No. _____

IN THE
Supreme Court of the United States

ANTONIO MARSHALL,

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 A WRIT OF CERTIORARI

JASON J. TUPMAN
Federal Public Defender
DAVID S. BARARI
Assistant Federal Public Defender,
Counsel of Record
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
655 Omaha Street, Suite 100
Rapid City, SD 57701
David_Barari@fd.org
605-343-5110

Attorneys for Petitioner

QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1), which permanently prohibits possession of a firearm by a person who has been convicted of a crime punishable by imprisonment for a term exceeding one year, is subject to as-applied challenges under the Second Amendment.

LIST OF PARTIES

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

RELATED PROCEEDINGS

United States v. Antonio Marshall, a/k/a Tony Quick Bear, No. 3:23-cr-30124, United States District Court for the District of South Dakota. Judgment entered June 11, 2024.

United States v. Antonio Marshall, a/k/a Tony Quick Bear, No. 24-2310, United States Court of Appeals for the Eighth Circuit. Judgment entered May 14, 2025.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Materials

PETITION FOR A WRIT OF CERTIORARI

Antonio Marshall 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 opinion of the court of appeals (App. 1a-2a) is unreported but is available at 2025 WL 1397406. The district court's order (App. 3a-4a) is unreported but available at 2024 WL 584037.

JURISDICTION

The court of appeals entered judgment on May 14, 2025. App. 1a-2a. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & 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)(1):

> It shall be unlawful for any person 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.

INTRODUCTION

This petition presents an important and recurring question of federal law that can only be settled by this Court: whether a criminal defendant may raise an as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(1). This Court has never addressed this question directly, and there is a clear and growing split of authority among the Circuits. The court below, the Eighth Circuit, does not allow as-applied challenges, holding "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024) (*Jackson* II), *cert. denied*, No. 24-6517, --- S. Ct. ---, 2025 WL 1426707 (May 19, 2025) (Mem.); *see also United States v. Cunningham,* 114 F.4th 671, 675 (8th Cir. 2024) (*Cunningham* II). The Fourth, Ninth, Tenth, and Eleventh Circuits have reached the same or similar conclusions. *United States v. Hunt*, 123 F.4th 697, 708 (4th Cir. 2024) (*citing Jackson* II, 110 F.4th at 1125, 1127-28), *cert. denied*, No. 24-6818, --- S. Ct. ---, 2025 WL 1549804 (June 2, 2025) (Mem.); *United States v. Duarte*, 137 F.4th 743, 759-62 (9th Cir. 2025); *Vincent v. Bondi*, 127 F.4th 1263, 1265-66 (10th Cir. 2025), *petition for cert. filed*, (May 12, 2025) (No. 24-1155); *United States v. Dubois*, 139 F.4th 887, 892-94 (11th Cir. 2025). In contrast, the Third, Fifth, and Sixth Circuits allow as-applied challenges to § 922(g)(1). *See Range v. Attorney General United States*, 124 F.4th 218, 228-32 (3rd Cir. 2024) (en banc); *United States v. Diaz*, 116 F.4th 458, 467-72 (5th Cir. 2024), *cert. denied*, No. 24-6625, --- S. Ct. ---, 2025 WL 1727419 (June 23, 2025) (Mem.); *United States v. Williams*, 113 F.4th 637, 644-45, 657-63 (6th Cir. 2024).

The split in authority among the Circuits shows that the issue was not resolved by this Court's decisions in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) or *United States v. Rahimi*, 602 U.S. 680 (2024). This Court should grant certiorari and resolve this important and recurring issue.

STATEMENT OF THE CASE

This petition arises out of Marshall's conviction for possession of a firearm by a prohibited person under 18 U.S.C. §§ 922(g)(1), 924(a)(8), and (d). Dist. Ct. Dkt. 1; Dist. Ct. Dkt. 41.[1] Marshall's felony record included a 2020 North Dakota theft conviction and a 2020 federal conviction for conspiracy to distribute a controlled substance and possession of a firearm by a prohibited person. Dist. Ct. Dkt. 37, at 7-8.

