NO. _____

In the

Supreme Court of the United States

DAVID KEITH NUTTER, ***Petitioner*****,**

v.

UNITED STATES OF AMERICA, ***Respondent.***

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

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I. QUESTIONS PRESENTED FOR REVIEW

In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), this Court adopted a two-step approach for analyzing whether regulation of the possession of firearms violated the Second Amendment. The first step of that analysis involves determining whether the conduct at issue is protected by the Second Amendment. Lower courts, including the Fourth Circuit, have concluded that the first step of *Bruen* is satisfied only if the challenger is a "law-abiding" citizen.

In *United States v. Rahimi*, 602 U.S. 680 (2024), this Court clarified how a tradition of firearm regulation may be established by a historical analogue sharing the same "why" and "how" in terms of Second Amendment burdens as the modern firearm regulation being challenged. This Court upheld the ***temporary*** disarmament imposed by 18 U.S.C. § 922(g)(8), based on Founding era civil surety laws and criminal affray laws collectively as historical analogues. Relying on both *Rahimi* and the analogues it analyzed, the Fourth Circuit in this case also found 18 U.S.C. § 922(g)(9) facially constitutional.

This Petition presents two issues:

1. Whether § 922(g)(9) runs afoul of the Second Amendment, facially and as-applied, where (a) ambiguous historical regulation of generalized "dangerousness" justifies the "why," (b) the relevant proxy for such "dangerousness" is a ***misdemeanor*** conviction categorically requiring no more than reckless non-consensual touching to establish use of physical force as an element, and (c) the

statute exacts the much greater burden than any referenced historical analogues in *Rahimi* by permanently disarming citizens who sustained such convictions.

2. Whether the Fourth Circuit erred by concluding that Nutter's as-applied challenge to § 922(g)(9) had been waived.

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- *United States v. Nutter*, Appeal No. 22-4541, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on May 14, 2025.

V. OPINIONS BELOW

The Fourth Circuit affirmed the denial of Nutter's motion to dismiss in a published decision, *United States v. Nutter*, 137 F.4th 224 (4th Cir. 2025), that is attached to this Petition as Appendix A. The district court's written memorandum opinion denying petitioner's motion to dismiss was also a published decision, *United States v. Nutter*, 624 F. Supp. 3d 636 (S.D. W. Va. 2022), and is attached to this Petition as Appendix B. The judgment order is unpublished and is attached to this Petition as Exhibit C.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on May 14, 2025. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

This Petition requires interpretation and application of the Second Amendment to the United States Constitution, which 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.

As well as 18 U.S.C. § 922, which provides, in pertinent part:

> (g) It shall be unlawful for any person –
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> * * *
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
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> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

And 18 U.S.C. § 921(a)(33), which provides also in pertinent part:

> (A) . . . the term "misdemeanor crime of domestic violence" means an offense that –
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> (i) is a misdemeanor under Federal, State, Tribal, or local law; and
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> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, by a person similarly situated to a spouse, parent or guardian of the victim, or by a person who has a current or recent former dating relationship with the victim.
>
> * * *
>
> (C) . . . Provided, That, in the case of a person who has not more than 1 conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship, and is not otherwise prohibited under this chapter, the person shall not be disqualified from shipping, transport, possession, receipt, or purchase of a firearm under this

> chapter if 5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted of another such offense, a misdemeanor under Federal, State, Tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, or any other offense that would disqualify the person under section 922(g). The national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act (34 U.S.C. 40901) shall be updated to reflect the status of the person. Restoration under this subparagraph is not available for a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On August 11, 2021, a federal grand jury sitting in the Southern District of West Virginia returned a single count indictment charging David Keith Nutter with possessing a firearm after sustaining a conviction for misdemeanor crime of domestic violence, under 18 U.S.C. §§ 922(g)(9) and 924(a)(2). JA008-JA009.[1] Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. The district court denied petitioner's *Bruen*-based motion to dismiss, JA122-JA137, subsequent to which Nutter persisted in his revised pre-*Bruen* plea agreement. JA178-JA184. This is an appeal from a final judgment and sentence imposed on September 15, 2022. JA187-JA194. Nutter timely

[1] "JA" refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

filed a notice of appeal on September 21, 2022. JA195. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3731.

B. Relevant Second Amendment Jurisprudence.

The Second Amendment provides that 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." For generations courts interpreted that text as limiting the right to bear arms to being associated with militia service. That changed in 2008 with this Court's decision in *Heller*. Since then, however, lower courts have not given the individual right enshrined by the Second Amendment full deference and have continued to insulate regulations, such as 18 U.S.C. § 922(g)(9) from sufficient scrutiny.

