No. _____

In the

Supreme Court of the United States

_____

Jessie Dejuan Sullivan,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

First, whether 18 U.S.C. § 922(g)(1) facially violates the Second Amendment?

Second, some sentencing judges assert that they would have selected the exact same sentence regardless of any error in applying the Sentencing Guidelines. Should an appellate court accept those assertions at face value?

PARTIES TO THE PROCEEDING

Petitioner is Jessie Dejuan Sullivan, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RELATED PROCEEDINGS

- *United States v. Sullivan,* 4:22-CR-080-P, U.S. District Court for the Northern District of Texas. Judgment entered on August 30, 2024.
- *United States v. Sullivan,* No. 24-10799, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on May 14, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jessie Dejuan Sullivan seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unpublished opinion is available at *United States v. Sullivan*, No. 24-10799, 2025 WL 1392087 (5th Cir. May 14, 2025). It is reprinted in Appendix A. The district court's judgment and sentence in *United States v. Sullivan*, No. 4:22-CR-80-P (N.D. Tex. Aug. 30, 2024), is reprinted in Appendix B.

JURISDICTION

The Fifth Circuit entered judgment on May 14, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the U.S. 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.

Section 922(g)(1) of Title 18 reads in relevant part:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1).

Federal Rule of Criminal Procedure 52(a) provides:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

The government obtained an indictment against Petitioner Jessie Dejuan Sullivan, alleging that he possessed a firearm following a felony conviction. Record in the Court of Appeals 20-22. Subsequently, Mr. Sullivan pleaded guilty to the indictment without a plea agreement. Record in the Court of Appeals 161.

On July 28, 2022, Mr. Sullivan failed to appear for his sentencing, and the court issued a bench warrant. Record in the Court of Appeals 197. He was arrested on the federal warrant on July 14, 2024. Record in the Court of Appeals 197. Mr. Sullivan was sentenced on August 30, 2024. Record in the Court of Appeals 7.

At sentencing, the district court adopted the guideline calculations in the Third Addendum to the Presentence Report (PSR). Record in the Court of Appeals 143-44. That document applied a base offense level of 20 based on a determination that Mr. Sullivan's prior conviction for Texas Robbery Causing Bodily Injury was a crime of violence under the Guidelines. Record in the Court of Appeals 197 (citing U.S.S.G. § 2K1.1(a)(4)(A)). It arrived at a Total Offense Level of 24, after adding a two-level stolen firearm enhancement, a two-level adjustment for obstruction of justice, and no adjustments for acceptance of responsibility. Record in the Court of Appeals 197-98.

The Third Addendum also noted that:

> The offense of conviction concluded on September 29, 2021. The probation officer reviewed and compared the Guidelines Manual in effect on the date the defendant is to be sentenced and the Guidelines Manual in effect on the date the offense of conviction concluded. Based on this review, this officer determined the use of the Guidelines Manual in effect on the date the defendant is to be sentenced will not violate the

> *ex post facto clause* of the U.S. Constitution. Therefore, the November 1, 2021, Guidelines Manual was used to determine the defendant's offense level. USSG §1B1.11(a).

Record in the Court of Appeals 197.

The final guidelines calculation was as follows: Total Offense Level 24, Criminal History Category II, for a Guideline Imprisonment Range of 57 to 71 months. Record in the Court of Appeals 145.

The district court sentenced Mr. Sullivan to 65 months of imprisonment, a three year term of supervised release, and a $100 special assessment. Record in the Court of Appeals 149-51.

After stating the sentence, the district court said:

> And I did feel that a sentence of 65 months with a three-year term of supervised release was sufficient, but not greater than necessary, to comply with all of those purposes pointed out in paragraph (2) of 3553(a). And given the unique facts and circumstances of this case, Mr. Sullivan, and your absconding, this would have been the same sentence I would have given you even if we didn't have the guidelines.

Record in the Court of Appeals 151. It reiterated this sentiment in its statement of reasons. Record in the Court of Appeals 207 ("Even if the guidelines calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. § 3553.").

B. Appellate Proceedings

On appeal, Mr. Sullivan raised, *inter alia*, three claims. First, he argued that the district court plainly erred because it concluded that Mr. Sullivan had been convicted of a crime of violence based on his Texas conviction for robbery causing bodily injury. Initial Brief in *United States v. Sullivan*, No. 24-10799, 2025 WL

475749 at *8 (5th Cir. Filed Feb. 3, 2025) ("Initial Brief."). Acknowledging that Fifth Circuit precedent had held the same, he pointed out that those cases were decided prior to November 1, 2023, when Sentencing Guidelines Amendment 822 was promulgated. Initial Brief at *8. That amendment makes clear that U.S.S.G. § 4B1.2's enumerated offense of "robbery" requires a causal nexus between the taking and force elements of the offense. Initial Brief at *8. Texas robbery causing bodily injury lacks such a nexus. Initial Brief at *8. In addition, the new Guidelines definition of "robbery" incorporates the definition of Hobbs Act robbery, in which the "unlawful taking" must be accomplished "by means of actual or threatened force, or violence, or fear of injury." Initial Brief at **15-16 (citing 18 U.S.C. § 1951(b)(1)). The current definition, like that in the Hobbs Act, requires intentional conduct. Initial Brief at **15-16; Reply Brief in *United States v. Sullivan*, No. 24-10799, 2025 WL 994080 at *2 (5th Cir. Filed Mar. 24, 2025) ("Reply Brief.") And even the Department of Justice agreed with Mr. Sullivan that Texas robbery, which can be committed recklessly, does not fall within the Guidelines' definition. *See* Initial Brief at **19-21; Reply Brief at *2, **13-14.

