NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

TERRY LEE GAMMAGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether after *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022) and *United States v. Rahimi*, 602 U.S. 680 (2024), a criminal defendant may raise an as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(1).

(2) If so, whether under the *Bruen/Rahimi* methodology, the Second Amendment is unconstitutional as applied to a defendant like Petitioner with only non-violent priors.

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

Petitioner Gammage was the defendant in the district court and appellant below.

Respondent United States of America was the plaintiff in the district court and appellee below.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court: *United States v. Gammage*, 23-80120-CR-CANNON (S.D. Fla.), *aff'd*, *United States v. Gammage*, 2025 WL 2504533 (11th Cir. Sept. 2, 2024).

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions, Statutes, and Other Authorities:

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Terry Lee Gammage respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 24-11250 in that court on September 2, 2025, *United States v. Gammage*, 2025 WL 2504533 (11th Cir. September 2, 2025).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in Appendix A-1. The district court's final judgment is contained in Appendix A-2.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The United States Court of Appeals had jurisdiction over this cause pursuant to 28 U.S.C. § 1291. The decision of the court of appeals was entered on September 2, 2025, *United States v. Gammage*, 2025 WL 2504533 (11th Cir. Sept. 2, 2025). This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, U.S. Const. amend. II, 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.

Title 18, United States Code Section 922(g)(1) 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 OF THE CASE

I. Legal Background

In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court recognized that based on the text of the Second Amendment and history, the amendment conferred an individual right to possess handguns in the home for self-defense. *Id.* at 581-82, 592-95. Soon thereafter, in *United States* v. *Rozier*, 598 F.3d 768 (11th Cir. 2010), the Eleventh Circuit was asked to pass on the constitutionality of 18 U.S.C. § 922(g)(1), the federal felon-in-possession ban, as applied to a defendant with non-violent drug priors who possessed the firearm in his home for self-defense. And the Eleventh Circuit held that "statutes disqualifying felons from possessing a firearm *under any and all circumstances* do not offend the Second Amendment." *Id.* at 771 (emphasis added). Simply "by virtue of [any] felony conviction," the court held, Rozier could be constitutionally stripped of his Second Amendment right to possess a firearm even for self-defense in his home, and the circumstances of such possession were "irrelevant." *Id.*

Notably, the Eleventh Circuit reached that conclusion without considering the Second Amendment's "plain text," including *Heller*'s specific determination that reference to "the people" in the Second Amendment—consistent with the use of the same term in other amendments—"unambiguously refers" to "all Americans." 554 U.S. at 579-81. Instead, *Rozier* relied entirely upon dicta in *Heller* about "presumptively lawful" "longstanding prohibitions" against felons possessing firearms, *id.* at 626 & n. 26, even though there was no question about § 922(g)(1) in

Heller, and the Court acknowledged it had not engaged in an "exhaustive historical analysis" on the point. *Compare Heller*, *id.* at 626 ("we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment") *with Rozier*, 598 F.3d at 768 (ignoring the latter caveat; finding dispositive, *Heller*'s comment, 554 U.S. at 626, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons").

Over a decade later, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court clarified *Heller*'s text-and-history approach which had been uniformly misunderstood by the lower courts, and set forth a two-step "test" for deciding the constitutionality of all firearm regulations going forward. At "Step One," *Bruen* held, courts may consider *only* whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. at 17. If it does, *Bruen* held, "the Constitution presumptively protects that conduct." *Id.* And regulating presumptively protected conduct is unconstitutional unless the government, at "Step Two" of the analysis, can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation"—that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Id.* at 37.

After *Bruen* but prior to this Court's decision in *United States v. Rahimi*, 602 U.S. 680 (2024), the Eleventh Circuit decided *United States v. Dubois*, 94 F.4th 1284 (11th Cir. Mar. 5, 2024) ("*Dubois I*"). In *Dubois I*, the Eleventh Circuit continued to follow its pre-*Bruen* approach in *Rozier*. It declined to conduct *Bruen*'s two-step analysis for Second Amendment challenges—viewing that as "foreclose[d]" by *Rozier*,

94 F.4th at 1291, and rejecting the suggestion *Bruen* had abrogated *Rozier*. *Id.* Rather, the Eleventh Circuit cited as determinative the dicta from *Heller* referenced above. *See Dubois I, id.* at 1291-93 (stating the Court "made it clear" in *Heller*, *id.* at 626-27 & n. 26, that its holding "did not cast doubt" on felon-in-possession prohibitions," which were "presumptively lawful;" and in *Bruen*, 597 U.S. at 17, that its holding was "'[i]n keeping with *Heller*'").

In the view of the Eleventh Circuit, *Bruen* did not abrogate the *Rozier* approach because "*Bruen* repeatedly stated that its decision was faithful to *Heller*." *Dubois I*, 94 F.4th at 1293. Therefore, the Eleventh Circuit held, *Rozier* remained good law, and felons remained "*categorically 'disqualified'* from exercising their Second Amendment right." *Id.* at 1293 (quoting *Rozier*, 598 F.3d at 770–71) (emphasis added).

Although the Eleventh Circuit technically left the door open to reconsideration after this Court decided *Rahimi*, by stating: "We require clearer instruction from the Supreme Court before we may reconsider the constitutionality of section 922(g)(1)," 94 F.4th at 1293, it soon shut that door—definitively. After this Court handed down its decision in *Rahimi*, the defendant in *Dubois I* sought certiorari. And this Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Rahimi*. *Dubois v. United States*, 145 S.Ct. 1041 (Jan. 13, 2025) (No. 24-5744). The Eleventh Circuit panel ordered supplemental briefing on whether *Rahimi* had abrogated *Rozier*. *United States v. Dubois*, DE 77 (11th Cir. Feb. 21, 2025) (No. 22-10829). But after receiving that supplemental briefing, without hearing oral

argument, the panel rendered its decision on remand, which was entirely consistent with its pre-*Rahimi* decision. *See United States v. Dubois*, 139 F.4th 887 (11th Cir. June 2, 2025) ("*Dubois II*"). Under the Eleventh Circuit's rigid "prior-panel-precedent rule," the *Dubois II* panel concluded *Rahimi* did not abrogate *Rozier*. *Id.* at 892-94; *see id.* at 893 (noting the only time the *Rahimi* majority "mentioned felons was to reiterate *Heller*'s conclusion that prohibitions 'on the possession of firearms by "felons and the mentally ill …" are "presumptively lawful;" "This endorsement of the underlying basis for our prior holding that section 922(g)(1) does not violate the Second Amendment suggests that *Rahimi* reinforced—not undermined—*Rozier*"). And as such, the *Dubois II* panel held, the pre-*Bruen* approach of *Rozier* continued to control the constitutionality of § 922(g)(1) even after *Rahimi*. Thus, no as-applied Second Amendment challenges to § 922(g)(1) would be recognized. *Id.* For that reason, the *Dubois II* panel explained, it was reinstating its decision in *Dubois I*. *Id.* at 894.