1. This Court sets forth the individual right to keep and bear arms in *Heller*.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court rejected the collectivist, militia-based construction of the Second Amendment which had prevailed since 1939, *see United States v. Miller*, 307 U.S. 174 (1939); *Parker v. District of Columbia*, 478 F.3d 370, 379 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203, 218-20 (5th Cir. 2001), with an individual right to self-defense disconnected from militia service. Foundational to that individual right, this Court defined the "people" in the Second Amendment's plain text as including all members of the political community, not an unspecified subset. *Heller*, 554 U.S. at 579-580. This Court went on to define "the substance of the right" (i.e. conduct) protected by the Second Amendment as possessing and/or carrying "arms" for purposes of individual self-

defense. *Id.* at 581-595. Rejecting Justice Breyer's interest balancing approach for defining the scope of that individual right, this Court held that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

This Court emphasized that it was not reading the Second Amendment to protect the right of citizens to carry arms for ***any*** sort of confrontation, and that the right secured by the Second Amendment "is not unlimited." *Heller*, 554 U.S. at 595, 626. This Court further added, without identifying what specific longstanding prohibitions it was relying on: "[a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." *Id.* at 626; *see also id.* at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples"). This Court concluded by acknowledging that *Heller* was its first in-depth examination of the Second Amendment, that it was not intended to clarify the field, and that "[t]here will be time enough to expound upon the historical justifications for the exceptions . . . when those exceptions come before us." *Id.* at 635.

2. Lower courts read *Heller* narrowly and give effect to its broad *dicta*.

After *Heller*, the Government seized upon the "longstanding prohibitions," "presumptively lawful," and "law-abiding and responsible citizen" language as if they were the controlling substance of this Court's holding. Based upon *Heller*'s *dicta*, the Government has consistently maintained since 2008 that Second Amendment

protections only apply to law-abiding and responsible citizens. The Fourth Circuit (as well as other lower courts), ultimately accepted the Government's assertions, adopting an intermediate scrutiny standard to conclude that diminished Second Amendment protections applied to persons who were not perfect "law-abiding and responsible" citizens (however those terms were supposed to be defined). *See, e.g., United States v. Chester*, 628 F.3d 673, 678 (4th Cir. 2010). Because the Second Amendment codified a pre-existing right, *United States v. Cruikshank*, 92 U.S. 542 (1875), and because *Heller* said the scope of Second Amendment protections is subject to historical limitation, *Chester* adopted a two-step test for analyzing Second Amendment challenges. *Chester*'s first step combined a textual and historical inquiry regarding the Second Amendment's scope at the time of its ratification with whether the challenged regulation burdened otherwise protected conduct. *Chester*, 628 F.3d. at 680. If the regulation did, then *Chester*'s second step was to apply the appropriate level of means end scrutiny. *Ibid. Chester* placed the burden for the historical step one inquiry on the defendant, and for the step two means-end scrutiny inquiry justifying the regulation on the Government.

Thereafter, as *Heller*-based Second Amendment litigation on the constitutionality of different Gun Control Act sections ensued, the Fourth Circuit held that § 922(g)(9) survived post-*Heller* Second Amendment scrutiny. As part of establishing intermediate scrutiny review, *Chester* found that with respect to disarming entire categories of persons (as is the case with several provisions of the 1968 Gun Control Act) the inquiry focused on whether the person, rather than their

conduct with a firearm, is protected by the Second Amendment. *Chester*, 628 F.3d at 680.[2] After debating what *Heller* could have meant by "presumptively lawful" regulatory measures, *Chester* observed even if *Heller*'s listed categorical disarmaments were not historical limitations on the scope of the Second Amendment, the Court could have still believed that they were valid on their face under any level of means-end scrutiny. *Chester* then importantly acknowledged that if historical evidence of disarming felons was inconclusive, it would likely be even more so with respect to domestic violence misdemeanants, given that § 922(g)(9) was not enacted until 1996. *Id.* at 681. The Court ***assumed*** without holding that domestic violence misdemeanants' Second Amendment rights were intact, before adopting intermediate means-end scrutiny as a less demanding standard for reviewing § 922(g)(9) under the Second Amendment. *Chester* then remanded to the district court to apply intermediate scrutiny to § 922(g)(9). *Id.* at 682-683. Notably, the *Chester* majority opinion did not mention, much less distinguish between, post-*Heller* facial and as-applied challenges to § 922(g)(9). *Id*.

United States v. Staten, 666 F.4th 154 (4th 2011), was decided while *Chester* was on remand. Using *Chester*'s intermediate scrutiny standard to analyze Staten's as-applied challenge to § 922(g)(9),[3] the court found a reasonable fit between the challenged regulation and a substantial government objective – reducing domestic

[2] A position this Court has never taken either before or after *Chester*.

