NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEVEON JAMEAR SMITH,

Petitioner

vs.

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 A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Charge of Unlawful User of or Addicted to Any Controlled Substance in Possession of a Firearm in Violation of 18 U.S.C. § 922(g)(3) is Facially a Violation of the Second Amendment of the United States Constitution.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

United States v. Deveon Jamear Smith, United States District Court for the Southern District of Iowa, # 4:22-cr-00127 (judgment entered November 16, 2023).

United States v. Deveon Jamear Smith, United States Court of Appeals for the Eighth Circuit, No. 23-3570, 2025 WL 25946, 2025 U.S. App. LEXIS 58*, (Filed January 3, 2025) .

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TABLE OF AUTHORITIES

E. Other Authority

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

The Petitioner, Deveon Jamear Smith, respectfully petitions for a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Eighth Circuit in *United States v. Smith*, Case No. 23-3570.

OPINION BELOW

The opinion of the Court of Appeals appears at Appendix Pages C-1 through C-3 and is reported as *United States v. Smith*, No. 23-3570, 2025 WL 25946, 2025 U.S. App. LEXIS 58 (8th Cir. 2025) .

JURISDICTION

The date on which the United States Court of Appeals decided the case was on January 3, 2025.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and is timely under Rule of Supreme Court 13(1 & 3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

18 U.S.C. § 922(g)(3)

> (g) It shall be unlawful for any person—
>
> …

> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802));
>
> …
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

On August 13, 2022, a traffic stop was conducted in Altoona, Iowa. Deveon Smith was in the backseat on the passenger side. Three other people were in the car. *United States v. Smith*, No. 4:22-cr-127 (S.D. IA), Presentence Investigation Report ("PSIR") Doc. 48, page 5. Under the front passenger seat officers located a baggie of marijuana, as well as a Glock, model 19X, nine-millimeter pistol. Mr. Smith admitted to police that the marijuana and the gun were his. *Id.*. He also admitted that he did smoke marijuana and had smoked earlier that day. *Id.* This incident led to the charges in this case. See, *Id.*, Indictment, Doc. 4, page 1.

Two other incidents were found to be relevant conduct in this case. On November 9, 2022, a Minnesota State Trooper stopped a car on a freeway in the Twin Cities. Mr. Smith was the sole occupant and driver. Troopers could smell marijuana and observed a rolled blunt inside the car. *Id.*, PSIR, Doc. 48, page 6. Mr. Smith got out of the car and ran across the freeway. He was not captured at that time. *Id.* Inside of the car was a stolen nine-millimeter pistol and approximately two ounces of marijuana. *Id.*

On March 24, 2023 a car was stopped on Interstate I-235 in Des Moines, Iowa for speeding. Mr. Smith was in the backseat. A search of the vehicle found a Taurus pistol under the seat where Mr. Smith had been sitting. There was also a backpack on the front area floorboard containing marijuana. *Id.,* Doc. 48, page 7. Officers could smell marijuana coming from the vehicle. *Id.*, Doc. 48, page 6. Mr. Smith again ran across the freeway and escaped. *Id.*, Doc. 48, page 7. Mr. Smith was arrested three days latter, on March 27, 2023, on the Federal warrant in this case. *Id.*

A motion to dismiss the indictment was filed on June 1, 2023. *Id.*, Motion to Dismiss Indictment, Doc. 31. The motion was based on a facial challenge under the Second Amendment. *Id.* The District Court denied the motion on June 20, 2023. *Id.*, Order Denying Defendant's Motion to Dismiss Indictment, Doc. 33, Appendix, pages A-1 through A-3. The Court found, that Section 922(g)(3) "implicates conduct protected by the Second Amendment" but found that the section was "consistent with this Nation's historical tradition of firearm regulation." *Id.*, Appendix page A-2.

The parties reached a plea agreement in this case. As part of the agreement the parties stipulated:

> (a) On August 13, 2022, Defendant was a passenger in a car that was stopped by law enforcement in the Southern District of Iowa.
>
> (b) The occupants were removed from the car. Under the front passenger seat, but toward the back and directly in front of where Defendant had been seated, law enforcement located a baggie

> containing approximately 22 grams of marijuana and a Glock, Model 19x, nine-millimeter pistol, with serial number BPNN548. The pistol was loaded with 17 rounds of ammunition. Law enforcement also found a digital scale on directly behind the front seat, where Defendant had been seated. Defendant knowingly possessed the aforementioned pistol.
>
> (c) On August 13, 2022 , Defendant was also an unlawful user of marijuana, to include smoking marijuana on August 13, 2022.
>
> (d) The Glock, Model 19x, nine -millimeter pistol, with serial number BPNN548 was not manufactured in the state of Iowa. Thus, it necessarily crossed a state line before Defendant possessed it.