On December 12, 2023, Marshall was indicted under 18 U.S.C. §§ 922(g)(1), 924(a)(8) and (d), with knowingly possessing a firearm with an obliterated serial number while a felon. Dist. Ct. Dkt. 1. In the district court, Marshall moved to dismiss the 2023 federal indictment, arguing § 922(g)(1) was unconstitutional, both facially and as applied to him, considering the non-violent nature of his previous convictions. Dist. Ct. Dkt. 20; Dist. Ct. Dkt. 21. The district court denied Marshall's motion based on the Eighth Circuit's then-controlling decisions in *United States v.*

[1] All citations to "Dist. Ct. Dkt." are to the docket in *United States v. Marshall*, No. 3:23-cr-30124 (D.S.D.).

Jackson, 69 F.4th 495 (8th Cir. 2023) (*Jackson* I) and *United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023) (*Cunningham* I). App. 3a-4a.[2]

Marshall then entered a conditional guilty plea and was sentenced to 26 months in prison. Dist. Ct. Dkt. 23, at 7-8; Dist. Ct. Dkt. 41, at 2. On appeal, a panel of the Eighth Circuit Court of Appeals found that Marshall's arguments were foreclosed by its post-*Rahimi* decisions in *Cunningham* II and *Jackson* II. App. 1a-2a. The Eighth Circuit deemed his arguments foreclosed by *Cunningham* II's conclusion that "[t]here is no need for felony-by-felony determinations regarding the constitutionality of § 922(g)(1) as applied to a particular defendant." App. 2a (citing *Cunningham* II, 114 F.4th at 675).

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The Second Amendment to the United States Constitution provides, "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." U.S. Const. amend. II. The Second Amendment "confer[s] an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). It is a fundamental right, applicable against state and local governments, and entitled to the same protection as other

[2] While Marshall's case was on appeal, this Court granted the petitions for a writ of certiorari in *Jackson* I and *Cunningham* I, vacated the judgments, and remanded for further consideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024). *See Jackson v. United States*, 144 S. Ct. 2710 (2024) (Mem.); *Cunningham v. United States*, 144 S. Ct. 2713 (2024) (Mem.). The Eighth Circuit issued *Jackson* II and *Cunningham* II during the pendency of Marshall's appeal.

fundamental rights enshrined in the Constitution. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). This Court has cautioned that it should not be treated as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* at 780 (plurality opinion); *see also Bruen*, 597 U.S. at 70.

The contours of any abridgement of this fundamental right are an issue of profound significance. The Circuit courts have reached opposing conclusions about the availability of individual, as-applied Second Amendment challenges in § 922(g)(1) cases. *Compare Hunt*, 123 F.4th 697, *Jackson* II, 110 F.4th 1120, *Duarte*, 137 F.4th 743, *Vincent*, 127 F.4th 1263, *and Dubois*, 139 F.4th 887, *with Range*, 124 F.4th 218, *Diaz*, 116 F.4th 458, *and Williams*, 113 F.4th 637. This Court should address and resolve the Circuit split regarding defendants' ability to challenge the constitutionality of the prohibition on their right to possess firearms.

I. The courts of appeals are divided on the question presented.

Section 922(g)(1) makes it illegal for anyone convicted of "a crime punishable by imprisonment for a term exceeding one year" to ever possess a firearm. Since *Bruen,* Circuit courts across the country have reached different conclusions regarding the constitutionality of firearms regulations, including 18 U.S.C. § 922(g)(1). Relevant here, the Circuits disagree about the availability of as-applied challenges to prosecutions under § 922(g)(1). This Court should resolve this divide.

