No. 25-

IN THE UNITED STATES SUPREME COURT

JORGE ENRIQUE BARRAGAN-GUTIERREZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, No. 23-8032

Petition for Writ of Certiorari

Adam Mueller
HADDON, MORGAN AND FOREMAN, P.C.
945 North Pennsylvania Street
Denver, CO 80203
Tel 303.831.7364
amueller@hmflaw.com
Counsel for Mr. Barragan

Questions Presented

1) Whether this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), recognized a new right that is retroactively applicable to cases on collateral review.

2) Whether 18 U.S.C. § 924(c)(1)(A)(i), as applied to Mr. Barragan, violates the Second Amendment.

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Mr. Barragan seeks certiorari review of the Tenth Circuit's decision in *United States v. Barragan-Gutierrez*, 136 F.4th 998 (10th Cir. 2025).

Opinions Below

Barragan-Gutierrez v. United States, 668 F. Supp. 3d 1231 (D. Wyo. 2023).

United States v. Barragan-Gutierrez, 133 F.4th 1101 (10th Cir. 2025), superseded by *United States v. Barragan-Gutierrez*, 136 F.4th 998 (10th Cir. 2025).

Related Cases

United States v. Barragan-Gutierrez, No. 2:14-cr-00232-NDF-3 (D. Wyo.) (underlying criminal case against Mr. Barragan).

United States v. Barragan-Gutierrez, No. 15-8026 (10th Cir.) (Mr. Barragan's direct appeal of the judgment of conviction entered in Case No. 2:14-cr-00232-NDF-3 (D. Wyo.)) (case dismissed on August 18, 2015) (case under seal).

Jurisdiction

The Court of Appeals affirmed the order denying Mr. Barragan's section 2255 motion on April 15, 2025. Pet. App. 011a-023a. Mr. Barragan timely petitioned for rehearing on April 16, 2025. *Id.* at 024a-045a. The Court of Appeals granted that petition on May 12, 2025, *id.* at 046a, and on that same day, issued a modified opinion affirming the order denying Mr. Barragan's section 2255 motion, *id.* at 047a-059a. The mandate was issued on July 7, 2025. *Id.* at 060a.

Justice Gorsuch granted Mr. Barragan until September 2, 2025, to seek certiorari review in this Court.

This certiorari petition is timely, *see* Sup. Ct. R. 13.1, and Mr. Barragan invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Second Amendment to the United States Constitution reads:

> 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.

Mr. Barragan was convicted of possession of a weapon in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i), which provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

Mr. Barragan sought collateral review of his conviction under 28 U.S.C. § 2225, which provides a one-year statute of limitations. 28 U.S.C. § 2255(f). Mr. Barragan's petition was not filed within one year of the "date on which the judgment of conviction [became] final." 28 U.S.C. § 2255(f)(1). Thus, his petition was untimely unless it fell within the exception of subsection 2255(f)(3).

Section 2255(f)(3) allows a defendant to file a section 2255 petition within one year of

> the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

28 U.S.C. § 2255(f)(3).

Mr. Barragan filed his section 2255 petition within one year of this Court's decision in *Bruen*.[1]

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[1] Because this is Mr. Barragan's first section 2255 petition, he need not surmount the additional burden of proving an entitlement to a second or successive petition. *See* 28 U.S.C. § 2255(h). A first section 2255 petition is a proper vehicle for deciding whether a newly recognized right is retroactive on collateral review even if a second or successive section 2255 petition based on a newly recognized right can succeed only if the Supreme Court has already determined the right is

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Statement of the Case and the Facts

In 2014, Mr. Barragan pleaded guilty to three charges: (1) conspiracy to possess with intent to distribute methamphetamine, heroin, and marijuana, in violation of 21 U.S.C. §§ 846, 841(a)(l), and 841(b)(l)(A) (Count 1); (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count 2); and (3) conspiracy to launder money, in violation of 18 U.S.C. §§ 1956(a)(l)(A)(i) and 1956(h) (Count 3). App. R. Vol. I, p 47.

On February 25, 2015, the district court sentenced Mr. Barragan to two concurrent counts of 151 months' imprisonment on Counts 1 and 3 and a consecutive sentence of 60 months' imprisonment on Count 2. App. R. Vol. I, p 48.

