No. __-_____

IN THE

Supreme Court of the United States

SHALIK RASHEEM MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1)'s lifetime ban on firearm possession for all individuals previously convicted of a felony violates the Second Amendment, either facially or as applied to the Petitioner.

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

(1) *United States v. Mitchell*, No. 24-4280, U.S. Court of Appeals for the Fourth Circuit. Judgment entered May 15, 2025.

(2) *United States v. Mitchell*, No. 3:23-cr-00039, U.S. District Court for the Eastern District of Virginia. Judgment entered May 2, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Shalik Mitchell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The order of the Fourth Circuit granting the government's motion for summary disposition appears at App. 1a and is unreported. The district court's orders appear at App. 4a–5a and are also unreported.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. That court issued its judgment on May 15, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment of the 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.

18 U.S.C. § 922(g) provides, in relevant part:

> 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.

INTRODUCTION

This case presents an issue of vital importance that has deeply divided the courts of appeals: whether the government, consistent with the Second Amendment, can permanently disarm U.S. citizens who have previously been convicted of a felony. In the wake of this Court's decisions in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022) and *United States v. Rahimi*, 602 U.S. 680 (2024), the courts of appeals are deeply split on whether 18 U.S.C. § 922(g)(1) is susceptible to as-applied challenges. After surveying the historical record, the Third, Fifth, and Sixth Circuits have held that § 922(g)(1) is constitutional only as applied to people with prior felonies who are dangerous. The Third Circuit, applying that holding, concluded that § 922(g)(1) was unconstitutional as applied to an individual convicted of food-stamp fraud.

In contrast, the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have held that § 922(g)(1) is constitutional as applied to all felons. Those courts have adopted a sweeping rule that applies to individuals with felony convictions that are nonviolent or decades old. In those circuits, a defendant with a food-stamp fraud conviction would not only be prosecuted for possessing a firearm, but he would be prohibited from even attempting to assert an as-applied challenge.

This circuit split is intractable and has created fundamentally unfair disparities in how similarly situated defendants are treated. Individuals with minor or nonviolent felonies in some circuits retain their Second Amendment rights, while individuals with similar criminal histories in other circuits are exposed to federal prosecution if they possess a firearm. Because this split exists, criminal defendants

charged under § 922(g)(1) will continue to pursue these claims and file petitions for certiorari until this Court resolves this issue. This Court should grant the petition and resolve the disagreement between the circuits.

This Court should also grant the petition to correct the decision below. The circuits that have concluded that as-applied challenges are unavailable, including the Fourth Circuit, have misapplied the text-and-history analysis mandated by *Bruen* and *Rahimi*. Under the correct application of that analysis, the government cannot permanently disarm Mr. Mitchell. At the very least, this Court should grant, vacate, and remand with instructions for the Fourth Circuit to decide whether Mr. Mitchell can constitutionally be convicted under § 922(g)(1).

STATEMENT OF THE CASE

Proceedings in the District Court

In March 2023, a grand jury indicted Petitioner Shalik Mitchell in the Eastern District of Virginia on one count of possessing of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). C.A.J.A. 14.[1] Mr. Mitchell had previously been convicted of malicious wounding, use of a firearm in commission of a felony, and possession of a firearm by a felon in violation of § 922(g)(1). C.A.J.A. 241.

Mr. Mitchell moved to dismiss the indictment, arguing that it violated his Second Amendment right to keep and bear arms. C.A.J.A. 16. Citing *Bruen*, he argued that criminalizing the mere possession of a firearm and ammunition, even by a person with a prior felony conviction, was inconsistent with this Nation's historical

[1] Citations to the joint appendix filed in the Court of Appeals will be identified as "C.A.J.A." The joint appendix can be found at Docket Entry 25 on the Court of Appeals docket.

tradition of firearm regulation. C.A.J.A. 16–32. He raised both a facial challenge and an as-applied challenge. C.A.J.A. 31.

The district court held a hearing on the motion and heard arguments from the parties. The court denied the motion from the bench and issued an order after the hearing. C.A.J.A. 165–167; App. 4a. The court adopted the reasoning from an earlier decision in the same district: *United States v. Lane*, 689 F. Supp. 3d 232 (E.D. Va. 2023). App. 4a. In *Lane*, the court concluded that the Fourth Circuit's pre-*Bruen* precedent upholding the constitutionality of § 922(g)(1) was still good law because *Bruen* did not reject or undermine the reasoning of that precedent. *Id*. at 240–242. In the alternative, the court concluded that even if the *Bruen* test applied, Mr. Lane's challenge would fail because felons are not part of "the people" that the Second Amendment protects. *Id*. at 243–249.

In a later memorandum order, the district court in Mr. Mitchell's case also adopted, in the alternative, the court's reasoning in *United States v. Coleman*, 698 F. Supp. 3d 851 (E.D. Va. 2023). The court in *Coleman* disagreed with *Lane* and concluded that felons were part of "the people" the Second Amendment protects. *Coleman*, 698 F. Supp. 3d at 867. But the *Coleman* court held that § 922(g)(1) was still constitutional because, in its view, there was a history and tradition of disarming felons. *Id*. at 867–870. Too support that holding, the court pointed to laws disarming Loyalists during the Revolutionary War and laws "[i]n the decades after ratification" that restricted the rights of felons to carry arms. *Id*. at 868.