A. The Third, Fifth, and Sixth Circuits allow as-applied challenges, based on historical practices.

The Third, Fifth, and Sixth Circuits allow as-applied challenges in § 922(g)(1) prosecutions. In opinions issued after this Court's opinion in *Rahimi*, these courts have focused their analysis on the second prong of the *Bruen* test, whether disarmament of the defendant is "consistent with the Nation's historical tradition of firearm regulation." *Diaz*, 116 F.4th at 467 (quoting *Bruen*, 597 U.S. at 24); *see also Range,* 124 F.4th at 228 (". . . we must determine whether the Government has shown that applying § 922(g)(1) to Range would be 'consistent with the Nation's historical tradition of firearm regulation' " (quoting *Bruen*, 597 U.S. at 24)); *Williams*, 113 F.4th at 650-57 (examining historical firearms regulations from pre-Founding England through the post-Civil War era, concluding "[t]his historical study reveals that governments in England and colonial America long disarmed groups that they deemed to be dangerous. . . . Each time, however, individuals could demonstrate that their particular possession of a weapon posed no danger to peace"). All three find that as-applied challenges are appropriate or required by this history.

Third Circuit:

In *Range*, the Third Circuit focused its analysis on the second prong of *Bruen*, after rejecting the Government's argument that felons are not part of "the people" protected by the Second Amendment under the first prong. *See Range*, 124 F.4th at 226-28 (stating, in part, "[i]n sum, we reject the Government's contention that 'felons are not among 'the people' protected by the Second

Amendment.' *Heller* and its progeny lead us to conclude that [the defendant] remains among 'the people' despite his [prior conviction]").

The *Range* court rejected the Government's arguments that historical disarmament of certain groups of people, "classes" or "status-based restrictions," due to their "dangerousness" are legitimate analogies to justify disarmament of all felons under § 922(g)(1). *Id.* at 229-30 (noting, "[a]ny such analogy would be 'far too broad[ ]' " (quoting *Bruen*, 597 U.S. at 31)). Moreover, it found that capital punishment or estate forfeiture imposed in our early history was not analogous to § 922(g)(1), particularly when the underlying criminal conduct is unlike colonial-era criminal offenses. *Id.* at 230-31. "[T]he Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here—de facto lifetime disarmament for all felonies and felony-equivalent misdemeanors—is rooted in our Nation's history and tradition." *Id.* at 231. Further, it noted that the Government had not presented any historical analogues, such as statutes precluding a convict from regaining property after serving their sentence, which would justify the duration and scope of § 922(g)(1)'s disarmament. *Id.* Ultimately, the Third Circuit found § 922(g)(1) unconstitutional as applied to Range, given the nature of his prior offense, his age of his conviction, his lack of a risk of danger to others, and the lack of a "longstanding history and tradition of depriving people like Range of their firearms . . . ." *Id.* at 232.

Fifth Circuit:

The Fifth Circuit also allows as-applied challenges based on its review of historical practices regarding firearms regulation in comparison to § 922(g)(1). In *Diaz*, the court considered whether the defendant's underlying conviction, leading to his present disarmament, would have been considered a "felony" in the 18th Century. *Diaz*, 116 F.4th at 468 (explaining, in part, "[t]he fact that Diaz is a felon today, then, does not necessarily mean that he would have been one in the 18th Century"). Further, the Fifth Circuit examined the history of § 922(g)(1) itself, which previously only restricted those who committed felonies reflecting "violent tendencies" from possession of firearms. *Id.* at 468-69. Overall, the Fifth Circuit analyzed the "why" and "how" of historical disarmament of felons, in relation to the modern crime of conviction, rather than the categorization of the defendant as a felon. *See id.* "Simply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny." *Id.* at 469. Therefore, because "not all felons today would have been considered felons at the Founding" and because the definition of a felon has varied historically, "[s]uch 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.*

In other words, the Fifth Circuit determined first whether the individual defendant's prior conviction was analogous to a felony at the Founding, and second, whether disarmament would have been within the historical tradition of

punishment for that analogous crime. Because the Fifth Circuit considers the historical tradition of disarmament relative to each crime, as-applied challenges to § 922(g)(1) are allowed, despite the statute's facial validity. *Id.* at 468-71.

Ultimately, the Fifth Circuit rejected Diaz's challenge after analyzing his prior criminal history relative to the Founding. *Id.* at 468-70. Diaz had been convicted of vehicular theft, which the court analogized to horse theft, a crime that at the Founding "would have led to capital punishment or estate forfeiture." *Id.* at 469-70. Therefore, § 922(g)(1) was constitutional, as applied, because "[d]isarming Diaz fits within this tradition of serious and permanent punishment." *Id.* at 470.