Count 2 was based on Mr. Barragan's possession of an AR-15 rifle and a Masterpiece Arms 9 mm machine gun style firearm. App. R. Vol. I, pp 70-74; App. R. Vol. III, pp 34, 39. At the change of plea hearing, Mr. Barragan admitted possessing the AR-15 for a brief period. App. R. Vol. I, pp 70-71. Mr. Barragan said he received the rifle in exchange for drugs and that he possessed the rifle "only . . . for a while before I returned it to its owner because I really didn't need it." App. R.

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retroactive on collateral review. *Tyler v. Cain*, 533 U.S. 656, 663 (2001); *see* 28 U.S.C. § 2244(b)(2)(A).

Vol. I, p 71:14-15. For its part, the Masterpiece Arms 9 mm was discovered during a July 2014 search of a home connected to Mr. Barragan. App. R. Vol. I, p at 73; App. R. Vol. III, pp 19-20.

Neither the plea agreement nor the transcript of the change of plea hearing allege that Mr. Barragan used or threatened to use any firearm. App. R. Vol. I, pp 70-74; App. R. Vol. III, pp 14-23. Instead, the record shows that Mr. Barragan possessed a firearm during the same time and in the same location in which he distributed controlled substances. App. R. Vol. I, pp 70-71; App. R. Vol. III, pp 14-23.

Although the Government alleged that Mr. Barragan kept a firearm at his home in case someone tried to steal drugs (something the Government said had happened before), App. R. Vol. 1, p 73:9-20, Mr. Barragan said that AR-15 "wasn't for my own protection because I was getting ready to leave. It was for them, the other people." App. R. Vol. I, p 74:4-7.

The district court found that Mr. Barragan's section 2255 petition was time-barred. Although a Supreme Court decision may be retroactively applied in some circumstances, the district court concluded those circumstances did not apply to Mr. Barragan. *Barragan-Gutierrez v. United States*, 668 F. Supp. 3d 1231, 1234 (D. Wyo. 2023). And even if the petition were timely, the district court concluded Mr.

Barragan's argument would fail on the merits because he was convicted not merely for *possessing* a firearm, but for possessing it *in furtherance* of another crime. Pet. App. 050a (citing *Barragan-Gutierrez*, 668 F. Supp. 3d at 1235-36).

Mr. Barragan filed a pro se appeal to the Tenth Circuit. Judge Matheson granted a certificate of appealability on three issues:

(1) Whether *New York State Rifle & Pistol Ass'n. v. Bruen*, 597 U.S. 1 (2022) identified a new right that applies to more than "law-abiding citizens."

(2) If *Bruen* recognized a new right that applies to more than "law-abiding citizens," whether the new right is retroactive on collateral review.

(3) And if the new right is retroactive on collateral review, whether 18 U.S.C. § 924(c)(1)(A)(i) is unconstitutional under *Bruen*.

The Tenth Circuit appointed undersigned counsel to file supplemental briefs. The Court then ordered additional supplemental briefing after this Court decided *United States v. Rahimi*, 602 U.S. 680 (2024), which was issued after Judge Matheson granted the certificate of appealability. Pet. App. 050a-051a.

In the end, in a published opinion, the Tenth Circuit resolved the first question presented, concluding that this Court did not identify a new constitutional right that applies to Mr. Barragan. Pet. App. 051a. His petition was, therefore,

untimely—the one-year period to challenge his conviction passed in 2016. So the Court of Appeals affirmed the district court's dismissal order. *Id.*

Mr. Barragan now seeks review in this Court of the Court of Appeals' threshold determination that *Bruen* did not recognize a new right that is retroactively applicable to cases on collateral review.

If this Court finds it appropriate, it could also address the constitutional merits question: Whether 18 U.S.C. § 924(c)(1)(A)(i), as applied to Mr. Barragan, violates the Second Amendment. This Court could also return the case to the Tenth Circuit to resolve that question in the first instance.

