No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

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MONTE BARRY,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

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*On Petition For Writ Of Certiorari*
*to the United States Court of Appeals*
*for the Third Circuit*

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Section 922(g)(1) of Title 18 of the United States Code makes it a crime for a person convicted of a felony to possess a firearm at any time thereafter. Petitioner challenged the statute's constitutionality on the ground that lifetime disarmament based on his legal status as a "felon" unlawfully abridges the Second Amendment right to keep and bear arms. The court of appeals rejected his challenge without resolving the constitutionality of the status offense. It relied instead on the view that the Second Amendment affords no protection to persons, like petitioner, who were on parole at the time of allegedly possessing a gun. The questions presented are:

1. Whether courts should analyze as-applied Second Amendment challenges to 18 U.S.C. § 922(g)(1) by examining whether historical tradition supports permanently disarming someone for the predicate offense(s) underlying the defendant's conviction.

2. Whether § 922(g)(1), on its face, unconstitutionally abridges the Second Amendment right to keep and bear arms.

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings are those named in the caption to this petition.

## STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Barry*, Crim. No. 2:18-cr-440, United States District Court for the Western District of Pennsylvania. Judgment entered Dec. 2, 2019.
- *United States v. Barry,* No. 19-3903, United States Court of Appeals for the Third Circuit. Judgment entered Apr. 16, 2025.

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## PETITION FOR WRIT OF CERTIORARI

Monte Barry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit, along with a dissenting opinion, is unreported but available at *United States v. Barry*, 2025 WL 1121593 (3d Cir. 2025), and is reproduced at Appendix A to the petition (App., *infra*, 1a-11a). The judgment of the court of appeals was entered on April 16, 2025. App., *infra*, 12a-13a.

## JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(1). The Third Circuit issued its opinion on April 16, 2025, and denied a timely rehearing petition on June 4, 2025. App. 15a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution states:

> 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 of Title 18 of the United States Code provides:

> (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).

## STATEMENT OF THE CASE

### A. Legal Background

In its seminal decision in *District of Columbia v. Heller*, this Court held that there is "no doubt … that the Second Amendment confer[s] an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). While the Court acknowledged that the right is not "unlimited," it looked to historical restrictions on firearm possession to inform its analysis of the constitutionality of the law at hand. *Id.* at 626-27, 631-34. But the Court left a full-throated exposition of that historical analysis for another day.

Over the next decade, lower courts "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Bruen*, 597 U.S. at 17. But this Court ultimately rejected that approach in *Bruen*, explaining that a "judge-empowering 'interest-balancing inquiry'" would not sufficiently safeguard individuals' constitutional rights. *Id.* at 22. After all, as *Heller* made clear, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* at 23 (quoting *Heller*, 554 U.S. at 634). So the Court laid out a more robust constitutional framework steeped in "the Nation's historical tradition of firearm regulation." *Id.* at 24. Under that approach, if the regulated conduct is covered by the text of the Second Amendment, then it is presumptively protected, and the burden shifts to the government to justify its regulation. *Id.* To do so, the government must identify historical firearm restrictions that are analogous to the modern challenged regulation in their "how and why"—*i.e.*,

the "modern and historical regulations" must "impose a comparable burden on the right of armed self-defense" that "is comparably justified." *Id*. at 29.

Last year, this Court provided additional guidance on how to implement *Bruen's* methodology in *United States v. Rahimi*, 602 U.S. 680 (2024). *Rahimi* reiterated that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition" as evidenced by the government's proffered historical analogues. *Id*. at 692. This Court clarified that those analogues "need not be a 'dead ringer' or a 'historical twin'" for the challenged regulation. *Id*. But it reiterated that "[w]hy and how the [challenged] regulation burdens the right are central" to the Second Amendment inquiry. *Id*. In other words, the focus remains on whether the challenged regulation "impos[es] similar restrictions for similar reasons." *Id*. Applying that framework, this Court held that § 922(g)(8)(C)(i) is constitutionally sound, as it is grounded in a historical tradition of temporarily disarming individuals who have been found to pose "a credible threat to the physical safety of another." *Id*. at 702.