Dubois sought, but was denied, rehearing *en banc*. *United States v. Dubois*, No. 22-10829, DE 89-2 (11th Cir. Sept. 2, 2025). As such, under the Eleventh Circuit's rigid prior panel precedent rule, unless this Court "clearly" abrogates the reasoning in *Dubois II*, it will bind all future panels of the court. *See Dubois II*, 139 F.4th at 892-93 (explaining that under the Circuit's "prior-panel-precedent rule," [a]n intervening Supreme Court decision abrogates our precedent only if [it] is both 'clearly on point' and 'clearly contrary to' our earlier decision;" the intervening decision must "demolish and eviscerate" the "fundamental props" of the panel

decision; if the Supreme Court "does not discuss our precedent or 'otherwise comment on the precise issue before the prior panel, our precedent remains binding'") (citations and internal quotation marks omitted).

II. Factual and Procedural Background

In July 2023, the United States charged Petitioner Terry Lee Gammage with a single count of violating 18 U.S.C. § 922(g)(1), for knowingly possessing a firearm and ammunition, while knowing that he had been convicted of a felony. Petitioner moved to dismiss the indictment as both facially unconstitutional under the new two-step Second Amendment methodology set forth in *Bruen*, and unconstitutional as applied to him given that all of his prior felonies were non-violent.

Although the government did not dispute that Petitioner's prior felonies were indeed non-violent, it argued *Bruen* did not undermine or abrogate the Eleventh Circuit's holding in *Rozier*, and even after *Bruen*, a statute categorically disqualifying felons from possessing firearms did not offend the Second Amendment. The district court agreed, and thus did not address the specific as-applied challenge. Petitioner then pled guilty and was sentenced to 180 months incarceration. Appendix A-2.

On appeal, Petitioner continued to press his as-applied challenge preserved below. But rather than responding to his argument on the merits, the United States instead moved for summary affirmance, claiming it was "squarely foreclosed" by *Dubois I* which reaffirmed the rule from *Rozier* that "statutes disqualifying felons from possessing a firearm *under any and all circumstances* do not offend the Second Amendment, and rejected the argument that *Bruen* abrogated *Rozier*. The Eleventh

Circuit granted the government's motion for summary affirmance and decided the case without further merits briefing. It found the government to be "clearly right as a matter of law" that Petitioner's challenges to the constitutionality of § 922(g)(1) were foreclosed by its still-binding prior precedents in *Rozier* and *Dubois*, which had not been abrogated by either *Bruen* or *Rahimi*. *United States v. Gammage*, 2025 WL 2504533, *2 (11th Cir. 2024). Appendix A-1.

REASONS FOR GRANTING THE PETITION

I. The Circuits are Intractably Divided on Whether As-Applied Second Amendment Challenges to 18 U.S.C. § 922(g)(1) are Cognizable after *Bruen* and *Rahimi*

This appeal asks, as a threshold question, whether after *Bruen* and *Rahimi* the government may categorically preclude a person who comes within the orbit of 18 U.S.C. § 922(g)(1) from possessing a firearm simply because that person has a predicate felony conviction, or whether a defendant may mount a challenge that his prior record does not supply a basis, consistent with the Second Amendment, for permanent disarmament.

Although this question was not directly presented in *Rahimi*, as explained below, the manner by which the Court resolved *Rahimi* confirmed that as-applied challenges to the lifetime firearm ban in § 922(g)(1) are indeed cognizable. After *Rahimi*, the majority of circuits have weighed in on the as-applied question, and there is now an entrenched circuit split.

A. Three Circuits (the Third, Fifth, and Sixth) have recognized that as-applied Second Amendment challenges are cognizable after *Rahimi*. The Third, Fifth, and Sixth Circuits have each considered as-applied challenges to § 922(g)(1) after *Rahimi*, and confirmed that such challenges are indeed cognizable, even while rejecting some challenges based on the defendant's individual circumstances.

1. The Third Circuit. In *United States v. Moore*, 111 F.4th 266 (3d Cir. 2024), a panel of the Third Circuit was the first to confirm that an as-applied

challenge to § 922(g)(1) is indeed cognizable post-*Rahimi*, although the *Moore* court ultimately rejected the challenge because the defendant was on supervised release at the time he possessed a firearm. *See id.* at 270, 273. Thereafter, in *Range v. Att'y Gen.*, 124 F.4th 218 (3d Cir. Dec. 23, 2024) (*en banc*) (*Range II*), upon remand from this Court to consider its post-*Bruen* as-applied ruling in *Range v. Att'y Gen.*, 69 F.4th 96 (3rd Cir. 2023) (*en banc*) (*Range I*) in light of *Rahimi*, the *en banc* Third Circuit confirmed its pre-*Rahimi* view that as-applied challenges to § 922(g)(1) were not only cognizable, but indeed, the statute was unconstitutional as applied to people "like Range." 124 F.4th at 232.

Although the Third Circuit did not clarify exactly what a person "like Range" entailed, it noted *Rahimi* had "bless[ed] disarming (at least temporarily) physically dangerous people." *Id.* at 230. The court rejected the government's claim that Founding-era laws imposing status-based restrictions on presumably "dangerous" groups like Blacks, Native Americans, Catholics, and Loyalists distrusted by the government, were comparably justified to § 922(g)(1). Beyond the unconstitutionality of certain of those restrictions, the majority emphasized Range was not part of any of these groups. And in any event, not only would such analogy be "'far too broad,'" *id.* at 229 (citing *Bruen*, 597 U.S. at 31), but indeed, the government's attempt to "stretch dangerousness to cover all felonies" by arguing "'those 'convicted of serious crimes, as a class, can be expected to misuse firearms,'" failed because it operated "at such a high level of generality that it waters down the right." *Id.* at 230 (citing *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring)).

The *Range II* court also squarely rejected the government's contention that permanent disarmament under § 922(g)(1) was "relevantly similar" to Founding-era laws that (1) imposed the death penalty for *some* nonviolent crimes (like forgery or counterfeiting) but not for crimes like false statement or embezzlement, or (2) required forfeiture of felons' weapons or estates. *Id.* at 230-31. Neither type of law was a sufficient analogue in terms of the burden imposed to uphold § 922(g)(1) as applied to Range, the court explained, because:

> [T]he 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. Though our dissenting colleagues read *Rahimi* as blessing disarmament as a lesser punishment generally, the Court did not do that. Instead, it authorized temporary disarmament as a sufficient analogue to historic temporary imprisonment *only* to "respond to the use of guns to threaten the physical safety of others." *Compare Rahimi*, [602 U.S. at 699], *with United States v. Diaz*, 116 F.4th 458, 469-70 (5th Cir. 2024) (similarly broad reasoning).
>
> For similar reasons, Founding-era laws that forfeited felons' weapons or estates are not sufficient analogues either. Such laws often prescribed the forfeiture of the specific weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally. ... [I]n the Founding era, a felon could acquire arms after completing his sentence and reintegrating into society.
>
> Against this backdrop, it's important to remember that Range's crime—making a false statement on an application for food stamps—did not involve a firearm, so there was no criminal instrument to forfeit. And even if there were, government confiscation of the instruments of a crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession.

124 F.4th at 231. As such, and because there was no record evidence indicating Range currently posed a physical danger to anyone, the Third Circuit enjoined the enforcement of § 922(g)(1) against him. *Id.* at 232.

