No. 25-425

IN THE

Supreme Court of the United States

STEVEN DUARTE,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici Curiae the Ninth Circuit Federal Public and Community Defenders represent the majority of indigent defendants charged with firearm offenses in federal courts throughout the Ninth Circuit. Chief among such offenses is 18 U.S.C. § 922(g)(1), at issue here. Collectively, amici have defended thousands of clients accused of violating that law. Given that experience, amici are particularly interested in whether persons previously convicted of felony offenses may be permanently prohibited from—and criminally prosecuted for—possessing firearms.

In *United States v. Duarte*, the Ninth Circuit upheld a legislative scheme that imposes criminal liability on approximately five percent of Americans if they choose to exercise a constitutional right. 137 F.4th 743 (9th Cir. 2025) (en banc). In reaching this conclusion, the majority opinion drew heavily from dicta in *District of Columbia v. Heller* to infer that any and all felon-in-possession laws are "presumptively lawful" and therefore consistent with historical tradition. *Id.* at 752 (citing *Heller*, 554 U.S. 570, 626 n. 26 (2008)). Bolstering its case through simplistic application of the historical approach announced in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus made such a monetary contribution. Under Rule 37.2, late notice of intent to file this brief was provided to the parties on October 31, 2025, without objection.

597 U.S. 1 (2022), the Ninth Circuit purported to find that there is no limit to the legislature's power to categorically disarm groups of people. *Id.* at 756. The court has since used the decision below to effectively eliminate as-applied challenges to not just felon-in-possession laws, but *all* class-based criminal disarmament laws. *See United States v. VanDyke*, --- F.4th ---, 2025 WL 3000188, at *6 (9th Cir. Oct. 27, 2025).

Amici agree with Petitioner and the dissenting judges below that this approach is wrong. By the same token, amici agree that § 922(g)(1) is unconstitutional in most if not all circumstances.

Amici submit the following brief to illustrate the magnitude of the § 922(g)(1) problem and the need for an administrable as-applied approach. In contrast to the Ninth Circuit's resolution, the Third, Fifth, and Sixth Circuits have properly recognized those realities and left open as-applied challenges. This Court should grant the Petition and resolve that split in authority.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 922(g)(1) and its impact are uniquely modern creations. In the late 1940s, fewer than two million Americans had felony convictions.[2] Today, between 20 and 24 million Americans are felons.[3] That growth is not attributed to enforcement alone—but also to the growing number of felonies Americans can be convicted of. Between 2000 and 2007, Congress added "fifty-seven new crimes every year."[4] As of 1998, half the criminal code had been added after 1950, and just five percent existed prior to 1900.[5] The expanding array of felony offenses widens the pipeline to § 922(g)(1). That pipeline, in turn, sweeps in a host of individuals who in no way pose a risk of injury to others.

Despite the law's unprecedented scope, the Ninth Circuit reasoned that history and tradition prohibit individual defendants from bringing as-applied challenges to § 922(g)(1) prosecutions. This is wrong. This Court has never held a law falls within a historical tradition just because a legislature "declare[d]" it to be so, *Bruen*, 597 U.S. at 30, let alone barred litigants from testing those traditions' boundaries on an as-applied basis. For example, in

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[2] Sarah K.D. Shannon et al. *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States*, 1948-2010, 54 Demography 1795, 1806 (2018).

[3] *Id.*

[4] Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 538 (2012).

[5] Criminal Justice Section, Am. Bar Ass'n, *The Federalization of Criminal Law* 9 (1998).

United States v. Rahimi, this Court did not merely defer to Congress's choice to disarm "dangerous" persons subject to domestic violence protective orders. Instead, this Court found that the law was constitutional as applied to the facts of Rahimi's case, and only after carefully comparing the law to its historical precursors, such as surety statutes and "going armed" laws. *United States v. Rahimi*, 602 U.S. 680, 680 (2024). And as with this Court's other modern Second Amendment cases, the as-applied analysis in *Rahimi* focused on the facts necessary to sustain prosecution under § 922(g)(8), rather than facts that had no bearing on the law's application to a particular litigant.