[3] Staten had previously asserted a facial challenge before the District Court, which was abandoned on appeal.

gun violence. *Id.* at 160-167. After the *Chester* district court found a similar "reasonable fit" for § 922(g)(9) relying on the "intervening decision" of *Staten*, *United States v. Chester*, 847 F. Supp. 2d 902 (S.D. W. Va. 2012), the Fourth Circuit found *Staten* indistinguishable, affirmed the district court, and rejected Chester's Second Amendment facial overbreadth challenge. *United States v. Chester*, 514 F. App'x 393, 395 (4th Cir. 2013). Until *Bruen*, *Staten* and *Chester* remained the controlling Second Amendment precedents respecting the constitutionality of § 922(g)(9) in the Fourth Circuit.

Four years later, the Fourth Circuit decided *Hamilton v. Pallozzi*, 848 F.3d 614, 625 (4th Cir. 2017), a civil challenge to Maryland firearm regulations. *Hamilton* ultimately held that as-applied challenges to felon disarmament laws were foreclosed unless that citizen had received a pardon or the law forming the basis of the predicate conviction had been declared unconstitutional or otherwise unlawful. Crucial for this Petition's purposes, given the Fourth Circuit's post-*Bruen* reliance on *Hamilton*[4] is that any historical inquiry regarding the Second Amendment's scope was supplanted by "the more direct question of whether the challenger's conduct is within the protected Second Amendment right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Hamilton*, 848 F.3d at 624. For *Hamilton*, ***any*** disrespect for the law was sufficient to deny Second Amendment protection, no matter how old the prior conduct, whether it was non-violent, and no matter what steps the

[4] *See United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024). In combination with *Hamilton*, *Hunt*'s law-abiding citizen limitation was identified as controlling precedent by at least one panelist during oral argument of Nutter's case.

individual citizen had taken after the fact to rehabilitate themselves and avoid further recidivism. Instead, *Hamilton* not only limited as-applied Second Amendment challenges to felon disarmament laws to law-abiding and responsible citizens, it expressly held that the relative seriousness of the predicate conviction, or evidence of rehabilitation, the likelihood of recidivism, and the passage of time, "may not be considered at the first step of the *Chester* inquiry." *Id.* at 626-629.

3. This Court reinforces the proper analytic framework for the Second Amendment in *Bruen,* but little changes in lower courts.

Five years after *Hamilton*, and fourteen years after *Heller*, in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), this Court dispensed with means end scrutiny for Second Amendment challenges altogether. *Bruen* effectively eliminated *Chester*'s step two, instead establishing a "text and history" framework for analyzing whether a firearm regulation violates the Second Amendment. Specifically, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the Government must then demonstrate that the challenged regulation is consistent with this Nation's historical tradition of firearm regulation. *Id.* at 17. Structurally, *Bruen*'s text and history standard now involves two distinct inquiries or steps, much the way *Chester*'s post-*Heller* standard did. The Fourth Circuit's post-*Heller* steps, however, were substantially different from this Court's post-*Bruen* steps. Where *Chester*'s step one combined a textual and historical inquiry regarding the scope of Second Amendment protections, *Bruen* split the analysis into two separate inquiries allocating different

burdens on the parties. The first is textual, simple, and arguably intended to provide meaningful deference to Second Amendment protections of arms possessing and carrying conduct. *See Snope v. Brown*, 145 S. Ct. 1534, 1536-1537 (2025)(Thomas, J., dissenting denial of certiorari). The second consults history, and requires an affirmative showing of a well-established and representative tradition of firearm regulation consistent with the statute being challenged. *Bruen's* second step places the burden squarely on the Government to establish the historical tradition supporting the challenged modern firearm regulation.

Yet, in the Fourth Circuit, little has changed in the wake of this Court's decision in *Bruen*. In *United States v. Price*, 111 F.4th 392 (4th Cir. 2024)(*en banc*), the court addressed whether 18 U.S.C. § 922(k), which makes it a crime to possess a firearm with an altered serial number, violates the Second Amendment. In overturning the district court's grant of a motion to dismiss on that basis, the court concluded that "the conduct regulated by § 922(k) does not fall within the scope of the right enshrined in the Second Amendment because a firearm with a removed, obliterated, or altered serial number is not a weapon in common use for lawful purposes." *Id*. at 397. Recognizing that "*Bruen* set forth a new framework" from the one that developed in the wake of *Heller*, the court stated that "[f]irst, we must ask whether the Second Amendment's plain text covers the ***context*** [not conduct] at issue. If not, that ends the inquiry." *Id*. at 398 (emphasis added). Only if that conduct is covered must the court "ask whether the Government has justified the regulation as consistent with the 'principles that underpin' our nation's historical tradition of

firearm regulation." *Ibid.* citing *United States v. Rahimi*, 602 U.S. 680, 692 (2024). The court rejected Price's argument that "our inquiry at step one is extremely narrow" and "the only relevant question is whether the regulation criminalizes 'keep[ing] and bear[ing]' any 'Arms,'" *Id.* at 398, concluding that "we can *only* properly apply the step one of the *Bruen* framework by looking to the historical scope of the Second Amendment right." *Id.* at 401. *Accord Bianchi v. Brown*, 111 F.4th 438, 448 (4th Cir. 2024)(*en banc*)(citing *Price*). In substance, *Price* opted to continue using the combined *Chester* step one as if it was this Court's *Bruen* step one.