Id., Plea Agreement, Doc. 37, pages 2-3 .

The agreement also provided:

> 26. Limited Waiver of Appeal and Post-Conviction Review. Defendant knowingly and expressly waives any and all rights to appeal Defendant's conviction in this case, including a waiver of all motions, defenses and objections which Defendant could assert to the charge(s) or to the Court's entry of judgment against Defendant; except that both Defendant and the Government preserve the right to appeal any sentence imposed by the Court, to the extent that an appeal is authorized by law, *and pursuant to Federal Rule of Criminal Procedure 11(a)(2), Defendant preserves the right to appeal the Court's denial of Defendant's Motion to Dismiss, entered on June 20, 2023 (Court's Docket No. 33).* Also, Defendant knowingly and expressly waives any and all rights to contest Defendant's conviction and sentence in any post-conviction proceedings, including any proceedings under 28 U.S.C. § 2255. These waivers are full and complete, except that they do not extend to the right to appeal or seek post-conviction relief based on grounds of ineffective assistance of counsel or prosecutorial misconduct.

Id., pages 9-10 (emphasis added and footnote omitted). The Agreement provided that should Mr. Smith prevail on appeal, he would be permitted to withdraw his plea of guilty. *Id.*, page 10, footnote 1. The District Court in a text order agreed to the joint request to preserve Mr. Smith's right to appeal the denial of the motion to

dismiss. *Id.*, Doc. 54.

On appeal the Eighth Circuit affirmed. Pet. App., page A-1. In a *per curiam* opinion, the panel found that a facial attack to the statute under the Second Amendment was foreclosed by the Circuit's opinion in *United States v. Veasley*, 98 F.4th 906, 918 (8th Cir. 2024).

REASONS FOR GRANTING THE WRIT

The Eighth Circuit in *Vesey* held that the Second Amendment allowed for as applied challenges to the user in possession of a firearm statute, but not facial challenges:

> A facial challenge, the only type still available to Veasley, goes further. As the Supreme Court has explained, "[a] facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications," regardless of the individual circumstances. *Bucklew v. Precythe,* 587 U.S. 119, 138 (2019) (emphasis added). The stakes are higher in a facial challenge, so the bar goes up as well: there must be, as Veasley acknowledges, "no set of circumstances . . . under which [§ 922(g)(3)] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); see *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (noting that "a facial challenge must fail where the statute has a plainly legitimate sweep (citation omitted)). If some applications are constitutional, then facially speaking, the statute is too. See, e.g., *United States v. Stephens*, 594 F.3d 1033, 1038 (8th Cir. 2010) (holding that a defendant's "facial challenge . . . fails because . . . [o]ne can imagine many defendants [to] whom" the statute could constitutionally apply); *Antonyuk v. Chiumento*, 89 F.4th 271, 314 (2d Cir. 2023) (rejecting a facial *Bruen* challenge to a licensing scheme requiring good moral character because "[t]here are applications of the character provision that would be constitutional").
>
> These differences have practical consequences. An as-applied challenge would focus only on Veasley: is applying "the regulation" to his conduct "[in]consistent with this Nation's historical tradition of firearm

> regulation"? *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). To counter a facial challenge, by contrast, all the government must do is identify constitutional applications—even if they are unrelated to Veasley's conduct—using the same text-and-historical-understanding framework. See *id.* at 33-34; *United States v. Raines*, 362 U.S. 17, 22 (1960) (cautioning courts not to "pronounc[e] an Act of Congress unconstitutional" when constitutional applications exist).
>
> In effect, Veasley is speaking for a range of people. On its face, § 922(g)(3) applies to everyone from the frail and elderly grandmother to regular users of a drug like PCP, which can induce violence. See *United States v. Daniels*, 77 F.4th 337, 355 (5th Cir. 2023) (concluding that a marijuana user's § 922(g)(3) conviction was inconsistent with the history and tradition of firearms regulation); see also Mim J. Landry, *Understanding Drugs of Abuse: The Processes of Addiction, Treatment, and Recovery* 108 (1994) ("PCP toxicity may include combative hostility, paranoia, depersonalization, and violence . . . ."). In a prior case, we concluded that a facial challenge could not succeed. See *Seay*, 620 F.3d at 925. *Bruen* has supplemented the analysis, but it has not changed the answer. See *United States v. Jackson,* 69 F.4th 495, 501-06 (8th Cir. 2023)(undertaking the historical analysis "endorsed by *Bruen*" rather than just relying on two post-*Heller* decisions, *United States v. Adams*, 914 F.3d 602, 607 (8th Cir. 2019) and *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011)); cf. *United States v. Sitladeen*, 64 F.4th 978, 985-87 (8th Cir. 2023) (concluding that a pre-*Bruen* precedent only remained binding because it "did exactly" what "*Bruen* [now] tells us to").