Amici urge this Court to adopt an as-applied standard that conforms to past precedent by focusing on the nature of the underlying predicate felony and only those facts necessary to support the conviction. Doing so will provide clear and predictable guidance, enabling courts to reach consistent decisions and giving law enforcement, prosecutors, and the public notice as to whether specific conduct is lawfully prohibited and punishable under § 922(g)(1).

ARGUMENT

I. Nationally, § 922(g)(1) applies to persons who pose no danger of violence or misuse of firearms.

The last four decades have seen exponential growth in the number of Americans with felony convictions. Because of this expansion, more people and more kinds of conduct are covered by § 922(g)(1) than ever before. A predicate felony under § 922(g)(1) now covers an “immense and diverse category” of criminal offenses, “everything from . . . mail fraud, to selling pigs without a license in Massachusetts, redeeming large quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses.” *Kanter v. Barr*, 919 F.3d 437, 466 (7th Cir. 2019) (Barrett, J., dissenting).

Like Petitioner Steven Duarte, many of these convictions involve non-violent conduct. Among the thousands of persons singled out for prosecution under 18 U.S.C. § 922(g)(1) each year, nearly half have prior convictions that did not involve misuse of firearms or violence against others. National data from the United States Sentencing Commission, for instance, show that out of 28,498 persons prosecuted between 2019 and 2023 under § 922(g)(1), 12,568—roughly 44 percent—had no prior qualifying convictions for a crime of violence or controlled substance offense.[6] The upshot: every year, § 922(g)(1) punishes thousands of non-violent Americans for merely possessing a firearm.

A smattering of representative cases confirm as much. Sometimes the underlying conviction is trivial. Sometimes the underlying conviction is for a crime that is no longer even a felony. Sometimes the underlying conviction is for another constitutionally suspect firearm-possession charge. And sometimes circumstances change in the intervening years (or decades) to make permanent criminal sanctions inappropriate. Section 922(g)(1) punishes possessing a constitutionally protected item (a firearm) simply by

[6] Report of Paralegal Kip Manley Based on Sentencing Resource Counsel Worksheet (Oct. 31, 2025) (on file with amici).

virtue of past conduct that has little probative value of the person's present propensity to misuse firearms.

Seventeen years ago—when he was 20 years old—Christopher Collins was convicted of embezzlement for taking money from the till of a cash register. He later became a plumber and now works as a supervisor on a construction site in Maryland where he is helping to raise his partner's three children. Despite paying restitution for his offense, successfully obtaining restoration of his civil rights under Virginia law, and building a new life for himself, Mr. Collins was charged with violating 18 U.S.C. § 922(g)(1).[7] Like all § 922(g)(1) defendants, Mr. Collins now faces up to 15 years in prison. *See* 18 U.S.C. § 924(a)(8).

Francisco Hilt was convicted in 1999 by a no-contest plea of possessing marijuana with the intent to distribute—at that time a felony under California law—for which he served sixty days of incarceration.[8] Following his conviction, California reclassified the offense as a misdemeanor.[9] California eventually dismissed and sealed his underlying state prosecution.[10] Before that dismissal, however, Mr.

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[7] *United States v. Collins*, No. 23-cr-383, ECF No. 1 (D. Md. Oct. 31, 2023). Mr. Collins' case remains pending.

[8] Appellant's Opening Br. at 13, *Hilt v. United States*, No. 23-55380 (9th Cir. Apr. 25, 2023).

[9] *Id*. at 15.

[10] *Id*. Mr. Hilt's underlying state case was dismissed along with many other cases in recognition that the original convictions had been an "injustice." *Id*.

Hilt was convicted under § 922(g)(1) for possessing a firearm during an ATF sting operation.[11]

Trevor Young is similar. Mr. Young was convicted in 2017 of shoplifting $253.46 worth of merchandise, then a felony under Virginia law.[12] Less than a year later, Virginia raised the minimum dollar amount for felony theft to $500.[13] That change came too late for Mr. Young. In 2025, he was convicted under § 922(g)(1) and sentenced to 18 months' incarceration.

Likewise for Justin Meyer. In 2012, when he was 21 years old, Mr. Meyer was convicted of stealing a phone worth approximately $300.[14] That offense was later reclassified as a misdemeanor.[15] But, as with Mr. Hilt and Mr. Young, that reclassification did not stop federal prosecutors from charging Mr. Meyer ten years later (in 2022) for violating § 922(g)(1).