The Fourth Circuit addressed facial challenges to § 922(g)(1) in *United States v. Canada*, 123 F.4th 159 (4th Cir. 2024). Noting that the "law of the Second Amendment is in flux, and courts (including this one) are grappling with many difficult questions" in the wake of *Bruen* and *Rahimi*, the court concluded that "the facial constitutionality of Section 922(g)(1) is not one of them." *Id.* at 161. The court concluded that it "need not – and thus do[es] not – resolve whether Section 922(g)(1)'s constitutionality turns on the definition of the 'people' at step one of *Bruen*," or "a history and tradition of disarming dangerous people considered at step two of *Bruen*," or even this Court's "repeated references to longstanding and presumptively lawful prohibitions on the possession of firearms by felons." *Ibid.* (cleaned up). Nor did the court decide "whether *Bruen* or *Rahimi* sufficiently unsettled the law in this area to free use from our otherwise-absolute obligation to follow this Court's post-*Heller* but pre-*Bruen* and pre-*Rahimi* holdings rejecting" challenges to § 922(g)(1). *Ibid.* Instead, the court concluded that § 922(g)(1) "is facially constitutional because it has a plainly

legitimate sweep and may be constitutional in at least some set of circumstances," *Ibid*. (cleaned up), noting examples such as those convicted "of a drive-by-shooting, carjacking, armed bank robbery, or even assassinating the President of the United States." *Id*. at 161-162. *Canada* is thus noteworthy as much for what it did not decide as for what it did.

In *United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024), the Fourth Circuit further addressed as-applied challenges to § 922(g)(1). Deciding one of the issues left unsettled after *Canada*, the Court concluded that "neither *Bruen* nor *Rahimi* abrogates this Court's precedent foreclosing as-applied challenges to Section 922(g)(1)," as well as that "in the alterative . . . that Section 922(g)(1) would pass constitutional muster even if we were unconstrained by circuit precedent." *Id*. at 702. Noting that the court had concluded in a related Second Amendment area that neither *Bruen* nor *Rahimi* changed existing law,[5] it reached the same conclusion with regard to § 922(g)(1), finding that *United States v. Moore,* 666 F.3d 313 (4th Cir. 2017), remained good law, as it relied on *Heller*'s *dicta* regarding longstanding prohibitions on the possession of firearms by felons. *Hunt* at 702-703.

While recognizing that *Moore* "left open the possibility that some hypothetical challenger" could prevail in an as-applied challenge, "this Court's later decisions repeatedly rejected such challenges, including those brought by allegedly non-violent felons." *Hunt*, 123 F.4th. at 703 (cleaned up). Relying on *Hamilton*, the court

[5] *See Bianchi v. Brown*, 111 F.4th 438 (4th Cir. 2024)(*en banc*)(rejecting Second Amendment challenge to Maryland assault weapons regulations).

reiterated its post-*Heller* holding that felons are excluded from the "category of law abiding, responsible citizens" protected by the Second Amendment. *Ibid.* (cleaned up). Such decisions are "neither impossible to reconcile with *Bruen* and *Rahimi* nor rest on a mode of analysis that has been rendered untenable by them." *Ibid*. For purposes of this Petition, *Hunt*'s wholesale acceptance of the "law-abiding citizen" construction of the Second Amendment obviously extends to other law breakers, including excluding domestic violence misdemeanants from Second Amendment protections. *See id.* at 705-706 ("legislatures had the ability to disarm particular people 'to address a risk of dangerousness,' ***which readily attaches to people who have already been found guilty of having broken the law***")(emphasis added).