Sixth Circuit:

Finally, the Sixth Circuit has identified as-applied challenges to § 922(g)(1) as an important and historical mechanism for individuals in a class susceptible to disarmament to seek an exception to being personally disarmed. *Williams*, 113 F.4th at 650-57. After extensively analyzing historical disarmament practices, the Sixth Circuit noted that the disarmament of a class of people traditionally included means by which an individual member of that class could seek a personal exception to collective disarmament. *Id.* at 650-57. Comparing that historical tradition to § 922(g)(1), the *Williams* court found that without as-applied challenges, § 922(g)(1) would not provide adequate opportunity for individuals to seek an exception to disarmament. *Id.* at 657-61. "When a disarmament statute doesn't provide an administrative scheme for

individualized exceptions, as-applied challenges provide a mechanism for courts to make individualized dangerousness determinations." *Id.* at 661. In other words, a means to seek an exception is a necessary component of this Nation's historical disarmament traditions.

The Sixth Circuit then considered Williams's criminal history in light of the historical traditions. *Id.* at 661-62. Williams's history included two felony counts of aggravated robbery, both involving the use of a gun. *Id.* at 662. "Because Williams's criminal record shows that he's dangerous, his as-applied challenge fails." *Id.* Therefore, "[t]he government may, consistent with the Second Amendment, punish him for possessing a firearm." *Id.*

B. The Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits reject individual assessment or as-applied challenges.

On the other hand, the Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have disallowed as-applied challenges to § 922(g)(1), based on their review of historical traditions allowing the disarmament of classes of people deemed either dangerous, not law abiding, or not responsible, by a legislature, or based on pre-*Bruen* circuit precedents. *Hunt*, 123 F.4th 697; *Jackson* II, 110 F.4th 1120; *Duarte*, 137 F.4th 743; *Vincent*, 127 F.4th 1263; *Dubois*, 139 F.4th 887. Essentially, these courts found that because large classes of people were prohibited from possessing firearms in the past, § 922(g)(1) is applicable to all members of that class (felons), without exception.

Fourth Circuit:

In *Hunt*, the Fourth Circuit applied its pre-*Bruen* rationale "that people who have been convicted of felonies are outside the group of 'law-abiding responsible citizen[s]' that the Second Amendment protects." *Hunt*, 123 F.4th at 704 (quoting *United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012)). Post-*Bruen*, the circuit adhered to its precedent that felons' possession of firearms falls "outside the ambit of the individual right to keep and bear arms." *Id.* (quoting *Bianchi v. Brown*, 111 F.4th 348, 448 (4th Cir. 2024) (en banc)). Consequently, "*Bruen* and *Rahimi* thus provide no basis . . . to depart from this Court's previous rejection of the need for any case-by-case inquiry about whether a felon may be barred from possessing firearms." *Id.*

Therefore, under the first prong of the *Bruen* test, the Fourth Circuit found that felons are not part of "the people" protected by the Second Amendment, because they are not law abiding. *Id.* at 705 (explaining that § 922(g)(1) does not "regulate activity within the scope of the Second Amendment"). As to the second prong, the *Hunt* court joined *Jackson* II's historical analysis and conclusions, explained below. *Id.* at 705-06 (stating, in part, "[w]e agree that 'either reading' of the relevant history 'supports the constitutionality of § 922(g)(1) as applied to [Hunt] and other convicted felons' " (quoting *Jackson* II, 110 F.4th at 1126)).

Eighth Circuit:

In *Jackson* II, the Eighth Circuit found that "legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by *those who deviated from legal norms*, not merely to address a person's demonstrated propensity for violence." *Jackson* II, 110 F.4th at 1127 (emphasis added). Thus, it held that the Second Amendment allows permanent disarmament of anyone who is "*not a law-abiding citizen*, and history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society." *Id.* (emphasis added). As an alternative justification, it reasoned that disarmament by classification was proper because "[l]egislatures historically prohibited possession by categories of persons based on a conclusion that the *category as a whole presented an unacceptable risk of danger* if armed." *Id.* at 1128 (emphasis added).