Sometimes § 922(g)(1) even doubles down on earlier, constitutionally-suspect firearm convictions. For example, Deontay Compton's only prior conviction was for possessing a loaded firearm in a vehicle. That offense was classified by state law as a misdemeanor, but for which he could have been imprisoned for up to

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[11] *Id.* at 4–7. Mr. Hilt was convicted on other related charges as well, but his felony status was the primary basis for his 165-month sentence. *Id.* at 9.

[12] Def.'s Sentencing Mem. at 2–3, *United States v. Young*, No. 1:25-cr-14, ECF No. 45 (W.D. Va. Apr. 8, 2025).

[13] *Id.* at 3.

[14] Appellant's Opening Br. at 2–3, *United States v. Meyer*, No. 25-1003 (11th Cir. Jan. 2, 2025).

[15] *Id.* at 3.

three years.[16] Mr. Compton was convicted of violating § 922(g)(1) and sentenced to 18 months in prison.[17]

Alexi Vidal-Collazo suffered a similar outcome. In 2012—as a 22-year-old—Mr. Vidal-Collazo was convicted of possessing a firearm while being a user of marijuana, pursuant to 18 U.S.C. § 922(g)(3).[18] This single conviction for possessing a firearm while being a user of marijuana formed the basis for two subsequent prosecutions under § 922(g)(1).[19]

Even violent prior conduct can age out. In 1968, when he was 20 years old, Jefferson Schrader was convicted of a common-law misdemeanor assault and battery arising from a brief altercation he had with a gang member who had previously assaulted him.[20] Mr. Schrader was serving in the U.S. Navy at the time of the offense and subsequently completed his tour in Vietnam.[21] Even though he was sentenced to only a fine, his common-law misdemeanor was potentially punishable by any term of imprisonment not

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[16] Pet. for Writ of Cert. at 4, 22, *Compton v. United States,* No. 25-5358 (Aug. 14, 2025).

[17] *Id.* at 5.

[18] *United States v. Vidal-Collazo*, No. 12-cr-903 (D.P.R. Nov. 27, 2012).

[19] *United States v. Vidal-Collazo*, No. 16-cr-446 (D.P.R. Jul 14, 2016); *United States v. Vidal-Collazo*, No. 22-cr-356 (D.P.R. Aug 10, 2022).

[20] *Schrader v. Holder*, 704 F.3d 980, 983 (D.C. Cir. 2013).

[21] *Id.*

prohibited by the Constitution, meaning he was permanently disarmed for life.[22]

As these examples illustrate, § 922(g)(1) criminalizes firearm possession by a wide swath of non-violent individuals. The government makes no attempt to argue this would have been conceivable at the Founding. Yet the Ninth Circuit's decision below gives legislatures carte blanche to criminalize firearm possession regardless of how insignificant the prior conviction. This Court should grant review.

II. Allowing as-applied challenges to § 922(g)(1) aligns with the Second Amendment's text, history, and tradition—and is judicially administrable.

Review is especially appropriate because the Ninth Circuit's decision will deprive future litigants of the right to bring as-applied Second Amendment challenges to § 922(g)(1), and potentially any type of categorical firearm regulation. Allowing at least as-applied challenges is consistent with the Second Amendment's text, history, and tradition—and this Court's precedent. A well-constructed framework with clear guideposts like the Fifth Circuit's is judicially administrable. Such considerations further warrant this Court's review.

A. The Ninth Circuit's rejection of as-applied challenges to § 922(g)(1) is incompatible with history and precedent.

The Ninth Circuit joins four other circuits in finding that a categorical prohibition on possession of

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[22] *Id.*

firearms by felons is constitutional in all its applications, without regard for the underlying felony.[23] According to these courts, felons convicted under modern law are categorically different from those who enjoy the right to bear arms and may therefore be disarmed for life.