Increased Second Amendment deference was an intended consequence of *Bruen*, which does not make the step one inquiry complicated or difficult. This approach did not just materialize out of thin air in 2022. Prior to *Bruen*, for fourteen years Justice Thomas had consistently observed both the states and lower federal courts were resisting this Court's decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), by failing to protect Second Amendment rights to the same extent they protected other constitutional rights.[6] *Bruen* was the predictable reaction

[6] S*ee, e.g.*, *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020)(appeal of New Jersey may issue carry permit requirement and near-total prohibition on public carry: "many courts have resisted our decisions in *Heller* and *McDonald*."); *New York State Rifle & Pistol Ass'n v. City of New York,* 590 U.S. 336, 340-341 (2020)(appeal of New York firearm license ordinance, dismissed as moot when city amended ordinances during appeal; Justice Alito dissent joined by Justice Gorsuch and Justice Thomas); *Silvester v. Becerra*, 138 S. Ct. 945, 950-951 (2018)(appeal of California's 10-day waiting/ cooling off period for firearm purchases); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017)(appeal of California's prohibition of public carry and carrying concealed

to this. The Fourth Circuit, including the panel in this case, has now similarly misapplied *Bruen*'s step one, in a manner that imitates intermediate means-end scrutiny by continuing to avoid meaningful historical justification of regulations burdening Second Amendment protections. *Hunt* relies on *Price* for the proposition historical limits on the scope of Second Amendment protections are properly assessed at *Bruen*'s step one. *Hunt*, 123 F.4th at 705. Yet *Hunt*'s reliance on *Hamilton* conflates *Bruen*'s intended historical inquiry entirely with merely confirming that a citizen has an underlying predicate conviction, thereby ensuring the challenging citizen "flunks" the law-abiding citizen test (a test which does not exist within the plain text of the Second Amendment).

C. Facts Pertinent to the Issue Presented.

In July of 2019, a sheriff's deputy received information that Nutter had firearms in his home. The deputy investigated and learned that Nutter had prior convictions in Ohio related to domestic violence. JA073. Officers executed a search warrant at Nutter's home, recovering a revolver, two shotguns, and a .22 caliber rifle. JA074. As a result of the search, Nutter was charged by indictment with violating 18 U.S.C. § 922(g)(9) for possessing firearms after having sustained convictions for

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firearms in public); *Voisine v. United States*, 579 U.S. 686, 714-716 (2016)(appeal of denying Second Amendment protections based on reckless misdemeanor conduct); *Friedman v. Highland Park*, 136 S. Ct. 447, 449 (2015)(appeal of Illinois' AR-style rifle and large capacity magazine bans); *Jackson v. City and County of San Francisco,* 135 S. Ct. 2799, 2800-02 (2015)(appeal of California ordinance requiring trigger locks for handguns stored in residences).

misdemeanor crimes of domestic violence. JA008-009. Specifically, one conviction was sustained in 1998, the other two in 2002, both in Ohio. JA009.

Nutter filed a motion to dismiss the indictment, on two grounds. JA010-015. As relevant to this Petition, he argued that "18 U.S.C. § 922(g)(9) violates the Second Amendment, as applied to him," noting that since 2002 he had "lived as a law abiding citizen, who should retain and enjoy the fundamental core right to individual self defense protected by the Second Amendment." JA011, JA014-015. On May 17, 2022, the district court denied Nutter's motion to dismiss the indictment in a written opinion and order. JA049-057. Nutter pleaded guilty pursuant to a conditional plea agreement, in which Nutter agreed to plead guilty to the indictment while retaining his right to appeal the district court's denial of his motion to suppress. JA093-099.

After his guilty plea but prior to sentencing, and following this Court's decision in *Bruen*, Nutter renewed his motion to dismiss. JA102-105. The district court denied the renewed motion in a published memorandum and order, *United States v. Nutter*, 624 F. Supp. 3d 636 (S.D. W. Va. 2022). In doing so, the district court "presume[d] without deciding that" Nutter's conduct was covered by the Second Amendment. *Id.* at 639 n.5. However, the district court ultimately concluded that § 922(g)(9) "fits easily within [the] framework of regulation consistent with the history and purposes of the Second Amendment and designed to keep firearms away from dangerous people." *Id.* at 643.

Nutter renewed his challenge to § 922(g)(9) before the Fourth Circuit. After cabining Nutter's appeal to a strictly facial challenge, the Court of Appeal's treatment

of § 922(g)(9) closely tracked *Rahimi* and *Canada*. *United States v. Nutter*, 137 F.4th 224, 229 (4th Cir. 2025). The court declined to apply *Bruen*'s step one to resolve whether Nutter was part of the "people" enjoying Second Amendment protections because it felt Nutter's challenge was decided by *Bruen*'s step two. *Id.* at 230. "In short" the Court held Nutter failed to show that § 922(g)(9) was unconstitutional in all its applications. *Id.* at 231. Relying on the Sixth Circuit's decision in *United States v. Gailes*, 118 F.4th 822 (6th Cir. 2024), and the Eighth Circuit's decision in *United States v. Bernard*, 136 F.4th 762 (8th Cir. 2025), the Fourth Circuit concluded that § 922(g)(9) disarming every person convicted of an offense "in which they had been adjudicated by a court of law to have used . . . physical force . . . against their victim" was on par with *Rahimi*'s finding that temporarily disarming persons found to pose a credible threat of physical safety to others was consistent with the historical tradition of civil surety and criminal affray laws. Thus the court concluded that the historical regulatory tradition relied on by *Rahimi* to uphold § 922(g)(8) was materially indistinguishable and thus similarly applied to § 922(g)(9). *Ibid.* The court also held that § 922(g)(9)'s permanent disarmament was not truly that much greater a burden or "permanent" because the affected citizen's conviction could be vacated, pardoned, set aside and otherwise expunged. *Id.* at 232-233. The court also concluded that Gailes' conduct as a serial domestic violence offender, with two convictions, constituted a case proving that § 922(g)(9) would not be unconstitutional in every circumstance. *Ibid.*