Veasley, 98 F.4th 909-10.

Looking at circumstances and events in each individual case is exactly the sort of exercise "to decide on a case-by-case basis whether the right is really worth insisting upon" that this court has explicitly rejected in Second Amendment cases. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

Here, as accepted by the Eighth Circuit in *Veasley*:

§ 922(g)(3) "governs conduct that falls within the plain text of the

> Second Amendment." that is, drug users "are part of 'the people' whom the Second Amendment protects," and "handguns are weapons 'in common use' today." So "we proceed to ask whether [§ 922(g)(3)] fits within America's historical tradition of firearm regulation."

Veasley, 98 F.4th at 910.

The correct standard for applying the Second Amendment in this situation is:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 597 U.S. at 24.

In *Veasley*, the Circuit Court reviewed the nation's history in this context, and found that disarmament is not part of the nation's tradition to address this problem:

> It makes sense to start with the closest "historical analogue," *Bruen*, 597 U.S. at 30, which is the regulation of intoxicating substances. Alcohol and drug abuse have been "general societal problem[s]," *id.* at 26, for thousands of years. See Hanan Hamdi et al., *Early Historical Report of Alcohol Hepatotoxicity in Minooye Kherad, a Pahlavi Manuscript in Ancient Persia, 6th Century CE*, 13 Caspian J. Internal Med. 431, 431 (2022) ("[S]everal kinds of alcoholic beverages have been . . . abused by humans for thousands of years . . . . [A]rchaeological and historical evidence revealed that the fermentation of grains into beer . . . dated back about 20,000 years as an ancient custom. (Internal citations omitted)). Colonial times were no exception. See *Bruen*, 597 U.S. at 26. Physician Benjamin Rush, a signer of the Declaration of Independence, recognized that alcohol can be so addictive that some drinkers "can afford scarcely any marks of remission either during the day or the night." Benjamin Rush, *An Inquiry into the Effects of Ardent Spirits upon the Human Body and Mind 8* (8th ed., Boston, James Loring 1823); see Karl Mann et al., *One Hundred Years of Alcoholism: The Twentieth Century*, 35 Alcohol & Alcoholism 10, 10 (2000).

Other drugs were around then too. The use of opioids was common. First introduced in the 17th century, the "formulation known as 'laudanum' (i.e., tincture of opium) . . . incorporate[d] opium along with other ingredients, such as cinnamon, clover, and saffron, in Spanish wine." Enrique Raviña, *The Evolution of Drug Discovery: From Traditional Medicine to Modern Drugs* 11 (2011); see J. K. Crellin, *Domestic Medicine Chests: Microcosms of 18th and 19th Century Medical Practice*, 21 Pharmacy in Hist. 122, 126 (1979) (noting that 18th-century medicine chests contained opiates and laudanum). Cannabis was in use too. See Martin Booth, *Cannabis: A History* 70 (2003)(describing the widespread use of hemp and recognition of its psychoactive properties). And so were natural hallucinogens. See generally Martin Nesvig, *Forbidden Drugs of the Colonial Americas*, in The Oxford Handbook of Global Drug History 153-75 (Paul Gootenberg ed., 2022) (discussing the use of ayahuasca, peyote, and hallucinogenic mushrooms in colonial America).

Many of these drugs, and others like them, remain a problem today. When a "challenged regulation [like § 922(g)(3)] addresses a general societal problem that has persisted since the 18th century," like substance abuse, "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 597 U.S. at 26. "Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* at 26-27. Our task is to figure out whether § 922(g)(3) looks like anything that "earlier generations" did to keep firearms out of the hands of drug and alcohol users. *Id.* at 26.

