... in the home.' 554 U.S., at 636; Brief for Respondent at 32. But *Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home. In fact, our opinion stated that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.' 554 U. S., at 626, 627, n. 26. Op. 15.

Here, the Court was simply saying that Mr. Rahimi had over-read *Heller*, which on its own terms did not support his position that all gun bans in the home are unconstitutional. The Court was *not* independently endorsing the idea that felon-disarmament bans are lawful; it was simply noting that *Heller* did not support Rahimi's position. Indeed, the *Rahimi* Court thereafter confirmed that, as in *Heller*

and *Bruen*, it was "not 'undertak[ing] an exhaustive historical analysis ... of the full scope of the Second Amendment,'" and was "only" holding that people who pose a credible threat to others may be disarmed. 144 S. Ct. 1903.

These statements and others in the decision preclude reading the *Rahimi* majority's single, passing reference to footnote 26 in *Heller* as a "holding" about the constitutionality of § 922(g)(1). It was not. *See also Rahimi*, *id.* at 1902 (making clear that the Court was expressly declining to decide whether categorical bans like § 922(g)(1), referenced in *Heller*, were actually lawful); *id.* at 1910 (Gorsuch, J., concurring) ("Nor do we purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, 'not "responsible."' ... Not a single Member of the Court adopts the Government's theory.")

Thus, *Rahimi* confirms that the Court meant what it said when it declared that the Second Amendment right "belongs to all Americans." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). Contrary to Eighth Circuit's repeated refrain in defense of § 922(g)(1), all Americans (including those with a prior felony conviction) are among "the people" presumptively protected by the Second Amendment. Still, courts will continue to rely on this "law abiding" language until this Court conclusively states otherwise. Certiorari is necessary to address this issue.

### B. The Eighth Circuit's "historical analogue" analysis for felon in possession is inconsistent with *Bruen* and *Rahimi*.

The Eighth Circuit's approach under step two is also inconsistent with this Court's precedent. Under *Bruen* and *Rahimi*, to justify a firearm law infringing on otherwise protected conduct, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. "A court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances." *Rahimi*, 144 S. Ct. at 1898 (cleaned up). Notably, the "central considerations" in a "relevantly similar" inquiry are what *Bruen* called the "*how* and *why:*" "whether modern and historical regulations impose a *comparable burden* on the right of armed self-defense and whether that burden is *comparably justified*." *Bruen*, 597 U.S. at 29 (emphasis added).

*Jackson II* does not point to any specific laws that it considers "relevantly similar" to the felon in possession prohibition, but instead only relied on generalities. Yet in applying *Bruen*, *Rahim*i made clear that Second Amendment challenges mandate detailed historical analysis applied to a specific law, not sweeping generalities. With respect to § 922(g)(8)(C)(i), examined in *Rahimi*, the Court ultimately concluded that surety laws and "going armed" laws sufficiently established a tradition of temporarily disarming someone found by a court to pose a credible threat to the physical safety of others (just like § 922(g)(8)(C)(i) does today). Notably,

surety laws—like § 922(g)(8)(C)(i)—mitigated "demonstrated threats of physical violence" and were temporary. *Rahimi*, 144 S. Ct. at 1901.

In stark contrast, § 922(g)(1) contains no requirement that a judge find that someone poses a threat, and the statute permanently disarms people on the basis of a prior conviction alone. Additionally, like domestic violence restraining orders today, the surety regime was "individualized," *id*. at 1899, while § 922(g)(1) is categorical. So-called "going armed" laws—again, like § 922(g)(8)(C)(i)—were similarly limited in scope, disarming people based on individualized determinations that they threatened public safety rather than overly broad categorical bans. *Id*. at 1902. Moreover, a person subject to a surety bond received "significant procedural protections" and "could obtain an exception if he needed his arms for self-defense." *Id*. at 1900. "Many postfounding going armed laws" incorporated similar exceptions. *See id*. at 1942 (Thomas, J., dissenting). Not so for someone disarmed under § 922(g)(1). *See Logan v. United States*, 552 U.S. 23, 28 n.1 (2007) (explaining that the provision for restoring firearm rights, 18 U.S.C.§ 925(c), has been "rendered inoperative" by lack of funding). Thus, the government successfully came forward with highly specific founding-era regulations that justified the narrowly tailored and temporary firearm restriction found in § 922(g)(8)(C)(i). That regulation is lacking in the § 922(g)(1) analysis.

