No. _____

IN THE
Supreme Court of the United States

DALE MITCHELL, Jr.,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether 18 U.S.C. § 922(g)(1) is constitutional in all its applications or is it subject to as-applied challenges?

II. If as-applied challenges are prohibited, is 18 U.S.C. § 922(g)(1) facially invalid because it violates the Due Process Clause and is substantially overbroad?

III. Whether *Stinson v. United States* still accurately states the level of deference due to the Commentary of the Federal Sentencing Guidelines?

PARTIES TO THE PROCEEDING

Dale Mitchell, Jr., petitioner on review, was the appellant-defendant below.

The United States of America, respondent on review, was the appellee-plaintiff below.

RELATED PROCEEDINGS

United States v. Mitchell, No. 25-1294, 2025 WL 3688159 (8th Cir. 2025)

United States v. Mitchell, No. 23-00203, 2024 WL 2186861 (W.D. Mo. May 15, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported but is available at 2025 WL 3688159 and is reproduced in Appendix A at pages 1-3. The decision of the district court is not reported but is available at 2024 WL 2186861 and is reproduced in Appendix B at pages 4-8. The magistrate judge's report and recommendation is reproduced in Appendix D at pages 11-15.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231, as Mitchell was charged with an offense against the United States. The court of appeals had jurisdiction under 28 U.S.C. § 1291, which provides for jurisdiction over appeals from all final decisions of district courts of the United States.

The court of appeals entered its judgment on December 19, 2025. On January 2, 2026, the court extended the time to file a petition for rehearing to January 7, 2026. The court denied the timely filed petition for rehearing on January 28, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

For questions I and II, the pertinent constitutional and statutory provisions are:

The Second Amendment to the United States Constitution 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), of Title 18 of the United States Code provides, in pertinent part:

> (g) It shall be unlawful for any person—
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> >
> > * * *
> >
> > to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

For question III, the pertinent guideline is U.S.S.G. § 4B1.2 (2021) which states:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping,

aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

* * *

Commentary

Application Notes:

1. Definitions. –For purposes of this guideline—

"Crime of violence" and ***"controlled substance offense"*** include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

INTRODUCTION

Questions I and II:

Millions of Americans have felony convictions. In 2019, Dr. Nicholas Eberstadt of the American Enterprise Institute testified before the United States Congress Joint Economic Committee that the number of adults with felony convictions in 1948 was less than two million persons but, by 2010, had increased to nearly 20 million.[1] [2] "By those numbers, roughly one in 12 American adults had a felony conviction in 2010, one in eight adult men." *Id*. In 2019, 1,297,856 prisoners were confined in state and federal prisons.[3] In that year, 96.7 percent of people confined in state and federal confinement facilities were convicted of an offense with a maximum sentence of more than one year. *Id*. at 9, Table 4.

These citizens are forever barred by statute from possessing a firearm for any reason—even if one is needed for lawful self-defense—in any place, including their own homes and vehicles. 18 U.S.C. § 922(g)(1). A violation of the statute can result

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[1] The Economic Impacts of the 2020 Census and Business Uses of Federal Data, (May 22, 2019) at 12. Available at https://www.jec.senate.gov/public/_cache/files/42e1f0bd-c8c0-4a71-812c-39a53d303256/chrg-116shrg37080.pdf (last accessed Apr. 27, 2026)

[2] The study referred to in Dr. Eberstadt's testimony was "The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010" published in Demography. 2017 October; 54(5): 1795-1818. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5996985/pdf/nihms963104.pdf (last accessed Apr. 27, 2026)

[3] U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Census of State and Federal Adult Correctional Facilities, 2019 – Statistical Tables" (Nov. 2021) at p. 7, Table 1. Available at https://bjs.ojp.gov/content/pub/pdf/csfacf19st.pdf (last accessed on Apr. 27, 2026)

in imprisonment for up to 15 years. 18 U.S.C. § 924(a)(8). This is true even though very minor crimes are felonies because they are punishable by imprisonment for a term exceeding one year. *See*, *Range v. Att'y Gen. United States*, 124 F.4th 218, 227, n. 6 (3d Cir. 2024) (*en banc*), citing 18 U.S.C. § 1464 (uttering "any obscene, indecent, or profane language by means of radio communication); Mich. Comp. Laws. Ann. § 445.574a(2)(d) (returning out-of-state bottles or cans); Pa. Cos. Stat. Ann. § 3929.1 (third offense of library theft of more than $150); *id*. § 7613 (reading another's email without permission). In fact, only 18.2 percent of felony convictions in state courts and 4.2 percent of federal felony convictions were for violent offenses. *United States v. Jackson*, 110 F.4th 1120, 1125, n. 2 (8th Cir. 2024). Thus, even though most felons have committed non-violent crimes, Congress nonetheless has decided all felons are forever prohibited from exercising their Second Amendment right to possess a firearm.

Even though § 922(g)(1) sweeps up thousands of non-violent felons and permanently denies them their Second Amendment right to possess a firearm, the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits hold that § 922(g)(1) is constitutional as to *all* felons. The Third, Fifth, and Sixth Circuits, however, have held that the statute may be unconstitutional as to some felons. The circuit split means that in some jurisdictions citizens with felony convictions may be able to avoid imprisonment if charged under § 922(g)(1) by making an as-applied challenge, but in other jurisdictions individuals with felony convictions cannot challenge the constitutionality of the statute even if their prior felony offenses were for nonviolent

crimes. Individuals in the Third, Fifth, and Sixth Circuits do not have to risk incarceration at all if they can obtain a declaratory judgment holding that the statute is unconstitutional as applied to their circumstances.

If § 922(g)(1) is not subject to as-applied challenges, as some circuits hold, and the statute cannot be invalidated on its face merely because it is constitutional in some applications, then Congress truly has unreviewable power to permanently disarm Americans for any offense it makes a felony. But if as-applied challenges are prohibited, the statute is invalid on its face because it violates the Due Process Clause and is substantially overbroad.

Question III:

In *Stinson v. United States*, this Court said that guideline commentary is like an agency's interpretation of its own rules and should be given controlling weight unless it is plainly erroneous or inconsistent with the guideline text. 508 U.S. 36, 45 (1993). *Stinson* treated the commentary as binding even though it was not compelled by the guideline text. *Id*. at 47. Years later, this Court decided *Kisor v. Wilkie*, which did not explicitly address the sentencing guidelines, but called into question whether courts must defer to the Sentencing Commission's commentary if a guideline's text is not genuinely ambiguous. The circuits are split on whether *Kisor* modified *Stinson* such that courts need not defer to guideline commentary.

