

No. 26-270

In the Supreme Court of the United States

JOSEPH FREDERICK JOHNSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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October 1, 2026

QUESTION PRESENTED

Whether an individual whose sole predicate felony is a non-violent offense may bring an as-applied Second Amendment challenge to § 922(g)(1)'s permanent dispossession of the right to keep and bear arms.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT THAT CANNOT BE DENIED BASED ON FELONY STATUS ALONE.	4
A. Felons remain among “the people” protected by the Second Amendment.	4
B. Status- and virtue-based exclusions apply only to civic rights.	6
II. WHY § 922(g)(1) DISARMS NONVIOLENT FELONS DOES NOT COMPORT WITH HISTORICAL ANALOGUES.	8
A. Historical firearm laws disarmed only the dangerous.	9
B. Modern felony offenses are much broader than Founding-era felonies.	11
III. HOW § 922(g)(1) DISARMS NONVIOLENT FELONS DOES NOT COMPORT WITH HISTORICAL ANALOGUES.	14
A. Historical laws required a judicial finding of dangerousness.	14

B. Historical disarmament was only temporary.....	16
CONCLUSION	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Carpenter v. United States</i> , 585 U.S. 296 (2018)	6
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	6
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	2, 5
<i>Folajtar v. Att’y Gen.</i> , 980 F.3d 897 (3d Cir. 2020)	13
<i>Kanter v. Barr</i> , 919 F.3d 437 (7th Cir. 2019). 5, 6, 7, 8, 9, 10, 11, 12, 17	
<i>Konigsberg v. State Bar of Cal.</i> , 366 U.S. 36, (1961)	8
<i>Lange v. California</i> , 594 U.S. 295 (2021)	12
<i>McDonald v. Chicago</i> , 561 U.S. 742 (2010)	8
<i>N.Y. State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)	2, 5, 6, 8, 9, 12, 14
<i>Range v. Att’y Gen.</i> , 124 F.4th 218 (3d Cir. 2024)	12, 16
<i>Smith v. United States</i> , 508 U.S. 223 (1993)	11
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1985)	12
<i>United States v. Hemani</i> , 146 S. Ct. 1677 (2026)	2, 3, 4, 5, 6, 10, 11, 13, 15, 17
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024) ..	6, 9, 13
<i>Voisine v. United States</i> , 579 U.S. 686 (2016)	13

Statutes

18 U.S.C. § 2332a.....	13
18 U.S.C. § 922(g)(1)	15
18 U.S.C. § 922(g)(3)	15
18 U.S.C. § 922(g)(8)	15, 16
49 U.S.C. § 46502.....	13

Other Authorities

Saul Cornell, <i>A New Paradigm for the Second Amendment</i> , 22 LAW & HIST. REV. 161 (2004)	6
--	---

Constitutional Provisions

U.S. CONST. amend. II	4
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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

This case interests *amicus* because the right to keep and bear arms for self-defense is fundamental, and an individual does not forfeit this right simply because of his status as a felon.

¹ Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Section 922(g)(1) strips the right to keep and bear arms from anyone convicted of a felony—for life—regardless of the offense. It does so on the strength of the felony label alone.

Just last term, in *United States v. Hemani*, 146 S. Ct. 1677, 1693 (2026), this Court refused to let the government disarm a class of people simply because of their designation as drug users. Yet six circuits continue to hold that felony status alone justifies lifetime disarmament, foreclosing as-applied challenges entirely. Pet. Br. 8. Mr. Johnson’s case shows what that rule means in practice. His only felony—a 2015 conviction for cultivating marijuana—occurred eight years before, and a state away from, his firearm charge, and nothing connected the two. *Id.* at 4. His sentence for that offense shows how minor it was: he received probation, not prison, and the probation even ended early. *Id.* Regardless, Mr. Johnson must now endure lifetime disarmament and a subsequent criminal conviction—not because he is dangerous, but because of his status as a felon.

This is the case even though Mr. Johnson remains part of “the people” protected by the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court settled that the right to keep and bear arms is an individual right, not a civic right. Felons remain within the right’s plain text, and the government may disarm them only in a manner consistent with the nation’s historical tradition of firearm regulation. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022).