While the Third Circuit expressed approval of the Sixth Circuit's post-*Rahimi* decision in *United States v. Williams*, 113 F.4th 637, 658-61 (6th Cir. 2024) because it drew a clear distinction for as-applied challenges between persons with dangerous and non-dangerous priors, the *Range II* court squarely rejected the contrary, "categorical" approach of the Eighth Circuit's post-*Rahimi* decision in *United States v. Jackson*, 110 F.4th 1120, 1127-29 (8th Cir. 2024) (*Jackson II*), which refused all as-applied challenges to § 922(g)(1) on the overbroad and wrong assumption that anyone convicted of a "serious crime" "can be expected to misuse firearms." 124 F.4th at 230.

Although the government sought certiorari in *Range I*, and sought an extension to consider whether to file certiorari in *Range II*, it ultimately declined to seek certiorari in *Range II*—an implicit acknowledgement that indeed, § 922(g)(1) is *not* constitutional "under any and all circumstances," as the majority of circuits have agreed post-*Rahimi*.

2. The Sixth Circuit. As indicated above, in *Williams*, the Sixth Circuit likewise found as-applied challenges to §922(g) (1) cognizable, but offered additional explanations as to why such challenges must be available. According to the Sixth Circuit, it was "history" that showed § 922(g)(1) could be "susceptible to an as-applied challenge in certain cases." *Id.* at 657. After conducting a "historical study" which it

found revealed governments in England and colonial America disarmed groups that they deemed to be dangerous, the Sixth Circuit held that a conviction under § 922(g)(1) "must focus on each individual's specific characteristics" in order to be consistent with the Second Amendment. *Id.* at 657.

In so concluding, the Sixth Circuit explained that accepting that all felons could be permanently disarmed—without a finding of dangerousness—would be incompatible with at least three strands of this Court's jurisprudence. *First*, it would be "inconsistent with *Heller*" because "[i]f courts uncritically deferred to Congress's class-wide dangerousness determinations, disarmament laws would most often be subject to rational-basis review," contrary to express statements in *Heller*. *Williams*, 113 F.4th at 660; *see Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

Second, the Sixth Circuit found, "history cuts in the opposite direction," as "English laws" and common-law "disarmament legislation" showed that, traditionally, "individuals had the opportunity to demonstrate that they weren't dangerous" and therefore it would be "mistaken" to "let the elected branches"—Congress—"make the dangerousness call" without any space for as-applied exceptions. *Id.* at 660.

Third, the Sixth Circuit reasoned, "complete deference to legislative line-drawing would allow legislatures to define away a fundamental right," which clashes

with "[t]he very premise of constitutional rights" which "don't spring into being at the legislature's grace." *Id.* at 661; *see Kilbourn* v. *Thompson*, 103 U.S. 168, 199 (1880) ("[L]iving under a written constitution ... it is the province and duty of the judicial department to determine ... whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution[.]"). And, the Sixth Circuit concluded, "as-applied challenges provide a mechanism for courts to make individualized dangerousness determinations." 113 F.4th at 661.

This view, the Sixth Circuit explained, was "differen[t] than" that held by "some of our sister circuits" prior to *Rahimi*, including the Eleventh in *Dubois I*, which the Sixth Circuit criticized as "hav[ing] read too much into the Supreme Court's repeated invocation of 'law-abiding, responsible citizens.'" *Id.* at 646. Accordingly, it held, "[t]he relevant principle from our tradition of firearms regulation is that, when the legislature disarms on a class-wide basis, individuals must have a reasonable opportunity to prove that they don't fit the class-wide generalization," and proscribing "resort to the courts through as-applied challenges . . . would abridge non-dangerous felons' Second Amendment rights." *Id.* at 662.

Notably, after conducting its "historical study," the Sixth Circuit concluded that history confirmed "legislatures may disarm groups of people, like felons, whom the legislature believes to be dangerous—so long as each member of that disarmed group has an opportunity to make an individualized showing that he himself is not actually dangerous." *Id.* at 663. Setting "dangerousness" as the determinant of

whether § 922(g)(1) is unconstitutional as applied to a particular defendant, the Sixth Circuit held that at *Bruen* Step Two it is the defendant who bears the burden of demonstrating that in light of his "specific characteristics"—namely, his entire criminal record—he is not dangerous. *Id.* at 657-78, 659-63. To guide the dangerousness inquiry, the Sixth Circuit grouped priors into three broad categories, noting "certain categories of past convictions are highly probative of dangerousness, while others are less so." *Id.* at 658.

The Sixth Circuit's first category includes violent crimes against a person such as murder, rape, assault, and robbery—all of which were capital offenses at the Founding. And indeed, the Sixth Circuit held, that an individual previously committed one of these historical violent crimes against a person is at least "strong evidence that an individual is dangerous, if not totally dispositive on the question." *Id.* The Sixth Circuit's second category includes crimes that are not strictly against a person, but nonetheless "pose a significant threat of danger" such as drug trafficking or burglary. *Id.* at 659. In its view, "most of these crimes put someone's safety at risk, and thus, justify a finding of danger," *although that presumption is rebuttable in an individual case. Id.* As for the final category of crimes—those that cause no physical harm to another person or the community (for example, mail fraud or making false statements)—the Sixth Circuit recognized, district court judges should "have no trouble concluding" that such crimes "don't make a person dangerous." *Id.*

Applying its tri-partite construct to Williams, the Sixth Circuit had no trouble concluding his as-applied challenge failed. Williams had previously been convicted of aggravated robbery for robbing two people at gunpoint, as well as attempted murder, and felon-in-possession in a case where he "agreed to stash a pistol that was used to murder a police officer." *Id.* Any of those convictions, the Sixth Circuit opined, demonstrated Williams was a "dangerous felon" whom the government could constitutionally disarm for life. *Id.* at 662-63.

3. The Fifth Circuit. In *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), the Fifth Circuit likewise entertained an as-applied challenge after *Rahimi*, but unlike the approach in the Third and Sixth Circuits, the Fifth Circuit's as-applied test was categorical (based on a particular class of felony), *not* an individualized dangerousness determination. As a threshold matter, the Fifth Circuit agreed with Diaz that his challenge based on the fact that his only priors were for car theft, evading arrest, and possession a firearm as a felon, was not barred by pre-*Bruen* circuit precedent, because *Bruen* established a new "historical paradigm" for analyzing Second Amendment claims, which made the circuit's pre-*Bruen* precedents obsolete. *Id.* at 467-71. And notably, the Fifth Circuit made a point to state that "especially after *Rahimi*," it "respectfully disagree[ed]" with the Eleventh Circuit's approach relying on the "felons and mentally ill" language in *Heller* to uphold § 922(g)(1). *Diaz*, 116 F.4th at 466, n.2; *see also id.* at 466 ("Without precedent that conduct's *Bruen*'s historical inquiry into our Nation's tradition of regulating firearm possession by felons in particular, we must do so ourselves").

After conducting that historical inquiry for *Bruen* Step Two, the Fifth Circuit found that § 922(g)(1) was indeed constitutional as applied to Diaz because of his prior conviction for car theft, which it deemed analogous to the crime of "horse theft" which was a capital crime at the Founding. 116 F.4th at 468-69. Notably, the Fifth Circuit emphasized that the mere fact that Diaz was a felon was *not* itself enough, *id.* at 469; it simply found that "[t]aken together," historical "laws authorizing severe punishments for thievery and permanent disarmament in other cases establish that our tradition of firearm regulation supports application of § 922(g)(1) to Diaz." *Id.* at 471.