In short, as exemplified in *Rahimi*, *Bruen* tasks courts with conducting a categorical comparison of the mechanics of the challenged provision and the government's historical analogues to assess whether the challenged law passes constitutional muster.

**B. Factual Background**

1. This case originated when detectives in an unmarked car observed a youthful pedestrian, they mistakenly believed to be a minor seemingly in possession

of a firearm, and then-20-year-old Monte Barry ran from their attempted stop, discarding a firearm during his flight.

2. Mr. Barry was charged by indictment with one count of possessing a firearm after a conviction of a crime punishable by imprisonment exceeding one year, in violation of 18 U.S.C. § 922(g)(1). The indictment identified a 2014 robbery committed by Monte Barry with another juvenile when he was just 16 years old as the prior conviction that subjected him to prosecution under § 922(g)(1). *See* Dkt. No. 1. This juvenile offense was certified to adult criminal court, where Mr. Barry pled guilty to robbery, robbery of a motor vehicle, receiving stolen property, and possession of a firearm by a minor. Presentence Report (PSR) ¶28. He was incarcerated for this offense when he was just 17 years old and remained in jail until July 24, 2018 (from October 7, 2014 until July 24, 2018). PSR ¶28. The instant offense occurred less than three months after Mr. Barry's release from state custody and while he was on parole.

3. Mr. Barry entered into a negotiated plea agreement, reserving his right to appeal certain issues. At that time, the Third Circuit authorized Second Amendment as-applied challenges to § 922(g)(1) only for those with prior convictions for felony-equivalent offenses, that is, convictions for state misdemeanors punishable by more than two years' imprisonment. Thus, circuit precedent foreclosed as-applied Second Amendment challenges for those like Mr. Barry with a prior conviction for a true felony. *See Folajtar v. Att'y Gen.,* 980 F.3d 897 (3d Cir. 2020) (clarifying that a true felony conviction disqualifies an individual

from claiming Second Amendment protections) (citing *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc)).

4. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, which abrogated that Circuit precedent, was decided while Mr. Barry's case was pending on direct appeal. ___ U.S. ____, 142 S. Ct. 2111 (2022).

5. On appeal, relying on this Court's intervening precedent, Mr. Barry challenged § 922(g)(1)'s constitutionality, arguing that 18 U.S.C. § 922(g)(1) violates the Second Amendment on its face and as applied to him. He maintained that the government was unable to show a history of permanently disarming a person like him of possessing a firearm. Mr. Barry also objected to the government's attempted reliance on extra-indictment allegations regarding him and his conduct, in particular, that he possessed the charged firearm while on state parole.

6. The Third Circuit affirmed, relying on intervening circuit precedent. Relying on *United States v. Moore*, 111 F.4th 266 (3d Cir. 2024) and *United States v. Quailes*, 126 F.4th 215 (3d Cir. 2025), the court held the statute constitutional as applied to Mr. Barry based on his service of a term of parole at the time of his firearm possession. App. 5a & n.2. *Quailes* extended the circuit's earlier decision in *Moore*, which denied a Second Amendment challenge brought by a defendant on federal supervised release. In *Moore* and *Quailes*, the Court found that § 922(g)(1)'s lifetime bar, as applied to persons subject to criminal justice supervision, is consistent with the combined effect of, first, founding-era laws providing for forfeiture of a person's entire estate (including any arms) upon conviction of a

felony, and second, a tradition of disarming "convicts" serving custodial sentences in prison or elsewhere. *Quailes*, 126 F.4th at 221 & n.7; *Moore*, 111 F.4th at 269-271.

7. This timely petition follows.

## REASONS FOR GRANTING THE PETITION

The decision below is patently wrong. There is no other context in which the government may defend a conviction under a law that criminalizes constitutionally protected behavior by arguing that it could validly deprive the defendant of his constitutional rights for some other reason entirely. And certainly nothing in *Heller, Bruen*, or *Rahimi* suggests that, when a defendant argues that his conviction violates the Second Amendment, the inquiry turns on whether there is any reason that someone in similar shoes could be punished for possessing a firearm consistent with historical tradition. To the contrary, both this Court's cases and bedrock principles make plain that the government must defend the challenged law itself. Yet the Third Circuit failed to hold the government to that burden here.