Consequently, on the Eighth's Circuit theory, disarmament of the class precludes consideration of challenges by the individual. "This history demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons." *Id.* The *Jackson* II court rejected the suggestion that "a presumption of constitutionality [ ] could be rebutted on a case-by-case basis." *Id.*

Ninth Circuit:

In *Duarte,* the Ninth Circuit conducted its own review of the history of firearms regulations, finding § 922(g)(1) consistent with that tradition. *Duarte*, 137 F.4th at 755-62. Based on this review, the Ninth Circuit found a tradition of "permanent and categorical disarmament of felons," and joined the Fourth and Eighth Circuits' conclusions that § 922(g)(1) is constitutional as to "all" felons:

> Legislatures have historically retained the discretion to punish those who commit the most severe crimes with permanent deprivations of liberty, and legislatures could disarm on a categorical basis those who present a "special danger of misuse" of firearms. *Rahimi*, 602 U.S. at 698, 144 S.Ct. 1889. We agree with the Fourth and Eighth Circuits that either historical tradition is sufficient to uphold the application of § 922(g)(1) to all felons. *See Jackson*, 110 F.4th at 1127–28; *Hunt*, 123 F.4th at 706.

Id. at 761. This included "Duarte and other non-violent felons." *Id.* at 762.

Tenth Circuit:

Since *Rahimi,* the Tenth Circuit has reaffirmed its pre-*Bruen* conclusion that § 922(g)(1) is constitutional. *Vincent*, 127 F.4th at 1265-66 (concluding *Rahimi* did not abrogate *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)). Further, the *Vincent* court explained that even "nonviolent offenders" cannot challenge § 922(g)(1), as applied to them, because such challenges are unavailable under *McCane*. *Vincent,* 127 F.4th at 1266. "There we upheld the constitutionality of § 922(g)(1) without drawing constitutional distinctions based on the type of felony involved." *Id.* "*McCane* instead upheld the constitutionality of § 922(g)(1) for all individuals convicted of felonies." *Id.* Like the Fourth,

Eighth, and Ninth Circuits, the Tenth Circuit treats all felons as a class, whose members cannot challenge their disarmament individually.

Eleventh Circuit:

Finally, the Eleventh Circuit recently reaffirmed its pre-*Bruen,* pre-*Rahimi* precedent that held § 922(g)(1) is constitutional and allows for categorical disarmament of groups of persons, including felons. *Dubois*, 139 F.4th at 892-94 (concluding neither *Bruen*, nor *Rahimi,* abrogated *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010) (per curiam)). In *Rozier*, the Eleventh Circuit held:

> Rozier's Second Amendment right to bear arms is not weighed in the same manner as that of a law-abiding citizen, such as the appellant in *Heller*. While felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects the level of protection those rights are accorded.
>
> The Court made this clear when it referred to those "disqualified from the exercise of Second Amendment rights." [*Heller*, 554 U.S. at 635]. *Heller* stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons ...." *Id.* [at 626]. This language suggests that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment. Recently, in *United States v. White*, we held that Heller recognized § 922(g)(1) as "a presumptively lawful longstanding prohibition." *White*, 593 F.3d 1199, 1205–06 (11th Cir.2010).
>
> Thus, statutory restrictions of firearm possession, such as § 922(g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people. Rozier, by virtue of his felony conviction, falls within such a class. Therefore, the fact that Rozier may have possessed the handgun for purposes of self-defense (in his home), is irrelevant.

Rozier, 598 F.3d at 771 (footnote omitted). Under *Rozier*, the Eleventh Circuit's prohibition on as applied challenges is based on the determination that classes of

citizens may be categorically disarmed. *Id.* *Dubois* reaffirms this rationale after *Rahimi*. *Dubois*, 139 F.4th at 892-94. This rationale is essentially the same as applied in the Fourth, Eighth, Ninth, and Tenth Circuits.

