No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

DUSTIN DEWAYNE GILBERT, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether defendants may assert as-applied challenges to 18 U.S.C. § 922(g)(1) under the Second Amendment.

2. Whether 18 U.S.C. § 922(g)(1)'s lifetime ban on firearm possession by felons violates the Second Amendment as applied to Mr. Gilbert, who was previously convicted of a non-violent theft offense.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner DUSTIN DEWAYNE GILBERT petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS & ORDERS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit and the Order of the United States District Court for the Southern District of Alabama are included in the appendix.

JURISDICTION

On June 16, 2025, the Eleventh Circuit affirmed the district court's judgment and sentence. No petition for rehearing was filed. The deadline to file this petition is September 15, 2025, under Supreme Court Rule 13. Therefore, this petition is timely. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 922(g)(1) states in relevant part:

(g) It shall be unlawful for any person–

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition

which has been shipped or transported in interstate or foreign commerce.

The **Second Amendment to the U.S. Constitution** provides in relevant part:

> 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.

INTRODUCTION

Since this Court's decisions in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) and *United States v. Rahimi*, 602 U.S. 680 (2024), the courts of appeal are deeply split on whether 18 U.S.C. § 922(g)(1) is susceptible to as-applied challenges under the Second Amendment. After surveying the historical record, the Third, Fifth, and Sixth Circuits have held that § 922(g)(1) is constitutional only as applied to people with prior felonies who are dangerous. The Third Circuit, applying that holding, concluded that § 922(g)(1) was unconstitutional as applied to an individual convicted of food-stamp fraud.

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

This circuit split is intractable and has created fundamentally unfair disparities

in how similarly-situated defendants are treated. Individuals with minor or nonviolent felonies in some circuits retain their Second Amendment rights, while individuals with similar criminal histories in other circuits are exposed to federal prosecution if they possess a firearm. Because this split exists, criminal defendants charged under § 922(g)(1) will continue to pursue these claims and file petitions for certiorari until this Court resolves the issue. This Court should grant the petition and resolve the disagreement between the circuits.

This Court should also grant the petition to correct the decision below. As a non-violent felon, Mr. Gilbert retained the right to bear arms under the Second Amendment, but precedent in the Eleventh Circuit foreclosed his argument. The circuits that have concluded that as-applied challenges are unavailable, including the Eleventh Circuit, have misapplied the text-and-history analysis mandated by *Bruen* and *Rahimi*. Under the correct application of that analysis, the government cannot permanently disarm Mr. Gilbert solely because he has a prior conviction for theft.

Alternatively, if the Court anticipates that it may grant a writ of certiorari on the issues raised herein in another case, Mr. Gilbert requests that his petition be held pending resolution of that case.

STATEMENT OF THE CASE

In June 2021, a grand jury in the Southern District of Alabama charged Mr. Gilbert in a one-count indictment with knowing possession of two firearms, a 12-gauge shotgun and a .270-caliber rifle, as a felon, in violation of § 922(g)(1). Mr. Gilbert had one prior felony conviction, a 2017 Alabama conviction for first-degree theft of property, which served as the felony underlying the § 922(g)(1) charge.

Mr. Gilbert filed a motion to dismiss the indictment on grounds that § 922(g)(1) violated the Second Amendment on its face and as applied to him according to the framework established in *Bruen*. He argued the statute was unconstitutional as applied to him because the prior conviction on which the federal charge was based was non-violent. The district court denied the motion, citing pre-*Bruen* Eleventh Circuit precedent. In July 2023, Mr. Gilbert pled guilty to the indictment without a plea agreement and, in September 2023, was sentenced to time served, or approximately 31 months, in prison followed by three years of supervised release.[1]

Mr. Gilbert appealed the district court's denial of his motion to dismiss the indictment, arguing only that § 922(g)(1) was unconstitutional as applied to him. He did not raise a facial challenge to the statute. While his appeal was pending, this Court

[1] In January 2024, while his case was pending on appeal, Mr. Gilbert's supervised release was revoked, and he was sentenced to time served followed by 35 months of supervised release.