Unfortunately, this case is no isolated incident. Multiple courts of appeals have made the category mistake of letting the government avoid defending § 922(g)(1) convictions on their own terms based on facts—for example, an unexpired term of parole or supervised release at the time of the firearm possession—other than the legal status which makes someone a prohibited person under § 922(g)(1).

As has been reviewed before this Court by the petitioners in *Moore* and *Quailes*,[1] this approach is improper. To determine whether a statute is facially

[1] Case Nos. 24-968 and 24-7033 respectively.

constitutional, courts must consider the "actual applications of the statute." *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015). Here, in upholding the § 922(g)(1) ban based on a fact inessential to the offense, the court of appeals failed to resolve whether petitioner can constitutionally be convicted of the crime with which he was actually charged. Because this question remains unanswered, the matter must, at a minimum, be remanded for the Third Circuit to entertain the constitutional challenge properly before it.

That said, nothing should stop this Court from taking up § 922(g)(1)'s facial constitutionality itself. Doing so would advance the project of pruning the statute books of laws far afield from the Nation's historical tradition of firearm regulation. It would also offer opportunity to affirm that once a person has repaid his debt to society for a criminal offense, the right to keep and bear arms is among those "fundamental rights" to which he is restored. *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010). Alternatively, the Court may wish to grant certiorari in this case, or hold this case pending decision in another, to settle confusion and disagreement among the circuits concerning what aspects of a defendant's criminal record or broader history properly inform assessment of § 922(g)(1)'s constitutionality as applied. Indeed, lower courts have implored this Court for further guidance even after *Rahimi*.

## I. The Third Circuit's methodology for resolving as-applied challenges defies this Court's precedent and is egregiously wrong.

1. There is no basis in law or logic to permit the government to defend the constitutionality of a conviction by speculating that it could have reached the same result via an entirely different statute (real or imagined). Indeed, that much should

have been clear even without *Heller, Bruen*, or *Rahimi*. After all, this Court expressly rejected that sleight of hand more than half a century ago in *Williams v. Illinois*, 399 U.S. 235 (1970). There, a defendant challenged a state statutory regime that forced indigent criminal defendants who failed to pay the fines imposed as part of their sentences to serve a prison sentence longer than the applicable one-year statutory maximum. *Id*. at 238. Although the state argued that the statute was "not constitutionally infirm simply because the legislature could have achieved the same result by some other means," this Court had no difficulty rejecting that argument, as the state's authority to pass alternative means to achieve the same goal "does not resolve the [constitutional] issue" actually presented by the law it sought to enforce. *Id*. at 238- 39. For that reason, the Court granted relief to the defendant after finding that the law the state actually enacted and enforced violated his equal protection rights—even though it acknowledged that the state could "have appropriately fixed the penalty, in the first instance," and incarcerated the defendant for greater than one year for the same conduct. *Id*. at 240- 41; *accord Tate v. Short*, 401 U.S. 395, 399-401 (1971).

After *Williams*, there is no room for the government to argue that its ability to implement an alternative, supposedly constitutionally valid regime enables the *provision it actually enforced* to survive (or evade) constitutional review. As one court aptly put it, "[a]n unconstitutional statute does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so." *People v. Burns*, 79 N.E.3d 159, 165-

66 (Ill. 2015). That is why this Court invalidated a law categorically banning the display of signs outside its building under the First Amendment in *United States v. Grace*, 461 U.S. 171 (1983), even though the same behavior may have been regulated through "reasonable time, place and manner restrictions." *Id.* at 183-84. It also explains why this Court concluded in *United States v. Eichman*, 496 U.S. 310 (1990), that the government could not criminally punish a defendant for burning a Post Office flag under a law specifically outlawing flag burning, even though he could still be subject to prosecution for the destruction of federal property for the exact same conduct. *Id.* at 313 n.1, 316 n.5.

