No. 25-

In the Supreme Court of the United States

JASON DANIEL CARBAJAL, *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

Below, Petitioner Jason Daniel Carbajal challenged the constitutionality of 18 U.S.C. § 922(g)(1), which makes it a crime for a person convicted of a felony to possess a firearm. He argued that § 922(g)(1)'s permanent disarmament violates the Second Amendment right to keep and bear arms both facially and as applied to him. The court of appeals affirmed. It relied on a tradition of capital punishment and permanent estate forfeiture to hold that § 922(g)(1) is constitutional on its face. For the as-applied challenge, the court of appeals held that colonial-era laws punished theft severely, so § 922(g)(1) is constitutional as applied to Carbajal, who has a prior aggravated robbery conviction, even though none of his prior convictions involved misuse of a firearm. The questions presented are:

1. Does § 922(g)(1) violate the Second Amendment facially?
2. Does § 922(g)(1) violate the Second Amendment as applied to individuals with convictions for offenses that did not involve the misuse of firearms or establish a credible threat of such misuse?

RELATED PROCEEDINGS

United States District Court for the Western District of Texas:

United States v. Jason Daniel Carbajal, No. 7:23-cr-103-1 (Feb. 12, 2024) (judgment of conviction)

United States Court of Appeals for the Fifth Circuit:

United States v. Jason Daniel Carbajal, No. 24-50107 (June 2, 2025)

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Petitioner Jason Daniel Carbajal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

This Court's decision in *NYSRPA v. Bruen*, 597 U.S. 1 (2022), brought about a sea change in Second Amendment jurisprudence. In *Bruen*'s wake, the courts of appeals considered renewed constitutional challenges to the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1). They reached dramatically divergent results. The Court's decision in *United States v. Rahimi*, 602 U.S. 680

(2024), did little to quell the confusion. The courts of appeals continue to be deeply divided after *Rahimi*.

The Third, Fifth, and Sixth Circuits each acknowledge that § 922(g)(1) is vulnerable to as-applied challenges. By contrast, the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have upheld the statute in all of its applications (although based on different rationales).

The Fifth Circuit's decision below continues to deepen this intractable conflict in the courts of appeals over the scope of a fundamental right. And the Fifth Circuit's decision is wrong. Section 922(g)(1) is a mid-20th century innovation drafted when Congress believed—incorrectly—that the Second Amendment does not protect an individual right to bear arms. So Congress made no effort to pass a law that was "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. Rather, it passed a sweeping ban that is irreconcilable with our history and tradition.

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. At most, our history shows a tradition of temporarily disarming individuals who threaten armed insurrection or had threatened (or would likely threaten) another with a firearm. So, at the very least, § 922(g)(1) is unconstitutional as applied to permanently disarm individuals like Carbajal whose prior convictions established no misuse or likely misuse of a firearm.

This Court's intervention is urgently needed to resolve the scope of a fundamental constitutional right. This question will not go away, and this is an ideal vehicle to resolve it. The Court should grant certiorari.

OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Carbajal*, No. 24-50107 (5th Cir. June 2, 2025) (per curiam), is reproduced at App. 1a–2a.

JURISDICTION

The Fifth Circuit entered its judgment on June 2, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment 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."

Section 922(g)(1) of Title 18 of the United States Code provides: "It shall be unlawful for any person … who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year … to … possess in or affecting commerce, any firearm or ammunition."

STATEMENT

A. Legal background.

1. "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). Indeed, "[b]ans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding." Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1563 (2009). In 1938, Congress criminalized firearm possession by individuals convicted of certain crimes for the first time. *See* Federal Firearms Act, ch. 850, § 2(f), 52 Stat. 1250, 1251 (1938). But that statute was much narrower than the modern version. The Federal Firearms Act only applied to someone "convicted of a crime of violence," *id.*, which included "murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking," and certain kinds of aggravated assault, *id.* § 1(6). The Act prohibited an individual with

such a conviction from "receiv[ing]" a firearm, and it considered possession to be "presumptive evidence" of receipt.[1] *Id.* § 2(f).