Reasons for Granting the Petition

I. The Tenth Circuit's decision is wrong.

A. *Bruen* recognized a new right that is retroactively applicable to cases on collateral review.

1. Section 2255(f) provides a one-year statute of limitations for petitions seeking collateral relief. 28 U.S.C. § 2255(f). Mr. Barragan's petition was not filed within one year of the "date on which the judgment of conviction [became] final." 28 U.S.C. § 2255(f)(1). Thus, his petition was untimely unless it falls within the exception of subsection (f)(3). That provision allows a defendant to file a section 2255 petition within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly

recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

The first question, therefore, is whether *Bruen* recognized a new right that applies retroactively to cases on collateral review. The answer is "yes." The Tenth Circuit was wrong to conclude otherwise.

2. 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." U.S. Const. amend. II (emphasis added). In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court struck down New York's "discretionary" regulatory process for obtaining a concealed carry permit. The Court held individuals need not demonstrate a "special need" before receiving a concealed carry permit under the Second Amendment.

Relevant here, *Bruen* explained that firearms restrictions are now subject to a two-part test. First, courts must determine whether "the Second Amendment's plain text covers an individual's conduct," i.e., firearms possession. *Id.* at 24. Second, if the Second Amendment applies, the "Constitution presumptively protects that conduct" and the Government must overcome that presumption and "justify its regulation by demonstrating that it is consistent with the Nation's

historical tradition of firearm regulation." *Id.* at 24, 29 ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry.") (citation omitted). The Government must point to "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." *Id.* at 27 (internal quotations omitted). It is not incumbent on courts to "sift the historical materials for evidence to sustain" a firearms restriction. *Id.* at 60. That is the Government's burden, and only when the Government meets this burden may a court conclude the restriction "falls outside the Second Amendment's unqualified command." *Id.* at 24 (citation omitted).

In *United States v. Rahimi*, this Court affirmed the constitutionality of 18 U.S.C. § 922(g)(8), which prohibits individuals subject to domestic violence restraining orders from possessing firearms. *Rahimi*, 602 U.S. at 701.

At Step 1 of the *Bruen* analysis, the Court held that Mr. Rahimi was part of "the people" who presumptively have a Second Amendment right to possess firearms. *Id.* at 701-02 (citing *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 70 (2022)). In reaching this result, the Court easily and all but summarily

> reject[ed] the Government's contention that Rahimi may be disarmed simply because he is not "responsible." Brief for United States 6; see

> Tr. of Oral Arg. 8–11. "Responsible" is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term "responsible" to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. *See, e.g.*, [*District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)]; *Bruen*, 597 U.S. at 70 []. But those decisions did not define the term and said nothing about the status of citizens who were not "responsible." The question was simply not presented.

Id.

At Step 2, the Court concluded that section 922(g)(8) was consistent with the principles that underpin the Nation's regulatory tradition. *Id.* at 693-700. The Court decided that when a court has found an individual to pose a credible threat to the physical safety of another, that person may be temporarily disarmed without violating the Second Amendment. *Id.* at 693.

The country's regulatory tradition supported the constitutionality of section 922(g)(8) for two main reasons. One, at "common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others." *Id.* at 693. "Such conduct," explained the Court, "was often addressed through ordinary criminal laws and civil actions, such as prohibitions on fighting or private suits against individuals who threatened others." *Id.* at 964.

Two, by the 1700s and early 1800s, two additional "legal regimes had developed that specifically addressed firearms violence." *Id.* at 694-95. "The first were the surety laws," which permitted magistrates to "require individuals

suspected of future misbehavior to post a bond," including those individuals who wanted to "go armed offensively." *Id.* at 696. If an individual violated a bond condition, the bond would be forfeited. *Id.* at 695. "Bonds could not be required for more than six months at a time, and an individual could obtain an exception if he needed his arms for self-defense or some other legitimate reason." *Id.* at 697.

The second legal regime consisted of "going armed" laws, *id.* at 697-98, which prohibited "riding or going armed, with dangerous or unusual weapons, [to] terrify[ ] the good people of the land." *Id.* at 697 (quotation omitted; alterations in original). "While the surety laws provided a mechanism for preventing violence before it occurred, [the 'going armed' laws] provided a mechanism for punishing those who had menaced others with firearms." *Id.*

After considering section 922(g)(8)'s operation in comparison to the surety and "going armed" laws, the Court affirmed the constitutionality of the federal statute:

> Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be. *See Bruen*, 597 U.S. at 30 [ ]. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.

Id. at 698.