The Eighth Circuit instead continues to rely on vague discussions of statutes disarming dangerous individuals. As Justice Barrett rightly pointed out, interpreting historical principles "at such a high level of generality ... waters down

the right. ... The Court settle[d] on just the right level of generality," by holding "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." *Id.* at 1926 (Barrett, J., concurring, citing the majority decision, *id.* at 1896).

And indeed, in finding surety statutes to be "comparably justified" in *Rahimi*, the Court emphasized "importantly for this case," those laws *"targeted the misuse of firearms." Id.* at 1900 (emphasis added). And that was also true for the "going-armed" laws, which "provided a mechanism for punishing those who had menaced others with firearms." *Id.* at 1900-01. In other words, both early legal regimes criminalized specific—and serious—misconduct with a gun. Section 922(g)(1), by contrast, bans a category of people from possessing firearms whether or not they have "terrif[ied] the good people of the land," *id.*, or in fact, whether they have ever used or misused a gun. Therefore, laws that did not specifically target the misuse of firearms or gun violence, are not "comparably justified" analogues for § 922(g)(1).

Most importantly, the Eighth Circuit's post-*Rahimi* decision still fails to address the "how" question—specifically, if these analogous provisions allowed for lifetime disarmament as § 922(g)(1) does. In the "how" analysis in *Rahimi*, the Court highlighted specific features of § 922(g)(8)(C)(i) that strictly limited its scope and its ban's duration and thereby rendered it constitutional. As the Court observed, § 922(g)(8)(C)(i) restricts gun possession only if a restraining order "includes a finding that [a] person represents a credible threat to the physical safety of [an] intimate

partner or child." In other words, the statute "restricts gun use to mitigate demonstrated threats of physical violence" and applies only once a court has made an individualized finding that such a threat exists. *Rahimi*, 144 S. Ct. at 1901.

By contrast, § 922(g)(1) is a categorical ban that prohibits everyone convicted of a crime punishable by more than a year in prison from possessing a gun—without any individualized finding. And, critically, the Court also emphasized that § 922(g)(8)'s restriction is "temporary." *Id*. That is, the statute "only prohibits firearm possession so long as the defendant is subject to a restraining order." *Id*. (cleaned up). Section 922(g)(1), however, imposes a "permanent, life-long prohibition on possessing firearms." *Id*. at 1931 (Thomas, J., dissenting).

In short, the Supreme Court confirmed in *Rahimi* that *both* a comparable burden *and* a comparable justification are required in a "relevantly similar" analysis; a comparable justification alone does *not* suffice. Still, the Eighth Circuit is not conducting this portion of the analysis. Certiorari is necessary to address the proper approach.

## II. Courts are split on whether as-applied Second Amendment challenges to Section 922(g)(1) are cognizable.

### A. The Third, Fifth, and Sixth Circuits will address as-applied challenges to felon in possession prosecutions.

The Third, Fifth, and Sixth Circuits have each considered as-applied challenges to § 922(g)(1) after *Rahimi*, and confirmed that such challenges are indeed

cognizable, even while rejecting such challenges based on the defendant's individual circumstances.

In *United States v. Moore*, 111 F.4th 266 (3d Cir. 2024), *reh'g en banc denied* Oct. 9, 2024 (No. 23-1843), the Third Circuit entertained but rejected an as-applied challenge to § 922(g)(1) for a defendant on supervised release. The court cited *Rahimi* in holding that a 1790 Pennsylvania law disarming a convict while he served his criminal sentence "is sufficiently analogous to § 922(g)(1) as applied to convicts on supervised release." 111 F.4th at 270, 273.

In *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), the Fifth Circuit likewise entertained an as-applied challenge after *Rahimi*. As a threshold matter, the Fifth Circuit agreed with Diaz that his challenge based on the fact that his only priors were for car theft, evading arrest, and possession of a firearm as a felon was not barred by pre-*Bruen* circuit precedent, because *Bruen* established a new historical paradigm for analyzing Second Amendment claims, which made the circuit's pre-*Bruen* precedents obsolete. *Id.* at 467-71. And notably, the Fifth Circuit made a point to state that "especially after *Rahimi*," it "respectfully disagree[ed]" with relying on the "felons and mentally ill" language in *Heller* to uphold § 922(g)(1). *Diaz*, 116 F.4th at 466 n.2; *see also id.* at 466 ("Without precedent that conduct's *Bruen*'s historical inquiry into our Nation's tradition of regulating firearm possession by felons in particular, we must do so ourselves"). After conducting that historical inquiry for *Bruen* Step Two for the first time in the circuit, the Fifth Circuit found that § 922(g)(1)

was indeed constitutional as applied to Diaz because of his prior conviction for car theft. Although the Fifth Circuit was clear that the mere fact that Diaz was a felon was *not* itself enough, *id.* at 469, the court found that "[t]aken together," historical "laws authorizing severe punishments for thievery and permanent disarmament in other cases establish that our tradition of firearm regulation supports application of § 922(g)(1) to Diaz." *Id.* at 471.