This analysis rests on an oversimplified application of the *Bruen* standard. The sweep of the Ninth Circuit's holding is extreme. In its view, Congress enjoys unfettered discretion to disarm any group of persons—even if there is no evidentiary support that they pose a "special danger" of misusing firearms. *Duarte*, 137 F.4th at 761 (citation omitted). And there is no requirement that the legislative choice to disarm a category of person be connected to a historical tradition. *Id.* at 761 n.19 ("We do not hold . . . that every legislative judgment that a group of individuals presents a 'special danger of misuse' must be rooted in history."). The Ninth Circuit acknowledged that its construction of the historical approach likely allows "greater regulation than [. . .] means-end scrutiny" to disarm individuals. *Id.* at 762 *Id*. at 762 (quoting *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024)).

This holding flouts this Court's approach in other Second Amendment cases. Since *Heller*, this Court has considered several different categories of firearm

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[23] *See Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th Cir. 2025), *petition for cert. filed* (U.S. May 8, 2025) (No. 24-1155); *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, 145 S. Ct. 1041 (2025).

regulations, including laws affecting "dangerous and unusual weapons," "sensitive places," and "individuals who pose a credible threat to the physical safety of others." *See Caetano v. Massachusetts*, 577 U.S. 411 (2016), *New York Rifle & Pistol Ass'n., Inc. v. Bruen*, 597 U.S. 1 (2022), *United States v. Rahimi*, 602 U.S. 680 (2024). In each of these cases, this Court did not simply defer to the legislative judgment about who or what fell within the relevant category.

For example, in *Caetano*, this Court did not accept the government's assertion that Tasers were "dangerous and unusual weapons," 577 U.S. at 412. Instead, this Court instructed courts to make particularized findings about Tasers' contemporary usage. *Id.* And in *Rahimi*, the Court held that 18 U.S.C. § 922(g)(8) was constitutional "[a]s applied to the facts of [Rahimi's] case," since the features of the protective order which burdened his possession of firearms were consistent with well-established historical tradition. *Rahimi*, 602 U.S. at 696. Likewise, in *Bruen* this Court rejected the assertion that New York's proper cause requirement for concealed firearm permits was consistent with the historical definition of "sensitive places" laws. 597 U.S. at 30. This Court rightly found that there was no historical basis for characterizing the entire island of Manhattan as a "sensitive place." *Id.*

Here, this Court should not presume that § 922(g)(1) falls within the "presumptively lawful" prohibitions on possession of firearms by felons mentioned in *Heller*.

It is far from certain that the historical definition of "felony" is a useful benchmark for evaluating the legislature's power to disarm. As Judge VanDyke noted in his partial dissent, since legislatures enjoy the power to define what constitutes a felony, a one-size-fits-all approach makes the Second Amendment "a paper tiger with no fixed boundaries." *Duarte*, 137 F.4th at 791 (VanDyke, J., dissenting). "Congress may decide to change [the definition of any felony] in the future." *Id.* (quoting *United States v. Diaz*, 116 F.4th 458, 469 (5th Cir. 2024)). "Such a shifting benchmark should not define the limits of the Second Amendment, without further consideration of how that right was understood when it was first recognized." *Id.*

Indeed, the Ninth Circuit's majority opinion below recognized that the category of felonies in existence at the time of the Founding was "a good deal narrower than now." *Duarte*, 594 F.4th at 311 (quoting *Lange v. California*, 594 U.S. 295 (2021)). Many crimes which were classified as misdemeanors, or nonexistent, at common law are now felonies. *Tennessee v. Garner*, 471 U.S. 1, 14 (1985). It is undisputed that none of Mr. Duarte's felony convictions were classified as felonies at the time of the Founding.

This does not mean that the law should remain "trapped in amber." But it does underscore the futility of using historical punishments for felony offenses—none of which involved the specific penalty of disarmament—as a lens through which to evaluate the constitutionality of § 922(g)(1).

As it stands, application of § 922(g)(1) is imprecise because it treats all felonies the same regardless of any other factors. In comparison, the original Federal Firearms Act targeted only those convicted of a "crime of violence," which included "murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking," and certain aggravated assaults. Pub. L. No. 75-785 § 1 (6), 52 Stat. 1250 (1938). It was not until 1961 that Congress banned non-violent felons from possessing firearms. This history points to a separate tradition of firearm regulation, one that squares with common sense: the legislative prerogative to disarm persons who are actually dangerous. *Folajtar v. Att'y Gen.*, 980 F.3d 897, 924 (3d Cir. 2020) (Bibas, J., dissenting).