After his motion was denied, Mr. Mitchell entered a conditional guilty plea, preserving his right to appeal the district court's denial of his motion to dismiss the

indictment on Second Amendment grounds. C.A.J.A. 227–231. The district court gave Mr. Mitchell a time-served sentence but imposed a three-year term of supervised release. C.A.J.A. 253–254.

Proceedings in the Court of Appeals

Mr. Mitchell timely appealed to the Fourth Circuit and renewed his Second Amendment arguments. C.A.J.A. 259. Mr. Mitchell's appeal was put into abeyance while the Fourth Circuit considered the constitutionality of § 922(g)(1) in two separate cases. The Fourth Circuit issued those decisions in December 2024. First, in *United States v. Canada*, the Fourth Circuit held that § 922(g)(1) is facially constitutional. 123 F.4th 159, 161–162 (4th Cir. 2024). In a follow up case, the Fourth Circuit held that § 922(g)(1) is constitutional as applied to all people with felony convictions. *United States v. Hunt*, 123 F.4th 697, 700 (4th Cir. 2024) , *cert. denied*, No. 24-6818 (June 2, 2025). The court concluded that "neither *Bruen* nor *Rahimi* abrogate[d] [its] precedent foreclosing as-applied challenges to § 922(g)(1)" and "§ 922(g)(1) would pass constitutional muster even if [it] were unconstrained by circuit precedent." *Id*. at 702. After *Canada* and *Hunt* were issued, Mr. Mitchell filed his opening brief. The government filed a motion for summary affirmance, arguing that Mr. Mitchell's Second Amendment challenge was foreclosed by *Canada* and *Hunt*. App. 1a–2a. The Fourth Circuit granted the government's motion and affirmed the district court's decision. App. 1a–2a.

REASONS FOR GRANTING THE PETITION

I. The circuits disagree on whether a defendant may assert an as-applied challenge to a § 922(g)(1) conviction.

In *District of Columbia v. Heller*, this Court held that the Second Amendment confers an individual right to possess and carry weapons in case of confrontation. 554 U.S. 570, 592–595 (2008). After *Heller*, most circuit courts developed a two-part test to assess firearm regulations. *Bruen*, 597 U.S. at 18–19. First, courts would assess whether the conduct being regulated fit within the historical scope of the Second Amendment right, and at the second step, courts would apply an appropriate form of means-ends scrutiny. *Id*. Applying that test, most courts upheld the constitutionality of § 922(g)(1).

But the landscape changed when this Court issued its decision in *Bruen*. This Court rejected any form of means-ends scrutiny and established a new two-part test focused on Second Amendment's text and history. At step one, courts must assess whether the regulated conduct is covered by the plain text of the amendment. *Id*. at 24. If it is, then at step two, the government bears the burden of justifying the challenged regulation by showing that it is consistent with this Nation's history and tradition of firearm regulation. *Id*.

After *Bruen*, there is a deepening split between the circuits over whether § 922(g)(1) is susceptible to as-applied challenges under the Second Amendment. This Court should grant certiorari and resolve this intractable split.

A. As-applied challenges are available in three circuits.

1. The Third, Fifth, and Sixth Circuits have all held that § 922(g)(1) is open to as-applied challenges. *See Range v. Att'y Gen. United States*, 124 F.4th 218, 232

(3d Cir. 2024) (en banc); *United States v. Diaz*, 116 F.4th 458, 470 n.4, 472 (5th Cir. 2024), *cert. denied*, No. 24-6625 (Feb. 24, 2025); *United States v. Williams*, 113 F.4th 637, 657, 662–663 (6th Cir. 2024).[2] Although each court offered its own analysis, they agreed on several key preliminary issues.

First, all three courts concluded that *Bruen* and *Rahimi* "abrogated" their pre-*Bruen* case law upholding the constitutionality of § 922(g)(1). *Range*, 124 F.4th at 225; *see also Diaz*, 116 F.4th at 465 (concluding that *Bruen* "render[ed] our prior precedent obsolete" (citation omitted)); *Williams*, 113 F.4th at 647–648 ("[O]ur pre-*Bruen* precedent isn't binding here because intervening Supreme Court precedent demands a different mode of analysis."). Second, those courts also agreed that *Heller*'s statement that felon-in-possession laws are "presumptively lawful," 554 U.S. at 626–627 & n.26, was non-binding dicta. *Williams*, 113 F.4th at 645–648; *Diaz*, 116 F.4th at 465–466; *Range*, 124 F.4th at 226–228. All three courts reasoned that *Heller*'s brief mention of felon-in-possession laws, which were not at issue in that case, could not absolve them of their duty to analyze whether § 922(g)(1) was consistent with this Nation's history and tradition of firearm regulation. *Williams*, 113 F.4th at 645–648; *Diaz*, 116 F.4th at 465–466; *Range*, 124 F.4th at 226–228. Third and finally, at step one, these courts all agreed that the plain text of the Second Amendment covers people with felony convictions because they are part of "the

[2] The First Circuit has also suggested that as-applied challenges to § 922(g)(1) are permissible. *United States v. Turner*, 124 F.4th 69, 77 n.5 (1st Cir. 2024); *United States v. Langston*, 110 F.4th 408, 419 (1st Cir. 2024). And the Seventh Circuit has assumed without deciding that as-applied challenges are available. *United States v. Gay*, 98 F.4th 843, 846–847 (7th Cir. 2024).

people" the amendment protects. *Williams*, 113 F.4th at 648–650; *Diaz*, 116 F.4th at 466; *Range*, 124 F.4th at 228.