This Court should grant a writ of certiorari to resolve these circuit splits.

STATEMENT OF THE CASE

Law enforcement officers encountered Mitchell after he was involved in a non-injury car accident in which he struck a pole while driving (Tr. at 17-19, 24-25). Mitchell had an open container of alcohol and a firearm in his vehicle (Tr. 21, 35). The officers claimed he was intoxicated (Tr. at 21, 26, 35). After running a records check and learning he was a felon, the officers arrested him (Tr. at 26-27).

A. Proceedings in the district court

Mitchell was indicted under 18 U.S.C. §§ 922 (g)(1) and 924(a)(8) for being a felon in possession of a firearm (R. Doc. 1 at 1). Mitchell moved to dismiss the indictment arguing that the felon-in-possession statute is unconstitutional on its face and as applied to him because it violates the Second Amendment under the analysis required by *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1 (2022) (R. Doc. 30 at 3-4). Mitchell acknowledged the Eighth Circuit's decision in *United States v. Jackson*, which held that the statute did not violate the Second Amendment because it was within the Nation's historical tradition of prohibiting firearm possession by "persons who deviated from legal norms or persons who presented an unacceptable risk of dangerousness" (R. Doc. 30 at 1-2, citing *United States v. Jackson*, 69 F.4th 495, 505 (8th Cir. 2023)). Mitchell argued that *Jackson* was wrongly decided because there was no historical tradition that permitted a permanent, categorical ban on firearm possession by all felons that was not subject to as-applied challenges (R. Doc. 30 at 2, 15-25). The government argued that Mitchell's arguments were foreclosed by *Jackson* and its progeny, and the magistrate

court agreed (R. Doc. 36 at 1-3; R. Doc. 45 at 2-3).

The district court adopted the report and recommendation, relying on *Jackson* (R. Doc. 47 at 2, 5). Mitchell asked the district court to reconsider its ruling after this Court decided *United States v. Rahimi*, 602 U.S. 680 (2024) (R. Doc. 61 at 1). Mitchell argued, among other things, that *Rahimi*'s discussion of surety laws demonstrated that as-applied challenges were allowed historically because individuals subject to such laws were able to obtain exceptions to disarmament based on their individual circumstances (R. Doc. 61 at 4). The district court denied the request saying that *Rahimi* reinforced *dicta* from *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), saying firearm prohibitions on felons were presumptively lawful and nothing in *Heller* should "cast doubt on longstanding prohibitions on the possession of firearms by felons" (R. Doc. 80 at 1).

At a bench trial, the government offered certified records of Mitchell's prior convictions (Tr. at 56-61; Exhibits 9-16). Mitchell has prior convictions for possession of a controlled substance in 1997 and 1998 (Exhibits 9, 10, and 12). He has a tampering conviction from 1998 and an attempted second-degree robbery conviction from 2002 (Exhibits 11 and 13). In 2013, he was convicted of delivery of not more than five grams of marijuana (Exhibit 14). And he unlawfully possessed firearms in 2003 and 2014 (Exhibits 15 and 16).

The district court denied Mitchell's renewed motion to dismiss the indictment, his motions for judgment of acquittal, and found him guilty (Tr. at 64-65, 69). At sentencing, Mitchell explained that he carried a firearm for self-defense because he

was shot in the leg during a robbery in which three men attacked him (Sent. Tr. at 22-24). He was unarmed at the time and feared he might be killed (Sent. Tr. at 23). He now wears a knee brace and walks with a limp (Sent. Tr. at 24). At the time of the instant offense, he still feared for his safety (Tr. at 24).

The district court calculated a guideline range of 84 to 105 months' imprisonment based on a total offense level of 22 and criminal history category VI (Sent. Tr. at 8). This calculation was premised on a base offense level of 24 because Mr. Mitchell purportedly had a prior felony conviction for a controlled substance offense and a prior felony conviction for a crime of violence—attempted robbery in the second degree (PSR at 5-6). Mr. Mitchell objected to the base offense level, arguing that his conviction for attempted robbery was not a crime of violence under the force clause or the enumerated offense clause of U.S.S.G. § 4B1.2(a) (2021) (PSR 26-28). The district court overruled Mr. Mitchell's objection (Sent. Tr. at 8). The court imposed a sentence of 84 months' imprisonment and three years of supervised release (Sent. Tr. at 28; R. Doc. 105 at 2-3).

B. Proceedings in the Eighth Circuit

The appellate court summarily denied Mitchell's constitutional challenge to § 922(g)(1) relying on its holding in *United States v. Jackson*, 110 F.4th 1120, 1124-25 (2024). *Mitchell*, 2025 WL 3688159 at *1. The court concluded that "[e]ven if an as-applied challenge were still available to Mitchell, he could not succeed" due to his felony convictions. *Id.* Based on Mitchell's criminal history, the court said he posed a credible threat to the physical safety of others. *Id.*, *citing Rahimi*, 602 U.S. at 700.

The appellate court did not address Mitchell's facial challenge arguing that § 922(g)(1) violates the Due Process Clause and is substantially overbroad. *Id.*

With respect to Mitchell's argument that the guideline range was incorrectly calculated, the appellate court did not address whether *Kisor v. Wilkie*, 588 U.S. 558 (2019), modified *Stinson v. United States*, 508 U.S. 36 (1993), and simply held that it was bound by a prior en banc decision. *Id.*

REASONS FOR GRANTING THE PETITION

I. After this Court's decisions in *Bruen* and *Rahimi*, the circuits are split as to whether individuals with felony convictions may challenge the constitutionality of § 922(g)(1) as applied to their individual circumstances.

The Second Amendment gives all Americans the right to keep and bear arms. U.S. Const., Amend. II. In *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, the Supreme Court held that the scope of the right is determined by constitutional text and history. 597 U.S. 1, 17 (2022). The Court used a two-step analysis. At step one, a court determines whether the Second Amendment's plain text covers an individual's conduct. *Id.* If so, the Constitution presumptively protects that conduct. *Id.* At step two, the government must establish that its regulation is consistent with the Nation's historical tradition of firearm regulation. *Id.* A modern statute such as the felon-in-possession statute is analogous to a historical statute if both are "relevantly similar." *Id.* at 29.

A court must analyze "how" and "why" the regulation burdens an individual's right to armed self-defense. *Id.* Central to that analysis is "whether modern and historical regulations impose a comparable burden on the right of armed self-defense

and whether that burden is comparably justified." *Id.* The statutes need not be identical, but they also cannot be lumped into a category so broad that it encompasses "outliers that our ancestors would never have accepted." *Id.* at 30.

