No.

In the Supreme Court of the United States

MICHAEL THOMAS MCCOWAN, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

PETITION FOR A WRIT OF CERTIORARI

SHANNON W. LOCKE
The Locke Law Group
15600 San Pedro Avenue
Suite 105
San Antonio, Texas 78232
210.229.8300 (Tel)
214.229.8301 (Fax)
Texas State Bar No. 24048623

Counsel for Petitioner

QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1), the federal statute that prohibits anyone who has been convicted of "a crime punishable by imprisonment for a term exceeding one year" from possessing a firearm, violates the Second Amendment either facially or as applied to individuals with prior convictions for offenses that did not result in disarmament in the Founding era.

RELATED PROCEEDINGS

United States District Court for the Western District of Texas:

United States v. Michael Thomas McCowan, No. 7:23-cr-00174-DC-1 (June 13, 2024)

United States Court of Appeals for the Fifth Circuit:

United States v. Michael Thomas McCowan, No. 24-50202 (October 6, 2025)

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

In the Supreme Court of the United States

MICHAEL THOMAS MCCOWAN, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Thomas McCowan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

This Court's landmark decisions in *District of Columbia v. Heller* and *New York State Rifle & Pistol Association, Inc. v. Bruen* represented a break from past in Second Amendment jurisprudence—establishing an

individual's right to bear arms and requiring that contemporary gun-regulations be evaluated against historical analogues in assessing their constitutionality.

In this post-*Bruen* world, the modern gun regulation 18 U.S.C. § 922(g)(1)—a lifelong firearm ban administered against all convicted felons—has faced consistent scrutiny in lower courts, but without a consensus as to how to treat prosecutions under the law among the circuits. This circuit-split is intractable and requires this Court's intervention to resolve.

A summary of lower courts' perspectives on § 922(g)(1) reveals the extent of the disagreement. The Third Circuit, *en banc*, held that § 922(g)(1) was unconstitutional as applied to an individual with a nonviolent predicate conviction. A Ninth Circuit panel similarly held that the statute violated the Second Amendment as applied to someone with nonviolent offenses before vacating that decision *en banc*. The Fourth and Seventh Circuits assumed that as-applied challenges to § 922(g)(1) were available depending on the case. By contrast, the Eighth, Tenth, and Eleventh Circuits all upheld § 922(g)(1) with no need for felony-by-felony determinations, although those courts disagreed about whether a historical analysis of the law was required.

This Court's decision in *Rahimi*—which addressed § 922(g)(8), a firearm restriction concerning individuals subject to domestic-violence restraining orders—did not help lower courts resolve their disagreements on felon-in-possession laws. Since *Rahimi*, the Third, Fifth, and Sixth Circuits maintain that § 922(g)(1) is vulnerable to as-applied challenges. The Eighth Circuit, however, has reaffirmed its conclusion that history supports applying § 922(g)(1) across the board, with no need for felony-by-felony analysis. The Tenth and Eleventh Circuits continue to uphold the statute in all applications based on dicta from this Court. The Fourth Circuit refuses to consider as-applied challenges on several grounds, including that felons are not among "the people" protected by the Second Amendment. And the Ninth Circuit (*en banc*), as well as the Second Circuit, has held that there is a history of disarming certain classes of individuals that supports applying § 922(g)(1) to all felons.

The Fifth Circuit's decision below—affirming McCowan's conviction based on circuit precedent in *United States v. Diaz,* 116 F.4th 458 (5th Cir. 2024) and *United States v. Giglio*, 126 F.4th 1039 (5th Cir. 2025)—continues to deepen the conflict among the various circuit courts of appeal. It is also wrong on multiple levels. § 922(g)(1)—codified in a pre-

Bruen, pre-*Heller* legal landscape (before an individual's right to bear arms had been evaluated in caselaw)—represents a *lifetime* prohibition on bearing arms for all felons. There is no historical precedent in our tradition for permanent disarmament, or against such a broad and variegated group of individuals. At most, our historical tradition imagines regulations of disarming *violent* individuals who threaten armed insurrections or pose a present physical threat to others. So, at the very least, § 922(g)(1) is unconstitutional as applied to individuals like McCowan who were previously convicted of not-recent crimes and/or crimes that do not establish a present threat of violence. Furthermore, the Fifth Circuit's decision below flouts the plain text of § 922(g)(1), which disarms individuals based on a prior conviction, not based on their status as a probationer.