2. It was not until the 1960s that the federal felon-in-possession statute took on its modern form. At the time, Congress shared a widely held—but incorrect—understanding of the Second Amendment. In committee testimony, the Attorney General assured Congress that "[w]ith respect to the second amendment, the Supreme Court of the United States long ago made it clear that the amendment did not guarantee to any individuals the right to bear arms" and opined that "the right to bear arms protected by the second amendment relates only to the maintenance of the militia." *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinq. of the Sen. Comm. on the Judiciary,* 89th Cong. 41 (1965). And Congress dismissed constitutional concerns about federal firearm regulations, explaining that the Second Amendment posed "no obstacle" because federal regulations did not "hamper the present-day militia." S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2169. Congress relied on court decisions—including this Court's decision in *United States v. Miller*, 307 U.S.

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[1] This possession-based presumption was short-lived. A few years later, this Court invalidated the presumption on due process grounds. *Tot v. United States*, 319 U.S. 463, 467 (1943).

174 (1939)—which held that the Second Amendment "was not adopted with the individual rights in mind." *Id.*

Unconstrained by the Second Amendment, "Congress sought to rule broadly," employing an "expansive legislative approach" to pass a "sweeping prophylaxis … against misuse of firearms." *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (first quote); *Lewis v. United States*, 445 U.S. 55, 61, 63 (1980) (second and third quotes). In particular, Congress was concerned with keeping firearms out of the hands of broad categories of "potentially irresponsible persons, including convicted felons." *Barrett v. United States*, 423 U.S. 212, 220 (1976). So it enacted two significant changes that brought about the modern felon-in-possession ban. *First*, Congress expanded the Federal Firearms Act to prohibit individuals convicted of *any crime* "punishable by imprisonment for a term exceeding one year"—not just violent crimes—from receiving a firearm. *See* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, § 2, 75 Stat. 757, 757 (1961). *Second*, a few years later, Congress criminalized *possession* of a firearm—not just receipt—by anyone with a felony conviction. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202(a)(1), 82 Stat. 197, 236.

3. In its seminal decision in *District of Columbia v. Heller*, this Court held for the first time that the Second Amendment codifies an individual right to keep and bear arms—a right that is not limited to militia service. 554 U.S. 570, 579–600 (2008). In reaching this conclusion, the Court conducted a "textual analysis" of the Second Amendment's language and surveyed the Amendment's "historical background." *Id.* at 578, 592. The Court identified several "longstanding" and "presumptively lawful" firearm regulations, such as prohibitions on felons possessing firearms. *Id.* at 626–27 & n.27. But the Court cautioned that it was not "undertak[ing] an exhaustive historical analysis … of the full scope of the Second Amendment." *Id.* at 626. And it did not cite any historical examples of these "longstanding" laws, explaining that there would be "time enough to expound upon the historical justifications for the[se] exceptions … if and when those exceptions come before us." *Id.* at 635.

4. Following *Heller*, the courts of appeals coalesced around a two-step framework for analyzing Second Amendment challenges that focused on the historical scope of the Second Amendment at step one and applied means-ends scrutiny at step two. *See*, *e.g.*, *Kanter*, 919 F.3d at 441–42; *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017). And this Court's recognition that the Second

Amendment protects an individual right to bear arms brought constitutional challenges to § 922(g)(1). But the courts of appeals almost uniformly rejected Second Amendment challenges to the statute, either applying means-ends scrutiny or relying on *Heller*'s "presumptively lawful" language. *See*, *e.g.*, *United States v. Moore*, 666 F.3d 313, 316–17 (4th Cir. 2012) (collecting cases). The lone exception was the Third Circuit, which held that § 922(g)(1) was unconstitutional as applied to two individuals with underlying convictions—one for corrupting a minor and the other for carrying a handgun without a license—that "were not serious enough to strip them of their Second Amendment rights." *Binderup v. Attorney General*, 836 F.3d 336, 351–57 (3d Cir. 2016) (en banc).

5. Then came *Bruen*. In *Bruen*, this Court held that the two-step framework adopted by the courts of appeals was "one step too many." 597 U.S. at 19. Instead, the Court explained that *Heller* demanded a test "centered on constitutional text and history." *Id.* at 22. Under this test, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. "The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. "Only then may a court conclude that the individual's conduct falls

outside the Second Amendment's unqualified command." *Id.* (cleaned up).