Because there are no Founding-era statutes that prohibited felons from possessing firearms, the only way for the government to justify § 922(g)(1) is to identify historical analogues that were similarly justified and imposed comparable burdens. *Range*, 124 F.4th at 229 (earliest statute to prohibit possession of firearms by felons was the Federal Firearms Act of 1938, and it applied only to violent criminals). Step two of *Bruen* analysis has proven challenging to apply, with lower courts flummoxed as to what level of generality is acceptable when hunting for historical analogues. *Rahimi*, 602 U.S. at 742, n. 1 (Jackson, J., concurring) (collecting cases from lower courts seeking guidance on how to apply *Bruen*'s test).

United States v. Rahimi, this Court's first post-*Bruen* Second Amendment case, provided some guidance. There, the Court upheld the facial validity of 18 U.S.C. § 922(g)(8)(C)(i), which bars an individual from possessing a firearm if he is under a restraining order that includes a judicial finding that he poses a credible threat to the physical safety of a protected person. *Id.* at 693. Historically, physical threats of violence were addressed by "ordinary criminal laws and civil actions, such as prohibitions on fighting or private suits" rather than disarmament. *Id.* at 694. Surety laws and "going armed" laws "specifically addressed firearms violence," and *Rahimi* relied on them for historical support for temporarily disarming individuals subject to a restraining order under § 922(g)(8)(C)(i). *Id.* at 695-97.

The "going armed" laws prohibited individuals from carrying weapons "to the Terror of the People." *Id.* at 697. The typical case "involved fighting in public," conduct that "disrupted the public order" and "led almost necessarily to actual violence." *Id.* (cleaned up). The offense could be punished with forfeiture of arms and imprisonment. *Id.*

Under surety laws, a person found to pose a threat to others could be required to post a bond, for no longer than six months, and if he did not keep the peace, the bond would be forfeited. *Id.* at 696-97. But surety laws had exceptions based on individual circumstances. *Id.* at 697. "[A]n individual could obtain an exception if he needed his arms for self-defense or some other legitimate reason." *Id.*

Although *Rahimi* addressed the constitutionality of a different statute, it shed light on how to analyze § 922(g)(1). First, *Rahimi* looked to historical statutes that "specifically addressed firearms violence," which is the harm addressed in § 922(g)(1). Second, *Rahimi* emphasized that surety bonds were of limited duration (no more than six months), thus they only support temporary disarmament, unlike the lifetime ban on firearm possession imposed by § 922(g)(1). 602 U.S. at 697. And third, the surety laws examined in *Rahimi* provided exceptions based on individual circumstances. *Id.* That a person subject to a surety law could "obtain an exception if he needed his arms for self-defense or some legitimate reason" provides strong support for the argument that § 922(g)(1) is subject to as-applied challenges by felons. The very existence of exceptions demonstrates that the right to bear arms was determined based on an individual's circumstances, not the category or group to which he belonged.

Nonetheless, at step two of *Bruen* analysis, some circuits have taken a far broader view of history, justifying the statute's categorical dispossession of all felons by looking to historical laws that categorically prohibited classes of individuals *perceived* to be dangerous from possessing firearms. Other circuits have gleaned the historical record and found numerous instances in which individuals were allowed to possess firearms even though they belonged to a class perceived to be dangerous. These circuits endorse as-applied challenges. The circuits are split and the division will not resolve without this Court's intervention.

A. The Third, Fifth, and Sixth Circuits permit as-applied challenges.

The Third, Fifth, and Sixth Circuits have held that § 922(g)(1) is open to as-applied challenges. *See*, *Range*, 124 F.4th at 232; *United States v. Diaz*, 116 F.4th 458, 470 n.4, 472 (5th Cir. 2024), *cert denied*, 145 S.Ct. 2822 (2025); *United States v. Williams*, 113 F.4th 637, 657, 662-63 (6th Cir. 2024). At step one of *Bruen* analysis, each court held that felons are among "the people" protected by the Second Amendment, and § 922(g)(1) reaches conduct protected by that amendment. *Range*, 124 F.4th at 228; *Diaz,* 116 F.4th at 466; *Williams*, 113 F.4th at 649-50.

At step two of *Bruen* analysis, the Third and Sixth Circuits have taken similar approaches. The Third Circuit rejected the government's argument that "status-based restrictions" imposed by Founding-era governments to "disarm[] groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks" justified stripping Range of his Second Amendment right to possess a firearm simply because he had a prior conviction for food stamp fraud. *Range*, 124 F.4th at 222-23, 229. That

these groups were deemed dangerous in the Founding era, did not justify a categorical rule that all felons may be disarmed because all felons are dangerous in that they can be expected to misuse firearms. *Id*. at 230. Such a broad principle operates "'at such a high level of generality that it waters down the right.'" *Id*., quoting *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring).

Range also rejected the argument that the statute's permanent dispossession of felons could be justified by the historical use of the death penalty to punish many felony offenses. *Id*. That some nonviolent crimes were punished with death in the Founding era "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 231 (emphasis in the original).

And finally, *Range* concluded that historical forfeiture laws that took felons' weapons or estates were not analogous to § 922(g)(1), because those laws required forfeiture of the specific firearm used to commit an offense. *Id*. At the Founding, a felon could acquire firearms when he finished his prison term. *Id*. More specifically, Range's crime did not involve a firearm, "so there was no criminal instrument to forfeit." *Id*.

The Sixth Circuit in *Williams* held that "our nation's history and tradition demonstrate that Congress may disarm individuals they believe are dangerous," but each time "governments labeled whole classes as presumptively dangerous," "individuals could demonstrate that their particular possession of a weapon posed no

danger to peace." 113 F.4th at 657. The court recognized that as-applied challenges are permitted. Like "the justices of the peace of old," judges can make "fact-specific" dangerousness determinations "depending on the unique circumstances of the individual defendant." *Id.* at 660-61. The court put the burden on the individual to prove he did not belong in the class prohibited from possessing firearms. *Id.* at 661. "The 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 they don't fit the class-wide generalization." *Id.*

The Fifth Circuit takes a different approach keeping the burden of proof squarely on the government. *Diaz*, 116 F.4th at 467. To survive an as-applied challenge to § 922(g)(1), "the government must demonstrate that the Nation has a longstanding tradition of disarming someone with a criminal history analogous to" the challenger. *Id.* Diaz had prior convictions for vehicle theft, evading arrest, and possessing a firearm as a felon. *Id.* The court concluded that horse theft was an analogue to vehicle theft and because those convicted of horse theft were often subject to the death penalty, § 922(g)(1)'s lesser punishment of permanent dispossession of firearms was justified. *Id.* at 469.