This Court's intervention is urgently needed to decide the scope of a fundamental right, and this case is an ideal vehicle to resolve it. The Court should grant certiorari.[1]

---

[1] The fact pattern in this case resembles that of *United States v. Contreras*, No. 24-50370, 2025 U.S. App. LEXIS 17752 (5th Cir. 2025) (per curiam) (unpublished), *cert. denied*, No. 25-5909, 2026 U.S. LEXIS 481 (2026), and therefore many of the arguments presented in that petition for certiorari are

OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Michael Thomas McCowan*, No. 24-50202 (October 6, 2025), is reproduced at App. 1a–2a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on October 6, 2025. On December 23, 2025, Justice Samuel Alito extended the time to petition for a writ of certiorari to February 3, 2026. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Section 922(g)(1) of Title 18 of the United States Code provides: "It shall be unlawful for any person … who has been convicted in any court

---

used here as well. *See Contreras v. United States*, No. 25-5909, 2026 U.S. LEXIS 481 (2026).

of, a crime punishable by imprisonment for a term exceeding one year … to … possess in or affecting commerce, any firearm or ammunition."

STATEMENT

A. Legal Background.

1. "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). Indeed, "[b]ans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding." Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1563 (2009), *see* Federal Firearms Act, ch. 850, § 2(f), 52 Stat. 1250, 1251 (1938).

2. In the 1960s (when Congress passed the current version of the felon-in-possession statute), legislators shared a widely held—but incorrect—understanding of the Second Amendment. In committee testimony, the Attorney General assured Congress that "[w]ith respect to the second amendment, the Supreme Court of the United States long ago made it clear that the amendment did not guarantee to any individuals the right to bear arms" and opined that "the right to bear arms protected by the second amendment relates only to the maintenance of the militia." *Federal Firearms Act: Hearings Before the*

Subcomm. to Investigate Juvenile Delinq. of the Sen. Comm. on the Judiciary, 89th Cong. 41 (1965) (relying on decisions such as *United States v. Miller*, 307 U.S. 174 (1939), which held that the Second Amendment "was not adopted with the individual rights in mind") *Id.* Unconstrained by the Second Amendment, Congress employed an "expansive legislative approach" to pass a "sweeping prophylaxis … against misuse of firearms." *Lewis v. United States*, 445 U.S. 55, 61, 63 (1980).

3. In its seminal decision in *District of Columbia v. Heller*, however, this Court held for the first time that the Second Amendment codifies an individual right to keep and bear arms—a right that is not limited to militia service. 554 U.S. 570, 579–600 (2008). In reaching this conclusion, the Court conducted a "textual analysis" of the Second Amendment's language and surveyed the Amendment's "historical background." *Id.* at 578, 592. The Court had "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Id.* at 595.

4. Still, relying on the historical understanding of the Amendment, the Court recognized that "the right secured by the Second Amendment is not unlimited." *Id.* at 626. The Court identified several

"longstanding" and "presumptively lawful" firearm regulations, such as prohibitions on felons possessing firearms. *Id.* at 626–27 & n.27. But the Court cautioned that it was not "undertak[ing] an exhaustive historical analysis … of the full scope of the Second Amendment." *Id.* at 626. And it did not cite any historical examples of these "longstanding" laws, explaining that there would be "time enough to expound upon the historical justifications for the[se] exceptions … if and when those exceptions come before us." *Id.* at 635. The Court then turned to the District of Columbia handgun ban at issue, finding that it was historically unprecedented and thus violated the Second Amendment. *Id.* at 629, 631–35.

5. Following *Heller*, the courts of appeals coalesced around a twostep framework for analyzing Second Amendment challenges that focused on the historical scope of the Second Amendment at step one and applied means-ends scrutiny at step two. *See*, *e.g.*, *Kanter*, 919 F.3d at 441–42; *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017). And this Court's recognition that the Second Amendment protects an individual right to bear arms brought renewed constitutional challenges to § 922(g)(1). But the courts of appeals almost uniformly rejected Second Amendment challenges to the statute, either applying means-

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

6. Then came *Bruen*. In *Bruen*, this Court held that the twostep framework adopted by the courts of appeals was "one step too many." 597 U.S. at 19. Instead, the Court explained that *Heller* demanded a test "centered on constitutional text and history." *Id.* at 22. Under this test, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. "The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. "Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* (cleaned up). *Bruen*—and the Court's later decision in *Rahimi*—explain that "the appropriate analysis involves considering

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

B. Proceedings Below.

1. On September 26, 2023, a U.S. probation officer (accompanied by a Midland, Texas police officer) conducted a house visit of his supervisee McCowan. The probation officer observed a firearm in plain view in McCowan's residence, and the officer knew McCowan to be a

convicted felon and thus prohibited from lawfully possessing firearms. The probation officer and accompanying officers also believed McCowan to be under the influence "of a substance," and reported that the house smelled "like marijuana."

2. A subsequent search warrant for the residence led to the seizure of 23.64 grams of M30 pills (Fentanyl), 37.29 grams of suspected fake Xanax pills (Fentanyl), 5.92 grams of marijuana, 0.68 grams of suspected methamphetamine, and a bottle of Promethazine, as well as the pistol that had been observed in plain view.