Virtue-based exclusions are incompatible with that tradition. They were permissible only for civic rights like voting and jury service, not for individual rights like those protected by the Second Amendment. Founding-era laws disarmed people because they were dangerous, not because of virtue-based status. And this Court in *Hemani* refused to let the government substitute membership in a statutory category for a judgment about dangerousness. 146 S. Ct. at 1693. Moreover, the felony label once reserved for the gravest crimes now reaches a vast range of conduct with no connection to violence, and legislatures can expand it at will. Treating that label as a proxy for danger would let lawmakers shrink the Second Amendment's guarantee simply by writing new felonies, a power to which no other enumerated right is subject.

Even if the government could supply a historical reason for disarming nonviolent felons, § 922(g)(1) would still fail because of *how* it disarms them. Historically, disarmament followed a judicial finding that the person was dangerous, and it was temporary. A felony conviction provides process, but on the wrong question. The mere fact of a felony conviction establishes nothing about whether a person poses a threat. Regardless, § 922(g)(1) imposes its lifelong prohibition without a finding of danger.

The government bears the burden of proving that § 922(g)(1)'s application is consistent with history and tradition. In cases like this one, it cannot carry that burden, and the rule applied below never even makes it try. Mr. Johnson and other nonviolent felons like him should not be consigned to lifetime disarmament simply because courts excused the government from a

burden it could never have met. This Court should grant the petition and reverse the decision below.

ARGUMENT

I. THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT THAT CANNOT BE DENIED BASED ON FELONY STATUS ALONE.

In *Hemani*, this Court refused to let the government disarm a class of people simply by declaring its members dangerous. 146 S. Ct. at 1693. Section 922(g)(1) reaches even further than the law in that case: it treats a felony conviction, by itself, as enough to remove a person from “the people” whose right the Second Amendment secures. Neither text nor history supports that result. The Second Amendment guarantees an individual right. It uses the same language as the First and Fourth Amendments, and felons remain among “the people” that all three protect. To the extent the government argues that felons can be disarmed because of a historical tradition of requiring virtue as a prerequisite to exercising rights, that practice reached only civic rights tied to virtue, such as voting and jury service, never individual rights like the right to keep and bear arms. Felony status—just like the unlawful-user status at issue in *Hemani*—cannot by itself strip a person of that right.

A. Felons remain among “the people” protected by the Second Amendment.

The Second Amendment secures “*the right of the people* to keep and bear Arms.” U.S. CONST. amend. II (emphasis added). The phrase “right of the people” also appears in the First and Fourth Amendments, and the “Ninth Amendment uses very similar terminology.” *Heller*, 554 U.S. at 579. Each of these provisions

“unambiguously refers to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.” *Id.* at 579–80. This Court has thus adopted “a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.” *Id.* at 581.

“The people” does not only mean some people. With regard to every other provision of the Constitution where it appears, that term “unambiguously refers to all members of the political community, not an unspecified subset.” *Id.* at 580. Felons are not categorically excluded from “the people” protected by the First and Fourth Amendments. *See Kanter v. Barr*, 919 F.3d 437, 461–62 (7th Cir. 2019) (Barrett, J., dissenting) (comparing First Amendment); *cf. Hemani*, 146 S. Ct. at 1693 (rejecting disarmament based on status as a marijuana user alone). The Second Amendment’s identical text carries the same meaning, and felons remain among “the people” whose right to keep and bear arms it secures. *See Heller*, 554 U.S. at 580–81.

Because the Second Amendment, “like the First and Fourth Amendments, codified a pre-existing right,” history determines the limits the government may impose upon its exercise. *Id.* at 592. This Court has held that only history and tradition can authorize exceptions to the Second Amendment. *Bruen*, 597 U.S. at 24. That approach “accords with how we protect other constitutional rights,” like freedom of speech. *Id.* When the government argues that expressive conduct falls outside the First Amendment, it “must generally point to *historical* evidence about the reach of the First Amendment’s protection.” *Id.* at 24–25. The Fourth Amendment works the same way; its extent “is

informed by historical understandings ‘of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted.’” *Carpenter v. United States*, 585 U.S. 296, 305 (2018) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

It follows that the government cannot remove felons from the Second Amendment’s protections by mere legislative say-so. They are part of “the people” protected by the Second Amendment’s plain text and can be disarmed only insofar as the Anglo-American legal tradition historically allowed. *See Bruen*, 597 U.S. at 30–31; *United States v. Rahimi*, 602 U.S. 680, 701–02 (2024); *Hemani*, 146 S. Ct. at 1693–94.