II. The decision below was wrongly decided.

A. *Rahimi* rejects "responsible citizens" categorizations as a complete basis for disarmament.

The rationale of the *Hunt*, *Jackson* II, *Duarte, Vincent, Dubois*, and *Rozier* courts, authorizing classification-based disarmament, is at odds with this Court's analysis in *Rahimi.* Under *Rahimi*, an argument that a defendant or class is not "responsible" is not a valid standalone basis for disarmament. *Rahimi*, 602 U.S. at 701-02. A deeper historical analysis is required.

In *Rahimi*, the Court "reject[ed] the Government's contention that Rahimi [could] be disarmed simply because he is not 'responsible.' " *Id.* at 701. As the Court explained, "such a line" does not "derive from our case law." *Id.* Although *Heller* and *Bruen* "used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right," they "said nothing about the status of citizens who were not 'responsible.' " *Id.* at 701-02. That "question was simply not presented" in *Heller* or *Bruen*. *Id.* at 702. Further, "'[r]esponsible' is a vague term" since "[i]t is unclear what such a rule would entail." *Id.* at 701; *see also id.* at 775 (Thomas, J., dissenting on other grounds) ("[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. Congress could impose any firearm regulation so long as it

targets 'unfit' persons. And, of course, Congress would also dictate what 'unfit' means and who qualifies.").

Under *Rahimi*'s analysis, Marshall and others like him cannot be disarmed simply because modern legislatures have broadened the scope of felony convictions or deemed felons as a whole "irresponsible" or "dangerous." Therefore, the reliance on the categorization of a group of people as irresponsible, dangerous, or not law abiding is insufficient to warrant complete and permanent disarmament after *Rahimi*. *See e.g. Hunt*, 123 F.4th at 703-08; *Jackson* II, 110 F.4th at 1127-29; *Duarte*, 137 F.4th at 759-62; *Vincent*, 127 F.4th at 1265-66; *Dubois*, 139 F.4th at 892-94; *Rozier*, 598 F.3d at 771. The historical analysis and analogues referenced by those courts are insufficient or a misapplication of the *Bruen* standard, as clarified by *Rahimi*.

B. *Rahimi* supports an individualized assessment of dangerousness.

Under both *Bruen* and *Rahimi*, the government bears the burden to show that 18 U.S.C. § 922(g)(1) is consistent with our Nation's traditions of firearm regulation even as applied to nonviolent offenders like Marshall. While the government need not show a "historical twin," it must still demonstrate that its modern firearms regulation is "relevantly similar" to the "why and how" of historical regulations, such that it faithfully reflects "the balance struck by the founding generation." *Rahimi*, 602 U.S. at 692. The "why and how" of the historical authorities cited in *Jackson* II, concerning the disarmament of political or social groups posing a danger to the state, are not analogous to the permanent

disarmament of felons under the § 922(g)(1). *Jackson* II, 110 F.4th at 1126-27 (discussing broad-scale disarmament of religious, racial, and political minorities). Applying the reasoning of *Rahimi*, these historical precedents are too different and too broad to warrant the wholesale, permanent disarmament of felons, without the possibility of individualized assessment, as explained by the courts on the other side of the split.

The precise holding of *Rahimi* is straightforward and limited "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, 602 U.S. at 702. This holding is clear that if a "court" has determined that an "individual" poses a "credible" threat, the individual may be "temporarily" disarmed. *Rahimi* itself, although deciding a facial challenge, walked through how Rahimi's as-applied challenge would have gone to determine its validity. *Id.* at 698-99; *see also United States v. Jackson*, 121 F.4th at 656, 657 (8th Cir. 2024) (Stras, J., dissenting in denial of rehearing en banc) (stating "If the Court meant to cut off all as-applied challenges to disarmament laws . . . it would have been odd to send that message by deciding *Rahimi* based on how *his* as-applied challenge would have gone" (emphasis in original)).