The Fifth Circuit parted company with the Third and Sixth Circuits when it declined to "embrace the view that courts should 'look beyond' a defendant's predicate conviction 'and assess whether the felon's history or characteristics make him likely to misuse firearms.'" *United States v. Kimble*, 142 F.4th 308, 318 (5th Cir. 2025). The relevant consideration is the defendant's prior felony convictions; not unproven

conduct charged contemporaneously with the § 922(g)(1) charge or prior conduct that did not result in a felony conviction. *Id.*

B. Other circuits hold that § 922(g)(1) may be constitutionally applied to all felons.

The Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have held that § 922(g)(1) is constitutional as applied to all felons. *Zherka v. Bondi*, 140 F.4th 68, 96 (2d Cir. 2025); *United States v. Hunt*, 123 F.4th 697, 700 (4th Cir. 2024); *Jackson*, 110 F.4th at 1125, 1129; *United States v. Duarte*, 137 F.4th 743, 761-62 (9th Cir. 2025) *(en banc)*; *Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025); *United States v. Dubois*, 139 F.4th 887, 894 (11th Cir. 2025).

In *Jackson* the Eighth Circuit held Congress can categorically exclude certain groups from Second Amendment protection, even if individuals within the group are not dangerous or violent, and those individuals cannot make as-applied constitutional challenges. 110 F.4th at 1127. Drawing on a variety of purported analogues, *Jackson* held that § 922(g)(1) is constitutional because the historical record demonstrates legislatures had the authority to categorically prohibit firearm possession by certain groups. *Jackson*, 110 F.4th at 1126-27. From the historical record, *Jackson* extrapolated two broad categories of people who may be disarmed—"those who deviated from legal norms" and those who "present[] an unacceptable risk of danger if armed." *Id.* at 1127. *Jackson* concluded that legislatures have the power to disqualify certain categories of people "to address a danger of misuse by those who deviated from legal norms, not merely to address a person's demonstrated propensity for violence." *Id.*

According to *Jackson*, this historical practice means there is "no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons." *Id*. In other words, no individual within a prohibited category may challenge the constitutionality of § 922(g)(1) as applied to them. *Id*. They can be stripped of their Second Amendment rights even if they are not violent or dangerous. *Id*.

The Eighth Circuit denied rehearing en banc, but four judges dissented from that decision. *United States v. Jackson*, 121 F.4th 656 (8th Cir. 2024). The dissent faulted the majority for depriving "tens of millions of Americans" of their Second Amendment right to keep and bear arms even if they posed no credible threat to the safety of others. *Id*. at 657. Worse yet, according to the dissent, the majority prohibited as-applied challenges to the constitutionality of § 922(g)(1), thus "insulating felon-dispossession laws from Second Amendment scrutiny of any kind" in "deference to Congress's blanket determination" that all felons present an unacceptable risk of danger if armed. *Id*. at 658, 660.

The Second and Ninth Circuits followed *Jackson's* lead, concluding that § 922(g)(1) is constitutional in all cases because Founding-era laws categorically disarmed groups viewed as dangerous and the statute's lifetime prohibition of firearm possession was justified because many felonies were punishable by death and estate forfeiture. *Zherka*, 140 F.4th at 80-91; *Duarte*, 137 F.4th at 755-761.

Zherka concluded that "the death penalty as punishment for felonies remained ubiquitous in America during the Founding era and until the nineteenth century."

140 F.4th at 82. The absence of historical laws prohibiting felons from possessing firearms "proves next to nothing," according to *Zherka*, because "the Founders had no occasion to consider whether the collateral consequences of a felony conviction should include disarmament since … the standard punishment for a felony was death and the forfeiture of all property." *Id.* "Accordingly, the lack of felon-in-possession laws at the time of the Founding is not probative of the Founder's perception of the scope of the Second Amendment right." *Id.*

Zherka concluded that Second Amendment precursors proposed in Pennsylvania, Massachusetts, and New Hampshire at their ratifying conventions reflected some Founders' belief that Congress could disarm convicted felons. *Id.* at 83-84. The Pennsylvania Dissent of the Minority proposal read: "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals." Bernard Schwartz, *The Bill of Rights: A Documentary History*, Vol. II, p. 665 (1971). At the Massachusetts convention Samuel Adams proposed an amendment providing that "the Constitution be never construed … to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." *Id.* at 681. New Hampshire proposed an amendment saying, "Congress shall never disarm any citizen, unless such are or have been in Actual Rebellion." *Id.* at 761.

These proposals indicate that historical analogues to felon-in-possession statutes were contemplated, but rejected, at the Founding, which undermines *Zherka*'s assertion that the death penalty was so "ubiquitous in America during the

Founding era and until the nineteenth century" that the Founders never contemplated the collateral consequences of felony convictions. *Zherka* explains this contradiction saying that efforts at penal reform "mobilized in states across the nation during the late 18th and 19th centuries" resulted in laws that imposed terms of imprisonment for crimes formerly punished by death. 140 F.4th at 83.

This suggests that the death penalty waned by the Founding and thus was not deeply rooted in our Nation's history. *Zherka* does not persuasively argue that at the Founding all felons were sentenced to death, those sentences were carried out, and that practice persisted. In the absence of historical support that the death penalty was deeply rooted in our Nations's history, the justification for § 922(g)(1)'s lifetime prohibition on firearm possession fails.

Although *Duarte* upheld the constitutionality of § 922(g)(1) on historical analysis like that in *Jackson*, the Ninth Circuit, like the Eighth Circuit in *Jackson*, was fractured. Three judges concurred in the judgment reasoning that plain error review, rather than the de novo review applied by the majority, doomed Duarte's as-applied challenge. *Id*. at 773-79 (VanDyke, J., concurring in the judgment and dissenting in part). If review was de novo, however, these judges would conclude "the majority is wrong on the merits of Duarte's Second Amendment claim." *Id*. at 780.

These judges would not have relied on *Heller*'s *dicta* that said firearm prohibitions on felons were presumptively lawful and nothing in *Heller* should cast doubt on longstanding prohibitions on the possession of firearms by felons. *Id*. at 784. And they rejected the argument that the greater punishments of death and estate

forfeiture for felons in 1791 justified § 922(g)(1)'s lesser restriction of permanent disarmament, because the death penalty was not the standard penalty for all convicted felons, and even for those crimes deemed capital, death sentences were not always carried out. *Id.* at 785, 787-88. Setting history aside, the argument fails because it does not explain the gun rights of felons who were not executed, discharged their prison terms, and returned to society. *Id.* at 790. And the theory falls apart because the government cannot strip felons of their other constitutional rights on the ground that "'[d]ead men do not speak, assemble, or require protection from unreasonable searches and seizures.'" *Id.*, quoting *United States v. Jackson*, 85 F.4th 468, 474 (8th Cir. 2023) (Stras J., dissent).