Next, he claimed that the district court plainly erred by applying the 2021 Sentencing Guidelines Manual, rather than the 2023 Sentencing Guidelines Manul which was in effect when Mr. Sullivan was sentenced on August 30, 2024. Initial Brief at *8.

Finally, Mr. Sullivan argued that his conviction was unconstitutional in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Initial Brief at **8-9.

The Fifth Circuit affirmed in an unpublished opinion. *United States v. Sullivan*, No. 24-10799, 2025 WL 1392087 (5th Cir. May 14, 2025) [Appendix A]. It held that Mr. Sullivan's facial challenge is foreclosed by *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024). *See Sullivan*, No. 24-10799, 2025 WL 1392087 at *1 (5th Cir. Mar. 13, 2025) (citing *Diaz*, 116 F.4th 458). And it denied his two Guidelines-related claims solely based on prong 3 of plain error review:

> Even if we assume that Sullivan has shown clear or obvious error, he cannot succeed on plain error review because he has failed to demonstrate that any error affected his substantial rights. *See id.* To show that his substantial rights were affected, he must demonstrate a reasonable probability that, but for the error, his sentence would have been different. *See id.* Here, the district court stated that it would have imposed the same sentence even if its guideline calculations were incorrect, and its reasons for imposing the sentence were untethered to the allegedly incorrect guidelines range. These reasons included the facts and circumstances of Sullivan's case, the fact that he failed to appear for his original sentencing date and avoided apprehension for nearly two years, and the need to comply with the sentencing purposes listed in 18 U.S.C. § 3553(a)(2). Because the court's explanation shows that it thought the chosen sentence "was appropriate irrespective of the Guidelines range," Sullivan has not shown a reasonable probability that he would have received a different sentence but for the alleged error.

Sullivan, No. 24-10799, 2025 WL 1392087 at *1 (citation omitted).

REASONS FOR GRANTING THE PETITION

I. This Court Should Decide The Constitutionality Of 18 U.S.C. § 922(G)(1) Under The Second Amendment.

Section 922(g)(1) is facially unconstitutional because its lifetime prohibition on gun possession imposes a historically unprecedented burden on the right to bear arms. No historical firearm law imposed *permanent* disarmament. And the justification behind § 922(g)(1)—disarming a broad group of potentially irresponsible individuals—also fails historical scrutiny. The decision below relied on the Fifth Circuit's opinion in *Diaz*, which suffers from analytical flaws and is at odds with this Court's guidance in *Bruen* and *United States* v. *Rahimi*, 602 U.S. 680 (2024).

This question is critically important. Section 922(g)(1) is one of the most commonly charged federal offenses. Uncertainty about whether the statute is constitutional affects thousands of criminal cases each year. Even more concerning, § 922(g)(1) categorically and permanently prohibits millions of Americans from exercising their right to keep and bear arms.

This Court's intervention is urgently needed to resolve the scope of a fundamental constitutional right. After *Rahimi*, the confusion among the courts of appeals has only deepened. The Court should grant certiorari.

A. *Bruen* abrogated precedent upholding the constitutionality of § 922(g)(1).

The Second Amendment to the United States Constitution mandates 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." U.S. CONST. amend. II. In

District of Columbia v. Heller, this Court held that the Second Amendment codified an individual right to possess and carry weapons, the core purpose of which is self-defense in the home. 554 U.S. 570, 628 (2008). *See also McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010) (holding "that individual self-defense is the central component of the Second Amendment right").

After *Heller*, the Fifth Circuit "adopted a two-step inquiry for analyzing laws that might impact the Second Amendment." *Hollis* v. *Lynch*, 827 F.3d 436, 446 (5th Cir. 2016). In the first step, courts asked "whether the conduct at issue falls within the scope of the Second Amendment right." *United States* v. *McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020) (quoting *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012)). This step involved determining "whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." *Id.* at 754. If the conduct was outside the scope of the Second Amendment, the law was constitutional. *Id.* Otherwise, courts proceeded to the second step to determine whether to apply strict or intermediate scrutiny. *Id*.

In *Bruen*, this Court announced a new framework for analyzing Second Amendment claims, abrogating the two-step inquiry adopted by the Fifth Circuit and others. *See* 597 U.S. at 19. *See also Diaz*, 116 F.4th at 465 (holding that *Bruen* "render[s] our prior precedent obsolete") (quotation omitted). It rejected step two of that framework because "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Bruen*, 597 U.S. at 19.

The Court elaborated that, under the new framework, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. The government then "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* Only then may a court conclude that the individual's conduct falls outside of the Second Amendment's "unqualified command." *Id*. (citation omitted). *See also United States* v. *Rahimi*, 602 U.S. 680, 699–700 (2024) (finding § 922(g)(8) facially constitutional under *Bruen*'s Second Amendment test).