Bruen—and the Court's later decision in *Rahimi*—explain that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 692. "A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Id.* (quoting *Bruen*, 597 U.S. at 29). The law need not be a "historical twin," but analogical reasoning is also not a "regulatory blank check." *Bruen*, 597 U.S. at 30. "How" and "why" the regulations burden the right to bear arms are central to this inquiry. *Bruen*, 597 U.S. at 29; *Rahimi*, 602 U.S. at 692. These considerations ask whether the modern and historical regulations impose a "comparable burden" (the *how*) and "whether that burden is comparably justified" (the *why*). *Bruen*, 597 U.S. at 29. "Even when a law regulates arms-bearing for a permissible reason, … it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Rahimi*, 602 U.S. at 692.

B. Proceedings below.

1. In May 2023, Jason Daniel Carbajal was arrested after trying to evade officers who were executing a traffic stop. C.A. ROA.243–44. Officers found a rifle in the trunk of the car Carbajal was driving. *Id.*

2. Carbajal, who had prior felony convictions for aggravated robbery with a deadly weapon (a pole), aggravated assault with a deadly weapon (a bat), drug trafficking, and drug possession, was indicted for possessing a firearm as a felon, in violation of § 922(g)(1). C.A. ROA.9. Carbajal moved to dismiss the indictment. *Id.* at 64–87. He argued that § 922(g)(1) facially violates the Second Amendment under *Bruen*'s text-and-history test. *Id.* at 64–85. In the alternative, he argued that § 922(g)(1) is unconstitutional as applied to him because there is no historical tradition of permanently disarming a person with analogous criminal history. *Id.* at 85–87.

The district court denied Carbajal's motion to dismiss without explanation, relying instead on orders it had entered in other cases. C.A. ROA.132–33. Carbajal pleaded guilty to the indictment. *Id.* at 42–43, 183. The court sentenced him to 180 months' imprisonment and 3 years' supervised release. *Id.* at 140–41, 225–26.

3. On appeal, Carbajal renewed both his facial and as-applied challenges to the constitutionality of § 922(g)(1) under *Bruen*'s framework, as clarified in *Rahimi* and the Fifth Circuit's decision in *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), *cert. denied*, No. 24-6625 (U.S. June 23, 2025). *Diaz*, as the seminal Fifth Circuit case applying *Bruen* and *Rahimi*'s analyses to § 922(g)(1), established three points: (1) "felons" are part of "the people," and thus § 922(g)(1) is presumptively unconstitutional, *id.* at 466–67; (2) § 922(g)(1) is facially constitutional, *id.* at 471–72; and (3) § 922(g)(1) was constitutional as-applied to Diaz because—when considering only his prior convictions—his prior felony for vehicle theft was relevantly similar to the Founding-era crime of horse theft, which was punishable by death or estate forfeiture, *id.* at 467, 469–70.

Carbajal argued that § 922(g)(1) facially violates the Second Amendment to preserve the issue for further review but acknowledged that the Fifth Circuit's precedent foreclosed his argument. For his as-applied challenge, Carbajal argued that the government could not show that a person was permanently disarmed for convictions analogous to his, which did not involve the misuse of firearms or establish that he likely would threaten the safety of another with a firearm.

The Fifth Circuit affirmed. App. 1a–2a. The court held that its precedent foreclosed both Carbajal's facial and as-applied challenges to § 922(g)(1). App. 2a (citing *Diaz*, 116 F.4th at 471–72; *United States v. Schnur*, 132 F.4th 863, 870–71 (5th Cir. 2025)). *Schnur* held that *Diaz* foreclosed as-applied challenges by defendants with prior theft-related convictions, like robbery, because "our country has a historical tradition of severely punishing people … who have been convicted of theft." 132 F.4th at 870 (quoting *Diaz*, 116 F.4th at 468–69).

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are deeply divided over the scope of a fundamental constitutional right.

The courts of appeals are deeply divided over how to analyze Second Amendment challenges to § 922(g)(1).