B. Those circuits that have found § 922(g)(1) susceptible to as-applied challenges disagree as to what that approach would look like.

In conflict with the Ninth Circuit's decision here, three circuits agree that § 922(g)(1) may be subject to as-applied challenges.[24] Each of these circuits has concluded that legislatures may disarm some, but not all, felons. The common thread among these opinions is the "dangerousness" standard promoted by Justice Barrett when she was sitting on the Seventh Circuit:

> The historical evidence . . . support[s] a . . . proposition: that the legislature may disarm

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[24] *See Range v. Att'y Gen.*, 124 F.4th 218, 222–23 (3d Cir. 2024) (en banc); *United States v. Diaz*, 116 F.4th 458, 467 (5th Cir. 2024), *cert. denied* (U.S. June 23, 2025) (No. 24-6625); *United States v. Williams*, 113 F.4th 637, 661–62 (6th Cir. 2024). The Seventh Circuit has also assumed, *arguendo,* that there is some room for as-applied challenges but has said little else. *See United States v. Gay*, 98 F.4th 843, 846–47 (7th Cir. 2024) (concluding that the defendant was "not a 'law-abiding, responsible' person" (citation omitted)).

> those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This is a category simultaneously broader and narrower than "felons"—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness.

Kanter v. Barr, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting).

These courts have nonetheless adopted differing views about what criteria should be used to assess dangerousness on an as-applied basis. There is also disagreement about what kinds of materials should be considered. Of them, the Fifth Circuit's reasoning best aligns with the Second Amendment's text, history, and tradition.

That court has adopted two different types of as-applied "dangerousness" standards: one compares the underlying conviction with Founding-era punishments for analogous offenses, the other examines whether the underlying offense involves violence. Both approaches, however, are limited to consideration of the predicate offense and exclude consideration of facts unnecessary to sustain the conviction.

The first: In *Diaz*, the Fifth Circuit upheld application of § 922(g)(1) to a defendant who had previously been convicted of several non-violent felonies, including grand theft auto. 116 F.4th 458, 467 (5th Cir. 2024). Because the defendant's prior convictions were analogous to the historical crime of theft, which was punishable by death, the court reasoned that the lesser punishment of disarmament was constitutionally tolerable. *Id.* at 468. The court nonetheless clarified that its "holding is not [simply] premised on the fact that Diaz is a felon," as any such reasoning would fail "the level of historical rigor required by *Bruen* and its progeny." *Id.* at 469.

The second (and more recently): in *United States v. Schnur*, the Fifth Circuit concluded that a prior "crime of violence" conviction justified disarmament because it provided the necessary evidence that a person posed a threat to society if armed. 132 F.4th 863, 869–70 (5th Cir. 2025).

In both opinions, the Fifth Circuit has emphasized the nature of the defendant's predicate criminal offenses without regard to facts unrelated to the convictions themselves. In its view, a defendant's dismissed charges are "not relevant for [the court's] purposes." *Diaz*, 116 F.4th at 468. Similarly, past misdemeanors were equally irrelevant, as those convictions were not "punishable by more than one year, as required by § 922(g)(1)." *Id.* For the reasons explained below, the Fifth Circuit's methodology in *Diaz* tracks with this Court's precedent when conducting as-applied analysis in other contexts.

C. As-applied challenges are judicially administrable, with appropriate conditions on what is considered legally relevant evidence.

A conviction-centered approach like the Fifth Circuit's aligns best with the statutory language of § 922(g)(1), as well as this Court's modern Second Amendment jurisprudence. It would also conform with this Court's practice when conducting as-applied challenges more broadly. In all such settings, this Court has emphasized that the focus should be the facts directly related to the charge itself—not to extraneous facts outside what the statute in question proscribes. To the extent this Court embraces some form of as-applied challenges to § 922(g)(1), it should incorporate such guideposts.

Rahimi is instructive. In *Rahimi*, the government emphasized allegations concerning the defendant's history of violence towards others, including disputes over drug sales, road rage incidents, and repeated discharge of firearms in public. 602 U.S. at 686–87. But the underlying statute which Mr. Rahimi was charged with violating, 18 U.S.C. § 922(g)(8), targeted different conduct—namely, his possession of a firearm while subject to a qualified domestic violence protective order.

