No. _______

IN THE

Supreme Court of the United States

QUIVADAS QUADELL-LEE GAINES and
JOHN ABLE RUBINGH, SR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under New York State Rifle & Pistol Ass'n, Inc. v. *Bruen*, 597 U.S. 1 (2022), a firearm regulation survives the Second Amendment only if the government proves that it is "consistent with this Nation's historical tradition of firearm regulation." Whether a historical law counts toward that showing depends on whether it is "relevantly similar" to the modern one, and what counts as relevantly similar depends on the metric a court selects. *Bruen* supplied two metrics: how and why a regulation burdens the right. It did not supply a third, because it had no occasion to. New York enacted the law at issue there, and the historical laws to which it was compared were enacted by colonies, States, and territories. The identity of the regulating sovereign was constant across the comparison, and so it dropped out.

It does not drop out in a federal prosecution. Every case under 18 U.S.C. § 922(g) pits a federal statute against a historical record made by somebody else. There was no federal civilian firearms prohibition of any kind until the twentieth century, and no federal status-based possession ban until 1968.

The question presented is:

Whether the identity of the sovereign that enacted a historical firearm regulation is part of *Bruen*'s "relevantly similar" inquiry, so that a federal firearm prohibition must be justified by a federal historical tradition rather than by the regulatory history of the colonies, the States, and their political subdivisions.

PARTIES TO THE PROCEEDING

Petitioners are Quivadas Quadell-Lee Gaines and John Able Rubingh, Sr., who were the defendants-appellants in the proceedings below. Respondent is the United States of America.

STATEMENT UNDER RULE 12.4

This single petition seeks review of two judgments of the United States Court of Appeals for the Eighth Circuit. Both rest on the same question, presented to that court by the same counsel in the same terms, and the second rests expressly on the first. Because the two judgments are "sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions," a single petition covering both suffices. Sup. Ct. R. 12.4. Petitioners ask that the two judgments be reviewed together on this petition and that the cases be consolidated for briefing and argument.

RELATED PROCEEDINGS

United States District Court for the Southern District of Iowa:

United States v. Quivadas Quadell-Lee Gaines, No. 3:23-cr-00007-SHL-1 (judgment entered November 22, 2024)

United States v. John Able Rubingh, Sr., No. 3:25-cr-00056-SHL-1 (judgment entered March 12, 2026)

United States Court of Appeals for the Eighth Circuit:

United States v. Gaines, No. 24-3400 (judgment entered May 1, 2026; rehearing and rehearing en banc denied June 5, 2026)

United States v. Rubingh, No. 26-1572 (judgment entered August 17, 2026)

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JURISDICTION

In *Gaines*, the court of appeals entered judgment on May 1, 2026, and denied a timely petition for rehearing and rehearing en banc on June 5, 2026. The time to petition for certiorari therefore runs from June 5, 2026. Sup. Ct. R. 13.3.

In *Rubingh*, the court of appeals entered judgment on August 17, 2026.

This petition is timely as to both judgments. Sup. Ct. R. 13.1, 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Title 18, United States Code, Section 922(g) provides in relevant part:

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.

STATEMENT OF THE CASE

A. The framework, and the gap in it.

Bruen replaced means-end scrutiny with history. When the Second Amendment's plain text covers a person's conduct, the Constitution presumptively protects it, and the burden shifts to the government to prove that its regulation is "consistent with this Nation's historical tradition of firearm regulation." 597 U.S. at 17, 24. The government carries that burden by producing historical laws that are "relevantly similar" to the modern one. *Id.* at 28-29.

This Court was careful to say that "relevantly similar" is not self-defining. It depends on what is being measured. "[A] green truck and a green hat are relevantly similar if one's metric is 'things that are green.' They are not relevantly similar if the applicable metric is 'things you can wear.'" *Id.* at 29. *Bruen* then identified two metrics as central: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.*

Bruen also explained what a hole in the record means. "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 26. And "if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* at 26-27.

What *Bruen* did not address is who. It had no reason to. New York enacted the licensing regime at issue, and the historical enactments on both sides of the comparison were the work of colonies, States, and territories. The identity of the regulating sovereign was constant, and a constant does no work.

It is not a constant in a federal prosecution. There the regulating sovereign is the United States, and the historical record is not its own.

B. Petitioner Gaines.

Quivadas Gaines was indicted in the Southern District of Iowa for possessing a firearm after a felony conviction, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). He moved to dismiss the indictment on the ground that § 922(g)(1) cannot survive *Bruen* because the federal government has no historical tradition of regulating civilian firearm possession. The district court denied the motion. Gaines then pleaded guilty under an agreement preserving his right to appeal that denial, and he was sentenced to 115 months.