2. At *Bruen* step two, each court adopted a slightly different approach, but they all agree that as-applied challenges to § 922(g)(1) are available. *Williams*, 113 F.4th at 657; *Diaz*, 116 F.4th at 469–470 & n.4; *Range*, 124 F.4th at 232.

In *Range*, the Third Circuit concluded that the government "ha[d] not shown that the principles underlying the Nation's historical tradition of firearms regulation support depriving" someone convicted of food-stamp fraud from exercising his Second Amendment right. 124 F.4th at 232. In a subsequent case, the Third Circuit clarified that § 922(g)(1) is constitutional as applied to felons who "present a special danger of misusing firearms." *Pitsilides v. Barr*, 128 F.4th 203, 210 (3d Cir. 2025) (alterations adopted) (quoting *Rahimi*, 602 U.S. at 698). To determine whether a particular defendant is "dangerous" and subject to disarmament, the Third Circuit requires courts to "consider a convict's entire criminal history and post-conviction conduct indicative of dangerousness, along with his predicate offense and the conduct giving rise to that conviction[.]" *Id.* at 212.

The Sixth Circuit has adopted a similar test for as-applied challenges. In *Williams*, the Sixth Circuit concluded that "our nation's history and tradition demonstrate that Congress may disarm individuals they believe are dangerous," and it acknowledged that "§ 922(g)(1) might be susceptible to an as-applied challenge in certain cases." 113 F.4th at 657. Like the Third Circuit, the Sixth Circuit requires courts assessing an as applied challenge to "focus on each individual's specific

characteristics," including their "entire criminal record, not just the predicate offense …." *Id.*

The Fifth Circuit has taken a slightly different approach. In *Diaz*, the court explained that key question in as-applied cases is whether "the government [can] demonstrate that the Nation has a longstanding tradition of disarming someone with a criminal history analogous to" the challenger. 116 F.4th at 467. The court held that § 922(g)(1) was constitutional as applied to Diaz, who had prior convictions for vehicle theft and evading arrest. After canvassing the history, the court concluded that there was a history and tradition of severely punishing people with similar criminal records at the Founding. *Id.* at 469–470.

In a more recent case, the Fifth Circuit expanded on its as-applied test. *United States v. Kimble*, 142 F.4th 308 (5th Cir. 2025). The defendant in *Kimble* had a prior drug trafficking conviction. *Id.* at 309. The Fifth Circuit examined the historical record and concluded that "[t]he Second Amendment allows Congress to disarm classes of people it reasonably deems dangerous[.]" *Id.* at 314–315. But that was not the end of the analysis: the court emphasized that courts "must determine whether the government has identified a 'class of persons at the Founding who were "dangerous" for reasons comparable to' those Congress seeks to disarm today." *Id.* at 315 (citation omitted). In doing so, the court explained, courts should *not* "look beyond a defendant's predicate conviction" and conduct "an individualized assessment that [the defendant] is dangerous." *Id.* at 318 (citation and internal quotation marks omitted). Applying that standard, the court concluded that § 922(g)(1) is constitutional as applied to Kimble because "[l]ike legislatures in the past that sought

to keep guns out of the hands of potentially violent individuals, Congress today regards felon drug traffickers as too dangerous to trust with weapons." *Id.* at 316.

B. Six circuits hold that § 922(g)(1) is constitutional in every application.

1. The Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have all held that § 922(g)(1) is constitutional as applied to all people with at least one felony conviction—even minor or nonviolent convictions. *See United States v. Jackson*, 110 F.4th 1120, 1125, 1129 (8th Cir. 2024), *cert. denied*, No. 24-6517 (May 19, 2025); *Hunt*, 123 F.4th at 700; *Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th Cir. 2025), *cert. pet. docketed*, No. 24-1155 (May 8, 2025); *United States v. Duarte*, 137 F.4th 743, 761–762 (9th Cir. 2025) (en banc); *United States v. Dubois*, 139 F.4th 887, 894 (11th Cir. 2025); *Zherka v. Bondi*, 140 F.4th 68, 96 (2d Cir. 2025).

The Eighth Circuit reached that decision first in *Jackson*, 110 F.4th 1120. The court started by citing the language in *Heller* and other cases from this Court suggesting that felon-in-possession laws are presumptively valid. *Id.* at 1125. Turning to the *Bruen* analysis, the court concluded that "legislatures traditionally employed status-based restrictions to disqualify" people who "deviated from legal norms" or "presented an unacceptable risk of dangerousness" from possessing firearms. *Id.* at 1129. The court relied on two types of historical analogues to support its conclusion. First, it cited laws that prohibited certain disfavored groups—e.g., religious minorities, Native Americans, Loyalists—from possessing firearms. *Id.* at 1126–1127. Second, the court noted that at the time of the Founding most states "authorized punishments that subsumed disarmament—death or forfeiture of a perpetrator's entire estate—for non-violent offenses …." *Id.* at 1127. Considering the

dicta in *Heller* and those historical laws, the Eighth Circuit concluded that "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." *Id*. at 1125.

The Eighth Circuit voted to deny rehearing en banc, but four judges, in an opinion authored by Judge Stras, dissented from that decision. *United States v. Jackson*, 121 F.4th 656 (8th Cir. 2024). In the dissenters' view, the panel decision "deprives tens of millions of Americans of their right 'to keep and bear Arms' for the rest of their lives" without "a finding of 'a credible threat to the physical safety' of others" or giving those Americans a chance to prove they "no longer pose[] a danger." *Id*. at 657 (citations omitted). The dissenters also noted that the *Jackson* panel opinion "makes no attempt to explain how the burden imposed by the felon-in-possession statute, which lasts for a lifetime, is comparable to any of the Founding-era laws it discusses." *Id*. at 660.