In its as-applied analysis, this Court kept the inquiry firmly grounded on the facts relevant to the statute of conviction. Mr. Rahimi "had received notice and an opportunity to be heard," his restraining order "prohibited him from communicating with or threatening his [girlfriend], and the order included a finding that he represented 'a credible threat to the physical safety' of [his girlfriend] or her family," as required by § 922(g)(8)(C)(i). *Id.* at 688–89. Because his order met the requirements of § 922(g)(8)(C)(i) and was "temporary as applied to Rahimi," application of § 922(g)(8) to Rahimi was consistent with historical tradition. *Id.* at 699. Though this Court made passing observation of Mr. Rahimi's uncharged conduct in its case background, those allegations were entirely absent from this Court's as-applied analysis, and played no part in validating Mr. Rahimi's prosecution and conviction.

Similarly, when courts conduct an as-applied inquiry regarding § 922(g)(1), they should confine their review to only those facts that are relevant to what the statute actually criminalizes: possession of a firearm or ammunition after sustaining a felony conviction. This necessarily means that courts should not ask whether a particular person can be deprived of their constitutional rights based on characteristics unrelated to the present prosecution.

This logic follows from what it means for a statute to be "applied" in the first place. An "application" of a particular statute implicates only the conduct that the statute "actually authorizes or prohibits," as opposed to conduct which is "irrelevant" to the statute. *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (holding that searches pursuant to an exigency or a warrant are not "applications" of a statute that authorizes warrantless searches, and that "the proper focus of the constitutional inquiry is searches that the law actually authorizes."). But the law's application does not include circumstances or conduct which is incidental to the targeted acts.

For example, a statute that punishes flag burning is likely to be held unconstitutional as applied, even if the defendant may have also engaged in other criminal acts such as causing property damage. *E.g., United States v. Eichman*, 496 U.S. 310, 313 n.1 (1990). But in such cases, the property damage is incidental to what the charged statute "prohibits": burning flags. *Patel*, 576 U.S. at 418. So even if a person's flag burning activities cause property damage, prosecuting them under a flag-burning statute may still violate the Constitution. *See Eichman*, 496 U.S. at 313–19 & nn.1, 5 (upholding an as-applied First Amendment challenge to the Flag Protection Act but letting a willful injury to federal property charge go forward).

Likewise, a statute prohibiting same-sex intercourse is "unconstitutional when applied to any person." *McDonald v. Moose*, 710 F.3d 154, 162 (4th Cir. 2013). True, some instances of same-sex intercourse might involve other conduct that could be properly criminalized, like sex with a minor. *See id.* at 165. But the age of the sexual partner has nothing to do with the conduct that the charged statute "prohibits," *Patel*, 576 U.S. at 418, namely same-sex intercourse, *see Moose*, 710 F.3d at 165 ("The anti-sodomy provision does not mention the word 'minor[.]'"). The government is free to prosecute statutory rape under an applicable statutory rape statute. *Id.* But the government cannot defeat a constitutional challenge to a statute barring same-sex intercourse because the individual's behavior happened to be with a minor. *Id.* at 164–65.

Underlying all these cases is the same basic principle: when assessing the constitutionality of a statute, only those facts relevant to what that statute "authorizes or prohibits" matter. *Patel*, 576 U.S. at 418. The principle explains why this Court in *Rahimi* did not consider the panoply of contextual facts during its as-applied analysis: those facts had nothing to do with what § 922(g)(8) authorizes or prohibits. *Id.* For that statute, the only legally relevant facts involved Mr. Rahimi's gun possession while subject to a particular kind of restraining order. The government therefore could not defend Mr. Rahimi's conviction based on such extraneous facts as his unprovoked shootings, drug dealing, or dangerous driving. It had to, and successfully did, defend the case based on the conduct criminalized in the statute.

1. When evaluating predicate felonies, courts may not carry out an unbounded inquiry into the underlying conduct.

Amici urge this Court to reject an as-applied inquiry that would allow courts to consider unproven allegations beyond the facts necessary to sustain the prior felony conviction. Any as-applied regime this Court adopts should limit courts' analysis to the nature of the underlying conviction itself. That is because, when evaluating an as-applied challenge, courts consider only the facts directly relevant to the statutory requirements, not every fact tangentially related to the prohibited conduct or status.