These judges agreed with the Fifth Circuit that "*Bruen* requires the government to proffer Founding-era felony analogues that are 'distinctly similar' to Duarte's underlying offenses and would have been punishable either with execution, with life in prison, or permanent disarmament." *Id.* at 791, citing *Bruen*, 597 U.S. at 26. And they rejected the argument that class-wide prohibitions on British Loyalists, Catholics, Native Americans, and Blacks supported categorical disarmament of felons because those groups were perceived as dangerous in a particular way—they might take up arms against the government. *Id.* at 793.

The Eleventh Circuit concluded that neither *Bruen* nor *Rahimi* undermined its earlier precedent, which upheld the constitutionality of § 922(g)(1) relying largely on *Heller*'s *dicta* about longstanding prohibitions on the possession of firearms by felons. *United States v. Dubois*, 139 F.4th 887, 893 (11th Cir. 2025). The Tenth

Circuit did the same in *Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025).

The Fourth Circuit also held that *Bruen* and *Rahimi* did not abrogate its circuit precedent that relied on *Heller*. *United States v. Hunt*, 123 F.4th 697, 703-05 (4th Cir. 2024). *Heller,* according to the Fourth Circuit, not only established that prohibitions on firearm possession by felons were longstanding and presumptively lawful, it excluded felons as a group from Second Amendment protection because they are not law-abiding, responsible citizens. *Id.* at 703. Alternatively, *Hunt* held that § 922(g)(1) survives Second Amendment scrutiny without a need for felony-by-felony litigation as found in *Jackson*. *Id*. at 705-08.

* * *

In conclusion, the circuits are deeply divided as to whether § 922(g)(1) is subject to as-applied challenges. Some circuits, like the Eighth and Ninth, are internally divided with individual judges on both sides of the argument emphatically certain that their colleagues are wrong. Although both sides rely in large part on the same history, they diverge in their interpretation of it. This division will not resolve itself. *Bruen* was decided nearly four years ago, and *Rahimi*'s "clarification" of *Bruen* is nearly two years old. The debate over the viability of as-applied challenges has had time to percolate through the circuits but no consensus has been reached. This Court should grant a writ of certiorari and resolve the split.

II. If § 922(g)(1) is not subject to as-applied challenges by individual felons, it is invalid on its face because it violates the Due Process Clause and is substantially overbroad.

Section 922(g)(1) has no exceptions; it is a blanket, lifetime prohibition on all felons with no procedural mechanism for restoration of the right to bear arms and, as interpreted in *Jackson* and other circuits, is not susceptible to an as-applied challenge. It prohibits possession of a firearm for all purposes—even self-defense or defense of others—and in all places, including an individual's home, vehicle, or person. The categorical application of the statute to all felons for life with no means of making an as-applied challenge or for seeking restoration of rights makes the statute unconstitutional in all its applications.

A. The denial of as-applied challenges to § 922(g)(1) violates the Due Process Clause.

If dangerousness is the touchstone for firearm dispossession, then, as a matter of due process, felons must be able to challenge whether they fall within the dangerous category before their possession of a firearm can result in criminal punishment under a statute that irrefutably presumes dangerousness based on status rather than individual circumstances. *See*, *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 544 (1942) (Stone, J., concurring) (law permitting sterilization of all habitual offenders without affording an individual the opportunity to contest whether criminal tendences were inheritable was unconstitutional); *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (irrebuttable presumption that unwed fathers were unfit to parent their children, and consequent denial of hearing, violated

due process); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (suspending driver's license of uninsured motorist involved in an accident without hearing on issue of fault or liability violated due process).

In *Stanley v. Illinois*, this Court examined an Illinois statute that made children of unwed mothers wards of the state upon the death of their mother. 405 U.S. at 646. The term "parent" was statutorily defined as the father or mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, or an adoptive parent, but it did not include unwed fathers. *Id.* at 650. In what was called a "dependency proceeding," once the state showed the father was not married to the mother, the unwed father was deemed unfit, and the state was not required to prove unfitness in fact. *Id.*

The private interest of an unwed father in raising his children undeniably warranted deference, while the state, too, had a compelling interest in protecting the welfare of children. *Id.* at 651-52. The Court said it was not asked to decide whether the state had a legitimate interest but "to determine whether the means used to achieve these ends are constitutionally defensible." *Id.* at 652. The state could not achieve its goal without holding a hearing to determine whether the father was unfit, because separating children from a fit parent served no purpose and undermined the state's goal. *Id.* at 652-53. The Court found such a scheme "repugnant to the Due Process Clause" because it deprived a father of his children without reference to the very factor (fitness as a parent) that the state deemed fundamental to its statutory

scheme. *Id*. at 653. While it was possible that most unmarried fathers were not fit parents, the Court said, all unmarried fathers don't fall in that category. *Id*. at 654.

The same reasoning applies here. The government seeks to deprive all felons of their right to possess firearms on a presumption that all are dangerous even though not all felons fall into that category. Denying felons an opportunity to prove they are not dangerous via an as-applied challenge is, like the Illinois statute in *Stanley*, "repugnant to the Due Process Clause." It is not enough to say a felon was afforded due process at the time he was convicted at trial or by guilty plea because most individuals become felons with no jury determination or no admission that they are dangerous. Furthermore, a felon who was once dangerous may no longer be deemed dangerous years later.

B. The overbreadth doctrine should apply in the Second Amendment context.

Outside First Amendment litigation, the typical description of a facially unconstitutional statute is one that is not valid under any set of circumstances. *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024); *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Rahimi*, 602 U.S. at 693; *but see*, *Johnson v. United States*, 576 U.S. 591, 602 (2015) ("although statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp"). The overbreadth doctrine is an exception to that formulation, but it is generally understood to apply only in First Amendment cases. *Sabri v. United States*, 541 U.S. 600, 609-10 (2004). The overbreadth doctrine should be applied in

Second Amendment cases for several reasons.

1. The normal concerns with facial invalidation are not present here.

Overbreadth doctrine was "built into" the test for determining the scope of the Second Amendment adopted in *Bruen*. The requirement that a modern-day statute must be consistent with relevantly similar historical analogs, if applied correctly at a level of generality that does not water down the right, ensures that the modern-day statute does not sweep within its reach individuals who historically would not have been prohibited from firearm possession. Yet § 922(g)(1) casts its net broadly, capturing and subjecting nondangerous individuals to prosecution and harsh punishment.