After *Jackson*, a number of other courts followed suit for one reason or another. The Tenth and Eleventh Circuits concluded that neither *Bruen* nor *Rahimi* had undermined its pre-*Bruen* precedent upholding the constitutionality of § 922(g)(1) in all its applications. *Vincent v. Bondi*, 127 F.4th 1263, 1265–1266 (10th Cir. 2025); *United States v. Dubois*, 139 F.4th 887, 893–894 (11th Cir. 2025). The Tenth Circuit, for example, noted that its pre-*Bruen* precedent "relied on *Heller*'s instruction that felon dispossession laws are presumptively valid," and the court believed *Rahimi* "reaffirmed" that presumption. *Vincent*, 127 F.4th at 1265.

The Second and Ninth Circuits also cited *Heller*'s "presumptively lawful" language, but those courts applied the *Bruen* test, instead of merely relying on prior

precedent. Both courts concluded that felons are covered by the plain text of the Second Amendment. *Duarte*, 137 F.4th at 754–755 (finding that Duarte "is one of 'the people' who enjoys Second Amendment rights"); *Zherka*, 140 F.4th at 77 (same). But both courts also held that § 922(g)(1), in all its applications, is consistent with this Nation's historical tradition of firearm regulation. Like the Eighth Circuit in *Jackson*, the Second and Ninth Circuits supported their holdings by citing to (1) Founding-era criminal laws that punished many felonies with death and estate forfeiture and (2) colonial and Founding-era laws that categorically disarmed groups viewed as dangerous. *Duarte*, 137 F.4th at 755–761; *Zherka*, 140 F.4th at 80–91.

2. The Fourth Circuit took an all-of-the-above approach in *Hunt*. First, the Fourth Circuit held that its pre-*Bruen* precedent upholding § 922(g)(1)'s constitutionality, which rested primarily on the "presumptively lawful" dicta in *Heller*, was still good law. 123 F.4th at 702–704. In the *Hunt* panel's view, "nothing in *Bruen* or *Rahimi* undermines … this Court's previous reliance on *Heller*'s express statements about" felon-in-possession laws. *Id.* at 704. The Fourth Circuit acknowledged that *Bruen* had "disavowed the second step of this Court's former two-part test for considering Second Amendment challenges as 'one step too many.'" *Id.* at 704 (*Bruen*, 597 U.S. at 19). The old two-part test required courts to engage in means-ends scrutiny at step two. But the *Hunt* panel concluded that the pre-*Bruen* decisions on § 922(g)(1) were still good law because they "did not rely on any sort of 'means-end scrutiny.'" *Id.* (citation omitted). Instead, those cases determined, at step one of the old test, that felons fell "outside the scope of the Second Amendment." *Id.* (citation omitted).

Second, after reaffirming its earlier precedent, the Fourth Circuit concluded that even if it applied the *Bruen* test, § 922(g)(1) would be constitutional in all its applications. The Fourth Circuit has put its own gloss on the first step of the analysis. Instead of examining the plain text, the Fourth Circuit "'look[s] to the historical scope of the Second Amendment,' and use[s] that history to interpret what is and is not protected by the constitutional text." *Id.* at 705 (quoting *United States v. Price*, 111 F.4th 392, 401 (4th Cir. 2024) (en banc)). And instead of doing its own analysis of the history, the court relied entirely on *Heller*'s "presumptively lawful" language to conclude that felons fall outside the scope of the Second Amendment entirely. *Id.* at 705. The Fourth Circuit is the only circuit court to conclude, at step one, that the plain text of the Second Amendment does not extend to people with felony convictions.

Even if the Second Amendment did afford felons some protection, the Fourth Circuit held, at step two, that § 922(g)(1) is consistent with this Nation's history and tradition of firearm regulation. Relying heavily on the Eighth Circuit's reasoning in *Jackson*, the court held that § 922(g)(1) is justified by this nation's history of disarming (1) people "who deviated from legal norms" and (2) categories of people who posed "a risk of dangerousness." *Id.* at 706 (quoting *Jackson*, 110 F.4th at 1127). The court concluded that the first principle derived from early laws that "regularly punished felons and other non-violent offenders with estate forfeiture or death—far greater punishments that 'subsumed disarmament.'" *Id.* (quoting *Jackson*, 110 F.4th at 1127). And the court concluded that the colonial and Founding-era laws that prohibited certain groups of people—*e.g.*, religious minorities, Native Americans,

Loyalists—from possessing firearms established a tradition of categorically disarming groups deemed dangerous. *Id.* at 706–707.

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In sum, the courts of appeals are intractably split as to whether defendants can raise as-applied challenges to § 922(g)(1) under the Second Amendment. This deepening split has created an untenable situation, where an individual's Second Amendment rights depend on where he happens to live. An individual with a minor, non-violent felony conviction who lives in Pennsylvania can possess a firearm without fear of being prosecuted under § 922(g)(1)—unless he crosses the border into West Virginia, where § 922(g)(1) would still apply to him. To resolve such discrepancies, this Court should grant review and bring uniformity to this area of law.