B. *Diaz* was wrongly decided, insofar as it holds that the government has met its burden under *Bruen* step 2.

In *Diaz*, the Fifth Circuit considered a facial and as-applied challenge to § 922(g)(1). It first recognized that the constitutionality of § 922(g)(1) was an open question. This Court had not yet directly addressed the constitutionality of § 922(g)(1), and while the Fifth Circuit had issued prior decisions upholding the constitutionality of § 922(g)(1), these decisions relied on "the means-ends scrutiny that *Bruen* renounced" and did not survive *Bruen*. *Diaz*, 116 F.4th at 465 (citing *United States* v. *Darrington*, 351 F.3d 632, 634 (5th Cir. 2003), and *United States* v. *Emerson*, 270 F.3d 203 (5th Cir. 2001)). The court also rejected the government's arguments that felons were not among "the people" protected by the Second Amendment. *See id.* at 466–67 ("Diaz's status as a felon is relevant to our analysis, but it becomes so in *Bruen*'s second step of whether regulating firearm use in this way is consistent with the Nation's historical tradition rather than in considering the Second Amendment's initial applicability.").

But the court ultimately affirmed Diaz's conviction. *Id.* at 472. It found § 922(g)(1) was constitutional on its face and as-applied because there was a historical tradition of imposing severe, permanent punishments on felons like Diaz who had been convicted of theft offenses. *See id.* at 466–472. Specifically, it explained that "[a]t the time of the Second Amendment's ratification, those—like Diaz—guilty of certain crimes—like theft—were punished permanently and severely," that is, by death or estate forfeiture, and "permanent disarmament was [also] a part of our country's arsenal of available punishments at that time." *Id.*

Under *Bruen*, courts must strike down the law unless the government can meet its "heavy burden" to identify a historic tradition of regulations that are "relevantly similar" to § 922(g)(1). *United States* v. *Connelly*, 117 F.4th 269, 274 (5th Cir. 2024). "The challenged and historical laws . . . must both (1) address a comparable problem (the 'why') and (2) place a comparable burden on the right holder (the 'how')." *Id.* (citing *Rahimi*, 602 U.S. 692, and *Bruen*, 597 U.S. at 27–30).

There is no way that the government could have met this heavy burden. Founding-era laws generally limited categorical disarmament to disempowered minority communities—for example, enslaved persons and Native Americans—and those perceived to be disloyal to the government. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 261–65 (2020); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America*, 25 LAW & HIST. REV. 139, 156–61 (2007). These laws are not relevantly similar to § 922(g)(1) because they did not

"impose a comparable burden on the right" and are not "comparably justified" to § 922(g)(1). *Bruen*, 597 U.S. at 29. In fact, "[p]ossessing a firearm as a felon . . . was not considered a crime until 1938 at the earliest." *Diaz*, 116 F.4th at 468 (citing Federal Firearms Act, ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938); An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87–342, § 2, 75 Stat. 757, 757 (1961)).

Such twentieth century laws are well beyond the historical sources cited in *Bruen*, and they cannot demonstrate a longstanding tradition of disarming felons. *See Bruen*, 597 U.S. at 66 (noting that even "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence"). *See also Kanter* v. *Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting) (noting scholars have been unable to identify any founding-era laws disarming all felons); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1563 & n.67 (2009) ("The Founding generation had no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes."). Thus, the government cannot show that § 922(g)(1) is consistent with the Nation's historical tradition of firearm regulation.

This Court's decision in *Rahimi* also weighs in favor of striking down § 922(g)(1). *Rahimi* addressed a facial challenge to § 922(g)(8)(C)(i), the federal law that prohibits firearm possession by persons subject to certain domestic violence restraining orders. *Rahimi*, 602 U.S. 693. The Court found the government had met its burden to identify historical analogues that were "relevantly similar" to the

challenged statute. *Id.* at 697–98. Specifically, it held that the historical statutes identified by the government—surety laws and laws that prohibited riding or going armed with dangerous weapons—showed a national tradition of "temporarily disarm[ing]" an "individual found by a court to pose a credible threat to the physical safety of another." *Id.*

But, all the features that prevented this Court from striking down the *Rahimi* statute are missing from § 922(g)(1). In *Rahimi*, the Court emphasized the narrow scope of the challenged statute. It explained that "Section 922(g)(8) applies only once a court has found that the defendant represents a credible threat to the physical safety of another[,]" which "matches" the similar "judicial determinations" required in the surety and going armed laws. *Id.* at 699 (internal quotation marks omitted). The Court also emphasized the limited duration of § 922(g)(8). It explained that "Section 922(g)(8) only prohibits firearm possession so long as the defendant 'is' subject to a restraining order[,]" just "like surety bonds of limited duration[.]" *Id.* In contrast, § 922(g)(1) is a categorical ban that prohibits everyone convicted of a crime punishable by more than a year in prison from possessing a gun—without any individualized finding or consideration of whether or not they threaten others. *See* 18 U.S.C. § 922(g)(1). The analogues that the government relied upon in *Rahimi* cannot justify this broader, permanent ban. And this Court's reliance on features of § 922(g)(8) that are missing from § 922(g)(1) confirms that § 922(g)(1) cannot pass constitutional muster under *Bruen* and *Rahimi*. Thus, for the same reasons § 922(g)(8) is constitutional, § 922(g)(1) is not.

Diaz held that "laws authorizing severe punishments for" certain felonies "and permanent disarmament in other cases establish that our tradition of firearm regulation supports the application of § 922(g)(1) to" certain felons. 116 F.4th at 471. This analysis suffers from critical flaws.

First, as noted above, *Diaz* held that the government had met its burden to show a "relevantly similar" historical analogue to § 922(g)(1) by relying on historical laws that punished certain crimes by capital punishment and estate forfeiture. *See Diaz*, 116 F.4th at 467–70. But contrary to the reasoning in *Diaz*, laws unrelated to firearms use are not proper analogues. This Court's precedent requires the government to show that a modern gun law aligns with our "historical tradition of *firearm* regulation." *Bruen*, 597 U.S. at 17 (emphasis added); *Rahimi*, 602 U.S. at 691 (same). In other words, the government's historical analogues must regulate *firearms*; capital punishment and estate forfeiture are not firearm regulations. Indeed, *Rahimi* relied only on historical laws that "specifically addressed firearms violence." 602 U.S. at 694–95. So did *Bruen*. *See* 597 U.S. at 38–66.