This understanding of as-applied challenges is ubiquitous precisely because it follows from bedrock constitutional principles. Indeed, any other approach would render the "as-applied challenge" label a misnomer. As this Court has long observed, a court is "never to anticipate a question of constitutional law in advance of the necessity of deciding it." *United States v. Raines*, 362 U.S. 17, 21 (1960). If courts were instead authorized to sustain statutory enactments on the grounds that the government might have chosen another valid means to achieve the same result, they would stray from the case presented and answer constitutional questions that are not implicated. *Id.* Courts thus routinely reject government efforts to employ such sleights of hand. *See, e.g., United States v. Price*, 111 F.4th 392, 402 n.4 (4th Cir. 2024) (en banc) (rejecting an attempt to invoke defendant's felon status to defeat his constitutional challenge to § 922(k)'s ban on possessing firearms with obliterated

serial numbers because regulating felon firearm possession was "not the law Congress enacted via § 922(k)").

That principle does not change just because the court is tasked with addressing a Second Amendment challenge under *Bruen* and *Rahimi*. Indeed, there is absolutely nothing in the methodology laid out in either case that would justify a deviation from this bedrock rule. Both made clear that the focus of the analysis turns on the mechanics and contours of the challenged regulation itself. *See Rahimi*, 602 U.S. at 692 ("Why and how the [challenged] regulation burdens the right are central to this inquiry."); *Bruen*, 597 U.S. at 29 (requiring courts to evaluate "how and why the [challenged] regulations burden" the Second Amendment right). And neither announced any rule giving judges or the government a roving license to investigate whether there is any conceivable reason that the party asserting his Second Amendment rights could be disarmed. It is little wonder why not: Such a rule not only would treat the Second Amendment "as a second-class right," *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality), but would run afoul of the constitutional principles requiring strict adherence to examining the application of the challenged law to the facts at hand, c*f. City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (explaining that the Court "considered only applications of the statute in which it actually authorizes or prohibits conduct" when assessing its constitutionality).

Take *Rahimi*. This Court focused exclusively on whether historical going-armed and surety laws were comparable to § 922(g)(8), even though the defendant

there had not only threatened his domestic partner (prompting the domestic restraining order) but also threatened a woman with a firearm (prompting an aggravated assault charge) and was connected to five other shootings. *See* 602 U.S. at 687. Because the government charged *Rahimi* only with violating § 922(g)(8), the Court asked only whether § 922(g)(8) could pass constitutional muster, not whether the government could have constitutionally disarmed him on another basis. *See id.* at 690, 700-02; *see also id.* at 777 (Thomas, J., dissenting) ("This case is not about whether States can disarm people who threaten others.… Instead, the question is whether the Government can strip the Second Amendment right of anyone subject to a protective order[.]"). Just as with other constitutional questions, then, whether there may be other reasons the government could disarm someone is not a valid consideration in the proper constitutional analysis. *Cf. TikTok v. Garland*, 145 S. Ct. 57, 68 (2025) ("[W]e look [only] to the provisions of the Act that give rise to the effective TikTok ban that petitioners argue burdens their First Amendment rights" to address their as-applied challenge.).

2. Rather than follow these well-settled principles, the Third Circuit answered a question not properly presented for its review—effectively affirming a double deprivation of liberty (sending a man to prison and allowing him to be stripped of his right to keep and bear arms) without ever deciding whether the actual statute of conviction could constitutionally be applied to the defendant.

As set forth, the court of appeals summarily rejected Mr. Barry's facial and as-applied challenges under circuit precedent holding that the Second Amendment

affords parolees no protection because "parolees and probationers—like convicts on federal supervised release—are still serving their sentences." *United States v. Quailes,* 126 F.4th 215, 223 (3d Cir. 2025), *pet'n for cert. filed*, No. 24-7033 (distributed for conference of September 29); *see United States v. Moore*, 111 F.4th 266, 273 (3d Cir. 2024), *cert. denied*, No. 24-968 (June 30, 2025). *See* App. 5a & n.2.