1. Several circuits see no need for felony-by-felony as-applied litigation, but for drastically different reasons.

a. The Tenth and Eleventh Circuits, relying on this Court's dicta that felon-in-possession prohibitions are presumptively lawful, see no need to conduct the text-and-history analysis required by *Bruen*. *Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025), *pet. for cert. pending*, No. 24-1155 (U.S.); *United States v. Dubois*, 139 F.4th 887, 893 (11th Cir. 2025).

b. The Fourth Circuit also refuses to consider as-applied challenges on several grounds, including that felons are not among "the people" protected by the Second Amendment. *United States v. Hunt*, 123 F.4th 697, 700 (4th Cir. 2024), *cert. denied*, No. 24-6818 (U.S. June 2, 2025). The Seventh Circuit, while assuming "there is *some* room for as-applied challenges," similarly held that a defendant with violent felonies who was on parole when he possessed a gun is "not a 'law-abiding, responsible' person who has a constitutional right to possess firearms." *United States v. Gay*, 98 F.4th 843, 846–47 (7th Cir. 2024) (quoting *Bruen*, 597 U.S. at 26, 70) (emphasis in original).

c. The Eighth Circuit upheld § 922(g)(1) as constitutional across the board based on historical laws prohibiting certain groups of people—religious minorities, Native Americans, and those who refused to declare an oath of loyalty—from possessing guns. *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024), *cert. denied*, No. 24-6517 (U.S. May 19, 2025); *see also Hunt*, 123 F.4th at 705–08 (adopting similar reasoning as alternative ground for holding § 922(g)(1) constitutional in every instance).

d. The Second and Ninth Circuits largely agree with the Eighth Circuit's historical approach. As the Second Circuit reasons, it "has long been permissible to regulate firearms possession through

legislative proscription on a class-wide basis, without a particularized finding that the individuals disarmed pose a threat to society." *Zherka v. Bondi*, 140 F.4th 68, 78–79 (2d Cir. 2025) (cleaned up). The Ninth Circuit similarly held that the government met its burden under *Bruen*'s second step based on historical evidence consistent with "two regulatory principles that: (1) legislatures may disarm those who have committed the most serious crimes; and (2) legislatures may categorically disarm those they deem dangerous, without an individualized determination of dangerousness." *United States v. Duarte*, 137 F.4th 743, 761–62 (9th Cir. 2024) (en banc).

2. The Third and Sixth Circuits recognize that as-applied challenges to § 922(g)(1) are viable, but they analyze these challenges differently.

a. The Third Circuit, sitting en banc, struck down § 922(g)(1) as applied to an individual convicted of food stamp fraud who did not "pose[ ] a physical danger to others." *Range v. Attorney General*, 124 F.4th 218, 232 (3d Cir. 2024). The court rejected the government's reliance on status-based restrictions, emphasizing that founding-era laws disarmed distrusted groups—like loyalists, Native Americans, religious minorities, and Black Americans—based on fear of rebellion. *Id.* at 229–30. The court also dismissed

the government's "dangerousness" principle, which would encompass even non-violent offenders, as "far too broad." *Id.* at 230 (cleaned up). Finally, the court rejected the government's reliance on capital punishment and forfeiture, explaining that "the Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here—de facto lifetime disarmament for all felonies and felony-equivalent misdemeanors—is rooted in our Nation's history and tradition." *Id.* at 230–31.

b. The Sixth Circuit allows as-applied challenges to § 922(g)(1) by individuals who show that they are "not dangerous." *United States v. Williams*, 113 F.4th 637, 657, 663 (6th Cir. 2024). The court found historical support for disarming "presumptively dangerous" groups who posed a threat to public order—like religious minorities, Native Americans, loyalists, and freedmen—but explained that these laws all allowed individuals to show that they posed no danger. *Id.* at 657. So the court held that an individual must be given an opportunity to show that he is "not dangerous" and "falls outside of § 922(g)(1)'s constitutionally permissible scope." *Id.* In conducting this dangerousness inquiry, the court explained that courts can "consider a defendant's entire criminal record—not just

the specific felony underlying his § 922(g)(1) conviction." *Id.* at 659–60.