Together, *Bruen* and *Rahimi* show that the Second Amendment's protection apply to all "the People," not just "responsible" or "law-abiding" people. This Court made this clear in *Rahimi* in a single paragraph just seven sentences long. *Id.* at 701-02. The majority opinion—joined by eight members of the Court—rejected the Government's proposed reading of the Second Amendment, and none of the several concurrences implicitly or expressly endorsed the "Government['s] [attempt] to rewrite the Second Amendment to salvage its case." *Id.* at 772 (Thomas, J., dissenting).

> Not a single Member of the Court adopts the Government's theory. Indeed, the Court disposes of it in half a page—and for good reason. [*Rahimi*, 602 U.S. at 701-02]. The Government's argument lacks any basis in our precedents and would eviscerate the Second Amendment altogether.

Id.; *see also id.* at 708 ("[N]o one questions that the law Mr. Rahimi challenges addresses individual conduct covered by the text of the Second Amendment.") (Gorsuch, J., concurring).

So in *Bruen*, and later explained by *Rahimi*, this Court rejected any attempt to contort the text of the Second Amendment to mean something other than what it says: "[T]he right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

3. This Court's conclusion—that the Second Amendment's presumptive protections are not limited only to "responsible" or "law-abiding" citizens—recognized a new right that is retroactive on collateral review.

Under *Teague v. Lane*, 489 U.S. 288 (1989),"a right is 'newly recognized' for § 2255(f)(3) purposes if it is 'not dictated by precedent.'" *United States v. Hopkins*, 920 F.3d 690, 698 (10th Cir. 2019) (quoting *United States v. Greer*, 881 F.3d 1241, 1245 (10th Cir. 2018)). "A Supreme Court decision recognizing a right over a dissent is less likely to be dictated by precedent." *Id.* (citing *United States v. Chang Hong*, 671 F.3d 1147, 1154-55 (10th Cir. 2011) (concluding that the Supreme Court recognized a new rule in *Padilla v. Kentucky*, 559 U.S. 356 (2010))).

By contrast, a right is not "newly recognized" if it was "dictated by precedent existing at the time the defendant's conviction became final, is apparent to all reasonable jurists, or is merely an application of an existing right or principle." *Id.* (quotations and citations omitted).

In the Tenth Circuit, the Government conceded that *Bruen* recognized a new right that is retroactive on collateral review. Gov. Ans. Br. at 24-27. Even so, the Government insisted that Mr. Barragan's section 2255 motion failed because the right recognized in *Bruen* did not apply to Mr. Barragan's conduct. Gov. Ans. Br. at 16-24.

For its part, the Court of Appeals held that because *Bruen* did not apply to Mr. Barragan's conduct, neither decision recognized a new right. Said the Court: "[T]hose cases did not, as our test requires, 'formally acknowledge[]' a new right to possess firearms in furtherance of a crime, let alone announce it 'in a definitive way.'" Pet. App. 054a (quoting *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018)).

The Tenth Circuit read *Bruen* far too narrowly. Indeed, at least four considerations show that *Bruen* recognized a new right of all "the people" to keep and bear arms, not just "law-abiding citizens."

First, *Bruen*'s recognition that the Second Amendment applies to all "the people" and not just "responsible, law-abiding people," was not dictated by precedent. First of all, until the decision in *Heller*, no Supreme Court case had recognized an individual right to keep and bear firearms. *See United States v. Miller*, 307 U.S. 174, 178 (1939) (rejecting argument that Second Amendment protected individual right to possess or use a shotgun having a barrel of less than eighteen inches in length because that possession and use had no reasonable relationship to the preservation or efficiency of a well regulated militia). And while *Heller* and *McDonald* held that individuals possess an individual right to keep and bear arms under the Second Amendment, neither decision held that this right applied beyond

"law-abiding citizens." *See, e.g.*, *Heller*, 554 U.S. at 625 (interpreting *United States v. Miller* "to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns"); *McDonald v. City of Chicago*, 561 U.S. 742, 886 (2010) (Stevens, J., dissenting) ("'[T]he need for defense of self, family, and property is most acute' in one's abode, and celebrating 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 554 U.S. at 628, 635)). The decision in *Bruen*—to extend the Second Amendment to more than just "law-abiding citizens"—was thus not dictated by precedent and, instead, qualifies as a "newly recognized" right. *See Hopkins*, 920 F.3d 701 (distinguishing precedent and concluding that rule of *Luis v. United States*, 578 U.S. 5 (2016)—that the Sixth Amendment prevents the Government from pretrial freezing or seizing of untainted assets to prevent their dissipation—was not dictated by precedent because it was not "apparent to all reasonable jurists").