3. A criminal complaint was filed in this case, charging McCowan with a violation of § 922(g)(1), stating that McCowan was in possession of a firearm and had previously been convicted on a separate felon-in-possession charge on November 17, 2017. An indictment followed.

4. McCowan moved to dismiss the indictment arguing that § 922(g)(1) was unconstitutional both facially and as applied to defendants with criminal histories like McCowan's. The Government's response to the motion to dismiss argued that felons fell outside of the "people" covered by the Second Amendment; that there was a history of firearm regulations akin to § 922(g)(1); and that McCowan's full criminal history—which included prior felonies of burglary, theft of

property, tampering with a witness in a felony prosecution, and unlawful possession of firearm—justified his disarmament.

5. The district court denied McCowan's motion to dismiss, citing its orders in other cases upholding the constitutionality of § 922(g)(1).

6. McCowan pleaded guilty to the indictment. On the prior conviction element, the factual basis for his guilty plea said that McCowan had been previously convicted of the felony offense of "felon in possession of firearm" in 2017. The pre-sentence report detailed McCowan's other previous felony convictions: burglary and theft convictions that occurred in 2007 when McCowan was 17 years old; a tampering with witness conviction from 2012 when McCowan was 21 years old; and unlawful possession of firearm convictions from 2015 and 2017.

The district court ultimately sentenced McCowan to 51 months' imprisonment, to be followed by 3 years' supervised release.

7. McCowan appealed. He raised both facial and as-applied challenges to the constitutionality of § 922(g)(1) under *Bruen*'s framework, as clarified in *Rahimi* and the Fifth Circuit's decision in *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 2822 (2025). *Diaz*, as the seminal Fifth Circuit case applying *Bruen*

and *Rahimi*'s analyses to § 922(g)(1), established three points: (1) "felons" are part of "the people," and thus § 922(g)(1) is presumptively unconstitutional, *id*. at 466–67; (2) § 922(g)(1) is facially constitutional, *id*. at 471–72; and (3) § 922(g)(1) was constitutional as applied to Diaz because—when considering only his prior convictions—his prior felony conviction for vehicle theft was relevantly similar to the Founding-era crime of horse theft, which was punishable by death or estate forfeiture, *id*. at 467, 469–70.

Also relevant to McCowan's case was the Fifth Circuit's decision in *United States v. Giglio*, 126 F.4th 1039 (2025). There, the court held that § 922(g)(1) was constitutional as applied to a defendant who possessed a firearm while serving a federal term of supervised release for a felony conviction. *Id.* at 1040–41. *Giglio* reasoned that there is a historical tradition of "disarm[ing] those who continue to serve sentences for felony convictions." *Id.* at 1044. That tradition, *Giglio* held, matches the "why" and "how" of "disarming felons who are still serving out sentences." *Id*. As for the "why," historical forfeiture laws "burdened the right to bear arms for the same reasons that we now burden the rights of convicts on supervised release: to deter criminal conduct, protect the public, and facilitate the convict's rehabilitation." *Id.* (quoting *United States v.*

Moore, 111 F.4th 266, 269–70 (3d Cir. 2024)). As for the "how," even though historical laws "required forfeiture of *all* chattels, that practice can nevertheless justify the narrower practice of prohibiting possession of *some* (*viz.*, firearms)." *Id.* (citing the greater-includes-the-lesser theories of *Diaz*, 116 F.4th at 469–70, and *Rahimi*, 602 U.S. at 699). Finally, "[b]olstering" *Giglio*'s "conclusion is the unremarkable proposition that those subject to criminal sentences do not enjoy the full panoply of rights guaranteed by our Constitution." *Id.* at 1045.

McCowan acknowledged that, because of the circuit's published opinions *Diaz* and *Giglio*, his facial and as-applied challenges were both foreclosed in the Fifth Circuit, but he made arguments in briefing to preserve the issues for further review. McCowan argued that § 922(g)(1) was facially unconstitutional because the Government had failed to point to historically similar firearm regulations from the nation's founding tradition. In his as applied-challenge, McCowan argued that any reliance on his status as a probationer to defend the application of § 922(g)(1) was not appropriate because it did not address "how" and "why" McCowan was disarmed under the law (whose plain text punishes former criminals purely based on the past convictions that existed on their criminal records); none of the past convictions in McCowan's

record—neither the prior felon-in-possession conviction contained within the plea's factual basis; nor the many-years-old other convictions proffered within the pre-sentencing report (burglary and theft from 2007; witness tampering from 2012)—could serve has a suitable predicate for permanent disarmament in a *Bruen* analysis.