II. The decision below is wrong.

This Court should also grant the petition because the view adopted by the circuits barring as-applied challenges—including the Fourth Circuit—is erroneous. The Fourth Circuit's decision in *Hunt* provides a good overview of the various arguments defending the constitutionality of § 922(g)(1) and goes even further than most other circuits. As showcased in *Hunt*, the reasoning adopted by circuits upholding § 922(g)(1) in all its applications is inconsistent with *Bruen*'s text-and-history approach.

The Fourth Circuit primarily relies on its pre-*Bruen* precedent, which rests entirely on stray dicta in *Heller* and not any analysis of the text and history of the Second Amendment. In the alternative, the Fourth Circuit purported to apply the test articulated in *Bruen*, but the court ignored the plain text of the Second

Amendment and adopted an overly broad view of historical firearm regulations to uphold § 922(g)(1) and grant the government a "regulatory blank check." *Bruen*, 597 U.S. at 30. This Court should grant certiorari, reverse the decision below, and resolve the split by establishing a uniform and workable test for assessing as-applied challenges to § 922(g)(1).

A. The Fourth Circuit's opinion relies on dicta and misapplies the *Bruen* test.

1. The Fourth Circuit's pre-*Bruen* case law, which relies almost exclusively on dicta in *Heller*, is no longer good law. After *Heller*, the Fourth Circuit held that § 922(g)(1) was facially constitutional because *Heller* had identified felon-in-possession laws "as 'presumptively lawful regulatory measures.'" *United States v. Moore*, 666 F.3d 313, 318 (4th Cir. 2012) (quoting *Heller*, 554 U.S. at 626–627, n.26). *Moore* left open the possibility of as-applied challenges for individuals who could prove they were a "law-abiding responsible citizen[]." *Id.* at 319 (quoting *Heller*, 554 U.S. at 635). But the Fourth Circuit ultimately concluded that a person with a prior felony (even a non-violent one) "cannot be returned to the category of 'law-abiding, responsible citizens' for the purposes of the Second Amendment …, unless the felony conviction is pardoned or the law defining the crime of conviction is found unconstitutional or otherwise unlawful." *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017); *see also United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (holding that § 922(g)(1) is constitutional as applied "to allegedly non-violent felons").

Those decisions are not consistent with *Heller* and *Bruen*. This Court's dicta in *Heller* that identifies felon-in-possession laws as "presumptively lawful" does not resolve § 922(g)(1)'s constitutionality. The legality of § 922(g)(1) was simply not at

issue in *Heller*, so this Court's language is non-binding. *See Rahimi*, 602 U.S. at 701–702 (declining to apply dicta in *Heller* or *Bruen* on an issue that "was simply not presented" in either case); *see also Williams*, 113 F.4th at 648.

Moreover, "applying *Heller*'s dicta uncritically would be at odds with *Heller* itself, which stated courts would need to 'expound upon the historical justifications' for firearm-possession restrictions when the need arose." *Williams*, 113 F.4th at 648 (quoting *Heller*, 554 U.S. at 635). In *Bruen*, this Court reaffirmed that courts must analyze the historical record before adjudicating the constitutionality of a challenged regulation. The type of regulation at issue in *Bruen*—a law restricting the concealed carry of firearms in public—was also identified as a "presumptively lawful" regulation in *Heller*. *Heller*, 554 U.S. at 626 (noting that "the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues"). If *Heller*'s description of concealed-carry bans were dispositive, this Court would simply have deferred to *Heller* and upheld New York's statute on that basis. But this Court instead undertook an exhaustive historical survey of the law governing concealed carriage, from medieval England up to late-19th-century America. *Bruen*, 597 U.S. at 33–70. And after reviewing that history, this Court reached a conclusion different from its off-hand remark in *Heller*, holding that laws burdening concealed carriage are *un*constitutional, at least where the state also forbids open carry. *See id.* at 52–55, 59.

Bruen is clear: Rather than treating *Heller*'s "presumptively lawful" passage as dispositive, courts must actually investigate the historical record to determine whether a firearm regulation is in fact consistent the Second Amendment. Every

type of firearm regulation—even those on *Heller*'s "presumptively lawful" list—must be rigorously scrutinized to determine whether they are "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24.

But, before *Bruen*, the Fourth Circuit explicitly declined to engage in such a historical analysis; instead, the court simply assumed that felons fall outside the Second Amendment's ambit because of the "presumptively lawful" language in *Heller*. *Moore*, 666 F.3d at 318 (explaining that the "analysis is more streamlined when a presumptively lawful regulatory measure is under review"); *Pruess*, 703 F.3d at 246 n.3 ("Because the presumption of constitutionality from *Heller* and *Moore* governs, we need not pursue an analysis of the historical scope of the Second Amendment right"). Indeed, in one case, the Fourth Circuit said that courts faced with as-applied challenges to § 922(g)(1) "need not undertake an extensive historical inquiry to determine whether the conduct at issue was understood to be within the scope of the Second Amendment at the time of ratification." *Hamilton*, 848 F.3d at 624.

Because this Court's pre-*Bruen* case law failed to "undertake an extensive historical inquiry" to determine the constitutionality of § 922(g)(1), it is no longer binding.

2. The Fourth Circuit has also misapplied the first part of the *Bruen* analysis. This Court has instructed that, at step one, the challenger must show that "the Second Amendment's plain text covers" the conduct being regulated. *Bruen*, 597 U.S. at 24. This is generally an easy burden to meet because the plain text covers any "arms-bearing conduct." *Rahimi*, 602 U.S. at 691. If that burden is met, then at step two, the government must show that the challenged regulation "is consistent

with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24; *Rahimi*, 602 U.S. at 691 ("[W]hen the Government regulates arms-bearing conduct … it bears the burden to 'justify its regulation.'" (citation omitted)). In short, the burden is on the government to prove that the regulation is historically justified.