Second, *Bruen* specifically overruled all prior formulations of the Government's burden as an interests-balancing test subject to "intermediate" or "strict" scrutiny. *Bruen*, 597 U.S. at 17. Now, the only test is whether the Government can point to a compelling historical analogue justifying the restriction. *Id.* That is new. *Atkinson*, 70 F.4th at 1019 ("*Bruen* announced a new framework

for analyzing restrictions on the possession of firearms."); *United States v. Haas*, 2022 WL 15048667, at *2 n.1 (10th Cir. Oct. 27, 2022) (unpublished) (explaining *Bruen* "set forth a new test for assessing the constitutionality of a statute under the Second Amendment").

Third, *Bruen* was decided over the dissent of Justices Breyer, Sotomayor, and Kagan. And in the words of Justice Breyer, the *Bruen* majority "misread[] *Heller*." *Bruen*, 597 U.S. at 104 (Breyer, J., dissenting). That is compelling evidence that *Bruen* recognized a new right. *See Hopkins*, 920 F.3d at 702 (concluding that *Luis* recognized a new right in part because Justice Kennedy's dissent characterized the plurality's decision as "unprecedented" and stated that it "ignore[d] . . . precedent[ ]").

Fourth, like the fact that *Bruen* was decided over a dissent, the fact that courts split over its meaning is further evidence that it recognized a new right. *Cf. Chaidez v. United States*, 568 U.S. 342, 347 (2013) (a holding is not dictated by precedent "unless it would have been 'apparent to all reasonable jurists'" (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997))).

Because precedent did not dictate *Bruen*'s extension of the Second Amendment right to keep and bear arms to all "the people" and not just "law-abiding citizens," the decision recognized a new right. In turn, as explained below,

that new right is retroactive on collateral review, and Mr. Barragan's section 2255 petition is timely under § 2255(f)(3).

4. "Under *Teague*, a new constitutional rule of criminal law or procedure is not generally applicable retroactively to cases on collateral review. But *Teague* recognized two exceptions: (1) rules that change what conduct is punishable under substantive criminal law, and (2) watershed rules of criminal procedure." *Hopkins*, 920 F.3d at 699 (quotations and citations omitted). This case is about the first exception.

Teague's first exception applies when a newly recognized substantive rule "forbid[s] criminal punishment of certain primary conduct" or "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Id.* (citing *Montgomery*, 577 U.S. at 206).

In *Johnson v. United States*, 576 U.S. 591, 606 (2015), for example, this Court held the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) was void for vagueness. In turn, in *Welch v. United States*, 578 U.S. 120, 130 (2016), the Court held that *Johnson* applied retroactively. *Welch* explained that "the rule announced in *Johnson* is substantive." *Id.* at 129. By striking down the residual clause as unconstitutionally void, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering "the range of

conduct or the class of persons that the [Act] punishes." *Id.* at 135 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

Under the logic of *Welch*, *Bruen* is retroactive on collateral review because it announced a substantive rule that "alters the range of conduct or the class of persons that the law punishes." *See id.* at 129 (quoting *Schriro,* 542 U.S. at 353). After *Bruen*, the Second Amendment's right to keep and bear arms—to possess a firearm—is not limited to a "certain class of persons" (i.e., "law-abiding citizens"), and it instead applies, as the plain language of the Amendment says, to all "the people." U.S. Const. amend. II. *Bruen* is a "constitutional determination[] that place[s] particular conduct or persons covered by [18 U.S.C. § 924(c)(1)(A)(i)] beyond the State's power to punish." *Id.* (quoting *Schriro*, 542 U.S. at 351-52).