For drinkers, the focus was on the use of a firearm, not its possession. And the few restrictions that existed during colonial times were temporary and narrow in scope. One came from Virginia, which banned "shoot[ing] any gunns at drinkeing." Act XII of Mar. 10, 1655, reprinted in 1 The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619, at 401, 401-02 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823). Another from New York, which prohibited firing guns for the three days bracketing New Years, December 31 to January 2, because of the "great Damages" done by those "intoxicated with Liquor." Act of Feb. 16, 1771, ch. 1501, reprinted in 5 The Colonial Laws of New York from the Year 1664 to the Revolution 244, 244-45 (Albany, James B. Lyon 1894). Disarmament, on the other hand, was

not an option. See *Daniels*, 77 F.4th at 345-46 (surveying Founding-era statutes and concluding they were "limited in scope and duration" when it came to guns and alcohol, different from the way § 922(g)(3) operates).

There was even less regulation when it came to drugs. "[T]housands of . . . Americans at the time[] had become dependent on opium," Elizabeth Kelly Gray, *Habit Forming: Drug Addiction in America*, 1776-1914, at 20 (2023), and lawmakers were certainly aware of the problem. Senator John Randolph of Virginia was a user. See *id.* at 20-21. And so was Senator Robert Goodloe Harper's mother-in-law, who died of laudanum dependency. See *id.* at 21. Founding Father Rufus King, also a senator, wrote letters to his doctor lamenting his sister's opium dependency, including how it impaired her ability to care for her children. *Id.* Laudanum even held Thomas Jefferson in its grip for a while after he left the presidency. See John M. Holmes, *Thomas Jefferson Treats Himself: Herbs, Physicke, & Nutrition in Early America* 35-36 (1997). In a letter, Jefferson stated that "my habitual state." Letter from Thomas Jefferson to Robey Dunglison (Nov. 17, 1825), in *The Jefferson-Dunglison Letters* 41, 42 (John M. Dorsey ed., 1960).

Despite the widespread use of opium in particular, the government concedes that its "review of early colonial laws has not revealed any statutes that prohibited [firearm] possession" by drug users. In fact, the "general societal problem" of drug addiction did not receive congressional attention until 1909. See Smoking Opium Exclusion Act of 1909, Pub. L. No. 60-221, 35 Stat. 614; see also Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 785 (1914). And drug use went unmentioned in the National Firearms Act, which Congress passed almost 25 years later. See Pub. L. No. 73-474, 48 Stat. 1236 (1934). Instead, it took until 1968, with the passage of § 922(g)(3), for Congress to keep guns away from drug users and addicts.

The lesson here is that disarmament is a modern solution to a centuries-old problem. The fact that "earlier generations addressed the societal problem . . . through materially different means . . . [is] evidence that" disarming all drug users, simply because of who they are, is inconsistent with the Second Amendment. *Bruen*, 597 U.S. at 26.

Veasley, 98 F.4th at 910-12.

That history would seem to settle the question. The problem was present at this nation's founding. A solution was found and accepted. It was to punish those *using* weapons – and creating a danger to the public – *but only while intoxicated.* It was not to disallow ownership because of use or addiction. Under *Bruen* the historical record at the time of the founding shows that widespread, long term banning of possession of firearms was not the accepted solution. *Bruen*, 597 U.S. at 26.

The wording of this particular statute has always been problematic. Though § 922(g)(3) requires some temporal nexus between a person's drug use and firearm possession, the law allows long gaps between the two. *See Cook*, 970 F.3d at 879 ("[A] person who routinely uses marijuana on weekends may violate section 922(g)(3) by possessing a firearm on a Tuesday or Wednesday."); 27 C.F.R. § 478.11 (stating that '[a]n inference of current use may be drawn from evidence of a positive drug test, 'provided that the test was administered within the past year').

Saying that the statue will include prosecution of people who are in fact intoxicated or who have actually used a weapon does not solve this problem. First, and most importantly, neither is an element of this particular offense. Second, that solution will quickly devolve into an *ad hoc* browsing of the facts of each individual case to determine if the right applies. *Heller* has already found that "to decide on a case-by-case basis whether the right is really worth insisting upon" is not allowed. *Heller*, 554 U.S. at 634.

Consider Mr. Smith's case. He told police that he had used marijuana earlier that day. Prior to that use, was the possession of his handgun permissible? If he had last smoked on the weekend, when could he again possess it, if ever? If not "Tuesday or Wednesday," how about Thursday or Friday? What actual difference does it make whether he was intoxicated or not if he did not use the weapon? If he locked the gun in a closet rather than carry it in a car, is he guilty of a felony or not? There were certainly armed people habitually using substances at the time the constitution was written. Where in this country's history did the founders say that those people also lost the right to defend themselves or their home?