In justifying its reliance on capital punishment and estate forfeiture, however, *Diaz* asserted that *Rahimi* "consider[ed] several historical laws that were not explicitly related to guns." *Diaz*, 116 F.4th at 468. But *Rahimi* says just the opposite. In *Rahimi*, this Court relied on two historical legal regimes—surety laws and going armed laws—that "*specifically addressed firearms violence*." 602 U.S. at 694–95 (emphasis added). To be sure, surety laws were not "passed *solely* for the purpose of regulating firearm possession or use." *Diaz*, 116 F.4th at 468. But this Court

emphasized that, "*[i]mportantly for this case*, the surety laws also targeted the misuse of firearms." *Rahimi*, 602 U.S. at 696 (emphasis added). "The purpose of capital punishment in colonial America was threefold: deterrence, retribution, and penitence." *Diaz*, 116 F.4th at 469 (citation omitted). Targeting the misuse of firearms was *not* one of its purposes. Yet it was a primary purpose for permanent felon disarmament, which aimed "to keep firearms out of the hands of those who are 'a hazard to law-abiding citizens' and who had demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Id.* (citation omitted). In other words, laws that did *not* target the misuse of firearms—like capital punishment and estate forfeiture—are *not* proper analogues.

Second, *Diaz* noted that this Court accepted a "greater-includes-the-lesser" argument in *Rahimi*. *Diaz*, 116 F.4th at 469–70. This is true only insofar as in *Rahimi*, both the greater restriction (imprisonment under the going armed laws) and the lesser punishment (disarmament under 18 U.S.C. § 922(g)(8)) had *the same purpose*. *Rahimi* held that "if imprisonment was permissible to ***respond to the use of guns to threaten the physical safety of others,*** then the lesser restriction of temporary disarmament … is also permissible." 602 U.S. at 682 (emphasis added). But it does not follow, as *Diaz* concluded, that "if capital punishment was permissible to respond to theft, then the lesser restriction of permanent disarmament that § 922(g)(1) imposes is also permissible." *Diaz*, 116 F.4th at 469. Capital punishment simply did not target gun violence. Because neither capital punishment nor estate forfeiture

establish a tradition of *firearm* regulation, this Court's precedent forecloses employing them as historical analogues for § 922(g)(1).

Third, an historical law must match both metrics to be considered relevantly similar — the why *and* the how — to serve as an analogue under *Bruen*. *Diaz* accordingly mis-stepped when it concluded that "[g]oing armed laws are relevant historical analogues to § 922(g)(1), just as *Rahimi* found them to be with respect to § 922(g)(8)." *Diaz*, 116 F.4th at 471. In short, "the justification behind going armed laws—to 'mitigate demonstrated threats of physical violence'—does not necessarily support a tradition of disarming [felons] whose underlying convictions do not inherently involve a threat of violence." *Diaz*, 116 F.4th at 471 n.5 (quoting *Rahimi*, 602 U.S. at 698). *Diaz* nonetheless relied on these historical laws because of a match on the "how" part of the test, ignoring the deficit on the "why." *See id.* ("We focus on these laws to address the 'how' of colonial-era firearm regulation, rather than the 'why,' which is supported by other evidence." (citing *Bruen*, 597 U.S. at 29)). This approach directly contradicts this Court's instruction to match an analogue on *both* metrics. *Connelly*, 117 F.4th at 274 (citing *Rahimi*, 602 U.S. at 692; *Bruen*, 597 U.S. at 27–30).

The comparison to *Rahimi* also glosses over a critical difference between § 922(g)(1) and § 922(g)(8)(C)(i), which "applies only once a court has found that the defendant 'represents a credible threat to the physical safety' of another." *Rahimi*, 602 U.S. at 699 (quoting 18 U.S.C. § 922(g)(8)(C)(i)). "That matches the . . . going armed laws," *Rahimi* reasoned, "which involved judicial determinations of whether a

particular defendant likely would threaten or had threatened another with a weapon." *Id.* As *Diaz* itself recognized, § 922(g)(1), unlike § 922(g)(8), casts its net irrespective of threats of violence. *Diaz*, 116 F.4th at 471 n.5. *Diaz* cannot excuse this incongruity by only half-applying *Bruen*.

Ultimately, there are no historical firearms laws that imposed the type of categorical, permanent disarmament effected by § 922(g)(1). The government therefore cannot overcome the presumption that § 922(g)(1) violates the Second Amendment. *See Bruen*, 597 U.S. at 24. The statute is unconstitutional, and this Court should grant certiorari.

C. This Court should intervene to resolve the Circuit split regarding the scope of the Second Amendment.

Not only was *Diaz* wrongly decided, but it deepened an intractable split among the Courts of Appeals regarding the scope of the Second Amendment right. The Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have held that § 922(g)(1) may be constitutionally applied to all felons. *See United States v. Duarte*, 137 F.4th 743, 747 (9th Cir. 2025) (citing *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024) (rejecting an as-applied challenge on a categorical basis); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024) (same); *Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th Cir. 2025) (rejecting an as-applied challenge because neither *Bruen* nor *Rahimi* abrogated circuit precedent foreclosing such a challenge); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, — U.S. —, 145 S.Ct. 1041 (2025) (holding that *Bruen* did not abrogate circuit precedent foreclosing such challenges)).