In *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024), the Sixth Circuit also entertained an as-applied challenge based on the specifics of the defendant's record. Although it reasoned consistently with the Fifth Circuit on several points, its *Bruen* Step Two approach was markedly different. Specifically, after conducting its "historical study," the Sixth Circuit concluded that history confirmed "legislatures may disarm groups of people, like felons, whom the legislature believes to be dangerous—so long as each member of that disarmed group has an opportunity to make an individualized showing that he himself is not actually dangerous." *Id.* at 663. Setting "dangerousness" as the determinant of whether § 922(g)(1) is unconstitutional as applied to a particular defendant, the Sixth Circuit held that at *Bruen* Step Two it is the defendant who bears the burden of demonstrating that in light of his "specific characteristics"—namely, his entire criminal record—he is not dangerous. *Id.* at 657-78, 659-63. And given Williams' priors for aggravated robbery, attempted murder, and for "stashing a pistol that was used to murder a police officer,"

the Sixth Circuit had "little trouble concluding that Williams is a dangerous felon," whom the government could constitutionally disarm for life. *Id.* at 662-63.

Thereafter, in *United States v. Goins*, 118 F.4th 794 (6th Cir. 2024), the Sixth Circuit continued to follow the "totality of facts" "dangerousness" standard set in *Williams*, even for a defendant who possessed a gun while on state probation for driving under the influence. Differing from the Third Circuit in *Moore* by acknowledging that history "may not support disarmament of any criminal defendant under any criminal justice sentence in all circumstances," 118 F.4th at 804, the Sixth Circuit nonetheless concluded that temporary disarmament of Mr. Goins while on probation did not violate the Second Amendment because he had four "prior convictions for the same dangerous conduct" which "evince[d] a likelihood of future dangerous conduct." *Id.* *See id.* at 804-05 (noting that Goins was charged with five DUIs, and convicted of four, during an 8-year period; in one incident, his actions caused an accident requiring him to be transported to the hospital; and in the same 8-year period he was twice convicted of public intoxication and twice convicted of driving on a suspended license; all in all, his record revealed "a dangerous pattern of misuse of alcohol and motor vehicles, often together," and "his actions, including causing a motor vehicle accident pose a danger to public safety").

### B. The Eleventh and Fourth have joined the Eighth Circuit in preemptively rejecting all as-applied challenges.

By contrast to the case-by-case, offender-specific approach of these three circuits, the Eleventh and Fourth Circuits, like the Eighth Circuit, have categorically

barred all Second Amendment challenges by all offenders to a § 922(g)(1) conviction. As noted *supra*, the Eighth Circuit has rejected all Second Amendment challenges post-*Rahimi* in *Jackson II*. Similarly, the Eleventh Circuit has held that *Rahimi* did not change its previous case law rejecting all as-applied Second Amendment challenges to § 922(g)(1). *United States v. Dial*, No. 24-10732, 2024 WL 5103431 (11th Cir. Dec. 13, 2024). The Fourth Circuit recently agreed, repeatedly citing *Jackson II* to hold that Second Amendment as-applied challenges to § 922(g)(1) were not cognizable. *United States v. Hunt*, 123 F.4th 697, 705-08 (4th Cir. 2024).

The split continues on how to address Second Amendment challenges, even post-*Rahimi*. This Court should grant certiorari to address this split.

## III. Mr. Lindsey's case is an excellent vehicle to address this frequently occurring issue.

Mr. Lindsey'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. Lindsey's predicate felonies also illustrate the need to address the Eighth Circuit's complete rejection of all as-applied challenges. Mr. Lindsey's adult felonies are nonviolent. His criminal history, prior to the instant offense, includes adult felony convictions for forgery. PSR ¶¶ 61, 63. These felonies do not suggest that Mr. Lindsey would have been subject to lifetime disarmament at the time of the adoption of the Second Amendment

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. 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. Lindsey respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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