3. The Fifth Circuit's decision below underscores the deep divisions between the courts of appeals.

a. The Fifth Circuit splits with other circuits on two preliminary questions. Unlike the Second, Fourth, Ninth, Tenth, and Eleventh Circuits—which have held that they remain bound by their pre-*Bruen* precedent—the Fifth Circuit agrees with the Third and Sixth Circuits that *Bruen* rendered its prior precedent obsolete. *Diaz*, 116 F.4th at 466. And while some circuits have declined to conduct any historical analysis based on *Heller*'s "presumptively lawful" language, the Fifth Circuit joined the Third and Sixth Circuits in refusing to treat that language as controlling.[2] *Diaz*, 116 F.4th at 466. Instead, these courts acknowledge that *Bruen* requires a full text-and-history analysis. *Id.*

b. At *Bruen*'s first step, the Fifth Circuit adopted the majority view by holding that felons are part of "the people" protected by the Second Amendment. *Id.* at 466–67.

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[2] The Fifth Circuit expressly rejected the Eleventh Circuit's reliance "solely upon *Rahimi*'s mention of *Heller*'s 'felons and the mentally ill' language in upholding the constitutionality of § 922(g)(1)." *Diaz*, 116 F.4th at 466 n.2

c. At the second step, the Fifth Circuit's historical analysis diverges from other circuits in several respects. The Second, Fourth, Eighth, and Ninth Circuits have held that history supports upholding § 922(g)(1) regardless of a defendant's underlying conviction. But the Fifth Circuit left the door open for "as-applied challenges by defendants with different predicate convictions." *Diaz,* 116 F.4th at 469 & 470 n.4. At first, the Fifth Circuit limited its analysis to whether the felony predicates that triggered § 922(g)(1) were relevantly similar to crimes that subjected the convictions to "serious and permanent punishment" at the founding. *Diaz*, 116 F.4th at 470 & n.4. The court rejected Carbajal's as-applied challenge on this ground. App. 2a. This is different than the line drawn by the Third Circuit (whether a person poses a physical danger to others) and the Sixth Circuit (whether a person is dangerous). The Fifth Circuit has since held that § 922(g)(1) is constitutional as applied to individuals convicted of "violent crimes." *United States v. Bullock*, 123 F.4th 183, 185 (5th Cir. 2024); *see also Schnur*, 132 F.4th at 869.

* * *

The courts of appeals are fractured over how to conduct the Second Amendment analysis, and the splits are entrenched and

deepening. This Court's intervention is needed to resolve the scope of the right to keep and bear arms.

II. The decision below is wrong and conflicts with this Court's precedent.

The Fifth Circuit's decision in *Diaz*, followed by the panel below, correctly held that, under the plain text of the Second Amendment, felons are part of "the people" protected by the Amendment. 116 F.4th at 467; *see* App. 2a. After all, this Court has explained that "the people" "unambiguously refers to all members of the political community," so the right to keep and bear arms belongs to "all Americans." *Heller*, 554 U.S. at 580. But the Fifth Circuit misapplied *Bruen*'s historical analysis.

Section 922(g)(1) does not align with our Nation's tradition of firearm regulation on either of the two central considerations: how and why it burdens the right to keep and bear arms. *See Bruen*, 597 U.S. at 29; *Rahimi*, 602 U.S. at 692. The difference in *how* § 922(g)(1) burdens the right to bear arms is fatal to the statute facially, and *why* it burdens the right to bear arms dooms the statute as applied to offenders like Carbajal.

A. Section 922(g)(1) is facially unconstitutional because it imposes an unprecedented lifetime ban on firearm possession.

1. Section 922(g)(1) facially violates the Second Amendment because it imposes a sweeping, historically unprecedented lifetime ban that prevents millions of Americans from possessing firearms for self-defense. The government has not cited a single historical gun law that imposed a *permanent* prohibition on the right to keep and bear arms—even for self-defense. In other words, no historical regulation "impose[s] a comparable burden on the right of armed self-defense." *See Bruen*, 597 U.S. at 29.