The Third, Fifth, and Sixth Circuits remain open to as-applied challenges, but disagree on how to analyze such a challenge. The Fifth Circuit, as noted above, considers as-applied challenges by defendants whose relevant felonies were not punished "permanently and severely," that is, by death or estate forfeiture. *Diaz*, 116 F.4th at 472. More recently, the Fifth Circuit identified an additional ground for disarming an individual based on § 922(g)(1). In *Schnur*, the court held that the defendant's felony aggravated battery conviction was a "crime of violence" indicating that "he poses a threat to public safety and the orderly functioning of society[,]" and therefore, disarming him "is consistent with this Nation's historical tradition of firearm regulation and punishment of people who have been convicted of violent offenses." *United States v. Schnur*, 132 F.4th 863, 870 (5th Cir. 2025) (citations omitted) (cleaned up). Then, in *Betancourt*, the court looked to the facts of the defendant's felony aggravated assault convictions—in which he disregarded a red light, drove at 107 miles per hour, caused a major crash and seriously injured two people—and determined that he could be disarmed pursuant to *Schnur* because he "poses a threat to public safety." *United States v. Betancourt*, 139 F.4th 480, 484 (5th Cir. 2025) (quoting *Schnur*, 132 F.4th at 870) (internal quotation marks ommitted).

In the Sixth Circuit, however, the defendant bears the burden of proving that he is "not dangerous." *United States v. Williams*, 113 F.4th 637, 657 (6th Cir. 2024). And unlike in the Fifth Circuit—where, in conducting the dangerousness inquiry, the court may only consider "prior convictions that are punishable by imprisonment for a term exceeding one year[,]" *Schnur*, 132 F.4th at 867 (quoting *Diaz*, 116 F.4th at 467)

(cleaned up)—a Sixth Circuit court "may consider a defendant's *entire* criminal record—not just the specific felony underlying his § 922(g)(1) conviction." *Williams*, 113 F.4th at 659–60 (emphasis added).

Significantly, the Third Circuit upheld an as-applied challenge by an individual with a decades-old food stamp fraud conviction, holding that the government could not show a historical tradition of depriving people like him of his Second Amendment right. *Range v. Att'y Gen. U.S.*, 124 F.4th 218, 232 (3d Cir. 2024)(en banc). It adopted yet another standard, holding that § 922(g)(1) is unconstitutional as applied to someone who did not "'pose[ ] a physical danger to others' if armed[.]" *Pitsilides v. Barr*, 128 F.4th 203, 210 (3d Cir. 2025) (quoting *Range*, 124 F.4th at 232). It urged courts to "consider all factors that bear on a felon's capacity to possess a firearm without posing such a danger[,]" which includes an individual's "entire criminal history," and also "post-conviction conduct." *Id.* at 211–12.

In sum, disagreements abound — not only inter-circuit, but intra-circuit too. In *Range*, the en banc Third Circuit generated six opinions, including one dissent. The Ninth Circuit in *Duarte*, also en banc, generated four opinions, including one partial dissent. *Williams*, a panel decision, produced a concurrence in the judgment only. In short, judges "are currently at sea when it comes to evaluating firearms legislation[,]" and are in "need [of] a solid anchor for grounding their constitutional pronouncements." *Rahimi*, 602 U.S. at 747 (Jackson, J., concurring). Indeed, as the inter and intra circuit splits demonstrate, there is a dire need for this Court to intervene.

D. In the alternative, the Court should hold the instant petition pending the resolution of another case presenting the same issue.

This Court should grant certiorari to decide this important issue. Several petitions raising facial challenges to § 922(g)(1) are pending before this Court.[1]

Should the Court grant certiorari in another case presenting a facial challenge to § 922(g)(1), it should hold Mr. Sullivan's petition pending the outcome. *See Lawrence on Behalf Lawrence v. Chater*, 516 U.S. 163, 166 (1996); *Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting)("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be 'GVR'd' when the case is decided.")(emphasis in original).

II. The Court of Appeals Are Divided on the Level of Deference to Grant District Courts that Disclaim the Impact of the Guidelines on the Sentence Chosen, Undermining the Congressional Goal of Uniformity in Sentencing.

Although advisory only, *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines play a central role in federal sentencing. The district court must begin each sentencing determination by correctly calculating them, and mistakes in their application constitute reversible error. *Gall v. United States*, 552 U.S. 38, 49, 50 (2007). Indeed, this Court presumes that Guideline error affects the sentence imposed. *Molina-Martinez v. United States*, 578 U.S. 189 (2016).

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[1] Petitions raising facial challenges to § 922(g)(1) under the Second Amendment are pending in at least the following cases: *Johnson v. United States*, No. 24-7347 (U.S. May 30, 2025); *Mason v. United States*, No. 24-7286 (U.S. May 20, 2025); and *Matlock v. United States*, No. 24-7398 (U.S. Jun. 11, 2025).