B. Status- and virtue-based exclusions apply only to civic rights.

Neither can the government categorically disarm felons by recasting the right to keep and bear arms as a civic right conditioned on virtue. Before *Heller*, debate raged over whether the Second Amendment conferred an individual right or a civic right that applied only to the collective via militia service. *Heller*, 554 U.S. at 577. But *Heller* resolved that dispute, holding that the Amendment “conferred an individual right to keep and bear arms.” *Id.* at 595.

Civic rights, unlike individual rights, have historically been subject to status-based restrictions. Civic rights “require citizens to act in a collective manner for distinctly public purposes.” *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting) (quoting Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161, 165 (2004)). Such rights are tied to the “collective enterprise of self-governance” rather than exercised by individuals “solely for their own sake.” *Id.* For

that reason, civic rights were historically reserved for “virtuous citizens,” and so virtue-based exclusions barred felons from exercising “the right to vote and serve on juries.” *Id.*

Felon disarmament cannot be defended on this basis. *Id.* at 451, 462. The right to keep and bear arms is exercised “for the benefit of the individual (like free speech or free exercise),” not for exclusively public purposes. *Id.* at 463. Nothing suggests “that virtue exclusions ever applied to individual, as opposed to civic, rights.” *Id.* “And if virtue exclusions don’t apply to individual rights, then they don’t apply to the Second Amendment.” *Id.*

History bears out this distinction. Historical laws excluding felons from civic rights did so expressly. *Id.* State constitutions and statutes explicitly denied convicted felons the right to vote or sit on a jury. *Id.* No comparable restrictions existed on a felon’s right to bear arms. *Id.* at 463–64. That silence, together with the Second Amendment’s place in the Bill of Rights, confirms that its “limits are not defined by a general felon ban tied to a lack of virtue or good character.” *Id.* at 464.

This Court drew the same line between individual and civic rights in *United States v. Rahimi* by declining to revive the virtue theory under a new name. In upholding temporary disarmament based on a domestic restraining order under § 922(g)(8), this Court rejected the government’s contention that a person may be disarmed simply because he is not “responsible.” *Rahimi*, 602 U.S. at 701. As the Court explained, “[r]esponsible’ is a vague term,” and such a line does not “derive from our case law.” *Id.* Although *Heller* and *Bruen* described “responsible” citizens as undoubtedly

protected by the Second Amendment, those decisions “said nothing about the status of citizens who were not ‘responsible.’” *Id.* at 702.

Legislatures may disqualify citizens from voting or jury service on status or virtue grounds, but they may not strip anyone of an individual right on that basis. *See Kanter*, 919 F.3d at 441, 464 (Barrett, J., dissenting). The Second Amendment is no exception. It is not “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *McDonald v. Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion). It is not subject to a virtue test.

The government may still restrict a rights-holder’s access to arms, but only by showing that the restriction is consistent with the nation’s historical tradition of firearm regulation. *See Rahimi*, 602 U.S. at 692. Section 922(g)(1) fails that test.

II. WHY § 922(g)(1) DISARMS NONVIOLENT FELONS DOES NOT COMPORT WITH HISTORICAL ANALOGUES.

Because felons remain among “the people,” their keeping and bearing arms falls within the Second Amendment’s presumptive protection, and the government “must demonstrate” that permanently disarming them “is consistent with this Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 17. Only if the lifetime, categorical disarmament of felons is consistent with that tradition will “the Second Amendment’s ‘unqualified command’” yield. *Id.* (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).

To carry its burden, the government must show that the challenged law is “relevantly similar” to laws

that history and tradition permit. *Id.* at 29. “Why and how the regulation burdens the right are central to this inquiry.” *Rahimi*, 602 U.S. at 692. While the government need not identify a “historical twin,” *id.*; *Bruen*, 597 U.S. at 30, it must identify a well-established and representative historical analogue that burdened the right for a comparable reason and in a comparable way. *See Bruen* 597 U.S. at 29–30.