On appeal, Gaines framed the question in the terms this petition presents. His brief argued that "for second amendment analysis, 'relevantly similar' includes not just ‘what can legislatures legislate,’ which was the analysis in *Bruen*, but ‘which legislatures can legislate.’” It showed that the federal government enacted no civilian firearms prohibition for roughly the first century and a half of the republic; that when Congress finally entered the field in 1934 it did so by taxation rather than by prohibition; and that the historical survey in *United States v. Jackson*, 110 F.4th 1120 (8th Cir. 2024), on which the Eighth Circuit’s § 922(g)(1) jurisprudence rests, catalogued state and colonial enactments and identified no federal one.

The government did not contest that historical account. It did not identify a federal analogue from the founding era, the Reconstruction era, or any period before the twentieth century. It argued that circuit precedent foreclosed the claim.

The court of appeals affirmed in an unpublished per curiam opinion. Its entire treatment of the constitutional question was that “Gaines’s constitutional challenge is unavailing,” followed by a citation to *United States v. Cunningham*, 114 F.4th 671, 675 (8th Cir. 2024), and a see-also citation to *United States v. Rahimi*. App. 1a-2a. The opinion did not mention the argument Gaines made. It did not say the identity of the enacting sovereign is irrelevant. It did not say it is relevant. It did not address the metric at all.

Gaines petitioned for rehearing en banc, framing the question as one of exceptional importance and explaining that neither *Cunningham*, nor *Jackson*, nor *Rahimi* had engaged it. The court of appeals denied the petition on June 5, 2026, without a recorded dissent. App. 3a.

C. Petitioner Rubingh.

John Rubingh was indicted in the same district for possessing a firearm after a felony conviction, in violation of the same statutes. He moved to dismiss the indictment on the same ground, advancing the same argument through the same CJA appointed counsel. The district court denied the motion on November 17, 2025.

Rubingh then entered a conditional plea of guilty under Federal Rule of Criminal Procedure 11(a)(2), reserving the right to appeal the denial. His plea agreement provides that if he prevails on appeal he may withdraw the plea. The district court imposed a within-Guidelines sentence of 60 months.

Rubingh's opening brief presented the reserved question on the merits and told the court of appeals plainly that *Gaines* foreclosed relief there. Because a panel was bound by that precedent, and because a final judgment was the necessary predicate to review in this Court, Rubingh moved for summary affirmance under Eighth Circuit Rule 47A. His motion stated that he did not concede the merits, that the question was preserved, and that he intended to seek certiorari jointly with Gaines. The government did not oppose. On August 17, 2026, the court of appeals granted the motion and summarily affirmed. App. 4a. This joint petition for writ of certiorari follows.

D. The decisions below do not reach the question.

Two judgments now stand against petitioners. Neither contains a sentence about the question presented. The Eighth Circuit has never held that the sovereign which enacted a historical firearm law is irrelevant to the *Bruen* comparison. It has proceeded, as every court of appeals has proceeded, as though the point were settled. It is not settled. It has never been decided.

REASONS FOR GRANTING THE PETITION

I. The question is open at every level and controls every federal Second Amendment case.

A. This Court has never answered it.

Bruen did not present the question. The regulation under review was a state licensing statute, and the historical enactments the Court weighed were colonial, state, and territorial. Nothing in the opinion turns on a comparison between a federal law and a non-federal one, because there was no federal law in the case.

Rahimi did not present it either. *Rahimi* was a facial challenge to 18 U.S.C. § 922(g)(8), resolved on the narrow holding that "an individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." 602 U.S. 680, 702 (2024). The Court reasoned from surety and going-armed laws. No party asked whether those state traditions were available to Congress. The point was not briefed, not argued, and not mentioned. A question that lurks in a record without being raised or decided is not thereby resolved. *Webster v. Fall*, 266 U.S. 507, 511 (1925); *accord Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004).

Two Members of the Court did flag the family of problems to which this question belongs. Justice Barrett explained that "[c]ourts have struggled with this use of history in the wake of *Bruen*," that the central difficulty "is a level of generality problem," and that "[h]istorical regulations reveal a principle, not a mold." *Rahimi*, 602 U.S. at 739-740 (Barrett, J., concurring). She added a caution that bears directly here: "a court must be careful not to read a principle at such a high level of generality that it waters down the right." *Id.* at 740. And she reserved the rest: "Harder level-of-generality problems can await another day." *Id.* at 740. Her footnote states the underlying premise plainly. "In the Second Amendment context, particular gun regulations, even if from the ratification era, do not themselves have the status of constitutional law." *Id.* at 739 n.1. They are evidence. Whose evidence they are is the question here.