The Government moved for summary affirmance based on McCowan's concessions. McCowan took no position on the motion. The court of appeals granted the Government's motion, agreeing with the parties that McCowan's facial and as-applied challenges were foreclosed by *Diaz* and *Giglio*. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

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

The courts of appeals are deeply divided over how to analyze Second Amendment challenges to § 922(g)(1). Some circuits see no need to conduct the text-and-history analysis required by *Bruen*, relying instead on this Court's dicta that felon-in-possession prohibitions are presumptively lawful. Others apply *Bruen*'s text-and-history framework but reach dramatically different results. Examining the text, the circuits disagree about whether felons are part of "the people" protected by the

Second Amendment. And in analyzing the historical evidence, the circuits are split over which traditions justify § 922(g)(1), whether the statute is vulnerable to as-applied challenges, and (if so) what standard to apply.

1. The Second Circuit recently rejected a facial challenge to § 922(g)(1), holding that its pre-*Bruen* precedent, which upheld § 922(g)(1) based on the assurances in *Heller* and *McDonald* that "'longstanding prohibitions on the possession of firearms by felons" are presumptively constitutional,' … survives *Bruen*." *Zherka v. Bondi*, 140 F.4th 68, 74 (2d Cir. 2025) (cleaned up). Turning to the as-applied challenge, the Second Circuit found that the defendant, despite being a felon, remained part of "the people." *Id.* at 76–77. But under *Bruen*'s second step, the court rejected a case-by-case approach to determine if certain nonviolent felonies exempted a person from prosecution under § 922(g)(1), *id.* at 95–96, and found that, "[l]ike § 922(g)(1), laws from seventeenth century England, the American Colonies, and the early United States, establish that it has long been permissible to regulate firearms possession through legislative proscription on a class-wide basis, without a particularized finding that the individuals disarmed pose a threat to society." *Id.* at 78–79.2.

2. The Third Circuit, sitting *en banc*, struck down § 922(g)(1) as applied to an individual convicted of food stamp fraud who did not "pose[] a physical danger to others." *Range v. Attorney General*, 124 F.4th 218, 232 (3d Cir. 2024). The court held that the plaintiff was part of "the people" protected by the Second Amendment despite his prior conviction. *Id.* at 226–28. And the court held that the government failed to show "a longstanding history and tradition of depriving people like [the plaintiff] of their firearms." *Id.* at 232. In doing so, the court rejected the government's reliance on status-based restrictions, emphasizing that Founding-era laws disarmed distrusted groups—like loyalists, Native Americans, religious minorities, and Black Americans—based on fear of rebellion. *Id.* at 229–30. The court also dismissed the government's "dangerousness" principle, which would encompass even nonviolent offenders, as "far too broad." *Id.* at 230 (cleaned up). Finally, the court rejected the government's reliance on capital punishment and forfeiture, explaining that "the Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here—de facto lifetime disarmament for all felonies and felony-equivalent misdemeanors—is rooted in our Nation's history and tradition." *Id.* at 230–31. However, the court

subsequently held that a prosecution under § 922(g)(1) is justified as applied to "a convict on supervised release." *United States v. Moore*, 111 F.4th 266, 269–73 (3d Cir.2024), *cert. denied*, No. 24-968 (U.S. Jun. 30, 2025).

3. The Fourth Circuit takes a much different approach, refusing to entertain as-applied challenges and upholding § 922(g)(1) "without regard to the specific conviction that established [a per-son's] inability to lawfully possess firearms." *United States v. Hunt*, 123 F.4th 697, 700 (4th Cir. 2024), *cert. denied*, No. 24-6818 (U.S. Jun. 2, 2025). The court provided two alternative grounds for this conclusion. *First*, it held that it remained bound by its pre-*Bruen* precedent foreclosing as-applied challenges to § 922(g)(1). *Id.* at 702–04. Those earlier cases, in turn, relied on *Heller*'s statement that felon-in-possession bans are "presumptively lawful" and its reference to "law-abiding" citizens. *Id.* at 703. *Second*, the court held that as-applied challenges to § 922(g)(1) fail both steps of *Bruen*'s text-and-history test. *Id.* at 704. At the first step, the court held that "the Second Amendment protects firearms possession by the law-abiding, not by felons." *Id.* at 705. At the second step, the court concluded that legislatures could categorically disarm groups from

possessing firearms in a historical analysis mirroring the Eighth Circuit's discussed below. *Id.* at 705–08.

4. The Sixth Circuit allows as-applied challenges to § 922(g)(1) by individuals who show that they are "not dangerous." *United States v. Williams*, 113 F.4th 637, 657, 663 (6th Cir. 2024). The court first confirmed that felons are part of "the people" protected by the Second Amendment. *Id.* at 648–50. Next, the court found historical support for disarming "presumptively dangerous" groups who posed a threat to public order—like religious minorities, Native Americans, loyalists, and freedmen—but explained that these laws all allowed individuals to show that they posed no danger. *Id.* at 657. So the court held that an individual must begiven an opportunity to show that he is "not dangerous" and "falls outside of § 922(g)(1)'s constitutionally permissible scope." *Id.* In conducting this dangerousness inquiry, the court explained that courts can "consider a defendant's entire criminal record—not just the specific felony underlying his § 922(g)(1) conviction." *Id.* at 659–60. The Sixth Circuit extended this reasoning to hold that, like the Third Circuit, the nation's historical tradition of "disarming the dangerous" and "forfeiture laws" "also supports disarming those on parole, probation, or supervised release." *United*

States v. Goins, 118 F.4th 794, 801–02 (6th Cir. 2024) (citing *Moore*, 111 F.4th at 269–72).