That is hardly surprising. When Congress passed the modern felon-in-possession statute—four decades before *Heller* and more than a half-century before *Bruen*—it did not believe that the Second Amendment protected an individual right to keep and bear arms. *See supra* 5–6. So Congress did not try to pass a law that aligned with the "Nation's historical tradition of firearm regulation." *See Bruen*, 597 U.S. at 17. Instead—dismissing the Second Amendment as "no obstacle," *see supra* 5–6—it employed an "expansive legislative approach" to pass a "sweeping prophylaxis … against misuse of firearms." *Lewis*, 445 U.S. at 61, 63. And that sweeping, *permanent* prohibition on gun possession imposes a burden far broader than any firearm regulation in our Nation's history.

2. The Fifth Circuit has recognized that § 922(g)(1)'s permanent disarmament requires a historical analogue that also permanently prevented individuals from possessing guns. *See Diaz*, 116 F.4th at 469. But the court did not cite any historical firearm regulation imposing permanent disarmament.[3] Instead, the court relied on capital punishment and forfeiture laws as historical analogues justifying § 922(g)(1). *Id.* at 467–68. That reliance conflicts with this Court's precedent in three ways.

a. This Court requires the government to show that a modern gun law aligns with our "historical tradition of *firearm* regulation." *Bruen*, 597 U.S. at 24 (emphasis added); *Rahimi*, 602 U.S. at 691 (same). In other words, the government's historical analogues must regulate *firearms*. In *Rahimi*, this Court relied only on historical laws that "specifically addressed firearms violence." 602 U.S. at 694–95. So too in *Bruen*. 597 U.S. at 38–66. Capital punishment and estate forfeiture, however, are not *firearm* regulations. So they cannot justify § 922(g)(1). The Fifth Circuit reached a contrary conclusion by misreading *Rahimi*.

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[3] In its line of cases holding that § 922(g)(1) is constitutional as applied to someone convicted of a violent crime, the Fifth Circuit has cited the affray laws. *Bullock*, 123 F.4th at 185. But there is no indication that those laws *permanently* deprived individuals of the right to keep and bear arms.

First, the Fifth Circuit asserted that *Rahimi* "consider[ed] several laws that were not explicitly related to guns." *Diaz*, 116 F.4th at 468. But *Rahimi* says otherwise. In *Rahimi*, this Court relied on two historical legal regimes—surety laws and going armed laws—that both "specifically addressed firearms violence." 602 U.S. at 694–95. 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). In other words, historical laws that did *not* target the misuse of firearms—like capital punishment and estate forfeiture—are *not* proper analogues.

Second, the Fifth Circuit noted that this Court accepted a greater-includes-the-lesser argument in *Rahimi*. *Diaz*, 116 F.4th at 469. That is true as far as it goes. *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 699. But it does not follow, as the Fifth Circuit 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; *see* App. 2a. This Court explained that the purpose of imprisonment under the going armed laws was "to respond to the use of guns to threaten the physical safety of others." *Rahimi*, 602 U.S. at 699. So both the greater historical punishment (imprisonment under the going armed laws) and the lesser modern restriction (disarmament under 18 U.S.C. § 922(g)(8)) had the same purpose—curbing gun violence. Not so here. Again, capital punishment and forfeiture simply did not target gun violence.

b. This Court has also emphasized that the right to bear arms "is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (cleaned up). But the Fifth Circuit's reasoning—that because capital punishment is an "obviously permanent" deprivation of an individual's right to bear arms, the lesser restriction of permanent disarmament is permissible for individuals who are not executed, *Diaz*, 116 F.4th at 469—conflicts with how the Constitution treats other fundamental 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. "No one suggests that such an individual has no right to a jury

trial or be free from unreasonable searches and seizures." *Id.* And "we wouldn't say that the state can deprive felons of the right to free speech because felons lost that right via execution at the time of the founding." *Kanter*, 919 F.3d at 461–62 (Barrett, J., dissenting). "The obvious point that the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society." *Id.* at 462. Rather, "history confirms that the basis for the permanent and pervasive loss of all rights cannot be tied generally to one's status as a convicted felon or to the uniform severity of punishment that befell the class." *Id.* at 461.

c. Finally, this Court has expressed "doubt that *three* colonial regulations could suffice to show a tradition." *Bruen*, 597 U.S. at 46. But the Fifth Circuit relied on only three laws to establish a tradition of permanently punishing individuals who have been convicted of theft: a colonial Massachusetts law, a founding-era New York law, and a post-revolutionary Virginia law. *Diaz*, 116 F.4th at 468–69; *see* App. 2a. Putting to one side whether the court's reading of these laws is correct, this limited historical evidence is too slender a reed to establish a tradition justifying the deprivation of a fundamental constitutional right.