and the Eleventh Circuit decided a quartet of cases bearing on Mr. Gilbert's appeal. First, the Eleventh Circuit decided *United States v. Dubois*, 94 F.4th 1284, 1292-93 (11th Cir. 2024)("*Dubois I*"), in which it held that *Bruen* did not abrogate its precedent holding that § 922(g)(1) is constitutional and stated: "We require clearer instruction from the Supreme Court before we may reconsider the constitutionality of section 922(g)(1)." Second, this Court issued its decision in *Rahimi*, holding that a different subsection of § 922(g), § 922(g)(8), was constitutional as applied to a dangerous person (an "individual [found to pose] a credible threat to the physical safety of an intimate partner") temporarily restrained from possessing firearms ("while the [restraining] order is in effect"). 602 U.S. at 702. Third, this Court granted, vacated, and remanded *Dubois I* to the Eleventh Circuit for reconsideration in light of *Rahimi*. *Dubois v. United States*, 145 S. Ct. 1041 (Jan. 13, 2025). Fourth, in response to the remand order, the Eleventh Circuit issued its decision in *United States v. Dubois*, 139 F.4th 887 (11th Cir. 2025)("*Dubois II*"), in which the court reinstated its decision in *Dubois I*, concluded that neither *Bruen* nor *Rahimi* abrogated its precedent holding that § 922(g)(1) is constitutional, and stated again: "We require clearer instruction from the Supreme Court before we may reconsider the constitutionality of section 922(g)(1)." *Dubois II*, 139 F.4th at 894.

In June 2025, the Eleventh Circuit held that *Dubois II* "forecloses" Mr. Gilbert's as-applied constitutional challenge to § 922(g)(1) and affirmed his conviction.

REASONS FOR GRANTING THE WRIT

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

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

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

1. The Third, Fifth, and Sixth Circuits have all held that § 922(g)(1) is open to as-applied challenges. *See Range v. Att'y Gen. United States*, 124 F.4th 218, 232 (3d Cir. 2024) (en banc); *United States v. Diaz*, 116 F.4th 458, 470 n.4, 472 (5th Cir. 2024), *cert. denied*, No. 24-6625 (Feb. 24, 2025); *United States v. Williams*, 113 F.4th 637, 657, 662–663 (6th Cir. 2024).[2] Although each court offered its own analysis, they agreed on several key preliminary issues.

First, all three courts concluded that *Bruen* and *Rahimi* "abrogated" their pre-*Bruen* case law upholding the constitutionality of § 922(g)(1). *Range*, 124 F.4th at 225; *see also Diaz*, 116 F.4th at 465 (concluding that *Bruen* "render[ed] our prior precedent obsolete" (citation omitted)); *Williams*, 113 F.4th at 647-48 ("[O]ur pre-

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

Bruen precedent isn't binding here because intervening Supreme Court precedent demands a different mode of analysis."). Second, those courts also agreed that *Heller*'s statement that felon-in-possession laws are "presumptively lawful," *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008), was non-binding dicta. *Williams*, 113 F.4th at 645–648; *Diaz*, 116 F.4th at 465–466; *Range*, 124 F.4th at 226–228. All three courts reasoned that *Heller*'s brief mention of felon-in-possession laws, which were not at issue in that case, could not absolve them of their duty to analyze whether § 922(g)(1) was consistent with this Nation's history and tradition of firearm regulation. *Williams*, 113 F.4th at 645–648; *Diaz*, 116 F.4th at 465–466; *Range*, 124 F.4th at 226–228. Third and finally, at step one, these courts all agreed that the plain text of the Second Amendment covers people with felony convictions because they are part of "the people" the amendment protects. *Williams*, 113 F.4th at 648-50; *Diaz*, 116 F.4th at 466; *Range*, 124 F.4th at 228.

2. At *Bruen* step two, each court adopted a slightly different approach, but they all agree that as-applied challenges to § 922(g)(1) are available. *Williams*, 113 F.4th at 657; *Diaz*, 116 F.4th at 469–470 & n.4; *Range*, 124 F.4th at 232. In *Range*, the Third Circuit concluded that the government "ha[d] not shown that the principles underlying the Nation's historical tradition of firearms regulation support depriving" someone convicted of food-stamp fraud from exercising his Second Amendment right. 124 F.4th at 232. In a subsequent case, the Third Circuit clarified that §

922(g)(1) is constitutional as applied to felons who "present a special danger of misusing firearms." *Pitsilides v. Barr*, 128 F.4th 203, 210 (3d Cir. 2025) (alterations adopted) (quoting *Rahimi*, 602 U.S. at 698). To determine whether a particular defendant is "dangerous" and subject to disarmament, the Third Circuit requires courts to "consider a convict's entire criminal history and post-conviction conduct indicative of dangerousness, along with his predicate offense and the conduct giving rise to that conviction[.]" *Id.* at 212.