5. The Seventh Circuit has assumed that as-applied challenges to § 922(g)(1) are available. *United States v. Gay*, 98 F.4th843, 846 (7th Cir. 2024). But the court concluded that the defendant in *Gay*—who had convictions for violent felonies and was on parole when he possessed a gun—was "not a 'law-abiding, responsible' person who has a constitutional right to possess firearms." *Id.* at 847 (quoting *Bruen*, 597 U.S. at 26, 70).

6. The Eighth Circuit has upheld § 922(g)(1) as constitutional across the board with "no need for felony-by-felony litigation." *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024), *reh'g en banc denied*, 121 F.4th 656 (8th Cir. 2024), *cert. denied*, No. 24-6517 (U.S. May 19, 2025). Based on historical laws prohibiting certain groups of people—religious minorities, Native Americans, and those who refused to declare an oath of loyalty—from possessing guns, the court reasoned that legislatures have long exercised authority to disarm broad categories of people who are "not law-abiding" or "presented an unacceptable risk of danger if armed." *Id.* at 1126–28. Although the Third and Sixth Circuits surveyed similar laws and found that they did

not support disarming individuals who pose no risk of danger, the Eighth Circuit disagreed. The court explained that "not all persons disarmed under historical precedents … were violent or dangerous," so "there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons." *Id.* at 1128.

7. A Ninth Circuit panel held that § 922(g)(1) is unconstitutional as applied to a defendant with only nonviolent convictions. *United States v. Duarte*, 101 F.4th 657, 661 (9th Cir. 2024), *reh'g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. 2024). Sitting *en banc*, however, the court is aligned with the Second, Fourth, Eighth, Tenth, and Eleventh circuits and held that "§ 922(g)(1) is not unconstitutional as applied to nonviolent felons." *United States v. Duarte*, 137 F.4th 743, 748 (9th Cir. 2025). The court relied on this Court's repeated assurances that prohibitions on the possession of a firearm by felons are presumptively lawful and that *Bruen* and *Rahimi* did not disrupt the court's pre-*Bruen* precedent that foreclosed Second Amendment challenges to § 922(g)(1). *Id*. at 750–52. It then applied *Bruen*'s test to confirm its reading that no felony-by-felony evaluation of § 922(g)(1) is required. *Id*. at 761. While the court found that the conduct proscribed by § 922(g)(1) is covered by

the plain text of the Second Amendment, *id*., the court held that the government met its burden under *Bruen*'s second step based on historical evidence consistent with "two regulatory principles that: (1) legislatures may disarm those who have committed the most serious crimes; and (2) legislatures may categorically disarm those they deem dangerous, without an individualized determination of dangerousness," *id*. at 761–62.

8. The Tenth Circuit has held that § 922(g)(1) is constitutional as applied to "all individuals convicted of felonies" with no need to "draw[] constitutional distinctions based on the type of felony involved." *Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025), *pet. for cert. filed*, No. 24-1155 (U.S. May 8, 2025). But the court did not engage in *Bruen*'s text-and-history analysis. Instead, the court held that it remained bound by pre-*Bruen* precedent. *Id.* at1264–65. That precedent, in turn, foreclosed as-applied challenges to § 922(g)(1) based on *Heller*'s statement that prohibitions on the possession of firearms by felons were "longstanding" and "presumptively lawful." *Id.* at 1265. So the court held that "the Second Amendment doesn't prevent application of § 922(g)(1) to nonviolent offenders." *Id.* at 1266.

9. The Eleventh Circuit has also held—without conducting a historical analysis—that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment. *United States v. Dubois*, 139 F.4th 887,893 (11th Cir. 2025). Like the Second and Tenth Circuits, the court held that its pre-*Bruen* precedent—which relied on *Heller*—remained binding. *Id.* Thus, the court reaffirmed its conclusion that felons are categorically disqualified from exercising their Second Amendment right under *Heller*. *Id.* at 893–94.