On the Third Circuit's view, disarmament of persons subject to criminal justice supervision passes muster under the combined effect of founding-era laws providing for (i) the forfeiture of a person's estate (including any arms) upon conviction of a felony, and (ii) disarmament of persons serving custodial sentences in prison or elsewhere. *Quailes*, 126 F.4th at 221 & n.7; *see Moore,* 111 F.4th at 269-271.

Two other circuits have now followed in these conclusions. *See United States v. Giglio*, 126 F.4th 1039, 1044 (5th Cir. 2025); *United States v. Goins*, 118 F.4th 794, 802 (6th Cir. 2024); *see also United States v. Gay*, 98 F.4th 843, 847 (7th Cir. 2024) (similarly holding § 922(g)(1) constitutional as applied to parolee).

Even on its own terms, the analysis falls short. *Quailes* itself observes that "parole has been around for centuries," 126 F.4th at 223 n.10, yet the opinion offers no comment on the fact that, so far as its discussion shows, no founding-era law disarmed parolees. Nor does *Moore* address the absence of any such historical analogue. To be sure, *Bruen's* analytic framework does not require a "historical twin," *Rahimi*, 602 U.S. at 692, but when a present-day regulation newly disarms a category of persons perfectly familiar at the founding, "the lack of a historical twin" is difficult to ignore. *United States v. Morton*, 123 F.4th 492, 499 n.2 (6th Cir. 2024). In such

instances, the government's inability to point to "a distinctly similar historical regulation" will tend to show that a contemporary enactment is inconsistent with the Second Amendment. *Bruen*, 597 U.S. at 26.

More fundamentally, the Third Circuit's inspection of founding-era estate forfeiture laws to decide the constitutionality of § 922(g)(1) sidestepped the question before it: whether permanently disarming someone based on the felonies Barry committed comports with the nation's tradition of gun regulation. Nothing about that inquiry turns on an independent assessment of whether there may be *other* reasons why Mr. Barry could constitutionally be disarmed. As the petitioners in *Moore* and *Quailes* have explained, the court of appeals in effect asked whether any characteristic of the defendant could supply a valid historical basis for disarmament were a legislature to attach this consequence to it. *See* Petition at 12-13, 18, Reply at 6, *Moore v. United States*, No. 24-968; Petition at 10, *Quailes v. United States,* No. 24-7033.[2]

This was error. "An unconstitutional statute does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so." *People v. Burns*, 79 N.E.3d 159, 165-66 (Ill. 2015). In *Burns*, the Supreme Court of Illinois postulated—prior to this Court's decision in *Bruen*—that a law barring felons from carrying firearms in public might

[2] Indeed, shortly after its decision in *Quailes*, the Third Circuit instructed in another case that resolution of as-applied challenges requires consideration of "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." *Pitsilides v. Barr*, 128 F.4th 203, 212 (3d Cir. 2025).

pass constitutional muster. *See id*. at 165. But in the case at bar, it explained, the defendant's felon status had no bearing on his facial challenge to a statute prohibiting public carry on the part of all citizens. It was "precisely because the prohibition is not limited to a particular subset of persons" that "the statute, as written, is unconstitutional on its face." *Id*. (citing *City of Los Angeles v. Patel*, 576 U.S. 409 (2015)); *see also Williams v. Illinois*, 399 U.S. 235, 238-39 (1970) (explaining that possibility of legislature enacting a higher statutory maximum for petitioner's offense did not cure sentence subjecting him to imprisonment beyond existing maximum based on inability to pay a fine).

So too here. Even stipulating that persons subject to criminal justice supervision may be deprived of the right to keep and bear arms, that does not disqualify a parolee from mounting a facial or as-applied attack on § 922(g)(1)'s much broader prohibition of gun possession by anyone with a felony conviction. When confronted with such a Second Amendment challenge, a court's task is not to identify facts about a defendant which a legislature might in theory lawfully mark off as ground for disarmament. Rather, it is to determine whether the facts actually marked off by the challenged regulation—either generally or in the defendant's particular case—bring the regulation within the compass of the nation's historical tradition of firearm regulation. *See United States v. Diaz*, 116 F.4th 458, 467 (5th Cir. 2024), *cert. denied*, No. 24-6625 (June 23, 2025). Here, the Third Circuit's conclusion that Congress might constitutionally disarm parolees, should it elect to do so, bypassed

the constitutional inquiry pertinent to § 922(g)(1): whether Congress may constitutionally disarm anyone convicted of a felony.