But, as one member of this Court has already noted, the Fourth Circuit's post-*Bruen* case law places "the burden of producing historical evidence on the wrong party." *Snope v. Brown*, 145 S. Ct. 1534, 1536 (2025) (Thomas, J, dissenting from denial of certiorari). Indeed, the Fourth Circuit requires challengers—not the government—to show that the conduct being regulated fits within "the historical scope of the Second Amendment right." *Hunt*, 123 F.4th at 705 (quoting *Price*, 111 F.4th at 401). And, by collapsing the step-two historical analysis into step one, the Fourth Circuit ignores the plain text altogether. In *Hunt*, for example, the court does not quote the text of the Second Amendment or even use the words "plain text" at all.

If the Fourth Circuit had properly conducted the step-one inquiry, it would have concluded that § 922(g)(1) regulates conduct covered by the plain text of the Second Amendment. Indeed, every circuit to have addressed this question, aside from the Fourth Circuit, has reached that conclusion. *See, e.g.*, *Williams*, 113 F.4th at 649 ("On balance, the Second Amendment's plain text presumptively protects Williams's conduct."); *Duarte*, 137 F.4th at 752–753 (same).

The Second Amendment protects "the right of the people to keep and bear Arms." U.S. Const. amend. II. Section 922(g)(1) clearly regulates conduct protected by text of the amendment: the ability to "keep and bear Arms" for self-defense. *Zherka*, 140 F.4th at 76 (concluding that "Section 922(g)(1) clearly covers conduct that

the Second Amendment presumptively protects"). The only issue is whether felons are part of "the people" entitled to Second Amendment rights. The answer to that question is also unequivocally, "yes." *Heller* explicitly held that "the people" protected by the Second Amendment includes "all Americans," not an "unspecified subset." *Heller*, 554 U.S. at 580–81. In other words, the Second Amendment applies to every person who is a member of our "national community." *Id.* at 580 (citation omitted). And that community surely includes people with felony convictions, like Mr. Mitchell. *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) (concluding that felons are not "categorically excluded from our national community").

To be sure, *Heller* does say that the Second Amendment protects the rights of "law-abiding, responsible citizens," 554 U.S. at 635, but as *Rahimi* clarified, this Court used that term simply "to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right." 602 U.S. at 701–02. In other words, that descriptor was meant to define the core of the right, not its outer limits. Moreover, other amendments, like the First and Fourth Amendments, also refer to "the people," but "[f]elons are not categorically barred from First or Fourth Amendment protection because of their status." *Range*, 124 F.4th at 226. It would make scant sense to exclude felons from "the people" for Second Amendment purposes, when felons are still entitled to "constitutional rights in other contexts." *Id.*; *see also Zherka*, 140 F.4th at 77 (reaching similar conclusion); *Duarte*, 137 F.4th at 753–754 (same); *Williams*, 113 F.4th at 649 (same).

3. Finally, the Fourth Circuit incorrectly concluded that the government had met its burden to show that § 922(g)(1) is consistent with this Nation's history

and tradition of firearm regulation. The historical laws the government identified are simply not sufficiently analogous to § 922(g)(1) because they do not justify permanently disarming people who are dangerous or who have "deviated from legal norms." *Hunt*, 124 F.4th at 706 (citation omitted). For example, the Fourth Circuit concluded that permanent disarmament is allowed because Founding-era felons were punished with estate forfeiture or death. *Id.* But that gets the history wrong. By ratification "many states were moving away from making felonies … punishable by death in America." *Range*, 124 F.4th at 227. And under most estate forfeiture laws "a felon could acquire arms after completing his sentence and reintegrating into society." *Id.* at 231.

Even if the Fourth Circuit is right about the history, the mere fact that some felonies were capital crimes at the Founding does not mean that felons today lose all their rights. "Felons, after all, don't lose other rights guaranteed in the Bill of Rights even though an offender who committed the same act in 1790 would have faced capital punishment." *Williams*, 113 F.4th at 658; *see also Zherka*, 140 F.4th at 82 ("That felons could be executed when the Bill of Rights was enacted does not mean that anyone convicted of a felony today forfeits all civil rights."). Nor does the existence of the death penalty at the Founding tell us how the Founding generation would have treated individuals who were not sentenced to death, served their sentences, and re-entered society. *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting).

Next, the Fourth Circuit points to historical regulations that disarmed certain groups—such as, disfavored religious groups or political dissidents—based on their status. *Hunt*, 123 F.4th at 706–07. But none of those laws matches "how" or "why"

§ 922(g)(1) regulates firearm possession. *See Rahimi*, 602 U.S. at 692. Those historical laws were aimed at politically disruptive groups who the Founders feared might engage in rebellion or counter-revolution. "The Founders did not disarm English Loyalists because they were believed to lack self-control; it was because they were viewed as political threats to our nascent nation's integrity." *United States v. Connelly*, 117 F.4th 269, 278 (5th Cir. 2024). The Fourth Circuit also failed to grapple with the ways that those historical laws preserved the right to bear arms. Unlike § 922(g)(1), most of the historical status-based prohibitions had mechanisms in place for individuals "to demonstrate that they weren't dangerous" and retain their arms. *Williams*, 113 F.4th at 660; *see also Range*, 124 F.4th at 275 (Krause, J., concurring in judgment) (detailing how disarmed individuals could rebut the presumption that they posed a risk or danger).