10. The Fifth Circuit's decision below underscores the deep divisions between the courts of appeals. The Fifth Circuit splits with other circuits on two preliminary questions.

a) Unlike the Second, Fourth, Ninth, Tenth, and Eleventh Circuits—which have held that they remain bound by their pre-*Bruen* precedent—the Fifth Circuit agrees with the Third and Sixth Circuits that *Bruen* rendered its prior precedent obsolete. *Diaz*, 116 F.4th at 466. And while the Tenth and Eleventh Circuits have declined to conduct any historical analysis based on *Heller*'s "presumptively lawful" language, the Fifth Circuit joined the Third and Sixth Circuits in refusing to treat

that language as controlling.[2] *Id*. Instead, these courts acknowledge that *Bruen* requires a full text-and-history analysis. *Id*.

b) At *Bruen*'s first step, the Fifth Circuit adopted the majority view shared by the Second, Third, and Sixth Circuits—but split with the Fourth Circuit—by holding that felons are part of "the people" protected by the Second Amendment. *Id.* at 466–67.

At the second step, the Fifth Circuit's historical analysis diverges from other circuits in several respects. The Second, Fourth, Eighth, and Ninth Circuits have held that history supports upholding § 922(g)(1) regardless of a defendant's underlying conviction. But the Fifth Circuit left the door open for "as-applied challenges by defendants with different predicate convictions." *Diaz,* 116 F.4th at 469 & 470 n.4. At first, the Fifth Circuit's limited its analysis to whether the felony predicates that triggered § 922(g)(1) were relevantly similar to crimes that subjected the convictions to "serious and permanent punishment" at the Founding. *Diaz*, 116F.4th at 470 & n.4. This is different than the line drawn by the Third Circuit (whether a person poses a physical danger to others) and

---

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

the Sixth Circuit (whether a person is dangerous). The Fifth Circuit has since held that § 922(g)(1) is constitutional as applied to individuals convicted of "violent crimes." *United States v. Bullock*, 123 F.4th 183, 185 (5th Cir. 2024). And the Fifth Circuit has held that defendants who were on supervised release when they possessed a firearm can be disarmed under § 922(g)(1), joining the Third and Sixth Circuits. *See Giglio*, 126 F.4th at 1044; *Contreras*, 125 F.4th at 732–33.

* * *

In sum, the courts of appeals are fractured over how to conduct the Second Amendment analysis, and the splits are entrenched and deepening. This Court's intervention is needed to resolve the scope of the right to keep and bear arms.

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

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

Americans." *Heller*, 554 U.S. at 580. But the Fifth Circuit has misapplied *Bruen*'s historical analysis. Section 922(g)(1) does not align with our Nation's tradition of firearm regulation on either of the two central considerations: how and why it burdens the right to keep and bear arms. *See Bruen*, 597 U.S. at 29; *Rahimi*, 602 U.S. at 692. The difference in *how* and *why* § 922(g)(1) burdens the right to bear arms is fatal to the statute facially, and as applied to offenders like McCowan. And the Fifth Circuit's conclusion that someone on probation can be disarmed under § 922(g)(1) is divorced from the plain text of the statute, which has nothing to do with probation or release status.

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

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

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

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

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

§ 922(g)(1). *Id.* at 467–68. That reliance conflicts with this Court's precedent in three ways.[4]

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

---

[4] The Fifth Circuit's decision also misstates the historical evidence in three ways. *First*, the court cited a Founding-era New York law as "authorizing the death penalty for theft of chattels worth over five pounds." *Diaz*, 116 F.4th at 468. But theft is not among the crimes subject to the death penalty under that law. *See* Act of Feb. 21, 1788, ch. 37, 1788 N.Y. Laws 664–65. *Second*, despite the court's characterization of forfeiture laws as a type of "permanent" disarmament (*Diaz*, 116 F.4th at 469, 471), "[f]orfeiture still allows a person to keep their other firearms or obtain additional ones." *Rahimi*, 602 U.S. at 760 (Thomas, J., dissenting). *Third*, although the court stated (*Diaz*, 116 F.4th at 468–69) that individuals convicted of horse theft "were often subject to the death penalty," the only source it cited explains that "hardly any horse thieves were executed." Kathryn Preyer, *Crime and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53, 73 (1983).

First, the Fifth Circuit asserted that *Rahimi* "consider[ed] several laws that were not explicitly related to guns." *Diaz*, 116 F.4th at 468. But *Rahimi* says otherwise. In *Rahimi*, this Court relied on two historical legal regimes—surety laws and going armed laws— that both "specifically addressed firearms violence." 602 U.S. at 694–95. To be sure, surety laws were not "passed *solely* for the purpose of regulating firearm possession or use." *Diaz*, 116 F.4th at 468. But this Court emphasized that, "*[i]mportantly for this case*, the surety laws also targeted the misuse of firearms." *Rahimi*, 602 U.S. at 696 (emphasis added). In other words, historical laws that did *not* target the misuse of firearms—like capital punishment and estate forfeiture—are *not* proper analogues.