Here, too, *Rahimi* leads the way. As discussed above, the record in *Rahimi* contained extensive information about the underlying conduct that led to the court's finding that Mr. Rahimi presented a "credible threat." Yet that conduct played no role in the legal analysis.

This Court examined those aspects of Mr. Rahimi's restraining order that directly implicated the statutory requirements in § 922(g)(8). That makes sense. Congress identified a particular collection of factors that would trigger disarmament by one subject to a restraining order: a "finding" that the defendant poses "a credible threat," made after a "hearing" for which defendant had "actual notice" and an "opportunity to participate." All other facts about that hearing and about the conduct underlying the judge's findings are, from Congress's perspective, irrelevant. Like other circumstances extraneous to the § 922(g)(8) charge, then, they had no place in analyzing how the statute "applied" to Mr. Rahimi.

The same can be said of the prior-conviction element of § 922(g)(1). Section 922(g)(1) does not target the conduct underlying that conviction. It does not apply to "a person who has committed" a certain offense or a "crime that, in particular case, involves" certain facts. *Taylor v. United States*, 495 U.S. 575, 601 (1990). Rather, it targets anyone who "has been *convicted*" of a qualifying crime. 18 U.S.C. § 922(g)(1). Congress's "use of the term 'convict[ed]'" allows for inquiries about what "the defendant had been convicted of"—that is, the nature of their felony. *Mathis v. United States*, 579 U.S. 500, 511 (2016). But it does not allow an inquiry into "what the defendant had actually done." *Id.* In fact, Congress's judgment to predicate § 922(g)(1) liability on convictions "directly refutes an approach that would treat as consequential . . . factual circumstances not essential to" the conviction. *Id.* at 512.

The particular details of the defendant's underlying conduct are thus "irrelevant: find them or not, by examining the record or anything else, a [jury or] court still may not use them" to find the prior-conviction element. *Id.* at 513. Here, Duarte's ability to possess a firearm following his evading-police conviction, for instance, did not depend on his underlying conduct. Whether it involved a brief failure to yield or a lengthy high-speed chase, he was equally "convicted" of that crime and equally prohibited from ever possessing a firearm.

In sum, while a person's prior felony conviction is squarely related to § 922(g)(1)'s "application," the specific conduct underlying that conviction is not. This Court therefore should clarify that, in assessing an as-applied challenge, courts must limit their analysis to the criminal conviction itself, and may not conduct a wide-ranging inquiry into the actual conduct underlying that conviction.

2. An indiscriminate, anything-goes approach would raise various constitutional and prudential concerns.

The limits set out above are not only compelled by *Rahimi*, Congress's judgment, and the fundamental meaning of a statute's "application." They will also avoid a host of constitutional and prudential problems, which the anything-goes approach threatens to unleash.

First, an anything-goes approach would be difficult to administer. Courts would have to conduct a far-reaching inquiry, sifting through all aspects of the defendant's life to determine whether the defendant could be disarmed. It is hard to imagine consistent, useful standards that could guide that inquiry. Disparate outcomes would inevitably follow. Two people with the same prior felonies could receive two different results, depending on facts having nothing to do with what § 922(g)(1) actually criminalizes.

Second, the fact-finding process would present Sixth Amendment and due process concerns. Those constraints require "a jury [to] find beyond a reasonable doubt every fact which the law makes essential to [a] punishment that a judge might later seek to impose." *United States v. Haymond*, 588 U.S. 634, 642 (2019) (cleaned up). Thus, if the government justifies its right to punish based on extraneous and unadjudicated facts—like gang affiliation or the conduct underlying a predicate conviction—the Sixth Amendment would call for a jury finding. At a minimum, "essential principle[s] of due process" would require "notice and opportunity for hearing" on the government's allegations. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). This would lead to time-consuming mini-trials.