The larger issue is that the Fourth Circuit reads those historical laws at "such a high level of generality that it waters down the right." *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring). *Hunt* concludes that the historical status-based firearm prohibitions authorize modern-day legislatures "to designate any group as dangerous and thereby disqualify its members from having a gun." *Kanter*, 919 F.3d at 465 (Barrett, J., dissenting); *see also Williams*, 113 F.4th at 660 ("[C]omplete deference to legislative line-drawing would allow legislatures to define away a fundamental right."); *Range*, 124 F.4th at 230. That is not how constitutional rights are supposed to work. They are intended to set outer boundaries on legislative power, not to expand or constrict at the legislature's pleasure.

By "uncritically defer[ing] to Congress's class-wide dangerousness determinations," the Fourth Circuit essentially subjected § 922(g)(1) to rational basis review. *Williams*, 113 F.4th at 660. Not only does that contradict this Court's precedent, *Heller*, 554 U.S. at 628 n.27 (rejecting rational basis review in Second Amendment context), but it allows the government to disarm individuals who have been convicted of felonies that have little or no bearing on their propensity to commit physical violence.

For those reasons, this Court should grant review and correct the Fourth Circuit's decision.

B. This Court should adopt a uniform and consistent test for as applied challenges.

The historical record shows that at the very least § 922(g)(1) should be susceptible to as-applied challenges.[3] But this Court should reject the fact-based test adopted by the Third and Sixth Circuits, which requires courts to examine a defendant's entire history to determine if he is dangerous. *Pitsilides*, 128 F.4th at 212. That approach suffers from serious flaws. What standard would courts use to assess "dangerousness"? Does a judge or a jury have to decide the facts related to "dangerousness"? If that approach requires examination of the underlying facts of prior convictions, what if those facts are disputed or simply unavailable?

Beyond those thorny procedural issues, that fact-based approach would allow the government to justify disarming individuals for reasons that are irrelevant to the firearm regulation at issue—Section 922(g)(1). That statute disarms individuals

[3] Mr. Mitchell maintains his facial challenge and contends that even the status-based laws are not sufficiently analogous to § 922(g)(1).

solely because they have previously been convicted of a felony (or felonies). Thus, under *Bruen*, the government is required to demonstrate that our Nation has a history and tradition of disarming individuals based on *that* conduct (i.e., having a prior felony conviction)—not for any other reason. *See Bruen*, 597 U.S. at 29 (requiring courts to focus on "how and why the [challenged] regulations burden" the Second Amendment right). In other words, the government cannot defend § 922(g)(1)'s constitutionality by probing every aspect of a defendant's personal history to find some reason that justifies his lifetime disarmament.

In this case, the government must show that this Nation has a history and tradition of disarming individuals with criminal histories like Mr. Mitchell's. He was previously convicted of malicious wounding, use of a firearm during a felony, and possessing a firearm as a convicted felon. While assault offenses like malicious wounding would have been punished severely at the Founding, the government has failed to show during this litigation that individuals who committed assault offenses at the time of the Founding would have been subject to permanent disarmament. The historical laws that disarmed certain groups viewed as dangerous also do not justify applying § 922(g)(1)'s lifetime ban to Mr. Mitchell. The government has failed to prove that individuals who commit assault offenses, as a group, permanently present a danger to society. Mr. Mitchell was convicted of malicious wounding and use of a firearm a decade ago, when he was just 20 years old. C.A.J.A. 241. Those convictions tell us very little about whether he is still a danger to society today, much less 20 years from now.

In sum, this Court should grant certiorari and provide uniform guidance for lower courts. In doing so, this Court should adopt an as-applied test that focuses on each defendant's predicate felony convictions, not an all-encompassing review of their personal history and characteristics.

III. The issues presented are important and recurring.

The constitutionality of § 922(g)(1) is an exceptionally important issue given that millions of Americans have felony convictions on their records. *See* Sarah K.S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 Demography 1795, 1806 (2018), available at https://tinyurl.com/mt7frvhn (finding that 19 million people had felony convictions on their records in 2010). Section 922(g)(1) permanently bars these Americans from exercising their Second Amendment rights, and because of decisions like the one below, many are not even allowed to assert as applied challenges to restore their rights.

This issue is also recurring and unlikely to resolve itself soon. Section 922(g)(1) is routinely prosecuted in federal courts. In fiscal year 2024, for example, 7,419 cases involved convictions under § 922(g) and 90.4% of those convictions were under § 922(g)(1). U.S. Sent. Comm'n, *Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses* (May 2025), available at https://tinyurl.com/3yte33nu. Second Amendment challenges in § 922(g)(1) cases have multiplied in the wake of *Bruen* and *Rahimi*. Given the conflicting analyses provided by the various circuits, criminal defendants will continue to pursue these claims and file petitions with the Court until the issue is settled.

There is no need for this Court to wait for further percolation in the lower courts because most courts have spoken. Moreover, there is no indication that the lower courts will be able to resolve their numerous disagreements about the constitutionality of § 922(g)(1) or various aspects of the Second Amendment analysis. In fact, some jurists have already asked this Court to step in and provide clarity on the topic. *See United States v. Morton*, 123 F.4th 492, 498 n.2 (6th Cir. 2024) (noting that "there is significant disagreement" about the Second Amendment analysis in the § 922(g)(1) context "that the Supreme Court should resolve").