Second, the Fifth Circuit noted that this Court accepted a greater-includes-the-lesser argument in *Rahimi*. *Diaz*, 116 F.4th at 469. That is true as far as it goes. *Rahimi* held that "if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament … is also permissible." 602 U.S. at 699. But it does not follow, as the Fifth Circuit concluded, that "if capital punishment was permissible to respond to theft, then the lesser restriction of permanent disarmament that

§ 922(g)(1) imposes is also permissible." *Diaz*, 116 F.4th at 469. This Court explained that the purpose of imprisonment under the going armed laws was "to respond to the use of guns to threaten the physical safety of others." *Rahimi*, 602 U.S. at 699. So, both the greater historical punishment (imprisonment under the going armed laws) and the lesser modern restriction (disarmament under 18 U.S.C. § 922(g)(8)) had the same purpose—curbing gun violence. Not so here. Again, capital punishment and forfeiture simply did not target gun violence.

b) This Court has also emphasized that the right to bear arms "is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (cleaned up). But the Fifth Circuit's reasoning—that because capital punishment is an "obviously permanent" deprivation of an individual's right to bear arms, the lesser restriction of permanent disarmament is permissible for individuals who are not executed, *Diaz*, 116 F.4th at 469—conflicts with how the Constitution treats other fundamental rights. "Felons, after all, don't lose other rights guaranteed in the Bill of Rights even though an offender who committed the same act in 1790 would have faced capital punishment." *Williams*, 113 F.4th at 658. "No one suggests that such an individual has no right to a jury trial or be free from unreasonable

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

c) Finally, this Court has expressed "doubt that *three* colonial regulations could suffice to show a tradition." *Bruen*, 597 U.S. at 34 46. But the Fifth Circuit relied on only three laws to establish a tradition of permanently punishing individuals who have been convicted of theft: a colonial Massachusetts law, a Founding-era New York law, and a post-revolutionary Virginia law. *Diaz*, 116 F.4th at 468–69. Putting to one side whether the court's reading of these laws is correct, this limited historical evidence is too slender a reed to establish a tradition justifying the deprivation of a fundamental constitutional right.

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

B. Section 922(g)(1) is unconstitutional as applied to individuals based on their prior felony convictions for offenses that did not result in disarmament in the Founding era.

1. Even if § 922(g)(1) is facially constitutional, the statute violates the Second Amendment as applied to individuals who do not pose a present threat of violence based on their prior convictions. The Fifth Circuit seems to have acknowledged as much, explaining that the historical analogues that support applying the statute to individuals with violent convictions lose their force when an individual's "underlying convictions do not inherently involve a threat of violence." *Diaz*, 116 F.4th at 471 n.5. Indeed, the government has not cited any tradition of disarming nonviolent individuals. The government's historical evidence

shows—at most—a tradition of disarming violent individuals who threaten armed insurrection or presently threaten the physical safety of others. *See Kanter*, 919 F.3d at 454 (Barrett, J., dissenting) (explaining that historical evidence shows "that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety"). And there is no basis in law that condones the Fifth Circuit's decision to answer a question not presented for its review without deciding whether the actual statute of conviction could constitutionally be applied to a defendant.

2. McCowan appealed his judgment of conviction under § 922(g)(1) to challenge the criminal penalties the government sought to impose for violating that statute. The government was thus obligated to defend the appealed conviction by demonstrating that applying § 922(g)(1) to someone based on the felony identified in McCowan's guilty plea—ie. a prior "felon in possession of firearm" charge—is consistent with our Nation's historical tradition. *See Bruen*, 597 U.S. at 29. Nothing in *Bruen* or *Rahimi* suggests that that inquiry turns on an independent assessment of whether there may be some *other* reason why McCowan could constitutionally be disarmed. *See Rahimi*, 602 U.S. at 700– 02 (because the government charged Rahimi only with violating

§ 922(g)(8), the Court asked only whether § 922(g)(8) could pass constitutional muster, not whether the government could have constitutionally disarm him on another basis); *see also id.* at 777 (Thomas, J., dissenting) ("This case is not about whether States can disarm people who threaten others. … Instead, the question is whether the Government can strip the Second Amendment right of anyone subject to a protective order[.]"). Limiting the analysis to whether § 922(g)(1)'s permanent prohibition on firearm possession imposes a burden on the Second Amendment right consistent with our Nation's tradition requires the court to review how the law actually regulates that behavior. *See Williams v. Illinois*, 399 U.S. 235, 238–40 (1970) (holding that the law as it was actually enacted and enforced violated the defendant's equal protection rights and rejecting the state's argument that the statute was "not constitutionally infirm simply because the legislature could have achieved the same result by some other means").