In *United States v. Daniels*, the Fifth Circuit held that *Bruen* rendered unconstitutional 18 U.S.C. § 922(g)(3), which bars an individual from possessing a firearm if he is an "unlawful user" of a controlled substance, in that case marijuana. 77 F.4th 337, 339 (5th Cir. 2023), vacated and remanded, *United States v. Daniels*, 144 S. Ct. 2707 (2024).[2] While not a case about retroactivity, the Fifth Circuit held that it was unconstitutional to strip a "certain class of persons," *i.e.*,

[2] On remand, and in light of *Rahimi*, the Fifth Circuit again struck down 18 U.S.C. § 922(g)(3) as unconstitutional. *United States v. Daniels*, 124 F.4th 967, 970 (5th Cir. 2025).

marijuana users, of their Second Amendment rights. *Id.* at 354. The Fifth Circuit's analysis shows what *Bruen* and *Rahimi* announced: A new substantive rule "forbid[ding] criminal punishment of certain primary conduct" or "prohibit[ing] a certain category of punishment for a class of defendants because of their status or offense." *Montgomery* 577 U.S. at 206. That means *Bruen* is retroactive on collateral review.

This Court should grant certiorari and so hold.

B. Title 18, section 924(c)(1)(A)(i), as applied to Mr. Barragan, violates the Second Amendment.

In turn, 18 U.S.C. § 924(c)(1)(A)(i), as applied to Mr. Barragan, violates the Second Amendment.

Title 18 U.S.C. § 924(c)(1)(A) provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Because Mr. Barragan did not brandish or discharge a firearm (that is, he did not use a firearm), he was sentenced under subsection (c)(1)(A)(i) to a term of 60 months' imprisonment. And as discussed above, the record establishes that Mr. Barragan did nothing more than possess a firearm during the same time and in the same location in which he distributed controlled substances.

Bruen establishes the following framework for analyzing the constitutionality of a statute under the Second Amendment. If a federal regulation implicates the Second Amendment, that regulation is presumptively unconstitutional unless the Government provides a "well-established and representative historical *analogue*" that is consistent with the Framers' view of a valid limitation on the Second Amendment. *Bruen*, 597 U.S. at 30 (emphasis in original). The Government need not provide a "historical twin," but the historical analogue and presently challenged statute "must both address a comparable problem (the 'why') and place a comparable burden on the rightsholder (the 'how')." *Daniels*, 77 F.4th at 342.

Mr. Barragan was convicted merely for his possession of a firearm, rather than because he used, brandished, or discharged a firearm. Because the right to possess a firearm applies to all "the people" after *Bruen*, not just "law-abiding" people, the Second Amendment by its plain terms covers his conduct, and 18

U.S.C. § 924(c)(1)(A)(i) is presumptively unconstitutional. In turn, the Government cannot meet its burden to establish the statute's constitutionality.[3]

First, "[a]ny study of drug policy in the United States of America must take into consideration that illicit drugs were once legal in the United States." Margarita Mercado Echegaray*, Drug Prohibition in America: Federal Drug Policy and Its Consequences*, 75 Rev. Jur. U.P.R. 1215, 1217 (2006).[4] Because there is no historical tradition of drug criminalization at the time of our country's founding, there is no historical analogue for imposing a separate conviction and sentence for possession (but not use) of a firearm at the same time and location as unlawful drug distribution.

Second, Mr. Barragan was convicted of possessing the firearm during the same time and in the same location in which he distributed controlled substances. He was not convicted of using the firearm to facilitate distribution, nor of brandishing firearm during an act of distribution, nor of discharging a firearm as

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[3] Because Mr. Barragan did not brandish or discharge the firearm, this Court need not consider whether either 18 U.S.C. § 924(c)(1)(A)(ii) or 18 U.S.C. § 924(c)(1)(A)(iii) is unconstitutional.

[4] The tide apparently only shifted because of racial animus towards immigrants and Black communities in the late nineteenth century. Margarita Mercado Echegaray*, Drug Prohibition in America: Federal Drug Policy and Its Consequences*, 75 Rev. Jur. U.P.R. 1215, 1217-20 (2006).

part of an act of distribution. As Mr. Barragan explained below, 18 U.S.C. § 924(c)(1)(A)(i) criminalizes

> conduct that is not necessarily related to drug trafficking, but rather the mere possession of a firearm during the commission of the offense. This means that a person could be convicted under [§ 924(c)(1)(A)(i)] for simply possessing a firearm while engaging in drug trafficking, even if the firearm was not used or brandished in any way. This broad scope of the law could potentially criminalize the conduct of individuals who are not actually a danger to society or who are not using their firearms for any unlawful purposes.