IX. REASONS FOR GRANTING THE WRIT

A. Nutter's Petition should be granted so this Court may articulate a clear standard for measuring generalized, indeterminate "dangerousness" (or alternately reject it) if that term is to serve as a historical "principle" justifying any modern firearm regulation. Without clearly defined guard rails, lower courts are left to use whatever metric they want – making "dangerousness" (a word not found anywhere in the Second Amendment's plain text) no different, no less ambiguous, and no easier to consistently apply than the ill-conceived "responsible" standard *Rahimi* rejected.

Nutter seeks this Court's review of the decision of the Fourth Circuit Court of Appeals which has decided an important question of federal constitutional law that has not been, but certainly should be, settled by this Court: that is (a) the facial constitutionality of Section 922(g)(9) under the Second Amendment post-*Bruen*, and (b) that historical regulations based on generalized notions of "dangerousness" constitute a well-established representative tradition supporting the constitutionality of disarming citizens convicted of misdemeanor domestic violence offense despite the disproportionate burdens imposed on Second Amendment protections by permanent disarmament under § 922(g)(9). *See* Rules of the Supreme Court 10(c).

This Court has expressly held that an individual may not be disarmed, consistent with the Second Amendment, simply because they are not "responsible," concluding that the Government's "responsible" standard was vague. *Rahimi*, 602 U.S. at 701. As Justice Thomas explained, the Government "argue[d] that the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-

abiding,'" but "[n]ot a single Member of the Court adopts the Government's theory." *Id*. at 772-773 (Thomas, J., dissenting). This Court further found it unclear what such a rule would entail, and that the standard did not derive from any Supreme Court caselaw. *Id.* at 701. While the Court acknowledged using the term "responsible" in both *Heller* and *Bruen* to "describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right," those decisions did not define the term or exclude citizens who were not responsible from Second Amendment protections. *Id.* at 701-702.

The Fourth Circuit's resort to a generalized, indeterminate historical "dangerousness" standard, without more, suffers from the same defects as any "responsible" or "law-abiding" filter for historically examining Second Amendment protections. The terms easily lend themselves to segregating Second Amendment protections into the discrete subsections of the people *Heller* rejected. Without precise direction from this Court now, this overgeneralized, undefined "principle" of who may be "dangerous" is free to consume the Second Amendment indiscriminately through virtually any legislative, executive, or judicial whim. *See Rahimi*, 602 U.S. at 772, 777 (Thomas, J., dissenting)(the "Framers and ratifying public understood 'that the right to keep and bear arms was essential to the preservation of liberty' . . . Yet, in the interest of ensuring the Government can regulate one subset of society, today's decision puts at risk the Second Amendment rights of many more."). The *en banc* Third Circuit recognized this danger and its practical consequences in *Range v. Att'y Gen.*, 124 F.4th 218, 226-228 (3d Cir. 2024), as well as in its pre-*Rahimi* decision,

69 F.4th 96, 102-103 (3d Cir. 2023)(". . .such 'extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label.'").

B. *Rahimi*'s historical analogues do not impose a comparable burden to § 922(g)(9)'s "how" – permanent disarmament enforced by criminal prosecution and imprisonment. Conviction for a *misdemeanor* offense defining "use of physical force" as no more than reckless, nonconsensual touching – is an inadequate proxy for establishing indeterminate dangerousness sufficient to justify permanent disarmament in a home for purposes of self defense.

In the context of a Second Amendment challenge, *Rahimi* requires a court to ascertain whether the new law is "relevantly similar" to laws "our tradition is understood to permit." *Rahimi*, 602 U.S. at 692. Why and how the regulation burdens the right are central to this inquiry. Analyzing the historical how and why between Founding era civil surety laws and criminal affray laws and § 922(g)(8)'s temporary disarmament during the pendency of a domestic violence protection order, this Court found a historical tradition of firearm regulation supporting § 922(g)(8). *Ibid.* Doing so, it characterized the resulting temporary disarmament as "narrow" as opposed to being "broad" like the public carry law struck down by *Bruen*. *Id.* at 700.