The government has argued in other cases that the circuit split will be resolved by the Department of Justice's recent efforts to reinvigorate the administrative process under 18 U.S.C. § 925(c) for granting relief from federal firearm prohibitions. *See* Memorandum for the United States in Opposition, *Diaz v. United States*, No. 24-6625, at 2 (May 22, 2025). Under § 925(c), a person who is prohibited from possessing a firearm under federal law can apply for relief with the Attorney General, and the Attorney General can grant such relief if it is satisfied that "the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). For a long time, Congress refused to provide funding for this program, which had been delegated to the Bureau of Alcohol, Tobacco, and Firearms. *Williams* 113 F.4th at 661.

But this year the Attorney General revoked the delegation to the ATF and has indicated that it will begin accepting applications. *See Withdrawing the Attorney General's Delegation of Authority*, 90 Fed. Reg. 13,080 (March 20, 2025) (to be codified at 28 C.F.R. pt. 478). The Department of Justice recently proposed a rule setting

forth the criteria it will use to evaluate § 925(c) applications. *See Application for Relief From Disabilities Imposed by Federal Laws With Respect to the Acquisition, Receipt, Transfer, Shipment, Transportation, or Possession of Firearms*, 90 Fed. Reg. 34,394 (July 22, 2025) (to be codified at 28 C.F.R. pt. 107). The proposed rule sets out a scheme of tiered presumptions against relief. Applicants are presumptively ineligible for relief if they have: (1) ever committed certain enumerated "violent" crimes (e.g., robbery, carjacking, sexual assault); (2) committed certain other enumerated offenses (mostly drug offenses) within the last ten years; and (3) committed any other felony within the last five years. *Id*. at 34,402. An applicant can only rebut the presumption of ineligibility if they make a showing of "extraordinary circumstances." *Id*. Once the presumption no longer applies to an applicant, he still must show that he will not be a danger to the community going forward. *Id*. at 34,403–34,404.

The Attorney General's attempt to revive § 925(c) does not resolve the issues presented in this case. As an initial matter, relief under § 925(c) matters little to Mr. Mitchell and similarly situated defendants who have already been prosecuted and imprisoned for exercising their Second Amendment rights. These defendants are seeking to reverse their convictions and sentences, so § 925(c)'s restoration process is irrelevant to them.

In any case, it is not clear if relief under § 925(c) will be as broad as the Second Amendment requires. Under the proposed rule, the Attorney General's review will "not be bound by the artificial limits of the categorical approach." *Id*. at 34,398. In assessing whether the defendant is eligible for relief, the Attorney general will

consider "all the relevant circumstances, rather than a blindered approach that looks only at the facts that led to the applicant's federal firearm disability." *Id.* If this Court determines that as-applied challenges to § 922(g)(1) under the Second Amendment require the categorical approach, as argued above, *see supra* section II.B, then there will likely be some individuals who are eligible for relief under the Second Amendment who would be ineligible for § 925(c) relief.

Moreover, the government still must prove that § 925(c)'s application process is consistent with this Nation's history of firearm regulation. As noted, the colonial and Founding-era laws that disarmed large categories of people based on their status often gave individuals covered by such laws the opportunity to restore their firearm rights. *Range*, 124 F.4th at 275 (Krause, J., concurring in judgment). But most individuals could restore their rights by simply swearing a loyalty oath. *Id.*; *Williams*, 113 F.4th at 651, 657. Section 925(c)'s screening process, as set forth in the proposed rule, is far more burdensome than a mere loyalty oath. At a minimum, all felons are presumptively ineligible for relief for at least five years, and once an applicant gets out from under that presumption, he still must demonstrate "to the satisfaction of the Attorney General" that he is not dangerous. *Application for Relief From Disabilities*, 90 Fed. Reg. at 34,403.

Applicants under § 925(c) are also completely at the mercy of the Executive, who has the ultimate discretion to decide whether to grant relief. By contrast, during colonial times, it was usually "the local justice of the peace" who made dangerousness determinations, and those decisions were often "guided by some benchmarks, either a loyalty oath, the attestations of others, or some other statutory criteria." *Williams*,

113 F.4th at 657. The criteria for § 925(c) is largely set by the Attorney General through the rulemaking process, so it could change depending on who is residing in the White House. An administration that is particularly hostile to gun rights could establish criteria that are almost impossible to meet.

For those reasons, the government cannot evade defending the constitutionality of § 922(g)(1) by simply restarting the § 925(c) application process. The government still has an obligation to prove that § 922(g)(1)—even with a functioning § 925(c) relief mechanism—is consistent with this Nation's history of firearm regulation. This Court should grant review to determine if the government has met its burden.

IV. This case is a good vehicle to decide these important questions.

This case is the right vehicle to decide that § 922(g)(1) is unconstitutional. Mr. Mitchell has properly preserved his Second Amendment claim throughout the lifespan of this case, so there are no lurking standard of review or preservation issues to complicate matters. There is no reason to think that as-applied challenges to § 922(g)(1) will subside any time soon, so this Court should grant certiorari in this case in order to settle the issue quickly.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted. In the alternative, the case should be held until the Court rules on similar cases presenting the issues raised here and considered at that time.

Respectfully submitted,

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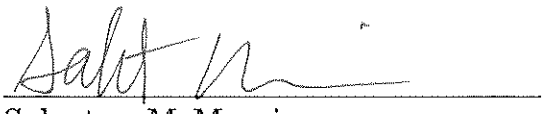

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