The Sixth Circuit has adopted a similar test for as-applied challenges. In *Williams*, the Sixth Circuit concluded that "our nation's history and tradition demonstrate that Congress may disarm individuals they believe are dangerous," and it acknowledged that "§ 922(g)(1) might be susceptible to an as-applied challenge in certain cases." 113 F.4th at 657. Like the Third Circuit, the Sixth Circuit requires courts assessing an as applied challenge to "focus on each individual's specific characteristics," including their "entire criminal record, not just the predicate offense …." *Id.*

The Fifth Circuit has taken a slightly different approach. In *Diaz*, the court explained that the key question in as-applied cases is whether "the government [can] demonstrate that the Nation has a longstanding tradition of disarming someone with a criminal history analogous to" the challenger. 116 F.4th at 467. The court held that § 922(g)(1) was constitutional as applied to Diaz, who had prior convictions for vehicle

theft and evading arrest. After canvassing the history, the court concluded that there was a history and tradition of severely punishing people with similar criminal records at the Founding. *Id.* at 469–470.

In a more recent case, the Fifth Circuit expanded on its as-applied test. *United States v. Kimble*, 142 F.4th 308 (5th Cir. 2025). The defendant in *Kimble* had a prior drug trafficking conviction. *Id.* at 309. The Fifth Circuit examined the historical record and concluded that "[t]he Second Amendment allows Congress to disarm classes of people it reasonably deems dangerous[.]" *Id.* at 314–315. But that was not the end of the analysis: the court emphasized that courts "must determine whether the government has identified a 'class of persons at the Founding who were "dangerous" for reasons comparable to' those Congress seeks to disarm today." *Id.* at 315 (citation omitted). In doing so, the court explained, courts should *not* "look beyond a defendant's predicate conviction" and conduct "an individualized assessment that [the defendant] is dangerous." *Id.* at 318 (citation and internal quotation marks omitted). Applying that standard, the court concluded that § 922(g)(1) is constitutional as applied to Kimble because "[l]ike legislatures in the past that sought to keep guns out of the hands of potentially violent individuals, Congress today regards felon drug traffickers as too dangerous to trust with weapons." *Id.* at 316.

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

The Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have all held that § 922(g)(1) is constitutional as applied to all people with at least one felony conviction—even minor or nonviolent convictions. *See United States v. Jackson*, 110 F.4th 1120, 1125, 1129 (8th Cir. 2024), *cert. denied*, No. 24-6517 (May 19, 2025); *United States v. Hunt*, 123 F.4th 697, 700 (4th Cir. 2024); *Vincent v. Bondi*, 127 F.4th 1263, 1265–1266 (10th Cir. 2025), *cert. pet. docketed*, No. 24-1155 (May 8, 2025); *United States v. Duarte*, 137 F.4th 743, 761–762 (9th Cir. 2025) (en banc); *Dubois II*, 139 F.4th at 894; *Zherka v. Bondi*, 140 F.4th 68, 96 (2d Cir. 2025).

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

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

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

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

The Second and Ninth Circuits also cited *Heller*'s "presumptively lawful"

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

The Fourth Circuit took an all-of-the-above approach in *Hunt*. First, the Fourth Circuit held that its pre-*Bruen* precedent upholding § 922(g)(1)'s constitutionality, which rested primarily on the "presumptively lawful" dicta in *Heller*, was still good law. 123 F.4th at 702–704. In the *Hunt* panel's view, "nothing in *Bruen* or *Rahimi* undermines … this Court's previous reliance on *Heller*'s express statements about" felon-in-possession laws. *Id.* at 704. The Fourth Circuit acknowledged that *Bruen* had "disavowed the second step of this Court's former two-part test for considering Second Amendment challenges as 'one step too many.'" *Id.* at 704 (*Bruen*, 597 U.S. at 19). The old two-part test required courts to engage in means-ends scrutiny at step two. But the *Hunt* panel concluded that the pre-*Bruen* decisions on

§ 922(g)(1) were still good law because they "did not rely on any sort of 'means-end scrutiny.'" *Id.* (citation omitted). Instead, those cases determined, at step one of the old test, that felons fell "outside the scope of the Second Amendment." *Id.* (citation omitted).

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

Even if the Second Amendment did afford felons some protection, the Fourth Circuit held, at step two, that § 922(g)(1) is consistent with this Nation's history and tradition of firearm regulation. Relying heavily on the Eighth Circuit's reasoning in *Jackson*, the court held that § 922(g)(1) is justified by this nation's history of disarming (1) people "who deviated from legal norms" and (2) categories of people who posed

"a risk of dangerousness." *Id.* at 706 (quoting *Jackson*, 110 F.4th at 1127). The court concluded that the first principle derived from early laws that "regularly punished felons and other non-violent offenders with estate forfeiture or death—far greater punishments that 'subsumed disarmament.'" *Id.* (quoting *Jackson*, 110 F.4th at 1127). And the court concluded that the colonial and Founding-era laws that prohibited certain groups of people—*e.g.*, religious minorities, Native Americans, Loyalists—from possessing firearms established a tradition of categorically disarming groups deemed dangerous. *Id.* at 706–707.