3. A law is not compatible with the Second Amendment if it regulates the right to bear arms "to an extent beyond what was done at the founding." *Rahimi*, 602 U.S. at 692. Section 922(g)(1) does just that. It imposes a lifetime ban on firearm possession that would have been unimaginable to the Founders. Thus, § 922(g)(1) facially violates the Second Amendment because there are "no set of circumstances" under which it is valid. *See Rahimi*, 602 U.S. at 693 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

B. Section 922(g)(1) is unconstitutional as applied to individuals convicted of offenses that did not involve misuse of firearms or establish a credible threat of such misuse.

1. Even if § 922(g)(1) is facially constitutional, the statute violates the Second Amendment as applied to individuals like Carbajal whose prior convictions do not establish misuse of a firearm or that he poses a credible threat of misusing firearms.

a. As explained above, *supra* 20–21, the court of appeals incorrectly relied on laws that did not regulate firearms even though *Bruen* and *Rahimi* require the government to show that a modern gun law aligns with our "historical tradition of *firearm* regulation." *Bruen*, 597 U.S. at 24 (emphasis added); *see Rahimi*, 602 U.S. at 1897. Capital punishment and estate forfeiture, however, are not *firearm* regulations.

b. The court of appeals applied a level of generality that is too high. *See supra* 21–23. It concluded that § 922(g)(1) and capital punishment share a common generic purpose ("to deter violence and lawlessness") and broad burden ("permanently punishing offenders"). *Diaz*, 116 F.4th at 469–70. The comparable purpose and scope acceptable in *Rahimi* were significantly narrower. In *Rahimi*, the historical analogues and § 922(g)(8)(C)(i) both sought "to mitigate *demonstrated threats* of *physical violence*" by *temporarily* restricting gun possession after *judicial determinations* that "a particular defendant *likely would threaten or had threatened another with a weapon*." *Rahimi*, 602 U.S. at 688–89 (emphasis added).

The "obvious point that the dead" have no Second Amendment right "does not tell us what the founding-era generation would have understood about the rights of felons who *lived*, discharged their sentences, and returned to society." *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting) (emphasis added). Capital punishment and permanent disarmament are similar if the metric is "severe punishments" but not if the metric is—as it must be—"how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, at 597 U.S. at 29.

c. Just as the court of appeals' conclusion that the Founders would have accepted permanent disarmament of someone who had been convicted of offenses like theft is not supported by the historical record, *supra* 23, neither is the conclusion that the Founders would have accepted permanent disarmament of someone with Carbajal's criminal history. Carbajal's aggravated robbery conviction involved recklessly causing bodily injury with a deadly weapon (a pole) in the course of committing a theft of property. Tex. Penal Code § 29.02(a)(1), 29.03(a)(2); *see* ROA.275–76, 296. Carbajal's conviction did not establish that the robbery was of an occupied dwelling, the dwelling owner was placed in fear, or the robbery occurred on a highway—the types of robbery that some jurisdictions subjected to capital punishment at the founding. *See* Crimes Act, 1 Cong. Ch. 9, 1 Stat. 112, 115 (1790); 2d Cong. Ch. 7, 1 Stat. 237 (1792). Nor do the underlying facts. ROA.275–76.

Moreover, most states at the Founding did *not* make robbery a capital offense. *See e.g.* Act of April 5, 1790, § 1, in 13 Penn. Stat. 511–12 (James T. Mitchell and Henry Flanders, ed. 1908) (the penal laws of Pennsylvania from 1790 provided that robbery was punishable by a sentence not exceeding ten years); Laws of Maryland, Act of Dec. 25, 1789, Ch. XXII (robbery punishable by restoring the thing robbed (or paying the value of the thing robbed)); Act