In concluding that as-applied Second Amendment challenges are permissible, the Fifth Circuit in *Diaz* agreed with the Sixth that a defendant's criminal history was what controlled. But its reasoning was different—*not* based on an individualized determination of dangerousness. In rejecting the proposition that "status-based gun restrictions" such as § 922(g)(1) categorically "foreclose Second Amendment challenges," and explaining that after *Bruen* and *Rahimi* "history and tradition" must be analyzed to "identify the scope of the legislature's power to take [the right] away," the Fifth Circuit quoted then-Judge Barrett's dissent in *Kanter* v. *Barr*, 919 F.3d 437 (7th Cir. 2019). *See* 116 F.4th at 466 (citing *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting) ("[A]ll people have the right to keep and bear arms," but "history and tradition support Congress's power to strip certain groups of that right"). Noting that *Bruen* "mandates" this approach, and *Rahimi* had just confirmed it, *id.* at 466, the Fifth Circuit was clear that "[s]imply classifying a crime as a felony does not meet the

level of historical rigor required by *Bruen* and its progeny... . [N]ot all felons today would have been considered felons at the Founding. Further, Congress may decide to change that definition in the future. Such a shifting benchmark should not define the limits of the Second Amendment[.]" *Id*. However, it reasoned, since at the Founding, "at least one of the predicate crimes that Diaz's § 922(g)(1) conviction relies on—theft—was a felony and thus would have led to capital punishment or estate forfeiture," "[d]isarming Diaz fits within this tradition of serious and permanent punishment." *Id.* at 470. It acknowledged the analysis would be different for "as-applied challenges by defendants with different predicate convictions." *Id.* at 470, n.4.

In a more recent case, *United States v. Kimble*, 142 F.4th 308 (5th Cir. 2025), the Fifth Circuit expanded upon its categorical as-applied test. The defendant in *Kimble* had two prior drug trafficking convictions. *Id.* at 309. While rejecting the government's purported analogy to Founding-era crimes penalizing the selling of "illicit goods," *see id.* at 314 (noting that government contention "stretches the analogical reasoning prescribed by *Bruen* and *Rahimi* too far"), the court in *Kimble* agreed with the government that "[t]he Second Amendment allows Congress to disarm classes of people it reasonably deems dangerous[.]" *Id.* at 314-15. But that was not the end of its 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) was 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. In its view, Kimble's prior drug trafficking crimes "underscores that he is the sort of dangerous individual that legislatures have long disarmed." *Id.* (finding "[c]lass-wide disarmament" of drug traffickers "accords with both history and precedent"). *See also id.* at 318 (noting the "narrowness" of its ruling approving class-wide disarmament of defendants convicted of "violent felonies like drug trafficking;" clarifying its "conclusion does not depend on an individualized assessment that Kimble is dangerous"). Notably, though, Judge Graves disagreed with the majority's "class-wide" reasoning, opining that an individualized assessment was necessary in an as-applied challenge because there are "cases involving people who were convicted of possession with intent offenses that did not involve a weapon or any violence." *Id.* at 318-322 (Graves, J., concurring in part and in the judgment).[1] This is exactly the case with Petitioner. Although he has

[1] Although the Seventh Circuit has not addressed the question post-*Rahimi* of whether as-applied challenges to § 922(g)(1) are permissible, pre-*Rahimi* it squarely rejected the government's argument that *Heller*'s "presumptively lawful" dicta allowed courts "to sidestep *Bruen*." *Atkinson v. Garland*, 70 F.4th 1018, 1022 (7th Cir. 2023) ("We must undertake the text-and-history inquiry the Court so plainly announced and expounded upon at great length"). Thereafter, in *United States v. Gay*, 98 F.4th 843 (7th Cir. 2024), it assumed without deciding that as-applied

prior drug trafficking convictions, at no time did his convictions involve possession or use of a firearm or an act of violence. Indeed, in Petitioner's entire criminal history, he had never been convicted or arrested for possession of a firearm or a crime involving violence.

B. By contrast, six circuits (the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh) reject any and all as-applied Second Amendment challenges, albeit for different reasons. By contrast to the case-by-case, offender-specific approach of the above three circuits, the majority of the circuits to have now considered the issue post-*Rahimi* have categorically barred all Second Amendment challenges by all offenders to a § 922(g)(1) conviction—even those with non-violent priors who pose no current risk of dangerousness. These six circuits have reached that conclusion for different reasons.

1. The Tenth and Eleventh Circuits. At one end of the spectrum, lie the Tenth and Eleventh Circuits—both of which continue to follow their pre-*Bruen* approach even post-*Rahimi*, and thus reject every possible as-applied post-*Bruen* challenge to § 922(g)(1) without considering either text, historical regulations that might possibly be Founding era "analogues" for § 922(g)(1), or a defendant's prior record. Instead, what continues to reign supreme in these circuits is the *Heller* dicta on "longstanding" "presumptively unlawful" felon-in-possession bans. As noted *supra*,

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challenges were available. *Id.* at 846-67 (assuming for the sake of argument that "there is *some* room for as-applied challenges, but that assumption does not assist Gay" who had 22 prior felonies including aggravated battery of a police officer, and he possessed a firearm while on parole).

the Eleventh Circuit held prior to *Bruen* in *Rozier* (which followed that dicta), confirmed after *Bruen* in *Dubois I*, and reconfirmed after *Rahimi* in *Dubois II*, that felons are "categorically 'disqualified' from exercising their Second Amendment right" "in all circumstances." *Dubois I*, 94 F.4th at 1293; *Dubois II*, 139 F.4th at 893-94. Notably, even prior to the Eleventh Circuit's reconfirmation in *Dubois II* that pre-*Bruen* precedent governed even after *Rahimi*, the Tenth Circuit had found that its similar pre-*Bruen* precedent likewise still governed after *Rahimi*, and required rejection of the argument that § 922(g)(1) did not apply to non-violent offenders. *See Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025) (holding *Rahimi* did not abrogate *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), which upheld the constitutionality of § 922(g)(1) "for all individuals convicted of felonies;"), *pet. for cert. filed* May 8, 2025 (No. 24-1155).

2. The Fourth and Eighth Circuits. Both the Fourth and Eighth Circuits have also found their pre-*Bruen* precedent rejecting all as-applied challenges still-controlling after *Bruen*. But they have nonetheless undertaken what they believe to be the correct *Bruen*/*Rahimi* analysis in the alternative to shore up their conclusions. In *United States v. Hunt*, 123 F.4th 697 (4th Cir. Dec. 18, 2024), the Fourth Circuit initially seemed to adopt the approach of the Tenth and Eleventh Circuits, deferring completely to its pre-*Bruen* rejection of all as-applied challenges. *Hunt*'s initial merits discussion (Part III.A) was not only consistent with *Dubois I,* it even cited *Dubois I*, 94 F.4th at 1293, in following pre-*Bruen* Fourth Circuit precedent that had relied upon the same "longstanding" and "presumptively lawful" prohibitions dicta in

Heller, n.26, to foreclose all as-applied challenges to § 922(g)(1), and "concluding that neither *Bruen* nor *Rahimi* abrogates this Court's precedent foreclosing as-applied challenges to Section 922(g)(1) and those decisions thus remain binding." 123 F.4th at 700, 702-04.