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

II. The decision below is wrong.

A. The Eleventh Circuit's opinion relies on dicta and ignores the Bruen test.

The Eleventh Circuit primarily relies on its pre-*Bruen* precedent, which rests entirely on stray dicta in *Heller* and not any analysis of the text and history of the Second Amendment. After *Heller*, the Eleventh Circuit asked the preliminary question "whether one is *qualified* to possess a firearm." *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010)(italics in original). It believed that *Heller*'s identification of felon-in-possession laws as "presumptively lawful" "longstanding prohibitions" and *Heller*'s references to the Second Amendment right belonging to "law-abiding citizens" "suggest[ed] that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id.* at 771. The court specifically rejected the contention that *Heller*'s references to "law-abiding citizens" was dicta. *Id.* at 771 n.6. The court did not consider the historical roots of felon disarmament statutes. Nor did it claim that the text of the Second Amendment excludes felons. Rather, it extracted from *Heller* an additional, binding preliminary question divorced from the constitutional text or regulatory history.

To be sure, *Heller* does say that the Second Amendment protects the rights of "law-abiding, responsible citizens," 554 U.S. at 635, but as *Rahimi* clarified, this Court used that term simply "to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right." 602 U.S. at 701-02. In other words, that descriptor was meant to define the core of the right, not its outer limits. Morever, other amendments, such as the First and Fourth Amendments, also refer to "the

people," but "[f]elons are not categorically barred from First or Fourth Amendment protection because of their status." *Range*, 124 F.4th at 226. It would make scant sense to exclude felons from "the people" for Second Amendment purposes, when felons are still entitled to "constitutional rights in other contexts." *Id.*; *see also Zherka*, 140 F.4th at 77 (reaching similar conclusion); *Duarte*, 137 F.4th at 753-54 (same); *Williams*, 113 F.4th at 649 (same). And there is no relevantly similar historical analogue to a lifetime ban on possession of firearms for nonviolent felons. As one Justice has noted, no historical tradition of prohibiting felons from possessing firearms for life exists, *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting), abrogated by *Bruen*, 597 U.S. 1, let alone a tradition of prohibiting *nonviolent* felons from possessing firearms for life.

Notwithstanding the intervening decisions of this Court in *Bruen* and *Rahimi*, the Eleventh Circuit's decisions in *Dubois* adhered to *Rozier*'s holding without engaging in any such text-and-history analysis. The court applied its prior panel precedent rule and simply concluded that "*Bruen* did not abrogate *Rozier*." *Dubois II*, 139 F.4th at 893. The court reasoned: "Because the Supreme Court 'made it clear in *Heller* that [its] holding did not cast doubt' on felon-in-possession prohibitions, and because the Court made it clear in *Bruen* that its holding was '[i]n keeping with *Heller*,' *Bruen* could not have clearly abrogated our precedent upholding section 922(g)(1)[.]" *Id.* (citations omitted). "Indeed," the court wrote, "the *Bruen* majority did not mention felons or

section 922(g)(1)." *Id.* (citations omitted). Hence, the Eleventh Circuit affirmed the § 922(g)(1) convictions of Mr. Gilbert and all other defendants raising Second Amendment challenges to § 922(g)(1) without ever engaging in the *Bruen* text-and-history analysis and without ever considering whether § 922(g)(1) might be unconstitutional in some of its applications.

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

As-applied challenges are the "basic building blocks of constitutional adjudication." *Gonzalez v. Carhart*, 550 U.S. 124, 168 (2007)(citation omitted). In *Rahimi*, this Court entertained and resolved an as-applied Second Amendment challenge to § 922(g)(8), 602 U.S. at 701, and the Third, Fifth and Sixth Circuits have persuasively explained why similar challenges can be made to § 922(g)(1). *See Range*, 124 F.4th at 224; *Diaz*, 116 F.4th at 472; *Williams*, 113 F.4th at 657.

The question perplexing these courts is how to assess those challenges. The courts seem to agree that the question is whether the defendant is too dangerous to possess a firearm. The closest historical analogues to § 922(g)(1) are status-based disarmament laws from the colonial and Founding-era, and, in contrast to § 922(g)(1), which imposes an inflexible lifetime ban on firearm possession, those laws often had mechanisms allowing individuals to "demonstrate they were not dangerous" and regain possession of their arms. *Williams*, 113 F.4th at 654; *Jackson*, 121 F.4th at 660

(Stras, J, dissenting from denial of rehearing) (explaining that most Founding-era laws "left room for 'individuals to show they were not as dangerous as the government thought'" (citation omitted)).