The Guidelines thus function as a "framework," *Molina-Martinez*, 589 U.S. at 192, an "anchor," *id.* at 204, a "lodestar," *id.* at 200, and a "benchmark and starting point," *Gall*, 552 U.S. at 49, in federal sentencing. That characterization is both doctrinal and empirical. From an empirical standpoint, most sentences fall within the Guidelines, and Guideline errors actually tend to affect the sentence imposed. *Molina-Martinez*, 589 U.S. at 199-200. Doctrinally, the central role of the Guidelines manifests in a presumption of reasonableness for within-Guideline sentences, *Rita v. United States*, 551 U.S. 338, 341 (2007), in the defendant's *ex post facto* rights in the Guideline Manual, *Peugh v. United States*, 569 U.S. 530 (2013), and in the District Court's duty to explain out-of-range sentences, *Rita*, 551 U.S. at 357. The practice of some Courts of Appeals—blindly accepting statements by the District Court calculated to engineer a finding of harmless error—undermines the special role of the Guidelines in federal sentencing. Moreover, it conflicts with the rule of several other Courts of Appeals. This Court should intervene.

A. The Lower Courts Are divided.

In the Eighth and Eleventh Circuits, a sentencing decision is automatically insulated from appellate review if "the district court explicitly states that it would have imposed the same sentence of imprisonment regardless of the underlying Sentencing Guideline range." *United States v. Peterson*, 887 F.3d 343, 349 (8th Cir. 2018)(quoting *United States v. Davis*, 583 F.3d 1081, 1094–95 (8th Cir. 2009)).

Like the Eighth Circuit, the Eleventh Circuit allows sentencing judges to disclaim any reliance on the Guidelines, even after extensive litigation about them. In the court's own words, a routine disclaimer is "'all we need to know' to hold that

any potential error was harmless." *United States v. Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021)(quoting *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006)); *accord United States v. Grady*, 18 F.4th 1275, 1291 (11th Cir. 2021) (citing *Keene*, 470 F.3d at 1348–49)("[A] guidelines error is harmless if the district court unambiguously expressed that it would have imposed the same sentence, regardless of the guidelines calculation.").

The Second, Third, Ninth, and Tenth Circuits have all rejected routine disclaimers like the one in this case. The Second Circuit has warned every sentencing court that it should "not try to answer the hypothetical question of whether or not it definitely would impose the same sentence on remand if [the court of appeals] found particular enhancements erroneous." *United States v. Feldman*, 647 F.3d 450, 460 (2d Cir. 2011). "Nor do we believe that criminal sentences may or should be exempted from procedural review with the use of a simple incantation: 'I would impose the same sentence regardless of any errors calculating the applicable Guidelines range.'" *Id.*; *see also United States v. Seabrook*, 968 F.3d 224, 233–34 (2d Cir. 2020) ("[T]he district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination when the record indicates that it did.").

In the Third Circuit, a disclaimer doesn't render a Guideline error harmless. The sentencing court would have to conduct a full, three-step sentencing process before selecting a valid alternative sentence: (1) calculate the correct Guideline range as a starting point; (2) decide whether to depart under the Guidelines; and then

(3) weigh the 18 U.S.C. § 3553(a) factors to determine whether a variance is appropriate. *United States v. Wright*, 642 F.3d 148, 155–54 & n.6 (3d Cir. 2011).

The Ninth Circuit agrees: a Guideline error is harmless only if the district court "performs its sentencing analysis twice." *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021)(quoting *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 n.5 (9th Cir. 2011)) (cleaned up). A "mere statement" that the court would impose the same sentence "'no matter what the correct calculation cannot, without more, insulate the sentence from remand' if 'the court's analysis did not flow from an initial determination of the correct Guidelines range.'" *Id.* (quoting *Munoz-Camarena*, 631 F.4d at 1031).

Unlike the court below, the Tenth Circuit would give "little weight to the district court's statement that its conclusion would be the same 'even if all of the defendant's objections to the presentence report had been successful.'" *United States v. Gieswein*, 887 F.3d 1054, 1062–63 (10th Cir. 2018). The Tenth Circuit "has rejected the notion that district courts can insulate sentencing decisions from review by making such statements." *Id.* (citing *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1109 (10th Cir. 2008)).

The Fifth Circuit cannot easily be sorted into one camp or the other. Some panels agree with the Second, Third, Ninth, and Tenth Circuits. *See, e.g.*, *United States v. Ritchey*, 117 F.4th 762, 767 (5th Cir. 2024) ("This statement is relevant to the harmless error inquiry, but it is not decisive."); *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017) ("Nonetheless, it is not enough for the district court to

say the same sentence would have been imposed but for the error."); *United States v. Martinez-Romero*, 817 F.3d 917, 925–26 (5th Cir. 2016)("The court stated three times that even if the 16–level enhancement for the attempted kidnapping was incorrect, it would nonetheless impose the same 46–month sentence." Even so, the "sentencing error [was] not harmless.").

But the decision below—like most published Fifth Circuit decisions—follows the Eighth and Eleventh Circuits' approach: a District Court's Guideline disclaimer is enough to make the error harmless. *See, e.g.*, *United States v. Reyna-Aragon*, 992 F.3d 381, 387–89 (5th Cir. 2021); *United States v. Medel-Guadalupe*, 987 F.3d 424, 429 (5th Cir. 2021); *United States v. Redmond*, 965 F.3d 416, 420–21 (5th Cir. 2020); *United States v. Vega-Garcia*, 893 F.3d 326, 328 (5th Cir. 2018); *United States v. Guzman-Rendon*, 864 F.3d 409, 411–12 (5th Cir. 2017).

B. Experience and data suggest that most Guideline disclaimers are wrong.

"[W]hen a Guidelines range moves up or down, offenders' sentences tend to move with it." *Molina-Martinez*, 578 U.S. at 199 (quoting *Peugh*, 569 U.S. at 544 (2013))(cleaned up). This Court has recognized that, "in most cases" where the "court mistakenly deemed applicable an incorrect, higher Guidelines range," that error will affect a defendant's substantial rights. *Id.* at 200.