Section 922(g)(1) fails both parts of this inquiry. To begin with the “why” prong, first, historical firearm laws disarmed only those shown to be dangerous. Second, the felony label cannot substitute for a specific finding of dangerousness, because modern felonies reach far more conduct than Founding-era felonies did—much of it nondangerous.

A. Historical firearm laws disarmed only the dangerous.

Historical firearm laws disarmed people because they were dangerous, not because they were ascribed a certain status. *See Kanter*, 919 F.3d at 454, 458 (Barrett, J., dissenting). This Court’s recent decisions show the difference. In *Rahimi*, this Court upheld the temporary disarmament under § 922(g)(8) of people subject to a domestic violence restraining order. It found this law permissible because it concerned “individuals who pose a credible threat to the physical safety of others.” *Rahimi*, 602 U.S. at 702. This Court grounded its holding in two historical regimes that specifically addressed firearms violence: surety laws and going-armed laws. *Id.* at 694–98. It held that § 922(g)(8)’s “prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.” *Id.* at 698. Like the “why” behind

those laws, § 922(g)(8) “restricts gun use to mitigate demonstrated threats of physical violence.” *Id.* And like § 922(g)(8), the historical laws “involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon.” *Id.* at 698–99.

This Court’s decision in *Hemani* shows the other side of the line. There, the government defended § 922(g)(3)’s “unlawful user” provision by pointing to historical habitual-drunkard laws. *Hemani*, 146 S. Ct. at 1686. But those laws covered only people whose drinking left them unable to control themselves. *Id.* at 1689. As this Court explained, “historical laws targeted habitual drunkards not merely because they regularly used intoxicants, or even sometimes used them to excess,” but “because their drinking rendered them practically incapacitated and incapable of managing their affairs.” *Id.* By contrast, § 922(g)(3) automatically disarms anyone who regularly uses a controlled substance, and borrows its definition from “a statute animated by a variety of other concerns” unrelated to dangerousness. *Id.* at 1692. Treating every unlawful drug user as “categorically and unusually dangerous,” *id.* at 1693, without any further showing, would afford the government “broad power to designate any group as dangerous and thereby disqualify its members from having a gun,” *id.* (quoting *Kanter*, 919 F.3d at 465 (Barrett, J., dissenting)).

This is precisely what § 922(g)(1) does. It treats every member of a statutory class as dangerous by virtue of membership alone. Like the “unlawful user” label, the “felon” label reflects a legislative judgment about a class—not a showing that its members categorically, or any given member individually, are

dangerous. *See id.* at 1693. If the government cannot disarm every unlawful drug user without specific inquiry, it cannot do so for everyone convicted of a felony, whatever the nature of the offense.

Even Founding-era laws that disarmed entire groups without individualized findings rested on danger. Those laws targeted groups thought to threaten public safety, such as former Loyalists, whose continued possession of arms was seen as a danger to the young republic. *Kanter*, 919 F.3d at 457–58 (Barrett, J., dissenting). No comparable tradition supports disarming all nonviolent felons. *Id.* at 454.

Mr. Johnson’s case shows how far § 922(g)(1) strays from the “why” behind historical disarmament. His predicate felony, marijuana cultivation, makes no reference to firearms, and his § 922(g)(1) charge made no reference to drugs. *See* Pet. Br. 1, 4. The two were legally and factually unconnected, occurring eight years apart in different states. *Id.* at 4. Although this Court has recognized that drugs and guns can be “a dangerous combination,” the two never mixed here. *See Smith v. United States*, 508 U.S. 223, 240 (1993). Nor was Mr. Johnson ever accused of the conduct targeted by the laws this Court accepted as analogues in *Rahimi*, such as terrorizing the public or threatening another with a weapon. *See Rahimi*, 602 U.S. at 694–98. He has been disarmed for different reasons than were Americans at the Founding: His permanent disarmament rests on the felony label alone. And the modern category of crimes designated as felonies goes far beyond those that are dangerous.