Unlike § 922(g)(8), the burden imposed by § 922(g)(9) is broad and quite substantial. "Section 922(g)(9) does far more than 'close [a] dangerous loophole' by prohibiting individuals who had committed felony domestic violence from possessing guns simply because they pleaded guilty to misdemeanors." *Voisine v. United States*, 579 U.S. 686, 715 (2016)(Thomas, J., dissenting). It imposes a lifetime ban on possessing a gun for all nonfelony domestic offenses, for which individuals typically

do not have any right to trial by jury. Conviction for such offenses can be obtained for recklessly causing nonconsensual contact or touching with a family member, and then trigger a lifetime ban on gun ownership. *Ibid.; see also United States v. Castleman*, 572 U.S. 157 (2014). In these contexts, whether an application of § 922(g)(9) involves a serial domestic violence offender (who otherwise should be convicted for felony offenses, not pled down to a misdemeanor), there is inconclusive evidence felonies resulted in permanent firearm disarmament at the time of the Founding, much less what is known today as a misdemeanor. Where the resulting burden on Second Amendment protections is so much greater than that imposed by § 922(g)(8) or its supporting historical analogues, § 922(g)(9) does not pass either *Bruen*'s or *Rahimi*'s comparable burden requirement to find support in § 922(g)(8)'s supporting historical analogues. And the reach of § 922(g)(9) impacts thousands of defendants every year.[7]

The misdemeanor element, and resulting permanent disarmament, do not just go to the comparable "how" of *Bruen*'s step two, but also to the Fourth Circuit's conclusion that § 922(g)(9) still has a legitimate sweep in at least some of its applications.

Petitioner does not dispute (generally) that a facial challenge to a legislative Act is the most difficult to mount successfully, because the challenger must establish that no set of circumstances exists under which the Act would be valid. *See Moody v.*

[7] 61,678 cases were reported to the Sentencing Commission for FY 2024, of which 7,419 involved felony convictions under § 922(g). *See* U.S. Sent'g Comm'n, *QuickFacts: Section 922(g) Firearms* (May 2025), https://www.ussc.gov/research/quick-facts/section-922g-firearms (last viewed May 26, 2025).

NetChoice, LLC, 603 U.S. 707, 723 (2024). This Court has held the fact the Act might operate unconstitutionally under some sets of circumstances is insufficient to render it wholly invalid, because this Court has not recognized an "overbreadth" doctrine outside the "limited context" of the First Amendment. *United States v. Salerno*, 481 U.S. 739, 745 (1987)(addressing Fifth Amendment due process and Eighth Amendment challenges to the Bail Reform Act basing detention on prospective future conduct).

In contrast to *Salerno* and operation of the Bail Reform Act, however, the Gun Control Act does not speak to misdemeanor domestic violence convictions and any disarmament enforced by criminal prosecution in terms of "circumstances." Instead, since 1996, § 922(g)(9) disarms citizens ***categorically*** based on a misdemeanor conviction requiring the use of physical force against a family member, which this Court confirmed includes reckless nonconsensual offensive touching. *United States v. Castleman*, 572 U.S. 157, 163-164 (2014); *Voisine v. United States*, 579 U.S. 686, 688 (2016). The definition of the required conviction is itself categorical. Not surprisingly, the Fourth Circuit's comparable burden analysis between civil surety and criminal affray laws and § 922(g)(9) is also categorical, finding the decisive element is court conviction for an offense involving use of physical force against a family member. The actual degree of force used, the frequency of violative conduct, the severity of any resulting injury and number of convictions do not change this. Instead, the categorical element is still a misdemeanor conviction for conduct involving use of physical force defined as no more than reckless, nonconsensual offensive touching. This type of

misdemeanor conviction necessarily includes offenses for which citizens have no right to a trial by jury.[8]

Bruen similarly does not speak in terms of "circumstances," requiring only that a firearm regulation burden the keeping and bearing of Second Amendment protected arms. Provided the regulation burdens that conduct, the inquiry focuses on consistency with a national historical tradition of firearm ***regulation*****,** not circumstances, as evidenced by relevantly similar analogous ***regulations***. Comparing the "why" and "how" of such regulations is necessarily a categorical exercise examining comparable elements of regulations and the comparable burdens they impose on Second Amendment rights. *Bruen*'s whole text and history approach, therefore, does not effectively lend itself to *Salerno*'s facial/as-applied dichotomy, particularly in the absence of any Second Amendment overbreadth doctrine.[9] Instead, where *Salerno*'s invalid-in-all-possible-circumstances standard is forced onto *Bruen* - facial Second Amendment challenges to any firearm regulation are effectively foreclosed. This is easily evidenced by this Court's approach to *Rahimi*, and the Fourth Circuit's approach in *Canada* and *Nutter*, and only reenforces Justice Thomas' ongoing objections to the Second Amendment being relegated to a second class right.