This concern is particularly acute when it comes to the facts underlying prior convictions. The most detailed factual allegations in criminal cases tend to come from police officers, prosecutors, probation officers, and other government officials. But these records are not tested through the adversarial process and can be ambiguous or conflicting. *See Descamps v. United States*, 570 U.S. 254, 270 (2013). And if a person is then prosecuted under § 922(g)(1), perhaps years or decades later, the allegations may be too dated for proper defense investigation.

This problem is not lessened simply because a defendant has pled guilty or been convicted following a jury trial. From a verdict, it is impossible to tell "what the jury in a prior trial must have accepted as the theory of the crime," and whether the jury found any particular facts true, unless implicit in the elements of the charge. *Id.* at 269. When a defendant enters a guilty plea, "he waives his right to a jury determination of only that offense's elements," but whatever else he says (or doesn't say) about superfluous facts should not be used to enhance punishment at a later date or sustain a separate criminal charge. *Id.* at 270. Defendants often lack the incentive (or the means) to challenge those facts beyond what is necessary for the conviction or plea. *Mathis*, 579 U.S. at 512. Thus, relying on trial transcripts or plea colloquies to "explore the manner in which the defendant committed that offense" would be unconstitutional and unfair.

Third, because Second Amendment rights would depend on an unlimited universe of prior, unadjudicated acts, it would be impossible for someone with a felony conviction to know ex ante whether their gun possession will be legal. That indeterminacy would threaten the "rule of law," which "entails . . . that all persons are entitled to be informed as to what the State commands or forbids." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (cleaned up). Without ascertainable, consistent standards governing as-applied challenges, a person could be "in one day and out the next," without even knowing it. *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting). A system that only "retroactively give[s] adequate warning of the boundary between the permissible and the impermissible applications of the law" offends due process. *City of Chicago v. Morales*, 527 U.S. 41, 59 (1999).

Fourth, and closely related, the statute's applicability would be improperly vague. Anyone who sustained a prior felony conviction would exercise their Second Amendment rights at their peril—or decide not to risk exercising them at all. When it comes to laws threatening "freedom of speech in the

First Amendment, [a right] to which *Heller* repeatedly compared the right to keep and bear arms," *Bruen*, 597 U.S. at 24, courts have applied particularly exacting standards: Vagueness that may "operate[] to inhibit the exercise of [constitutional] freedoms" receives more searching review. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Likewise, courts must reject an unpredictable methodology that chills the exercise of Second Amendment rights.

Fifth, the anything-goes approach threatens the separation of powers. "Only the people's elected representatives in the legislature are authorized to make an act a crime." *United States v. Davis*, 588 U.S. 445, 451 (2019) (cleaned up). But an open-ended inquiry would authorize courts to uphold particular applications of the statute based not on the conduct that Congress chose to criminalize (that is, possessing a firearm after having been "convicted of" a felony) but on conduct or circumstances that Congress deemed irrelevant (for example, possessing a firearm while gang affiliated, after sustained arrests or misdemeanor convictions, or following the commission of certain offense conduct). In effect, an as-applied inquiry untethered from the statute and the conduct it criminalizes would be a "judicial reformation of the [felon-in-possession] provision. *Moose*, 710 F.3d at 165 (making the same point about statutes criminalizing same-sex intercourse); *United States v. Adams*, 914 F.3d 602, 608–09 (8th Cir. 2019) (Kelly. J., concurring) (explaining that whether Congress could pass a concealed-carry statute "has nothing to do with whether [the defendant] can be prosecuted under § 922(g)(1) for being a felon-in-possession, unless we 'inva[de] . . . the legislative domain' by adding a concealment requirement to the statute.”). Even if Congress could write a statute outlawing gun possession under those circumstances, the Constitution requires “deliberate action by the people’s representatives, rather than by the judiciary.” *Moose*, 710 F.3d at 165.

An appropriately circumscribed approach to as-applied challenges would avoid all these issues. And clarifying those limits at the outset will avoid confusion in the district courts. Thus, this Court should not only recognize as-applied challenges to prosecutions that fall outside our Nation’s firearm traditions, but also instruct the circuit courts to limit their review to legally relevant facts: a person’s possession of a firearm and the nature of their prior felony conviction.

CONCLUSION

For the foregoing, this Court should grant the Petition for Writ of Certiorari and vacate the decision below.

Respectfully submitted,

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November 7, 2025