B. Modern felony offenses are much broader than Founding-era felonies.

The number of felonies has increased exponentially since the Founding. When the Second Amendment was ratified, “[t]he felony category was a good deal narrower than now.” *Lange v. California*, 594 U.S. 295, 311 (2021). “Many modern felonies were ‘classified as misdemeanors’ at common law, with the felony label mostly reserved for crimes ‘punishable by death.’” *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 13–14 (1985)).

Today, felonies reach well beyond “crimes like murder, assault, and rape” to cover “an immense and diverse category” of conduct, from Mr. Johnson’s marijuana cultivation to “selling pigs without a license in Massachusetts.” *Kanter*, 919 F.3d at 466 (Barrett, J., dissenting). Yet § 922(g)(1) treats the murderer, Mr. Johnson, and the unlicensed pig salesman the same: They all lose their right to keep and bear arms.

The breadth of felonies that lead to disarmament has also expanded apace. The Federal Firearms Act of 1938—the first federal felon-disarmament law and § 922(g)(1)’s predecessor—reached only those convicted of a “crime of violence.” *Range v. Att’y Gen.*, 124 F.4th 218, 246 (3d Cir. 2024) (en banc) (Matey, J., concurring). Congress did not extend the prohibition to nonviolent felonies until 1961, nearly 170 years after the Second Amendment was ratified. *See id.* at 229. (Of course, these late developments lack constitutional relevance, as modern evidence “does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.” *See Bruen*, 597 U.S. at 66 n.28.)

The category of felonies has outgrown its historical core and now covers a huge range of nondangerous conduct. Attributing to felon disarmament an

originalist pedigree based on the treatment of dangerous people in early America reads the history “at such a high level of generality that it waters down the right.” *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring).

Further, because “the label ‘felony’ is too easy for legislatures and prosecutors to manipulate,” deferring to it “gives legislatures unfettered power over a fundamental right.” *Folajtar v. Att’y Gen.*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting). No other individual right works this way. A legislature could not strip every felon’s right to free exercise or free speech simply by expanding the criminal code. As Justice Thomas has observed, this Court “treat[s] no other constitutional right so cavalierly.” *Voisine v. United States*, 579 U.S. 686, 715 (2016) (Thomas, J., dissenting).

This is not to say that no modern felony can justify disarmament. Some modern felonies with no Founding-era counterpart—like aircraft piracy or the use of weapons of mass destruction—involve danger, which was the concern that historically justified disarmament. *See* 49 U.S.C. § 46502; 18 U.S.C. § 2332a.

By contrast, Mr. Johnson’s modern predicate crime—marijuana cultivation—is a felony, but it involves no comparable danger. The government is asking this Court to uphold his lifetime disarmament based on the same reasoning rejected in *Hemani*: membership in a statutory category, without more. *See Hemani*, 146 S. Ct. at 1693. Because no historically analogous “why” supports applying § 922(g)(1) to non-violent felons like Mr. Johnson, doing so violates the Second Amendment.

III. HOW § 922(g)(1) DISARMS NONVIOLENT FELONS DOES NOT COMPORT WITH HISTORICAL ANALOGUES.

Section 922(g)(1) also lacks historical analogues in “how” it disarms nonviolent felons. Even when a law disarms for a permissible reason, “it may not be compatible” with the Second Amendment “if it does so to an extent beyond what was done at the founding.” *Rahimi*, 602 U.S. at 692. The government must show not only that a modern law rests on a comparable justification, but also that it imposes “a comparable burden on the right of armed self-defense.” *Bruen*, 597 U.S. at 29. Section 922(g)(1) fails this test as well.

A. Historical laws required a judicial finding of dangerousness.

Historical laws did not permit disarmament simply because the government thought a person shouldn’t own a gun. Rather, they required a court to make a specific finding of dangerousness. For example, the surety and going-armed laws analyzed by this Court in *Rahimi* “involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon.” *Rahimi*, 602 U.S. at 699. Surety laws “often offered the accused significant procedural protections” and required a judge to hear a complaint alleging a threat of harm before imposing any restriction. *Id.* at 696–97. Going-armed laws operated through criminal prosecution. They punished only those convicted of having “menaced others with firearms.” *Id.* at 697.