This is a facial attack on the statute. This Court has said concerning this type of challenge:

> Rahimi challenges [18 U.S.C.] Section 922(g)(8) on its face. This is the "most difficult challenge to mount successfully," because it requires a defendant to "establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U. S. At 745. That means that to prevail, the Government need only demonstrate that Section 922(g)(8) is constitutional in some of its applications. And here the provision is constitutional as applied to the facts of Rahimi's own case.
>
> Recall that Section 922(g)(8) provides two independent bases for liability. Section 922(g)(8)(C)(i) bars an individual from possessing a firearm if his restraining order includes a finding that he poses "a credible threat to the physical safety" of a protected person. Separately, Section 922(g)(8)(C)(ii) bars an individual from possessing a firearm if his restraining order "prohibits the use, attempted use, or threatened use of physical force." Our analysis starts and stops with Section 922(g)(8)(C)(i) because the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others. We need not decide whether regulation under Section 922(g)(8)(C)(ii) is also permissible.

United States v. Rahimi, 602 U.S. 680, 693 (2024).

Note that this Court in *Rahimi* did not go searching for an individual fact pattern within the case, rather it found that the history of this country supported disarmament in this respect under one means of committing the offense as defined by the statute. This country's history concerning disarmament of those using intoxicants does not support such a finding. Since this is a question that was present at the time for the founders to consider, the fact that they did not act answers the question against the modern action.

In this respect the question of a facial attack versus one that is an applied challenge is one that is different from those in other areas. It is not a question of focusing on what an individual defendant did, rather it is one of whether the historical record supports limiting the right or not as written in the statute under consideration. If the answer is no, then the question is settled. There is no reason to go searching for any other historical analogues which might be used to justify a different result. See, *Veasley*, 98 F.4th 913, 916 (8th Cir. 2024).

Use of substances and addiction are problems which have been present throughout out nation's history, and people with firearms with those conditions were dealt with at the time of the founding. They were not permanently disarmed because of either the use of substances or because of their addiction. The founders chose to rather to punish only those using a firearm while actively intoxicated. Neither of those requirements are part of § 922(g)(3).

This court has found that the standard for considering such challenges may

vary depending on context. For example, in First Amendment cases:

> For a host of good reasons, courts usually handle constitutional claims case by case, not en masse. *See Wash. State Grange*, 552 U. S. At 450-451. "Claims of facial invalidity often rest on speculation" about the law's coverage and its future enforcement. *Id.*, at 450. And "facial challenges threaten to short circuit the democratic process" by preventing duly enacted laws from being implemented in constitutional ways. *Id.*, at 451. This Court has therefore made facial challenges hard to win.
>
> That is true even when a facial suit is based on the First Amendment, although then a different standard applies. In other cases, a plaintiff cannot succeed on a facial challenge unless he "establish[es] that no set of circumstances exists under which the [law] would be valid," or he shows that the law lacks a "plainly legitimate sweep." *Salerno*, 481 U. S. at 745; *Wash. State Grange*, 552 U. S., at 449. In First Amendment cases, however, this Court has lowered that very high bar. To "provide breathing room for free expression," we have substituted a less demanding though still rigorous standard. *United States v. Hansen*, 599 U. S. 762, 769 (2023). The question is whether "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Americans for Prosperity Foundation v. Bonta*, 594 U. S. 595, 615 (2021); see *Hansen*, 599 U. S., at 770 (likewise asking whether the law "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep"). So in this singular context, even a law with "a plainly legitimate sweep" may be struck down in its entirety. But that is so only if the law's unconstitutional applications substantially outweigh its constitutional ones.

Moody v. NetChoice, LLC, 603 U.S. 707, 723-24 (2024).

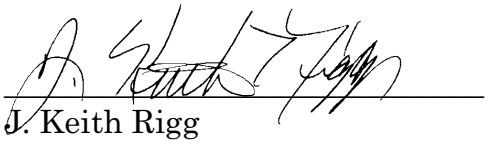
Obviously freedom of speech is a core principle of this country that is rightly rigorously protected. But the Second Amendment right is not a "second class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago,* 561 U.S. 742, 780 (2010). This Court recently reiterated this point in *Rahimi*, rejecting the argument that the

Government can disarm anyone it deems "irresponsible." *Rahimi*, 602 U.S. at 761. *Bruen* is clear that when the Second Amendment's plain text covers an individual's conduct, and the historical tradition of firearm regulation does not support the modern statute, it is unconstitutional. *Bruen*, 597 U.S. at 24. It is that historical review that makes Second Amendment challenges also somewhat different. If there is no clear historical precedent, then an applied challenge will look to see if the modern prohibition can fit within historical context by analogy. But if there is historical precedent, then it is followed. That is the case here. The statute is facially in violation of the Second Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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