But notably, unlike the Tenth and Eleventh Circuits, the Fourth did not stop its analysis at its pre-*Bruen* precedent. Instead, it ruled in the alternative (in Part III.B) that even if it were unconstrained by circuit precedent, Hunt's challenge to § 922(g)(1) would fail "both parts" of the *Bruen* test. *Id.* at 702, 704. And with specific regard to Step Two of the analysis, it noted full agreement with the Eighth Circuit's reasoning in *United States v. Jackson,* 110 F.4th 1120 (8th Cir. 2024) (*Jackson II*), that given certain "assurances" in *Rahimi*, "history" showed "categorical disarmament of people 'who have demonstrated disrespect for legal norms of society'"—even if not violent. It concluded that since § 922(g)(1) was similarly justified as "an effort to address a risk of dangerousness," "there is no need for felony-by-felony litigation." *Hunt*, 123 F.4th at 708 (citing *Jackson II*, 110 F.4th at 1125).

And indeed, in *Jackson II*, the Eighth Circuit had reasoned at Step Two of the analysis that *Rahimi* did "not change" its pre-*Rahimi* conclusion that "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)," due to two purported historical analogues: first, laws prohibiting disfavored groups such as religious minorities, Native Americans, Loyalists from possessing firearms; and second, laws authorizing "punishments that subsumed disarmament—death or forfeiture of a perpetrator's entire estate—for non-violent offenses." 110 F.4th at

1122, 1125-27. Therefore, the Eighth Circuit re-affirmed, the mere status as a felon is sufficient to permanently disarm an individual. *Id.* at 1127-29 (underscoring that felons were not "law-abiding citizens," and arguing that history supports Congress' authority to prohibit possession of firearms by persons "who have demonstrated disrespect for legal norms of society" since "legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms").

3. The Second and Ninth Circuits. Both the Second and Ninth Circuit have agreed with the Fourth and Eighth Circuits' alternative *Bruen* Step Two analysis, and have held based on that analysis—specifically, Founding-era laws categorically disarming "dangerous" groups, and punishing many felonies with death and estate forfeiture—that § 922(g)(1) is constitutional in all of its applications. *See United States v. Duarte*, 137 F.4th 743, 755-62 (9th Cir. 2025) (*en banc*), *pet. for cert. filed* Oct. 8, 2025 (No. 25-425); *Zherka v. Bondi*, 140 F.4th 68, 80-91 (2d Cir. 2025), *pet. for cert. filed* Sept. 9, 2025 (No. 25-269). Notably, though, these two circuits have squarely recognized at *Bruen* Step One, that felons are indeed among "the people" covered by the plain text of the Second Amendment. *See Duarte*, 137 F.4th at 754-55; *Zherka*, 140 F.4th at 77.

Nonetheless, despite their diverse rationales, all six of these Circuits doom all as-applied Second Amendment challenges. And as of this writing, the majority rule in the circuits is that *no* as-applied challenge to § 922(g)(1) will be recognized. The conflict is thoroughly entrenched.

C. The majority of the circuits are wrong, given the resolution in *Rahimi* and for the reasons stated by the Third, Fifth, and Sixth Circuits. The majority rule refusing to recognize any as-applied challenge to § 922(g)(1), is inconsistent with the reasoning of the Court in *Rahimi*. Specifically, in holding that Rahimi's facial challenge failed because the statute "is constitutional as applied to the facts of Rahimi's own case," 602 U.S. at 693, the Court necessarily and squarely rejected the position the government took at the *Rahimi* oral argument that as-applied challenges are unavailable in Second Amendment cases "if and when they come." Tr. of Oral Argument, *United States v. Rahimi*, 2023 WL 9375567, at *43 (U.S. Nov. 7, 2023). In fact, in making clear that the "no set of circumstances" standard from *United States v. Salerno*, 481 U.S. 739, 745 (1987) indeed applies to Second Amendment challenges, the Court necessarily recognized that as-applied Second Amendment challenges *are* permitted. *See id.* ("[T]o prevail, the Government need only demonstrate that Section 922(g)(8) is constitutional in some of its applications.")

Although an as-applied challenge to § 922(g)(1) was not before the Court in *Rahimi*, at the oral argument Justice Gorsuch nonetheless recognized, in response to the government's assertion there that the Court should never entertain as-applied Second Amendment challenges, that there may indeed "be an as-applied *if it's a lifetime ban*," 2023 WL 9375567, at 43—which § 922(g)(1) *is*. Consistent with the implicit recognition of as-applied Second Amendment challenges in *Rahimi*, the Third, Fifth, and Sixth Circuits have rightly recognized that as-applied challenges for § 922(g)(1) are indeed cognizable in certain circumstances. And notably, judges

on the Eighth and Ninth Circuit have as well. *See Jackson II*, 121 F.4th at 657-58 (Stas, J., joined by Erickson, Grasz, and Kobes, J.J., dissenting from denial of rehearing *en banc*) (emphasizing that in *Rahimi*, the Court dealt with a facial challenge "by examining whether the statute was 'constitutional in some of its *applications*," including in "Rahimi's own case;" "If the Court meant to cut off all as-applied challenges to disarmament laws, as *Jackson II* concludes, it would have been odd to send that message by deciding Rahimi based on how *his* as-applied challenge would have gone;" [c]linging to the "presumptively lawful" dicta in *Heller* "is no excuse" because "a measure can be presumptively constitutional and still have constitutionally problematic applications. As-applied challenges exist for exactly this reason"); *Duarte*, 137 F.4th at 782-83 (Vandyke, J., concurring in the judgment in part and dissenting in part) (agreeing with the Sixth Circuit in *Williams* that "*Heller* speaks only in terms of a presumption. A presumption must be defeasible. So the court's statement that felon-in-possession laws are only *presumptively* lawful implies that felon-in-possession laws must be unlawful in at least some instances") (internal citation omitted).

The Court should grant certiorari to resolve the circuit conflict on this threshold issue, and recognize explicitly that for all of the reasons articulated above, as-applied Second Amendment challenges are indeed cognizable after *Bruen/Rahimi*.

II. The Circuits are Intractably Divided on Whether Under the *Bruen/Rahimi* Methodology, § 922(g)(1) is Unconstitutional As Applied to a Defendant With Non-Violent Priors

A. The circuits are split on whether the *Bruen/Rahimi* methodology applies at all, and if so, whether felons are part of "the people" for Bruen Step One. While the Tenth and Eleventh Circuits refuse to apply the *Bruen/Rahimi* methodology altogether, and continue to rigidly defer to their pre-*Bruen* precedent, seven other circuits apply—or attempt to apply—both steps of the new *Bruen/Rahimi* methodology. And five circuits agree felons meet *Bruen* Step One.