In an "ordinary case," the Sentencing Guidelines "serve as the starting point for the district court's decision and anchor the court's discretion in selecting an appropriate sentence." *Molina-Martinez*, 578 U.S. at 204. As this Court has observed, Sentencing Commission "statistics demonstrate the real and pervasive effect the

Guidelines have on sentencing." *Molina-Martinez*, 578 U.S. at 199. That strongly suggests that judges who routinely make Guideline disclaimers understate the Guidelines' effect on their ultimate selection of sentence and overestimate the probability of an above-range departure in the absence of a Guideline error.

C. The practice of disclaiming Guideline error undermines the role of the Guidelines and frustrates Congressional policy.

The Guidelines seek to promote proportionality and uniformity of sentences among similarly situated offenders. *Rita*, 551 U.S. at 349. And appellate review of Guideline questions is important to that goal. Review provides public information about the meaning of Guidelines, resolving ambiguities that might afflict all litigants in the Circuit. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 151 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334 (describing the right to appellate review "essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines."). This process also alerts the Sentencing Commission that an Amendment might be necessary. *Rita*, 551 U.S. at 350; *Braxton v. United States*, 500 U.S. 344, 348 (1991).

Acceptance of routine Guideline disclaimers undermines this framework because it provides a way to avoid meaningful scrutiny of Guideline application questions. Many judges, after all, regard the Guidelines as complicated and cumbersome. *See United States v. Williams*, 431 F.3d 767, 773 (11th Cir. 2005)(Carnes, J., concurring)("The *Booker* decision did not free us from the task of applying the Sentencing Guidelines, some provisions of which are mind-numbingly complex and others of which are just mind-numbing."). District courts that do not

wish to trouble with them, or that do not wish to trouble with them more than once, may be tempted to insulate all sentences from review by issuing a simple Guideline disclaimer. Indeed, distinguished Circuit judges have encouraged such disclaimers precisely to avoid frustrating and difficult Guideline adjudications. *See Williams*, 431 F.3d at 773 (Carnes, J., concurring).

Widespread acceptance of Guideline disclaimers also diminishes the anchoring effect of the Guidelines in federal sentencing. Indeed, a concurring and dissenting opinion of the Fourth Circuit has argued that this is already the condition of federal sentencing:

> The evolution of our harmless error jurisprudence has reached the point where any procedural error may be ignored simply because the district court has asked us to ignore it. In other words, so long as the court announces, without any explanation as to why, that it would impose the same sentence, the court may err with respect to any number of enhancements or calculations. More to the point, a defendant may be forced to suffer the court's errors without a chance at meaningful review. *Gall* is essentially an academic exercise in this circuit now, never to be put to practical use if district courts follow our encouragement to announce alternative, variant sentences. If the majority wishes to abdicate its responsibility to meaningfully review sentences for procedural error, the least it can do is acknowledge that it has placed *Gall* in mothballs, available only to review those sentences where a district court fails to cover its mistakes with a few magic words.

United States v. Gomez-Jimenez, 750 F.3d 370, 390 (4th Cir. 2014)(Gregory, J., concurring and dissenting in part) (footnote omitted).

This Court should grant the petition for certiorari to decide whether such a disclaimer is enough to insulate an erroneous sentence from appellate review.

D. This case well presents the issue.

The present case is an apt vehicle to resolve the Circuit split. The only actual explanation the district court gave for the sentence is Mr. Sullivan's "absconding." *See* Initial Brief at **30–31 (citing Record on Appeal 151). The Fifth Circuit did not address Mr. Sullivan's point that the correct range of 30 to 37 months already takes into account the "absconding" because it includes a 2-level enhancement for obstruction of justice and omits the 3-level reduction for acceptance of responsibility that would otherwise apply for a defendant who pled guilty. Reply Brief at **20–21 (citing Record on Appeal 197-98; U.S.S.G. § 2K2.1(a)(6)(A); U.S.S.G. Ch. 5, Pt. A (Total Offense Level 18, criminal history category II); *see Sullivan*, No. 24-10799, 2025 WL 1392087 at *1. Even at the lower range, the Guidelines account for the "absconding" by increasing Mr. Sullivan's offense level by 5 points.

While the Fifth Circuit claimed that the court also mentioned "the facts and circumstances of Sullivan's case" and "the need to comply with the sentencing purposes in 18 U.S.C. § 3553(a)(2)," *Sullivan*, No. 24-10799, 2025 WL 1392087 at *1, those are boilerplate statements that—like the disclaimer—a district court can recite at *any* sentencing to avoid appellate review. It falls short of a "***detailed*** explanation of the reasons the selected sentence is appropriate." *Molina-Martinez*, 578 U.S. at 200 (emphasis added).

Moreover, the court sentenced Mr. Sullivan to 65 months, a number in the middle of the incorrect range of 57 to 71 months that it reached after considering "the guidelines." Record on Appeal 149, 151. The court's statement of reasons likewise

classified its sentence as a "within the guideline range" sentence. Record on Appeal 205. It is obvious that the Guidelines played a critical role in the district court's decision. The court's statement that it would give the same sentence cannot be treated like magic words, inoculating against this Court's review of the district court's erroneous application of the law.