App. R. Vol. 2, p 8.

As this Court held in *Bruen*, possession of a firearm is at the core of the Second Amendment, and that Second Amendment right extends not just to "law-abiding citizens," but to all "the people." Section 924(c)(1)(A)(i) thus imposes a substantial burden on a person's core Second Amendment rights because it criminalizes mere possession without also requiring proof that the firearm was used, brandished, or discharged in any way.[5]

Third, in *Daniels*, the Fifth Circuit held that 18 U.S.C. § 922(g)(3), which prevents "unlawful users" of a controlled substance from possessing a firearm, was unconstitutional under *Bruen*. The court reasoned that there simply was no

[5] Subsections (c)(1)(A)(ii) and (c)(1)(A)(iii), which penalize brandishing and discharging firearms in furtherance of drug trafficking crimes, are more than sufficient to vindicate the Government's interest in deterring gun violence as part of drug trafficking.

historical tradition of preventing unlawful drug users from possessing firearms. *See* 77 F.4th at 340; *see also United States v. Harrison*, 654 F. Supp. 3d 1191, 1200-01 (W.D. Okla. 2023) (discussing several laws that applied generally to firearms and intoxicants and concluding none satisfied *Bruen*'s second step), *rev'd and remanded*, __ F.4th __, 2025 WL 2452293 (10th Cir. No. 23-6028, Aug. 26, 2025). Likewise, the Government cannot point to a historical tradition of criminalizing the mere possession of a firearm during the same time and in the same location in which a person also distributes controlled substances and while not under the influence of controlled substances, which themselves were not unlawful for much of our history.

Fourth, drug abuse, drug dealing, and the use of firearms along with intoxicants have been "general societal problem[s]" for centuries. *See Bruen*, 597 U.S. at 26 (stating that if a modern regulation addresses "a general societal problem that has persisted since the 18th century," "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment"). In turn, the absence of any historical regulation addressing firearms possession during the process of drug distribution shows that 18 U.S.C. § 924(c)(1)(A)(i) conflicts with the Second Amendment. *See id.*

5. In defense of section 924(c)(1)(A)(i), the Government argued that the Nation's history establishes a "principle that Congress may disarm those who possess firearms for unlawful purposes." Gov. Suppl. Brief, p 5. But as Mr. Barragan showed below, there is, at most, a tradition of criminalizing the *use* of a firearm as part of unlawful activity, not *possession*.

The Government pointed to laws that, in its view, provided "for an enhanced penalty for burglary and robbery—usually the death penalty or forfeiture of the criminal's estate—where the perpetrator used violence or was armed with a 'dangerous weapon.'" Gov. Ans. Brief, pp 40 & n.8.[6] The Government's characterization of these laws, however, was not entirely accurate.

Take *An Act for the Punishment of Burglary and Robbery*, 1783 Conn. Laws 633. That Act enhanced the punishment for burglary and robbery if a defendant committed one of those offenses while "armed with any dangerous Armour or

[6] The Government also pointed to laws that purportedly punished the possession of weapons "with intent to assault" and the display of weapons in a "rude, angry, or threatening manner." Gov. Ans. Brief, pp 40-41. Neither of those two categories applies here, though, since Mr. Barragan did not admit having an "intent to assault" (which is not an element of a violation of section 924(c)(1)(A)(I) anyway), and he did not "use" a firearm by menacing anyone (that is, by displaying the weapon in a "rude, angry, or threatening manner").

Weapon, as clearly to indicate their violent Intentions."[7] Merely possessing a weapon at the same time and in the same location as the burglary or robbery wasn't enough. The Ohio law cited by the Government likewise criminalized possession of a weapon if that possession "clearly . . . indicate[d] a violent intention."[8] By contrast, there is no analogous requirement under section 924(c)(1)(A)(i). Indeed, there is no requirement of a specific intent to commit violence, and there is no requirement of actual or threatened or possible violence.