1. The Third, Fifth, and Sixth Circuits agree that under the *Bruen* Step One analysis, felons are part of "the people" with Second Amendment rights, and § 922(g)(1) is therefore presumptively unconstitutional. Admittedly, these three circuits have applied different as-applied tests at *Bruen* Step Two. But, as detailed below, they agree on all key preliminary points for the analysis: namely, that *Bruen* and *Rahimi* abrogated their pre-*Bruen* caselaw upholding the constitutionality of § 922(g)(1); *Bruen/Rahimi* demands a different mode of analysis; *Heller*'s statement that felon-in-possession statutes are "presumptively lawful" was non-binding dicta, which has not negated their duty to conduct their own historical analysis to determine whether § 922(g)(1) is consistent with the Nation's history and tradition of firearm regulation; and at *Brue*n Step One, the the term "the people" covers felons and accords them Second Amendment protections.

In *Range II*, the *en banc* Third Circuit reaffirmed its prior rulings that *Bruen* had abrogated its post-*Heller* Second Amendment jurisprudence; *Bruen* dictated an

entirely new analysis; and under the "plain text" analysis for *Bruen* Step One, felons and those with felon-equivalents like Range were part of "the people" protected by the Second Amendment. 124 F.4th at 225-28. On the latter point, the Third Circuit—as it had before, but now with additional support from *Rahimi*—squarely rejected the government's contention that any type of criminal conduct removes citizens from "the people" protected by the Second Amendment because that right had only belonged to "law-abiding responsible citizens." *Id.* at 226-28.

The Third Circuit articulated four reasons for finding *Heller*'s references to "law-abiding citizens" "should not be read as rejecting *Heller*'s interpretation of 'the people,'" which "presumptively 'belongs to all Americans," 554 U.S. at 580-81: (1) the criminal histories of the plaintiffs in *Heller* and *Bruen* "were not at issue," so the references to "law-abiding citizens" in those cases were dicta which should not be over-read; (2) there was no reason to adopt a reading of "the people" that excluded Americans only from the Second Amendment when other constitutional provisions refer to "the people" and felons "retain their constitutional rights in other contexts," (3) even if all citizens had a right to keep and bear arms, that would not prohibit legislatures from constitutionally stripping certain people of that right (the view of then-Judge Barrett in *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019)); and (4) as the government even conceded in its *en banc* brief, *Rahimi* "makes clear that citizens are not excluded from Second Amendment protections just because they are not "responsible," because "responsible" is too vague a term that did not "derive from

[Supreme Court] case law," and the same was true for the phrase "law-abiding." 124 F.4th at 226-27 (citing *Rahimi*, 602 U.S. at 701).

The Sixth Circuit agrees with the Third that as the Court recognized in *Heller*, the phrase "the people" in the plain text of the Second Amendment must have the same meaning as in both the First and Fourth Amendments, because the protections provided in those Amendments do not evaporate when the claimant is a felon. *Williams*, 114 F.4th at 649. *Id.* Excluding a felon from "the people" in the Second Amendment would exclude him from the First and Fourth Amendments too, the Sixth Circuit notes, which is "implausible under ordinary principles of construction" since "[c]ourts presume that words are used in a consistent way across provisions." *Id.* (citing *Hurtado v. California*, 110 U.S. 516, 533-34 [] (1884) ("The conclusion is equally irresistible, that when the same phrase was employed [elsewhere], ... it was used in the same sense and with no greater extent"); *Pulsifer v. United States*, 601 U.S. 124, 149 [] (2024)); and A. Scalia & B. Garner, *Reading Law* 170-171 (2012) (explaining in a given statute, the same term usually has the same meaning).

The Sixth Circuit has also rightly explained that *Bruen* and *Rahimi* "supersede[d] our circuit's past decisions on 922(g)." 113 F.4th at 646. Expressly disagreeing with the Eleventh Circuit in *Dubois I*, the Sixth Circuit held in *Williams* that pre-*Bruen* circuit precedent cannot now be binding because:

> Intervening Supreme Court precedent demands a different mode of analysis. *Heller*, to be sure, said felon-in-possession statutes were "presumptively lawful." But felon-in-possession statutes weren't before the Court in *Heller* [.] And while *Bruen* didn't overrule any aspect of *Heller*, it set forth a new analytical framework for courts to address Second Amendment challenges. Under *Bruen*, courts must consider

> whether a law's burden on an individual's Second Amendment rights is "consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898. Specifically, courts must study how and why the founding generation regulated firearm possession and determine whether the application of a modern regulation "fits neatly within" those principles. *Id*. at 1901.
>
> Our circuit's pre-*Bruen* decisions on § 922(g)(1) omitted any historical analysis. They simply relied on *Heller*'s one-off reference to felon-in-possession statutes. Those precedents are therefore inconsistent with *Bruen*'s mandate to consult historical analogs. Indeed, applying *Heller*'s dicta uncritically would be at odds with *Heller* itself, which stated courts would need to "expound upon the historical justifications" for firearm-possession restrictions when the need arose. 554 U.S. at 635. Thus, this case is not as simple as reaffirming our pre-*Bruen* precedent.

113 F.4th at 648.

And notably, the Fifth Circuit reasoned similarly in *Diaz*. It held that pre-*Bruen* circuit precedents no longer control because *Bruen* "established a new historical paradigm for analyzing Second Amendment claims;" and the mention of felons in prior Supreme Court cases was "mere dicta" which "cannot supplant the most recent analysis set forth by the Supreme Court in *Rahimi*, which we apply today." It squarely rejected the government's "familiar argument" that for the *Bruen* Step One "plain text" analysis, felons are not part of "the people." 116 F.4th at 465-67.

2. While the Tenth and Eleventh Circuits refuse to apply the *Bruen/Rahimi* methodology altogether, the other four circuits that reject as-applied challenges at least purport to apply the new methodology, and the Second and Ninth Circuits agree with the Third, Fifth, and Sixth Circuits that felons are part of "the people" for *Bruen* Step One. Only the Tenth and

Eleventh Circuits consistently affirm denials of as-applied challenges based on their pre-*Bruen* mode of analysis which reflexively followed dicta in *Heller*, over *Heller*'s holding on plain text, history, and tradition. The other four circuits (the Second, Fourth, Eighth, and Ninth) have all at least attempted to apply the new *Bruen/Rahimi* framework. *See, e.g., Jackson II*, 110 F.4th at 1126-27 (justifying preclusion of all as-applied challenges after *Rahimi*, by purported Founding-era analogues for Step Two of the *Bruen* analysis). While Petitioner disputes the correctness of the Eighth Circuit's *Bruen* Step Two analysis for the reasons stated by the Third and Sixth Circuits, and by the dissenters from rehearing *en banc* in *Jackson II*, *see* 121 F.4th at 657-58 (8th Cir. Nov. 5, 2024) (Stas, J., joined by Erickson, Grasz, and Kobes, JJ., dissenting from rehearing *en banc*), at least the *Jackson II* panel recognized that *Bruen* and *Rahimi* do in fact dictate a new methodology applicable to all Second Amendment claims which requires searching for a relevantly similar, Founding-era analogue. The Tenth and Eleventh will not even agree with that.

Even the Seventh Circuit, which has not yet addressed an as-applied challenge to § 922(g)(1) on the merits, has been clear that it is error to "avoid a *Bruen* analysis altogether" based on pre-*Bruen* precedent relying on *Heller*'s "presumptively lawful" dicta. *Atkinson v. Garland*, 70 F.4th 1018, 1022-25 (2023) ("Nothing," including pre-*Bruen* precedent citing the *Heller* dicta "allows us to sidestep *Bruen* in the way the government invites. … We must undertake the text-and-history inquiry the court so plainly announced and expounded upon at great length;" remanding so district court could apply *Bruen*'s methodology in the first instance).