Similarly, disarmament under § 922(g)(8) happens only after a court has found that a person “represents a credible threat to the physical safety” of an intimate

partner or child, 18 U.S.C. § 922(g)(8)(C)(i), and only after a hearing “of which such person received actual notice, and at which such person had an opportunity to participate,” *id.* § 922(g)(8)(A). That procedural parallel supported this Court’s conclusion in *Rahimi* that § 922(g)(8) is “relevantly similar” to its historical analogues. *See Rahimi*, 602 U.S. at 698–99.

Hemani reached the opposite result. There, this Court concluded that “the way habitual drunkard statutes worked in the past differs significantly from how § 922(g)(3)’s unlawful user provision works today.” 146 S. Ct. at 1691. Though the historical laws “usually provided some form of process before an individual lost any of his liberties, even temporarily,” the modern statute “automatically divests an individual of his constitutional right to bear arms the moment he becomes an unlawful user and until he ends his drug use—all without any pre-deprivation process.” *Id.* at 1691–92.

Section 922(g)(1) has the same defect. Like the regulation in *Hemani*—and unlike the one in *Rahimi*—it requires no court to consider whether the individual is dangerous before disarmament. *Compare* 18 U.S.C. § 922(g)(8), *with* 18 U.S.C. § 922(g)(1), *and* 18 U.S.C. § 922(g)(3).

Of course, individuals disarmed under § 922(g)(1) receive the process that accompanied their underlying conviction. But that process answers the wrong question. The historical laws this Court has examined supplied process as to the dangerousness or incapacity that justified disarmament, which was itself undertaken at or near the time of the finding. Even going-armed laws, which triggered disarmament upon conviction, fit that pattern because the offense itself was dangerous. *See Rahimi*, 602 U.S. at 697.

The same cannot be said for many modern felonies. Mr. Johnson’s 2015 conviction established that he cultivated marijuana—not whether he was dangerous then, let alone whether he still was when he possessed a firearm eight years later. The process behind “how” Mr. Johnson was disarmed lacks a historical analogue.

B. Historical disarmament was only temporary.

So does “how” Mr. Johnson has been disarmed in an instrumental sense. Historical laws disarmed people for a time; § 922(g)(1) disarms them for life. In *Range v. Attorney General*, the en banc Third Circuit held that a man’s conviction for making a false application for food stamps could not justify lifetime disarmament. *Range*, 124 F.4th at 232. The court concluded that Founding-era laws typically required only “forfeiture of the specific weapon used to commit a firearms related offense” and did not affect a person’s “right to keep arms *generally*.” *Id.* It noted that the government did not cite “a single statute or case that precludes a convict who has served his sentence from purchasing” a firearm. *Id.* The court was also unaware of any Founding-era law that prevented a felon from acquiring a firearm “after completing his sentence and reintegrating into society.” *Id.*

The disarmament scheme upheld by this Court in *Rahimi* aligns with this historical backdrop. The statute at issue in that case “only prohibits firearm possession so long as the defendant ‘is’ subject to a restraining order.” *Rahimi*, 602 U.S. at 699. When the order expires, so does the prohibition. *See* 18 U.S.C. § 922(g)(8). In Mr. Rahimi’s case, that was only “one to two years after his release from prison.” *Rahimi*, 602 U.S. at 699.

By contrast, a past felony conviction never expires with the passage of time. Section 922(g)(1)'s prohibition attaches to most people convicted of a crime designated as a felony for life.

Taken together, the lack of a judicial finding of dangerousness and the lifelong duration of disarmament set § 922(g)(1) apart from any historical disarmament law, and from any modern one upheld by this Court. How § 922(g)(1) burdens the rights of Mr. Johnson and other nonviolent felons is not "relevantly similar" to any historical limitation on the Second Amendment.

CONCLUSION

Affording the government "broad power to designate any group as dangerous and thereby disqualify its members from having a gun" would risk allowing it to 'quickly swallow' the Second Amendment." *Hemani*, 146 S. Ct. at 1693 (quoting *Kanter*, 919 F.3d at 465 (Barrett, J., dissenting)). Section 922(g)(1) confers precisely that power.

For these reasons and those given by Mr. Johnson, this Court should grant the petition and reverse the decision below.

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