Indeed, other constitutional questions are similarly limited to the particular law being challenged. *See, e.g., TikTok v. Garland*, 145 S. Ct. 57, 68 (2025) ("[W]e look [only] to the provisions of the Act that give rise to the effective TikTok ban that petitioners argue burdens their First

Amendment rights" to address their as-applied challenge); *United States v. Eichman*, 496 U.S. 310, 313 n.1, 316 n.5 (1990) (holding that the government could not criminally punish a defendant for burning Post Office flag under a law specifically outlawing flag burning, even though he could be subject to prosecution under a different statute based on the same conduct); *United States v. Grace*, 461 U.S. 171, 183–84 (1983) (invalidating a law that categorically banned the display of signs outside its building under the First Amendment, even though the same behavior may have been regulated through "reasonable time, place and manner restrictions").

3. In short, the government sought to imprison McCowan because he possessed a firearm after having been convicted of a certain felony (or felonies)—not because he was on probation. Indeed, § 922(g)(1) regulates the possession of a firearm by an individual who has been convicted of a felony, not possession of a firearm by an individual on probation or other supervision. Whether prior convictions for offenses that neither resulted in disarmament nor were subject to severe punishment at the Founding is the question that ought to have been analyzed on appeal. The Fifth Circuit's approach, which allows extra-offense characteristics and allows a wide range of potentially disqualifying factors outside the conduct

§ 922(g)(1) regulates, is contrary to the historical-tradition approach *Bruen* adopted and the longstanding principles observed by the Court when reviewing the constitutionality of a specific statute.

4. A proper *Breun* analysis of McCowan's as-applied challenge would focus on "how" and "why" the text of the statute operated against McCowan: here, the statute punishes individuals specifically for any past felony convictions in their criminal record, and strips them of their right to bear arms indefinitely. The Fifth Circuit significantly erred in choosing to analyze the constitutionality of § 922(g)(1) as applied to McCowan based on factors outside the scope of the statute.

5. If the Fifth Circuit were to review the past felony convictions that were relied on to prosecute McCowan under § 922(g)(1), as suggested by the court's own framework in *Diaz*, there is reason to believe that the court would have reversed McCowan's lower-court judgment. The only conviction presented within the factual basis for McCowan's plea was a prior "felon-in-possession" conviction, and this is a class of felony that the Fifth Circuit has noted did not exist throughout our nation's history: "possessing a firearm as a felon—one of [the appellant's] three predicate convictions justifying the application of §

922(g)(1)—was not considered a crime until 1938 at the earliest." *Diaz*, 116 F.4th at 468.

6. McCowan's other alleged convictions (burglary, theft, and witness tampering), if they are to be considered in his as-applied challenge (they were not included in the factual basis for his plea), were more than 10 years old (and not evidencing a current proclivity for violence). The age of these potential predicate convictions underscores the unconstitutional permanence of the firearm ban that § 922(g)(1) embodies.

6. The Fifth Circuit relied on McCowan's status as a probationer to dismiss his as-applied challenge; at a minimum, this Court should grant, vacate, and remand with instructions for the Fifth Circuit to consider McCowan's as-applied challenge to his § 922(g)(1) conviction itself, without any inquiry independent of the conduct the statute actually regulates.

III. This is a critically important and recurring question.

The Court should grant the petition because the question is critically important and recurring. After all, "§ 922(g) is no minor provision." *Rehaif v. United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting). Out of about 64,000 cases reported to the Sentencing Commission in

Fiscal Year 2023, more than 7,100 involved convictions under § 922(g)(1). *See* U.S. Sent'g Comm'n, *Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses*, at 1 (June 2024). Those convictions accounted for over 10% of all federal criminal cases. *See id.*

Even beyond new prosecutions, § 922(g)(1)'s reach is staggering. The statute prohibits millions of Americans from exercising their right to keep and bear arms for the rest of their lives. Recent estimates of the number of individuals with felony convictions range from 19 million to 24 million. Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1591 (2022) (citations omitted). And § 922(g)(1) is particularly troubling because most of the individuals it prohibits from possessing firearms are peaceful, with convictions for only nonviolent offenses. Less than 20% of state felony convictions and less than 5% of federal felony convictions are for violent offenses. *See* Dep't of Justice, Bureau of Justice Statistics, Sean Rosenmerkel et al., *Felony Sentences in State Courts, 2006—Statistical Tables*, at 3 (Table 1.1) (rev. Nov. 2010); Dep't of Justice, Bureau of Justice Statistics, Mark A. Motivans, *Federal Justice Statistics, 2022*, at 12 (Table 7) (Jan. 2024).

Given § 922(g)(1)'s widespread impact both on new prosecutions and on the millions of nonviolent Americans it prohibits from exercising a

fundamental constitutional right, this Court should answer this important and recurring question as soon as possible.

IV. This case is an ideal vehicle for addressing this question.

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

/s/ Shannon Locke
SHANNON LOCKE
State Bar No. 24048623
15600 San Pedro Avenue, Suite 105
San Antonio, Texas 78232
Tel: 210-229-8300
Fax: 210-229-8301

Counsel for Petitioner

February 3, 2026