However, the courts disagree about how to make that "dangerousness" finding. The Third and Sixth Circuits have suggested that courts should consider a person's history and characteristics, including their entire criminal history, not just the predicate offense for the § 922(g)(1) charge. But that approach suffers from serious flaws. What standard would courts use to assess "dangerousness"? Does a judge or a jury have to decide the facts related to "dangerousness"? If that approach requires examination of the underlying facts of prior convictions, what if those facts are disputed or simply unavailable? What crimes make someone permanently "dangerous"?

One test that is workable and avoids the vagueness problems inherent in the Third and Sixth Circuits' approach is the categorical approach. Courts could look at the elements of the defendant's predicate felony conviction to determine if that conviction necessarily involved the use, attempted use, or threatened use of force. The categorical approach "economizes on judicial resources" and avoids "mini-trials" long after the fact which would be "costly, but unreliable." *United States v. Wilson*, 951 F.2d 586, 589 (4th Cir. 1991). In addition, "the categorical approach furthers the important values of comity and federalism" by avoiding the possibility of conflicting factual determinations between state juries and federal courts. *Id.* at 590. And as the Supreme

Court has repeatedly held, looking to the elements of the offense is the only reliable way to determine what facts a jury must have found in order to support a conviction. *See Descamps v. United States*, 570 U.S. 254, 267 (2013); *Mathis v. United States*, 579 U.S. 500, 515 (2016) (in determining what a prior jury or judge found in convicting a defendant, "elements alone fit that bill"). Most importantly, it avoids the thorny constitutional and vagueness issues presented by the Third and Sixth Circuits' approach.

Whatever test the Court adopts, it will bring much needed clarity to the current situation. While the Third and Sixth Circuit use a fact-bound approach, the Fifth Circuit focuses on each defendant's predicate felony offense and asks whether there is a history and tradition of disarming individuals with similar predicates. Because the courts that allow as-applied challenges are divided on how those challenges should be litigated, this Court should grant certiorari and provide uniform guidance for lower courts.

III. The issues presented are important and recurring.

The constitutionality of § 922(g)(1) is an exceptionally important issue given that millions of Americans have felony convictions on their records. *See* Sarah K.S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 Demography 1795, 1806 (2018), available at https://tinyurl.com/mt7frvhn (finding that 19 million people had felony convictions

on their records in 2010). Section 922(g)(1) permanently bars these Americans from exercising their Second Amendment rights, and because of decisions like the one below, many are not even allowed to assert as-applied challenges to restore their rights.

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

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

in *Dubois I* and *Dubois II*, the Eleventh Circuit pled with this Court for more direction: "We require clearer instruction from the Supreme Court before we may reconsider the constitutionality of section 922(g)(1). *Rozier* continues to bind us, so Dubois's challenge based on the Second Amendment fails." *Dubois II*, 139 F.4th at 894.

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

But this year the Attorney General revoked the delegation to the ATF and has indicated that it will begin accepting applications. *See Withdrawing the Attorney General's Delegation of Authority*, 90 Fed. Reg. 13,080 (March 20, 2025) (to be codified at 28 C.F.R. pt. 478). The Department of Justice recently proposed a rule setting forth the criteria it will use to evaluate § 925(c) applications. *See Application for Relief From*

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

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

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

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

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

Applicants under § 925(c) are also completely at the mercy of the Executive,

who has the ultimate discretion to decide whether to grant relief. By contrast, during colonial times, it was usually "the local justice of the peace" who made dangerousness determinations, and those decisions were often "guided by some benchmarks, either a loyalty oath, the attestations of others, or some other statutory criteria." *Williams*, 113 F.4th at 657. The criteria for § 925(c) is largely set by the Attorney General through the rulemaking process, so it could change depending on who is residing in the White House. An administration that is particularly hostile to gun rights could establish criteria that are almost impossible to meet.

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

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

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

in order to settle the issue quickly.

CONCLUSION

Based on the foregoing arguments, the petition for a writ of certiorari should be granted. In the alternative, the case should be held until the Court rules on similar cases presenting the issues raised here and considered at that time. Remanding the case to the Eleventh Circuit for reconsideration in light of *Rahimi* would be a pointless exercise. The Eleventh Circuit considered *Rahimi* and *Dubois II*, which was a case remanded for reconsideration in light of *Rahimi*, when it affirmed Mr. Gilbert's conviction.

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Respectfully submitted,

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