Justice Jackson wrote separately to report what the lower courts are saying. "The message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness." *Id.* at 742 (Jackson, J., concurring). She identified as a principal source of the trouble "the level of generality at which a court evaluates those sources," which this Court has not "adequately clarified," and she catalogued a series of open questions *Bruen* left behind, including "[t]o what historical era (or eras) should courts look to divine a historical tradition of gun regulation" and "[h]ow many analogues add up to a tradition." *Id.* at 745-746.

The question presented belongs on that list, and it belongs at the top of it. Before a court can ask how many analogues add up to a tradition, it has to know which analogues a sovereign can point to.

B. No court of appeals has answered it either.

The courts of appeals have fractured over how to evaluate § 922(g)(1) after *Bruen* and *Rahimi*. Some have held that pre-*Bruen* circuit precedent still controls, relying on this Court's reference in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008), to presumptively lawful prohibitions. *Jackson*, 110 F.4th at 1125-29; *Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025); *United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024). Others have treated their prior precedent as displaced and conducted fresh historical analyses, reaching results by different routes. *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024); *Zherka v. Bondi*, 140 F.4th 68 (2d Cir. 2025); *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024) (adopting an as-applied framework keyed to dangerousness). The Third Circuit, sitting en banc, held that the government had not carried its *Bruen* burden as to a particular nonviolent offender. *Range v. Att'y Gen.*, 124 F.4th 218, 232 (3d Cir. 2024) *(en banc)*. The Ninth Circuit, sitting en banc, rejected a similar as-applied claim after its own survey. *United States v. Duarte*, 137 F.4th 743 (9th Cir. 2025) *(en banc)*.

Those decisions disagree about method, about the weight of *Heller*'s dicta, about whether as-applied challenges are available, and about what the historical record shows. They agree, without discussion, on the premise this petition challenges. Every one of them asks whether the non-federal historical record is close enough to § 922(g)(1) in how and why it burdens the right. Not one asks whether that record is available to the federal government in the first place. The circuits are divided over the second step of an inquiry whose first step no court has examined.

The Second Circuit came nearest. In *Zherka*, that court acknowledged that the federal felon-in-possession prohibition is a comparatively recent creation, traceable to the Federal Firearms Act of 1938, expanded in 1961, and taking its present form in the Gun Control Act of 1968. 140 F.4th at 76-79. It treated the point as immaterial, on the understanding that "this Nation's historical tradition" takes in the practice of every American government. That is an answer to the question presented. But it is an assumed answer rather than a defended one, and so the question remains in the background waiting to be briefed fairly by both sides and answered.

Because every court of appeals has now rejected facial challenges to § 922(g)(1), the question presented is unlikely to reach this Court through the ordinary route of a square conflict. It will arrive, if it arrives at all, in a case like this one, where it was raised, briefed, and passed over; this Court cannot wait for a circuit split to arise where the courts of appeals are ignoring the question, leaving it only to lurk in the background assumed but unexamined.

C. The question recurs constantly.

Prosecutions under § 922(g) are among the most common in the federal system. Every one of them rests on a statute whose constitutionality, under *Bruen*, depends on a historical tradition that the federal government did not make. District courts resolve these cases weekly. The answer to the question presented governs each of them, in every circuit at once, including the circuits that have already divided on everything downstream of it.

II. The constitutional structure supplies an answer, and it is not the one the courts of appeals have assumed.

A. For most of the relevant period, the Second Amendment did not restrain the sovereigns that made the historical record.

The strongest objection to petitioners' position is that this Court has "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Bruen*, 597 U.S. at 37. If the right means the same thing against both, the argument runs, the evidence of its meaning must be common to both.

The premise is correct. The conclusion does not follow, and the reason is chronological.