Although facial challenges have been termed "disfavored," the reasons for disfavor have little bearing in the context of *Bruen* litigation. Section 922(g)(1) is not an untested statute where it remains to be seen how the federal government will implement it. *See*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) ("The State has had no opportunity to implement [the statute], and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions").

Declaring a statute unconstitutional on its face is said to "frustrate[] the intent of the elected representatives of the people." *Id.* at 451. But here, the question is whether Congress, by enacting § 922(g)(1), has subverted the right of the people to keep and bear arms as the scope of that right was defined by the people at the time

the Second Amendment was adopted. Finding the felon-in-possession statute unconstitutional on its face under *Bruen* would uphold the will of the people, not frustrate it, by permitting nondangerous people to exercise their right to bear arms.

Congress has no power to expand or contract the historical scope of the right enshrined in the Constitution. Yet Congress has steadily encroached on the Second Amendment since passing the Federal Firearms Act of 1938. What began as a prohibition on firearm possession by violent felons convicted of murder, rape, kidnapping, and burglary, has been extended to all those convicted of a crime punishable by more than one year of imprisonment. *Range*, 124 F.4th at 229. The typical need for judicial restraint in declaring a statute unconstitutional is not present here.

Curbing Congress's overreach is consistent with the Second Amendment. Right now, Congress has unreviewable power to manipulate the Second Amendment by affixing the "felony" label to any offense it wants. If § 922(g)(1) is not subject to as-applied challenges, as some circuits hold, and the statute cannot be invalidated on its face merely because it is constitutional in some applications, then Congress truly has unreviewable power to permanently disarm Americans for any offense it makes a felony. Application of the overbreadth doctrine would not usurp Congress' authority; it would honor the Framers' intent in adopting the Second Amendment.

2. The Second Amendment is not a subordinate right.

The overbreadth doctrine should extend to Second Amendment cases because there is no reason to treat the Second Amendment as a subordinate right when it

comes to an overly broad statute that reaches constitutionally protected conduct. Both the First and the Second Amendments guarantee fundamental rights to engage in primary conduct without government interference. U.S. Const., Amend. II ("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*") (emphasis added); U.S. Const., Amend. I ("Congress shall make no law … abridging the freedom of speech …").

Both rights are focused on empowering individuals to resist government oppression. And both rights are subject to a chilling effect if overly broad statutes force individuals engaging in constitutionally protected expression or conduct to risk prosecution and face onerous criminal penalties for exercising their rights under the First and Second Amendments. *See*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (Child Pornography Prevention Act, which proscribes speech which is neither obscene nor child pornography, carries severe penalties such that "few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law," demonstrating why the "Constitution gives significant protection from overbroad laws that chill speech").

3. This Court has applied the overbreadth doctrine to sustain facial challenges brought under constitutional provisions other than the First Amendment.

In *Aptheker v. Secretary of State*, this Court addressed a challenge to the Subversive Activities Control Act, which prohibited a member of a registered Communist organization from applying for or using a passport to travel. 378 U.S.

500, 501 (1964). The Court held that the statute "too broadly and indiscriminately restrict[ed] the right to travel and thereby abridge[d] the liberty guaranteed by the Fifth Amendment." *Id*. at 505. The Court acknowledged that Congress' "power to safeguard our Nation's security is obvious and unarguable," but found the statute unconstitutional on its face because it was not narrowly drawn and made it a crime to travel for wholly innocent purposes. *Id*. at 509, 511.

The Court said, "[i]n determining whether there has been an abridgement of the Fifth Amendment's guarantee of liberty, this Court must recognize the danger of punishing a member of a Communist organization 'for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.'" *Id*. at 511-12, quoting *Noto v. United States*, 367 U.S. 290, 299-300 (1961). The statute "render[ed] irrelevant the member's degree of activity in the organization and his commitment to its purpose," factors that would illuminate whether travel by the individual "would be attended by the type of activity which Congress sought to control." *Id*. at 510. The statute established an "irrebuttable presumption that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States." *Id*. at 511. The statute also applied to a member of a Communist organization regardless of "the security-sensitivity of the areas in which he wishes to travel." *Id*. at 512.

In other words, an individual's mere status, such as membership in a Communist organization, could not justify infringement of a constitutionally

guaranteed right when the individual may not share the characteristics that would purportedly make him a danger to the United States. The statute under consideration in *Aptheker* allowed an individual to be stripped of his Fifth Amendment right to liberty with no consideration given to contextual factors—degree of activity in the organization, his commitment to the organization's purpose, where he wanted to travel—that would shed light on whether he was truly dangerous or merely a member of a disfavored group.

The parallels between the statute analyzed in *Aptheker* and § 922(g)(1) are obvious. Both deny a constitutional right based on membership in a disfavored group whose members are presumed to be a danger even though many are not. Membership in the group is "the sole criterion for limiting the individual's freedom." *Id*. at 510. Section 922(g)(1) renders irrelevant all facts that would bear on the likelihood that an individual is truly dangerous. Under the statute, felon status creates an irrebuttable presumption that an individual is dangerous regardless of the individual's actual conduct.

In *Aptheker,* the Court was willing to declare the statute unconstitutional on its face because the "clarity and preciseness" of the statute made it impossible to "narrow its indiscriminately cast and overly broad scope without substantial rewriting." *Id*. at 515. This will be discussed more below.

4. Absent as-applied challenges, the felon-in-possession statute cannot be saved.

Because the felon-in-possession statute is unconstitutional in so many of its applications, the question is whether a limiting construction can be applied to render

it constitutional or must it be invalidated. Normally, if a statute is not substantially overbroad, the extent to which it is overbroad may be "cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Through the accretion of case-by-case analysis, courts are permitted to formulate limiting constructions of an overly broad or vague statute *if* the statute is "readily susceptible" to such a construction. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997).

Sometimes the text of an overly broad statute will permit a narrowing of its reach along an easily identifiable line between what is constitutional and what is not. *Id*. For example, a statutory provision prohibiting the transmission of "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent" could be construed to limit the statute's application to obscene material, which can be banned totally because it has no First Amendment protection, simply by excising the words "or indecent" whose inclusion made the provision unconstitutional because indecent material is protected speech. *Id*. at 883.

But the opposite is not true. An unconstitutional criminal statute cannot be saved by a judicial construction that "writes in specific criteria that its text does not contain." *Skilling v. United States*, 561 U.S. 358, 415-16 (2010) (Scalia, J. concurring in part), citing *United States v. Reese*, 92 U.S. 214, 219-221 (1876). A court cannot rewrite a law to conform it to constitutional requirements. *Reno*, 521 U.S. at 884-85.