In contrast, 18 U.S.C. § 922(g)(1), effects a *permanent* and categorical ban on the possession of firearms by *all* persons convicted of felony-type offenses. Notably, Congress, in passing this law, categorized all people who have been convicted of felony-type offenses as a threat to others, regardless of the nature

and age of their offense, and as opposed to an individualized determination by a court. *See Rahimi*, 602 U.S. at 702. Moreover, 922(g)(1) does not provide a practical means for individuals to challenge its application, other than as-applied challenges. *See Williams*, 113 F.4th at 661 (discussing 18 U.S.C. § 925(c) and its limitations). Until 1992, 18 U.S.C. § 925(c) allowed a person prohibited from possessing a firearm to administratively apply for rearmament, but Congress has since refused to appropriate funds to effectuate this process. *Id.*; Kari Lorentson, *18 U.S.C. § 922(g)(1) Under Attack: The Case for As-Applied Challenges to the Felon-in-Possession Ban*, 93 Notre Dame L. Rev. 1723, 1726-27 (2018).

The mechanisms provided by § 922(g)(1) profoundly and impermissibly differ from "how" firearms were historically regulated. Traditional temporary and limited disarmaments were less onerous and burdensome than § 922(g)(1)'s permanent and complete disarmament, particularly when read to preclude individual challenges. *See Williams*, 113 F.4th at 657-61 (concluding "The relevant principle from our tradition of firearms regulation is that, when the legislature disarms on a class-wide basis, individuals must have a reasonable opportunity to prove that they don't fit the class-wide generalization. That principle is satisfied whether the official is an executive agent or a court addressing an as-applied challenge"). Further, § 922(g)(1) stands in stark contrast to the surety laws discussed in *Rahimi* that provided an individualized assessment of dangerousness or means of obtaining exceptions. *Rahimi*, 602 U.S. at 693-700. The surety laws and "going armed" laws, therefore, do not support

the expansive limitations and permanent restrictions imposed by § 922(g)(1), nor a reading that precludes as-applied challenges. Moreover, as discussed above, *Rahimi* rejects a categorical disarmament theory. *Id.* at 701-02, 775.

In *Rahimi*, this Court left open whether disarmament laws are subject to as-applied challenges, whether disarmament must be based on the existence of an individualized "threat" determination, and whether a challenge can be made to the duration of such disarmament. *See cf. id.* at 713 (Gorsuch, J., concurring). The question of whether § 922(g)(1) is subject to as-applied challenges raises these questions and continues to divide the courts of appeals. The Court should grant certiorari, address the conflicting conclusions drawn by the circuits from the historical information, and resolve the question of whether as-applied challenges are available under the Second Amendment.

III. This case is an ideal vehicle for the question presented.

This case squarely presents the Second Amendment issues driving the Circuit split. Marshall has been permanently disarmed based on his prior felony convictions. His felony-level criminal history includes the theft of an unoccupied vehicle, involvement in a conspiracy to distribute cocaine, and a previous conviction for possession of a firearm while a user of and addicted to controlled substances. *See* Dist. Ct. Dkt. 24, at 1-2; *see also* Dist. Ct. Dkt. 37, at 7-8. Marshall argued below that § 922(g)(1) is unconstitutional as applied to him. Dist. Ct. Dkt. 21, at 14-15. The district court denied his motion to dismiss without determining whether he is a dangerous person. App. 3a-4a. The court of appeals applied its categorical

prohibition on as-applied challenges to § 922(g)(1) and cut off Marshall's ability to litigate his dangerousness and the constitutionality of a lifetime firearm ban. App. 1a-2a.

This case provides the opportunity for this Court to make clear that § 922(g)(1) is subject to as-applied challenges, to adopt a standard for evaluating as-applied challenges to lifetime firearm prohibitions based on prior convictions, and to guide lower courts in addressing similar issues moving forward. This case is an ideal vehicle for the question presented

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 25th day of July, 2025.

Respectfully submitted,

JASON J. TUPMAN
Federal Public Defender
By:

/s/ David S. Barari

David S. Barari, Assistant Federal Public Defender
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
655 Omaha Street, Suite 100
Rapid City, SD 57701
David_Barari@fd.org
Phone: (605) 343-5110

Counsel of Record for Petitioner