And to the extent that the district court claimed that it would have given the "same sentence" "even if we didn't have the guidelines" Record on Appeal 151, this Court should not accept such an explanation. If the court would have sentenced Mr. Sullivan to 65 months in the absence of the Guidelines, that means the Guidelines were not the "'starting point and ... initial benchmark'" for the sentencing decision. *Molina-Martinez*, 578 U.S. at 198 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). Yet "[f]ederal courts…'must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.'" *Id.* (quoting *Peugh v. United States*, 569 U.S. 530, 541 (2013)) (emphasis in original). "The Guidelines are 'the framework for sentencing' and 'anchor ... the district court's discretion.'" *Id.* at 198–99 (quoting *Peugh*, 569 U.S. at 542, 549). If Guidelines played no role in the court's sentencing decision, then the district court flouted these Supreme Court directives.

Prong 3 is likely to be dispositive. The court plainly erred by applying the 2021 Guidelines manual, rather than the 2023 Guidelines manual, which was in effect on the date of sentencing. The error affected Mr. Sullivan's substantial rights, because unlike the 2021 Guidelines Manual, the 2023 Guidelines Manual contains

Amendment 822 which overruled this Court's precedent holding that his prior robbery offense was a crime of violence. *See* U.S.S.G. § 4B1.2(e)(3)(2023).

This is notwithstanding the fact that the Fifth Circuit recently held that Texas robbery is a crime of violence under the Guidelines. *See United States v. Wickware*, 143 F.4th 670 (5th Cir. 2025). Wickware argued that Texas robbery was broader than the Guidelines definition because "the addition of the phrase 'by means of actual or threatened force, or violence, or fear of injury' requires a 'causal connection' between the defendant's assaultive conduct and the unlawful taking; the property must be taken from the person *through* actual or threatened force." *Id.* at 674 (emphasis in original). By contrast, according to Wickware, Texas robbery "simply requires harm to another *in the course of* committing theft[.]" *Id.* (cleaned up) (emphasis in original). "For us to agree with Wickware," said the Court, "we must find that 'in the course of' and 'by means of' are substantially dissimilar." *Id.* It declined to do so, because "both phrases require the use of force preceding, during, or throughout the theft. And since minor variances in terminology should not distract us from the substance of the text, we do not find this difference compelling." *Id.* (cleaned up). The Court held that "the elements of robbery under § 29.02 are the same or narrower than those of the Guidelines' generic robbery offense." *Id*. at 675.

This conclusion is wrong. On November 1, 2023, the Sentencing Commission adopted Amendment 822, which created a new definition of "robbery" for the purposes of § 4B1.2 by importing the definition for Hobbs Act robbery. *Compare* U.S. Sentencing Comm'n, Guidelines Manual § 4B1.2(a)(2), (e)(3) (Nov. 1, 2023), *with* 18

U.S.C. § 1951(b)(1). Per the Commission, the recent amendment ensures that a conviction under that statute—frequently referred to as one for Hobbs Act robbery—will qualify as a conviction for a "crime of violence" under the Guidelines Manual. U.S. Sentencing Comm'n, Supplement to Appendix C at 247 (Nov. 1, 2023).

The Hobbs Act and now the Guidelines define "robbery" to require a taking "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . ." *See* 18 U.S.C. § 1951(b)(1); U.S.S.G. § 4B1.2(e)(3). It follows that because the "robbery" definition in § 4B1.2(e)(3) now mirrors Hobbs Act robbery, it requires an intentional use of force.

And, Hobbs Act robbery is a "crime of violence" under the elements clause of 18 U.S.C. § 924(c)(3)(A), which provides that an offense is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against another." *See, e.g.*, *United States v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023). By contrast, offenses committed recklessly *do not* satisfy the elements clause. *See, e.g*, *Borden v. United States*, 593 U.S. 420 (2021) (plurality op.) And because robbery in U.S.S.G. § 4B1.2(e)(3) mirrors the definition of Hobbs Act robbery, it excludes any offense that does not involve an intentional use of force and cannot be committed recklessly. And yet, the Texas Court of Appeals sustained a robbery conviction for a defendant who shoplifted from a store on the second floor of a shopping mall, and in an escape attempt, jumped over a railing and recklessly injured a shopper walking on the first floor. *Craver v. State*, No. 02-14-00076-CR, 2015 WL 3918057 at *2 (Tex. App. June 25, 2015). The Fifth Circuit explicitly declined to address this argument,

noting in a footnote that Wickware had forfeited it. *See Wickware*, 143 F.4th at 674, n.2.

Unlike the appellant in Wickware, Mr. Sullivan briefed this issue before the Court of Appeals. *See* Initial Brief at **14–24; Reply Brief at **1–14. And while review is for plain error, an error may become "plain" any time while the case remains on direct appeal. *See Henderson v. United States*, 568 U.S. 266 (2013).

E. In the alternative, the Court should hold the instant petition pending the resolution of another case presenting the same issue.

This Court should grant certiorari to decide this momentous issue. A petition for certiorari is pending in *United States v. Medrano*, 24-7508 (U.S. Jun. 26, 2025) that raises the issue of whether an appellate court should credit a district court's disclaimer of reliance on the Guidelines.

Should the Court grant certiorari in *Medrano*, or another case, it should hold Mr. Sullivan's petition pending the outcome. *See Lawrence on Behalf Lawrence v. Chater*, 516 U.S. 163, 166 (1996); *Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting)("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be 'GVR'd' when the case is decided.")(emphasis in original).

CONCLUSION

Petitioner Jessie Dejuan Sullivan respectfully asks this Court to grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 12th day of August, 2025.

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