## II. Section 922(g)(1) is unconstitutional on its face because lifetime disarmament based on felon status is without historical antecedent.

As has also been reviewed in other petitions before the Court this Term,[3] § 922(g)(1) is facially unconstitutional because the lifetime bar it places upon all persons convicted of a felony is not "consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 24 (2022).

Like all Americans, petitioner is among "the people" whose "right to keep and bear Arms" is vouchsafed by the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). Since § 922(g)(1) prohibits any possession of a gun or ammunition, the statute regulates conduct within the scope of the constitutional text. It is therefore incumbent on the government to demonstrate the requisite fit with historical tradition by identifying analogous founding-era regulations showing that lifetime disarmament based on felon status is consistent with the principles underlying the Second Amendment. In judging contemporary statutes, courts must consider both "why and how the regulation burdens the right," as even a law that "regulates arms-bearing for a permissible reason … may not be compatible with the right if it does so to an extent beyond what was done at the founding." *United States*

[3] *See, e.g., Toney v. United States*, No. 24-7253 (cert. denied June 23, 2025); *Diaz v. United States*, No. 24-6625 (cert. denied June 23, 2025); *French v. United States*, No. 24-6623 (cert. denied May 19, 2025).

*v. Rahimi,* 602 U.S. 680, 692 (2024). The ultimate question is whether § 922(g)(1) imposes "a comparable burden on the right of armed self-defense" that is "comparably justified." *Bruen*, 597 U.S. at 29.

It does not. While it may be that people "considered dangerous lost their arms" in the decades surrounding ratification of the Second Amendment, "being a criminal had little to do with it." *United States v. Jackson*, 85 F.4th 468, 472 (8th Cir. 2023) (Stras, J., dissenting from denial of rehearing en banc). Rather, in the founding era "most punishments were temporary," and "once wrongdoers had paid their debts to society, the colonists forgave them and welcomed them back into the fold." *Folajtar v. Att'y General*, 980 F.3d 897, 912, 923 (3d Cir. 2020) (Bibas, J., dissenting). So-called "felons" were then restored to full enjoyment of at least their natural rights, if not every privilege and immunity of citizenship. *See id*. at 924 ("Though [the plaintiff's] tax-fraud conviction affects some of her privileges, it does not change her right to keep and bear arms."). So "a felon could acquire arms after completing his sentence and reintegrating into society." *Range v. Att'y General*, 124 F.4th 218, 231 (3d Cir. 2024) (en banc).

In the years since *Heller* and *Bruen*, the government has yet to put forward a single founding-era law barring citizens from keeping and bearing arms based on felony status. It was only in 1938 that Congress prohibited even persons convicted of certain exceptionally serious crimes, such as murder and rape, from receiving a firearm in interstate commerce. *See* Pub. L. No. 75-785, § 1(6), 52 Stat. 1250, 1250-51 (June 30, 1938); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563

(2009). And not until the latter half of the 20th century did Congress disarm Americans based on felon status alone. *See Range*, 124 F.4th at 229.

To be sure, the nation's tradition of firearm regulation does permit temporary disarmament based on a judicial finding that a person poses "a credible threat to the physical safety of another." *See Rahimi*, 602 U.S. at 702. But conviction of a felony entails no finding of an active threat—only of the elements of an offense. And while the Second Amendment may or may not contemplate disarmament of "categories of persons thought by a legislature to present a special danger of misuse," *id*. at 698, felon status is too broad and variable a proxy—being contingent on the legislative prerogative to define crimes—to pass constitutional muster. *See Bruen*, 597 U.S. at 26 (courts may not "defer to the determinations of legislatures" with respect to Second Amendment's guarantee). Even as to violent crimes, § 922(g)(1) codifies an inference of incorrigible 'propensity' that our legal tradition elsewhere abhors. *E.g.*, Fed. R. Evid. 404(a); *see Michelson v. United States*, 335 U.S. 469, 475 (1948) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.").