of Dec. 16, 1811, § 52, in A Compilation of the Laws of the State of Georgia 149 (Lucius Q. C. Lamar, ed. 1821) (punishable by restoring property or paying value, and hard labor or solitude for a period between three and 10 years); *compare* Act of Dec. 18, 1781, ch. CCXC, in the Laws of the State of New Jersey 229 (Peter Wilson, ed. 1784) (piracy and robbery on the high seas punishable by death), *with* Act of March 18, 1796, ch. XXXIV, in Laws of the State of New Jersey 213 (Williams Paterson, ed. 1800) (robbery was only a "high misdemeanor" punishable by a fine and imprisonment for up to 15 years); Act of October 1795, 1 The Public Statute Laws of the State of Connecticut 184 (Hudson and Goodwin, ed. 1805) (robbery of "any person in the field or highway" was punishable by imprisonment for up to three years; punishable by life imprisonment if committed with any dangerous weapon to clearly indicate violent intentions); Act of Feb. 21, 1788, ch. 37, 1788 N.Y. Laws 664–65 (imposing capital punishment on robbery if the goods or chattel were taken out of church, place of worship, or dwelling house or if the person within the dwelling house was put in fear; but "any felony" not enumerated was punishable by imprisonment, fine or corporal punishment).

As then-Judge Barrett summarized in her dissenting opinion from *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019), "property

crimes including variations on theft, burglary, and robbery were, on the whole, *not* capital" at the Founding. *Kanter*, 919 F.3d at 459 (citation omitted) (emphasis added).

2. In sum, the Fifth Circuit's as-applied analysis incorrectly applied this Court's precedent. Under the comparative analysis proscribed by *Bruen* and *Rahimi*, § 922(g)(1) is unconstitutional as applied to Carbajal.

III. This critically important and recurring question is cleanly presented in Carbajal's case.

1. The Court should grant the petition because the question is critically important and recurring. After all, "§ 922(g) is no minor provision." *Rehaif v. United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting). Out of about 64,000 cases reported to the Sentencing Commission in Fiscal Year 2023, more than 7,100 involved convictions under § 922(g)(1). *See* U.S. Sent'g Comm'n, *Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses*, at 1 (June 2024). Those convictions accounted for over 10% of all federal criminal cases. *See id.*

Even beyond new prosecutions, § 922(g)(1)'s reach is staggering. The statute prohibits millions of Americans from exercising their right to keep and bear arms for the rest of their lives. Recent estimates of the number of individuals with felony convictions range from 19 million to 24 million. Dru Stevenson, *In*

Defense of Felon-in-Possession Laws, 43 CARDOZO L. REV. 1573, 1591 (2022) (citations omitted). And § 922(g)(1) is particularly troubling because most of the individuals it prohibits from possessing firearms are peaceful, with convictions for only non-violent offenses. Less than 20% of state felony convictions and less than 5% of federal felony convictions are for violent offenses. *See* Dep't of Justice, Bureau of Justice Statistics, Sean Rosenmerkel et al., *Felony Sentences in State Courts, 2006—Statistical Tables*, at 3 (Table 1.1) (rev. Nov. 2010); Dep't of Justice, Bureau of Justice Statistics, Mark A. Motivans, *Federal Justice Statistics, 2022*, at 12 (Table 7) (Jan. 2024).

Given § 922(g)(1)'s widespread impact both on new prosecutions and on the millions of non-violent Americans it prohibits from exercising a fundamental constitutional right, this Court should answer this important and recurring question as soon as possible.

2. This case presents an ideal vehicle for addressing whether § 922(g)(1) violates the Second Amendment. The case cleanly presents a purely legal issue. There are no jurisdictional problems, factual disputes, or preservation issues. Carbajal thoroughly briefed his facial and as-applied Second Amendment challenges in both the district court and the court of appeals. The district court and Fifth Circuit squarely rejected both challenges.

3. Counsel is aware of at least three pending petitions for writ of certiorari—and there are likely several more—that, if granted, would bear on the question presented in this case: *United States v. Stevens*, No. 25-5027 (U.S.); *Vincent v. Bondi*, No. 24-1155 (U.S.); and *United States v. Hernandez*, No. 25-5421 (U.S.). Should the Court grant certiorari in one of these cases or any another pending case presenting a facial or as-applied challenge to § 922(g)(1), it should at least hold Carbajal's petition pending that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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