And notably, although the Second and Ninth Circuits agree with the conclusion of the Fourth, Eighth, Ninth, and Tenth Circuits—that no as applied challenges may be brought—they only reach that conclusion *at Bruen Step Two*. *Zherka*, 140 F.4th at 77-96; *Duarte*, 137 F.4th at 755-62. At Step One of the analysis, both the Second and Ninth Circuits agree with the Third, Fifth, and Sixth Circuits, that indeed, felons are among "the people" covered by the Second Amendment. *See Zherka*, 140 F.4th at 75-77 (§ 922(g)(1) "clearly covers conduct that the Second Amendment presumptively protects;" to hold otherwise would be at odds with *Heller* which defined "the people" broadly to include "*all* Americans;" "We will not jeopardize the scope of other rights nor demean the status of Second Amendment rights by narrowly circumscribing the classes of Americans to whom those rights belong"); *Duarte*, 137 F.4th at 752-55 ("We adhere to the Supreme Court's definition of 'the people'" in *Heller*, which does not exclude felons;" Duarte's "status as a felon does not remove him from the ambit of the Second Amendment").

Plainly, the Tenth and Eleventh Circuits are the true outliers today, glued to their pre-*Bruen* approach. And for the reasons below, the Court should hold they are most definitely wrong.

B. After *Bruen/Rahimi*, § 922(g)(1) is presumptively unconstitutional at Step One of the required analysis, for the reasons stated by the Second, Third, Fifth, Sixth, and Ninth Circuits. In *Heller*, the Court was clear that "the people" as used in the Second Amendment "unambiguously refers" at the very least to "*all Americans*"—"not an unspecified subset"—because any other interpretation

would be inconsistent with the Court's interpretation of the same phrase in the First, Fourth, Ninth, and Tenth Amendments. *Id.* at 579-81 (citing *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990) ("the people" was a "term of art" at the time, which had the same meaning as in other parts of the Bill of Rights)).

Just as *Bruen* found dispositive that the Second Amendment does not "draw ... a home/public distinction with respect to the right to keep and bear arms," 597 U.S. at 32, it should be dispositive here—as a textual matter—that the Second Amendment likewise does not draw a felon/non-felon distinction. Indeed, even prior to *Bruen*, panels of the Eleventh and Seventh Circuits had recognized that the term "people" in the Second Amendment is *not* textually limited to law-abiding citizens. *See United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (noting even "dangerous felons" are "indisputably part of 'the people'" for Second Amendment purposes); *see also United States v. Meza-Rodriguez*, 798 F.3d 664, 671 (7th Cir. 2015) (a person's criminal record is irrelevant in determining whether he is among "the people" protected under the Second Amendment; the amendment "is not limited to such on-again, off-again protections").

But indeed, *if* there even *could* have been doubt on that point prior to *Rahimi*, there *cannot* be after *Rahimi*. That is because this Court in *Rahimi* squarely rejected the Solicitor General's proffered limitation of "the people" to the narrower subset of "law-abiding, responsible" citizens. The *Rahimi* majority acknowledged that the Second Amendment "secures *for Americans* a means of self-defense." 602 U.S. at 690 (emphasis added). And Justice Thomas—who disagreed with the majority *only* as to

Bruen Step Two—provided a robust explanation of the proper Step One analysis, confirming that *any American citizen* is among "the people" as a matter of the plain text. *Id.* at 752 (noting "the people" "unambiguously refers to all members of the political community, not an unspecified subset;'" "The Second Amendment thus recognizes a right 'guaranteed to "*all Americans*;'" citing *Bruen*, 597 U.S. at 70, and *Heller*, 554 U.S. at 581) (emphasis added).

Justice Thomas left no doubt about the implication of *Heller*/*Bruen*/*Rahimi* for "the people" question in § 922(g)(1), by confirming that "Not a single Member of the Court adopts the Government's [law-abiding, responsible citizen] theory." 602 U.S. at 773. In short, as Justice Thomas has definitively exposed, the "law-abiding, responsible citizen" theory unanimously rejected by *Rahimi* "is the Government's own creation, designed to justify every one of its existing regulations. It has no doctrinal or constitutional mooring." *Id.* at 774. And since that necessarily abrogates the assumptions underlying *Rozier* (and in turn, *Dubois II*), *Rahimi* should have compelled the Eleventh Circuit to conclude—as the Second, Third, Fifth, Sixth, and Ninth Circuits have now concluded—that this Court meant what it said when it declared in *Heller* that the Second Amendment right "belongs to all Americans." 554 U.S. at 581. The reasoning of all of these circuits is consistent with *Heller*, and correct on these points.

Based on *Heller*, *Rahimi*, and the analysis of all *five* of these courts, the Court should clarify definitively for the Tenth and Eleventh Circuits that pre-*Bruen* circuit precedents like *Rozier* and *McCane*, that did *not* apply the plain text-and-historical

tradition test, cannot control after *Rahimi*. And then it should hold that (1) applying the Court's new methodology, felons are indeed part of "the people" covered by the Second Amendment's plain text; (2) felons thus meet the new *Bruen* Step One; (3) as per *Bruen/Rahimi*, that establishes a presumption that § 922(g)(1) is unconstitutional, and shifts the burden to the government to show at Step Two a tradition of "relevantly similar" regulation (in terms of both the "why" and "how") dating to the Founding; and (4) the government cannot meet that burden for the reasons detailed by the Third Circuit in *Range II*, the dissenters from rehearing *en banc* in *Jackson II*, and Judge Van Dyke in *Duarte*.

C. Although the three circuits that acknowledge as-applied challenges are cognizable after *Bruen/Rahimi* disagree as to the proper Step Two analysis, § 922(g)(1) could be found unconstitutional as applied to Petitioner under the Third and Sixth Circuits' tests. Although Petitioner has multiple prior felony convictions, they are all—indisputably—non-violent, and all occurred more than five years prior to the instant offense. Furthermore, at no time in Petitioner's entire criminal history did he commit or attempt to commit an act of violence; possess or attempt to possess a firearm.

Since the Fifth Circuit has found § 922(g)(1) constitutional as applied to a defendant with a single prior for car theft, Petitioner's motion to dismiss would not succeed in the Fifth Circuit. But under the very different—dangerousness—tests applied by the Third and Sixth Circuits it is possible that Petitioner could rebut any

presumption of dangerousness on the record here, and these circuits would find § 922(g)(1) unconstitutional as applied to him.

Notably, the fact that Petitioner did not use a firearm or engage in any physical harm to anyone during any of his prior felonies, would likely be dispositive under the tests of these circuits. As noted *supra*, unlike the Fifth Circuit, the Sixth has focused exclusively on a defendant's individualized (factual) dangerousness in prior felonies, as the determinant of an as-applied challenge—instructing courts to "focus on each individual's specific characteristics." *Williams*, 113 F.4th at 657. But Petitioner's record is nothing like Williams'. There is no record evidence that he used a firearm in any of his prior drug trafficking offenses.