Turning to the "how" dimension of analysis, § 922(g)(1)'s lifetime bar burdens the right to an extent beyond any regulation of the founding era. To date, the government's own search for laws permanently disarming a citizen has yielded only draft penal codes from the 1820s that "ultimately were not adopted." Brief in Opposition at 8, *Jackson v. United States*, No. 24-6517. Consistent with this lack of

authority, *Rahimi* stressed that the disarmament provision there at issue was "temporary," lasting only "so long as the defendant 'is' subject to a restraining order," and thus burdening the right in a manner analogous to historical "surety bonds of limited duration." 602 U.S. at 699. The Court also cautioned that it "conclude[d] only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 702 (emphasis added).[4]

For these reasons, a proper application of *Bruen's* analytic framework leads to the conclusion that § 922(g)(1) unlawfully abridges the Second Amendment right to keep and bear arms. Certiorari should be granted to vindicate this fundamental guarantee "essential to the preservation of liberty." *McDonald*, 561 U.S. at 858 (Thomas, J., concurring in part and concurring in judgment)

## III. The questions presented are exceptionally important, and this case is an effective vehicle for this Court to address them.

How to resolve § 922(g)(1) challenges is an exceptionally important question given the frequency with which the federal government seeks to dispossess citizens of firearms under § 922(g)(1). Section 922(g)(1) impacts thousands of defendants every year.[5] And with the increasing volume of constitutional challenges to these

[4] In a recent filing, the government too has implicitly recognized the salience of § 922(g)(1)'s lifetime duration, stressing with respect to a different provision of § 922(g) that the distinct bar it imposes is temporary and indeed terminable at will by ceasing drug use. *See* Petition for Writ of Cert. at 2, *United States v. Hemani*, No. 24-1234; *id.* at 9, 20.

[5] Of the 61,678 cases reported to the Sentencing Commission for FY 2024, 7,419 involved felony convictions under § 922(g). And 90.4%, or 6,707 defendants, were convicted under § 922(g)(1). *See* U.S. Sent'g Comm'n, QuickFacts: Section

convictions, it is critical that courts have a shared (and correct) understanding of how to resolve them. Indeed, the government itself has made precisely this point in seeking review of decisions unfavorable to its maximalist position regarding the constitutionality of § 922(g)(1). *See, e.g.*, Pet. for Rhg. En Banc 19, *United States v. Duarte*, No. 22-50048 (9th Cir. May 14, 2024), Dkt.72-1; Pet. for Cert. 24-25, *Garland v. Range*, No. 23-374 (U.S. Oct. 5, 2023).

Mr. Barry's case is an effective vehicle for cutting off the analytical detour made by the Third Circuit and now followed by two additional circuits. Equally, the case is an effective vehicle for deciding whether § 922(g)(1)'s lifelong gun ban is unconstitutional on its face. The court resolved the question presented on the merits by applying its intervening precedent, *see* App. 5a & n.2, and there is no doubt of the question's magnitude: recent estimates of the number of individuals with felony convictions range from 19 million to 24 million. *See* Dru Stevenson, *In Defense of Felon-in-Possession Laws,* 43 Cardozo L. Rev. 1573, 1591 (2022); Sarah K.S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States*, 54 Demography 1795, 1807 (2018). Certiorari should accordingly be granted and, at a minimum, the judgment below vacated and the matter remanded with instructions to decide whether Mr. Barry may constitutionally be convicted of the crime with which he was actually charged.

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922(g) Firearms (May 2025), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY24.pdf (last viewed August 25, 2025).

## CONCLUSION

The petition for a writ of certiorari should be granted, or else held pending the grant of certiorari in another case raising one or more of the questions presented. Alternatively, the petition should be granted, the judgment below vacated, and the matter remanded with instructions to address the Second Amendment challenge that petitioner raised in the district court and court of appeals.

Respectfully submitted,

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