In *United States v. Stevens*, 559 U.S. 460, 482 (2010), this Court analyzed a federal statute that criminalized depictions of animal cruelty and found it facially

invalid due to its substantial overbreadth. The statute criminalized the creation, sale, or possession of depictions of animal cruelty if done for commercial gain. *Id.* at 464-65. The definition of animal cruelty included any depiction of a living animal being wounded or killed. *Id.* An exception was made for depictions having "serious religious, political, scientific, educational, journalistic, historical or artistic value." *Id.* at 465. The Court concluded the statute was of "alarming breadth," with a substantial number of its applications involving no cruelty to animals. *Id.* at 474.

The government invited the Court to interpret the statute more narrowly, but the Court declined, as in *Aptheker*, finding the text to contain "little ambiguity." *Id.* The Court said it could not rewrite a law to conform it to constitutional requirements. *Id.* at 481. A court may impose a limiting construction on a statute only if the statute is readily susceptible to such a construction. *Id.* Rewriting a statute would be a "serious invasion of the legislative domain." *Id.* But that is what would be required to save § 922(g)(1) from unconstitutional overbreadth.

The felon-in-possession statute makes it 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 a firearm. To confine the scope of the statute to the historical tradition of firearm regulation identified in *Jackson*—the disarmament of those who "presented an unacceptable risk of danger if armed"—requires rewriting of the statute, not mere excision. As in *Stevens*, this Court should decline to rewrite the statute. The statute must be invalidated.

III. The Courts of Appeals are divided as to the effect *Kisor v. Wilkie* has on the validity of *Stinson v. United States*.

After the Eighth Circuit affirmed Mitchell's conviction and sentence, this Court granted certiorari in *Kendrick Jarrell Beaird v. United States*, No. 25-5343, where the question presented is: "Whether *Stinson v. United States* still accurately states the level of deference due to the Commentary of the Federal Sentencing Guidelines?" Mitchell raises the same question. This Court should hold this petition pending resolution of *Beaird*.

While the guidelines are only advisory, this Court has held that district courts must correctly calculate guideline ranges. *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 551 U.S. 338 (2007). Thus, it matters whether district courts should defer to commentary even if a guideline's text is not ambiguous. If courts are not required to defer to guideline commentary, as required by *Stinson v. United States*, but defer only when a guideline is genuinely ambiguous, as set forth in *Kisor v. Wilkie*, Mitchell's guideline range was incorrectly calculated.

A. Contrary to *Stinson v. United States*, *Kisor v. Wilkie* does not require a court to defer to guideline commentary unless guideline text is genuinely ambiguous.

In *Stinson v. United States*, this Court said the guidelines are the equivalent of legislative rules adopted by federal agencies. 508 U.S. 36, 45 (1993). Commentary should be "treated as an agency's interpretation of its own legislative rule." *Id*. at 44. "[P]rovided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is

plainly erroneous or inconsistent with the regulation.'" *Id.* at 45, quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

Stinson held that commentary excluding the felon-in-possession offense from the definition of "crime of violence" was binding even though it was not compelled by the guideline text. *Id.* at 47. The commentary was binding because it did not "run afoul of the Constitution or a federal statute, and it [was] not 'plainly erroneous or inconsistent' with § 4B1.2." *Id.*, quoting *Seminole Rock*, 325 U.S. at 414. *Stinson* said, "commentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice." *Id.* at 44.

Three decades later this Court granted certiorari to determine whether *Seminole Rock* and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled. *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019). The Court ultimately did not overrule those decisions, which call for a court's deference to an agency's interpretation of its own regulations, but along the way it rejected the standard set forth in *Stinson*. *Id.* at 574. *Kisor* acknowledged that the Court's precedent on *Auer* deference (also called *Seminole Rock* deference) sent "mixed messages." *Id.* And one of those mixed messages was the "most classic formulation of the test—whether an agency's construction is 'plainly erroneous or inconsistent with the regulation,'" which was "a caricature of the doctrine, in which deference is 'reflexive.'" *Id.* (citation omitted). That "classic formulation" is found in *Stinson*, which gives guideline commentary controlling weight unless it is plainly erroneous or inconsistent with guideline text. *Stinson*, 508 U.S. at 45.

Kisor agreed that this formulation provided grist for the petitioner's claim that *Auer* gave agencies "expansive, unreviewable authority," but it assured those in favor of *Auer*'s demise that deference was not reflexive. 588 U.S. at 574. Deference, the Court said, was only appropriate if a "regulation is genuinely ambiguous." *Id*. "If uncertainty does not exist, there is no plausible reason for deference." *Id*. at 574-75. To drive the point home, *Kisor* repeated the need for genuine ambiguity three more times in as many paragraphs. *Id*. at 575.

B. The Courts of Appeals have divided on *Kisor*'s effect on *Stinson*.

In the context of federal sentencing, many circuits have recognized that *Kisor* permits a court to defer to commentary only if guideline text is genuinely ambiguous. *See*, *United States v. Henderson*, 64 F.4th 111, 119 (3d Cir. 2023) ("the Supreme Court overruled *Stinson* in *Kisor v. Wilkie*, revising the weight courts should afford agency interpretations"); *United States v. Riccardi*, 989 F.3d 476, 479 (6th Cir. 2021) ("guidelines commentary may only interpret, not add to, the guidelines themselves"); *United States v. Castillo*, 69 F.4th 648, 655 (9th Cir. 2023) ("the more demanding deference standard articulated in *Kisor* applies to the Guidelines' commentary"); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (because *Stinson* relied on the "classic formulation" of *Auer* deference that *Kisor* clarified, *Kisor* applies to the guidelines). And one circuit pre-*Kisor* already held that commentary exceeds its authority under *Stinson* when it adds to an already clear textual definition in a guideline. *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018).

Other circuits continue to follow *Stinson*. *United States v. Moses*, 23 F.4th 347, 352 (4th Cir. 2022) ("even though the two cases addressed analogous circumstances, *Stinson* nonetheless continues to apply when courts are addressing Guidelines commentary, while *Kisor* applies when courts are addressing executive agency determinations of legislative rules"); *United States v. Vargas*, 74 F.4th 673, 681 (5th Cir. 2023) (*Kisor* did not modify *Stinson* and "the Sentencing Commission and administrative agencies are different animals"); *United States v. White*, 97 F.4th 532, 539 (7th Cir. 2024) (recognizing the "entrenched" circuit split and declining to "change positions" because *Kisor* said nothing about altering *Stinson*); *United States v. Rivera*, 76 F.4th 1085, 1089-91 (8th Cir. 2023) (discussing the circuit split but concluding the panel was bound by its precedent following *Stinson*); *United States v. Maloid*, 71 F.4th 795, 807 (10th Cir. 2023) ("we cannot say that *Kisor* meant for its new standard—crafted entirely in the context of executive agencies—to reach the [Sentencing] Commission").