If the Court agrees that the relevant as-applied test is one of dangerousness, as applied by the Third and Sixth Circuits, it should find that on this record any possible presumption of dangerousness could have been effectively rebutted had the Eleventh Circuit permitted an as-applied challenge. In either the Third or Sixth Circuits, Petitioner's motion to dismiss the § 922(g)(1) charge may have been granted.

III. This Case Presents Important and Recurring Questions, and Provides an Excellent Vehicle for the Court to Resolve both Circuit Conflicts

Petitioner asks that the Court grant plenary review in this case to resolve two direct circuit splits that existed prior to *Rahimi*, but have only deepened since *Rahimi*. And Petitioner's case presents an ideal vehicle for resolving both important and recurring legal questions raised herein, for multiple reasons.

First, not only did the Eleventh Circuit panel below squarely reject Petitioner's as-applied challenge based on *Bruen/Rahimi* under its rigid "prior panel precedent" rule, there is also ***no*** chance the Eleventh Circuit will reconsider its barring of *all* as-applied challenges without the intervention of this Court. And the majority of judges in active service on both the Eighth and Ninth Circuits agree with the Eleventh Circuit that § 922(g)(1) is constitutional in all circumstances.

Second, Issue I raises what is unfortunately a threshold obstacle for defendants in the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits—but *not* for defendants in the Third, Fifth, and Sixth Circuits. It is unjustifiable that from the very outset, defendants in these six Circuits are being denied the type of constitutional review being accorded similarly situated defendants in three other circuits after *Bruen* and *Rahimi*.

Third, with specific regard to Issue II(C), the lower courts are deeply divided on the standard that should govern an as-applied challenge. In fact, not only the circuits but the district courts as well are all over the map on this question. And the split shows no signs of lessening. Notably, although the Seventh Circuit has not yet issued a post-*Rahimi* decision on whether as-applied challenges are cognizable and if so, the standard for evaluating them, a district court in the Seventh Circuit has found § 922(g)(1) unconstitutional as applied to a defendant with priors analogous to, or even more serious than, Petitioner. *See, e.g., United States v. Brown*, 2024 WL 4665527 (S.D. Ill. Nov. 4, 2024) (finding § 922(g)(1) unconstitutional as applied to a defendant with a residential burglary and domestic battery conviction; none of the

historical laws offered by the government imposed a comparable burden of permanent disarmament for a status, rather than criminal conduct).

If the Court believes some measure of dangerousness should determine whether § 922(g)(1) is constitutional as applied to a particular defendant, this is the ideal case for the Court to flesh out the contours of such a rule. Indeed, the Court could use the crimes in Petitioner's record to provide much-needed guidance to the lower courts on whether the dangerousness analysis for as-applied challenges is appropriately categorical or fact-based; if the latter, the relevance of remote convictions, and which party bears the burden of proof. While the Sixth Circuit in *Williams* placed the burden on the defendant to show he is not dangerous, *Bruen/Rahimi* indicates the Step Two burden is on the government.

Fourth, the Court need not and should not wait for further input on the impact of *Rahimi* from any other circuit at this juncture. With the current array of nine circuit decisions, and conflicting individual opinions from within four of the circuits, the Court now has before it a full panoply of approaches to consider. And because none of Petitioner's prior convictions involved the use of firearms or any other violent act threatening bodily harm to another—the Court will be able to use this single case as a comprehensive vehicle to provide clarity to the lower courts on the many sub-issues impacting the post-*Rahimi* as-applied analysis in § 922(g)(1) cases, so justice will no longer vary by locale. Any additional lower court decisions at this juncture will simply exacerbate the already-deep Circuit split on the issues raised herein.

Fifth, what makes the most sense at this juncture is to grant certiorari in Petitioner's case, and hear it at the same time, or at least in the same term as *United States v. Hemani*, ___ S.Ct. ___, 2025 WL 2949569 (cert. granted, Oct. 20, 2025) (No. 24-1234). *Hemani* will address an as-applied challenge to another subsection of § 922(g)—namely, § 922(g)(3) which prohibits possession of a firearm by an "unlawful user" of a controlled substance. Notably, in *Florida Commissioner of Agriculture v. Att'y Gen.*, 148 F.4th 1307 (11th Cir. Aug. 20, 2025), the Eleventh Circuit entertained an as-applied challenge to § 922(g)(3) without hesitation; it applied the *Bruen/Rahimi* framework correctly; and it concluded under that framework that a prosecution of a non-violent Florida medical marijuana user under § 922(g)(3) indeed violated the Second Amendment. *See* 148 F.4th at 1320-21 (holding the government had "failed to meet its burden of establishing that the challenged laws and regulations as applied to medical marijuana users are consistent with this Nation's history and tradition of firearm regulation").

Since no logical reason to except § 922(g)(1) but not § 922(g)(3) from the *Bruen/Rahimi* framework and as-applied challenges, the question arises—as aptly posed by Judge Stras in *Jackson II*— "Why one and not the other?" 121 F.4th at 659 (noting that before *Jackson II*, the Eighth Circuit had "invited as-applied challenges to the drug-user-in-possession statute, 18 U.S.C. § 922(g)(3), which is found in the same section of the U.S. Code;" citing *United States v. Veasley*, 98 F.4th 906, 912-16 (8th Cir. 2024) (stating that "the door [is] open to those as applied challenges").

While admittedly, the Court denied the petition for writ of certiorari filed in *Jackson II*, that denial predated its grant of certiorari in *Hemani*. And it now makes eminent sense to not only consider as-applied challenges to these almost-contiguous subsections of the same federal statute together given that cert. grant, but to do so *in an Eleventh Circuit case* since the Eleventh Circuit's rule (deferring to its pre-*Bruen* precedent on § 922(g)(1)) is the most extreme. And that is because the Eleventh Circuit's prior-panel-precedent rule is *also* the most rigid among the circuits, mandating that subsequent panels follow prior panel precedent notwithstanding intervening decisions of this Court clarifying the relevant "mode of analysis."

Notably, although the *en banc* Eleventh Circuit was clear in *NRA v. Bondi*, 133 F.4th 1108 (11th Cir. Mar. 14, 2025) (*en banc*), that the *Bruen/Rahimi* methodology indeed applies broadly to *all* "law[s] regulating arms-bearing conduct," *id.* at 1114—and § 922(g)(1) is certainly such a law—subsequent Eleventh Circuit panels (first in *Dubois II*, but then in Petitioner's case in deference to *Dubois II*) have refused to even apply the clear dictates of their *en banc* court in § 922(g)(1) cases. And indeed, subsequent Eleventh Circuit panels will continue this willful blindness to *Bruen/Rahimi* ***only*** in § 922(g)(1) cases, which will cause an avalanche of petitions challenging the Eleventh Circuit's obsolete Second Amendment reasoning in *Dubois II*, filed by defendants in Florida, Georgia, and Alabama to flood this Court unless it steps in and "clearly" abrogates the pre-*Bruen* approach in *Dubois II*.

CONCLUSION

Based on the foregoing argument and authority, the petition for certiorari should be granted. Alternatively, if the Court chooses to grant certiorari in another case or set of cases to resolve the issues raised herein, Petitioner asks the Court to hold his case pending its resolution of such case(s). At the very least, it should hold this case until it resolves the related as-applied challenge under § 922(g)(3) in *Hemani* and permit supplemental briefing after it renders that decision.

Respectfully submitted,

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