There was at least one more problem with the Government's contention that the Nation has a tradition of criminalizing possession of a firearm (but not use of a firearm) during unlawful activity: The unlawful activity here is conspiracy to distribute drugs, a modern invention of the criminal law. The laws the Government relied on, by contrast, criminalized burglary and robbery, which were illegal for centuries before our Nation's founding. If the Government were right that legislatures may prohibit firearms possession for all unlawful purposes, then that is no limit at all. All the Government would have to do to skirt the Second Amendment is to make some activity unlawful, at which point the Government

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[7] https://firearmslaw.duke.edu/laws/1783-conn-acts-633-an-act-for-the-punishment-of-burglary-and-robbery (last visited Sept. 2, 2025).

[8] https://firearmslaw.duke.edu/laws/1788-1801-ohio-laws-20-a-law-respecting-crimes-and-punishments-ch-6 (last visited Sept. 2, 2025).

could likewise criminalize possessing a firearm at the same time as the newly "unlawful" activity.

For these reasons, Mr. Barragan met his burden of showing that his conduct falls within the plain text of the Second Amendment. The burden now shifts to the Government to point to a well-established and representative historical analogue for 18 U.S.C. § 924(c)(1)(A)(i). Because the Government was and will remain unable to meet that burden, this Court should declare that 18 U.S.C. § 924(c)(1)(A)(i) is unconstitutional as applied to Mr. Barragan.[9]

II. The questions presented are of exceptional importance, and if this Court does not soon answer the first question, it may never have the opportunity to do so.

The first question presented—whether *Bruen* recognized a new right that is retroactive on collateral review—is of exceptional importance.

Additionally, this Court may never again have the opportunity to decide this question. *Bruen* was announced in 2022. If that decision recognized a new right retroactive on collateral review, a petitioner had one year from its issuance (until 2023) to file his section 2255 petition. Mr. Barragan met that deadline.

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[9] Mr. Barragan filed his section 2255 motion *pro se*. His *pro se* motion, which is entitled to liberal construction, did not expressly say whether he was leveling a facial or as-applied challenge to § 924(c)(1)(A)(i). As counsel for Mr. Barragan explained in the court below, this Court can resolve the case based on an as-applied challenge without considering the facial constitutionality of § 924(c)(1)(A)(i).

But that one-year period has now come and gone. If this Court does not decide the question soon, it won't have another opportunity to do so, since no new section 2255 petitions based on the retroactivity of *Bruen* can be filed now that it has been more than one year since *Bruen* was decided. If this Court intends to resolve the first question presented, it should do so now, in this case.

The second question is also of exceptional importance. Despite *Bruen* and *Rahimi*, lower courts continue to resist the plain language of the Second Amendment. This Court should hold, once and for all, that the Second Amendment presumptively protects firearms possession for *all the people*.

III. This case is an ideal vehicle for resolving the questions presented.

Both questions for review are squarely presented by this Petition. There are no waiver, forfeiture, or other procedural roadblocks in the way of this Court's deciding either question.[10]

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[10] The Tenth Circuit noted that Mr. Barragan is not a United States citizen. Pet. App. 042a n.4. Even so, nothing in the record shows that his presence in the country was unlawful. Because the Tenth Circuit did not address the issue, this Court need not decide whether the Second Amendment protects individuals who are lawfully in the United States even if they aren't citizens. As the Tenth Circuit recognized, "whether noncitizens possess a right to bear arms is an unanswered question currently dividing the circuits." *Id.*

The Tenth Circuit should be permitted to decide that question, if at all, in the first instance. As Mr. Barragan explained below, however, the Government

—footnote cont'd on next page—

Of course, because the Tenth Circuit based its decision on the answer to the first question presented, it did not reach the second. This Court could reach the second question if it desires—since it was fully briefed below, and because it's a question of law—or it could resolve the case based on the first question presented and remand to the Tenth Circuit to consider in the first instance the constitutionality of 18 U.S.C. § 924(c)(1)(A)(i) as applied to Mr. Barragan.

Conclusion

This Court should issue a writ of certiorari to review the Court of Appeals' decision.

Dated: September 2, 2025.

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waived this contention by waiting until its final supplemental brief to raise the issue for the very first time.

Respectfully submitted,

s/ Adam Mueller

Adam Mueller
HADDON, MORGAN AND FOREMAN, P.C.
945 North Pennsylvania Street
Denver, CO 80203
Tel 303.831.7364
amueller@hmflaw.com
Counsel for Mr. Barragan-Gutierrez