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[8] A misdemeanor is simply a "crime that is less serious than a felony," a "minor crime." *Misdemeanor*, Black's Law Dictionary (12th ed. 2024). It thus encompasses petty offenses, to which the Sixth Amendment's jury trial guarantee does not extend. *See Duncan v. Louisiana*, 391 U.S. 145, 159 (1968)("[c]rimes carrying possible penalties up to six months do not require a jury trial").

[9] For example, analysis of the "how" and "why" of a relevantly similar historical analogue to a modern firearm regulation would be the same whether challenged "facially" or "as-applied."

As a consequence, two evolving material constitutional questions are now presented by the Fourth Circuit's § 922(g)(9) analysis: (a) whether *Salerno*'s standard is necessarily categorical in the Second Amendment context, and (b) whether *Salerno*'s facial/as-applied dichotomy should even apply in the Second Amendment context at all.

The Fourth Circuit's conclusion that § 922(g)(9) has a legitimate sweep in at least some applications is simply not correct from a categorical perspective given its misdemeanor context and high burden of permanent disarmament under *Bruen*. No other constitutional right is treated as cavalierly. Without further review and intervention, the Second Amendment will continue to be relegated as a second-class right, if not an outright "parchment guarantee." Antonin Scalia, *Opening Statement on American Exceptionalism to the Senate Judiciary Committee* (Oct. 5, 2011), https://www.americanrhetoric.com/speeches/antoninscaliaamericanexceptionalism.htm (last viewed August 5, 2025); *Voisine*, 579 U.S. at 715-716 (Thomas, J., dissenting). For that reason, this Court should grant the Petition.

C. Nutter moved to dismiss his indictment based on the new substantive standard *Bruen* established. *Bruen* articulated a standard that did not distinguish Second Amendment challenges based on facial and as-applied grounds. Until *Rahimi* clarified *Salerno*'s continued application, *Bruen* as written either applied or it did not. Nutter's as-applied position was that he was convicted of misdemeanor offenses twenty years before he possessed the guns seized from his home. The Fourth Circuit should have analyzed his as-applied Second Amendment claim.

The Fourth Circuit held that Nutter waived any as-applied challenge on appeal. *Nutter*, 137 F.4th at 228-229. Nutter, however, did more than just use the "magic words" of "as-applied" before the district court and on appeal.

At oral argument, Nutter gave the Court multiple joint appendix references where his briefings referenced his also making an as-applied challenge. Nutter's opening briefing was also guided by *Bruen* itself, Nutter Opening Brief at 9-38, which made no distinction between facial and as-applied challenges. *Id.* Until this Court clarified *Salerno*'s further application to *Bruen* and the Second Amendment in *Rahimi*, 602 U.S. 680, 693, 701, *Bruen* was just *Bruen*. Either the regulation burdened conduct protected by the Second Amendment or it did not, and, if it did, either there was an applicable historical tradition of firearm regulation or there was not. A failure of the regulation under that standard seemingly doomed the regulation under the Second Amendment in ***any*** application, whether the challenge was facial or as-applied. Nutter should not have been penalized where the as-applied part of his case was short and simple: that the domestic violence misdemeanor convictions he sustained were roughly twenty years old, and he had been conducting himself as a law abiding citizen up to the time authorities seized his firearms.

So at a minimum, with respect to an issue solely significant to Nutter and other defendants whose *Bruen*-based cases arose immediately after *Bruen* had been decided, this Court should grant certiorari to correct an error materially prejudicing the party-defendant.

X. CONCLUSION

In 2008 this Court stated "[t]here will be time enough to expound upon the historical justifications for [Second Amendment limitations] . . . when those exceptions come before us." *Heller*, 554 U.S. at 635. This Petition squarely presents the controlling federal constitutional question of whether the Second Amendment textual/historical analysis involves some type of "dangerousness" test, and, if so - whether it is categorical, and then whether any misdemeanor conviction involving use of physical force defined as reckless, nonconsensual touching, can be historically justified to permanently disarm citizens in their own homes. Given how lower courts are using ambiguous purportedly historical "dangerousness" metrics to broadly exclude individual citizens from fundamental Second Amendment protections, it is past time for this Court to correct practical enshrinement of virtually every modern firearm regulation at the expense of Second Amendment protections intended by our Constitution. For the reasons stated, therefore, this Court should grant this Petition.

Respectfully submitted,

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By Counsel

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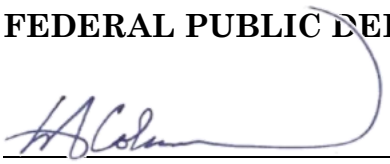

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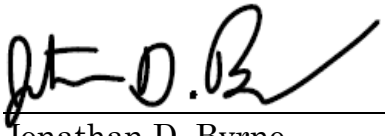

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Dated: August 8, 2025