Whether *Kisor* modifies or abrogates *Stinson* is a question warranting review by this Court. The split is entrenched and unlikely to resolve itself. And the issue is recurring because in the current Guidelines Manual, commentary often interprets guidelines in ways not apparent from the guideline text. *See*, U.S.S.G. § 2B1.1, cmt. n. 4(E)(i) (loss includes no less than $500 per access device used in the offense); U.S.S.G. § 2B1.1, cmt.n. 4(C)(ii)(I) (theft from certain mail containers considered to have involved at least ten victims); U.S.S.G. § 2B3.1, n. 2 (term "dangerous weapons" includes objects that closely resemble an instrument capable of inflicting death or

serious bodily injury and objects used in the manner creating the impression that the object was capable of inflicting death or serious bodily injury); U.S.S.G. § 2K2.1, cmt. n. 10 (excluding certain convictions from the definition of "felony convictions"); U.S.S.G. 2K2.1, cmt. n. 2 (defining large capacity magazine as one that could accept more than 15 rounds of ammunition).

C. The outcome of *Beaird* could determine whether Mitchell's guideline range was incorrectly calculated.

Mitchell's guideline calculation was premised on a base offense level of 24 because Mitchell purportedly had a prior felony conviction for a controlled substance offense and a prior felony conviction for a crime of violence—attempted robbery in the second degree (PSR at 5-6). Mitchell objected to the base offense level, arguing that his conviction for attempted robbery was not a crime of violence under the force clause or the enumerated offense clause of U.S.S.G. § 4B1.2(a) (2021) (PSR 26-28). Under the 2021 Guidelines Manual, if attempted robbery was not a crime of violence, the base offense level would have been 20 under U.S.S.G. § 2K2.1(a)(4)(A).

The PSR used the 2024 Guidelines Manual to determine Mitchell's offense level because that was the manual in effect on the date Mitchell was sentenced (PSR at 5). Normally, this would be correct. U.S.S.G. § 1B1.11(a). But in this case using the manual in effect at sentencing would violate the *ex post facto* clause of the Constitution, and the manual in effect when the offense of conviction was committed should be used instead. U.S.S.G. § 1B1.11(b)(1); *see*, *Peugh v. United States*, 569 U.S. 530, 541 (2013) (*ex post facto* clause is violated when a defendant is sentenced under a guideline promulgated after he committed the offense, and the new version provides

a higher guideline range than the version in place at the time of the offense). At the time of Mitchell's felon-in-possession offense on February 12, 2023, the 2021 Guidelines Manual was in effect (PSR at 3).

Under the 2024 Guidelines Manual, attempted robbery is a crime of violence under the enumerated offenses clause of U.S.S.G. § 4B1.2(a)(2), because robbery is an enumerated offense and inchoate crimes, including attempted offenses, are crimes of violence under the guideline text. U.S.S.G. § 4B1.2(d) (2024). Under the 2021 Guidelines Manual, robbery was an enumerated offense, but only the commentary, not the guideline itself, made inchoate offenses crimes of violence. The guideline text unambiguously said only robbery, not attempted robbery, was a crime of violence.

Mitchell committed attempted robbery in the second degree in 2001 in Missouri (PSR at 11). The statute in effect then provided, "[a] person commits the crime of robbery in the second degree when he forcibly steals property." V.A.M.S. § 569.030 (2001). Missouri's attempt statute provided, "[a] person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense. A 'substantial step' is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." V.A.M.S. § 564.011.1 (2001).

Mitchell's prior Missouri conviction for attempted second-degree robbery is not a crime of violence under the force clause of § 4B1.2(a), because the offense does not have as an element the use, attempted use, or threatened use of physical force against the person of another. *See*, *United States v. Taylor*, 596 U.S. 845, 851 (2022)

(attempted Hobbs Act robbery is not a crime of violence). Missouri attempted second-degree robbery is not distinguishable from the attempted Hobbs Act robbery analyzed in *Taylor*, and *Taylor* is controlling.

Under Missouri law, an overt act towards the commission of the crime is not required. *State v. Young*, 139 S.W.3d 194, 198 (Mo. App. 2004). When Missouri enacted § 564.011, it "substituted proof of a 'substantial step' for the common law proof of an overt act in perpetration of the crime." *Id.*, *citing State v. Withrow*, 8 S.W.3d 75, 78-79 (Mo. *banc* 1999). To satisfy the "substantial step" element of an attempted offense, there is no need for an overt act beyond mere preparation. *Id.* An attempted assault in Missouri does not require a use, threatened use, or attempted use of force. *See*, *State v. Lammers*, 479 S.W.3d 624, 632-33 (Mo. *banc* 2016) (defendant who planned a mass shooting at a Walmart was guilty of attempted first-degree assault because he purchased rifles and practiced shooting them, which was a substantial step corroborative of the firmness of is purpose).

Thus, Missouri attempted robbery would not necessarily require the use, threatened use, or attempted use of force if a person intended to forcibly steal from another and purchased a gun to do so. Merely purchasing a gun, even if it was never used to communicate a threat or otherwise, would be a substantial step corroborative of the person's purpose and would justify conviction, just as it was in *Lammers*.

If attempted robbery is not a crime of violence the guideline range calculated by the district court, 84 to 105 months' imprisonment, would be reduced to 57 to 71 months' imprisonment. The base offense level would be 20, under U.S.S.G. §

2K2.1(a)(4)(A) (2021), because Mitchell would have one prior controlled substance offense and no prior crime of violence (PSR at 5-6). After a two-point reduction for acceptance of responsibility, application of criminal history category VI would result in a guideline range of 57 to 71 months.

The failure to calculate the correct guideline range is procedural error. *Rosales-Mireles v. United States*, 585 U.S. 129, 134 (2018). In most cases in which a defendant shows a district court applied an incorrect, higher guideline range, the defendant will have established a reasonable probability of a different outcome. *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). Because Mitchell's 84-month sentence was premised on an incorrect guideline range, this Court should remand Mitchell's case to the Eighth Circuit.

CONCLUSION

The Court should grant Mitchell's petition.

Respectfully submitted,

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