For the first seventy-seven years of the Second Amendment's existence, it restrained the federal government and nobody else. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)("The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 139, the 'powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States."); *Presser v. Illinois*, 116 U.S. 252, 265

(1886)("the [Second] [A]mendment is a limitation only upon the power of Congress and the national government, and not upon that of the state"); *see McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010). The Kentucky legislature that banned concealed carry in 1813, the Georgia legislature that acted in 1837, the Alabama legislature that acted in 1839, the Massachusetts legislature that regulated powder storage in Boston in 1783 and again in 1792: not one of them was making a judgment about what the Second Amendment permits. The Second Amendment did not apply to them. Their enactments are evidence of what their own constitutions allowed, of how far the police power was understood to reach, and of what their constituents thought sound policy. They are not evidence that the Second Amendment left Congress free to do the same thing, because nobody who voted for them was answering that question.

The federal silence across the same period is a different kind of evidence, and it is exactly the kind *Bruen* told courts to weigh. Where a societal problem has persisted since the eighteenth century, "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence" of unconstitutionality, and where "earlier generations addressed the societal problem, but did so through materially different means," that too "could be evidence that a modern regulation is unconstitutional." 597 U.S. at 26-27.

Both conditions are met here, and the second is met in an unequivocally clear way. The problem of armed criminals is not new. Every generation of humans has addressed it and every foundation of government has been constructed to, at least in some degree, address it. In this country, we have addressed it through the governments that were constitutionally free to address it, state and local governments. When the one government bound by the Second Amendment declined for a century and a half to act, while every government not bound by it legislated freely and repeatedly, that contrast is not a gap in the historical record. It is the historical record, a record that makes it clear federal regulation is not our history and tradition.

B. The historical laws were exercises of a power the federal government does not possess.

Bruen's metrics ask what a historical law did to the citizen and for what reason. There is a prior question those metrics presuppose: by what authority did the sovereign act.

"The States have broad authority to enact legislation for the public good, what we have often called a 'police power.' The Federal Government, by contrast, has no such authority and 'can exercise only the powers granted to it.'" *Bond v. United States*, 572 U.S. 844, 854 (2014). The Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation," and "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *United States v. Lopez*, 514 U.S. 549, 566, 561 n.3 (1995).

The historical enactments the government offers in § 922(g) cases were exercises of that police power which the federal government does not, and never has, possessed. Colonial storage rules, antebellum concealed-carry bans, municipal check-your-guns ordinances, and turn-of-the-century licensing statutes were all the work of governments possessing general authority to legislate for the health, safety, and morals of their populations. Section 922(g)(1) is not. It is a criminal statute of a government of enumerated powers, resting on the Commerce Clause.

Two regulations that impose the same burden for the same stated reason, but that draw on different constitutional authority, are not obviously "relevantly similar," and no court has explained why they are. That is the green-truck problem in its most consequential form. If the metric is "restrictions on who may possess a gun," a Tennessee statute of 1838 and a federal statute of 1968 look alike. If the metric is "which sovereign may pass such restrictions," they do not resemble each other at all.

C. The asymmetry the government will invoke is not an anomaly. It is federalism.

The natural response is that petitioners' rule would produce an imbalance: a State could defend its laws with two centuries of accumulated practice, while Congress could defend its laws with almost nothing. Surely, the argument goes, a doctrine that leaves one sovereign with a rich evidentiary inheritance and another with an empty one has gone wrong somewhere.

It has not. That imbalance is the very design of our federalist system of government.

The States entered the Union holding a general power to legislate for the safety of their people, and they used it. Congress entered holding a list. The reason a State can point to a long tradition of firearms regulation and Congress cannot is that a State always had the authority to build one and Congress never did. An evidentiary rule that erases that difference does not correct a distortion; instead, it creates one. And it creates one our constitutional structure was built to prevent, by allowing the government of enumerated powers to draw on the accumulated practice of governments of general powers.

The point is not novel in this Court's work. It is why Congress cannot criminalize gun possession near a school as a matter of general concern, *Lopez*, 514 U.S. at 561, cannot create a federal civil remedy for gender-motivated violence, *Morrison*, 529 U.S. at 617-19, and cannot conscript state officers to run a federal firearms program, *Printz*, 521 U.S. at 918-22. In each of those cases the conduct regulated was one that States plainly could reach. That was never the answer. The question was always whether this government could reach it.

D. The tradition is not simply one of state and local regulation. It is a tradition of regulation by governments answerable to the people the regulation binds.

The argument so far has been about power: which government held the authority to legislate. There is a second point, bound up with the first, about accountability. While the first point establishes that the federal record is empty, the second point explains why.

Every historical enactment the government offers in these cases was the work of a body that answered directly and immediately to the people it bound. A town council that required visitors to check their guns sat a few blocks from the merchants and travelers the rule reached. A county board that adopted a permit scheme met in a courthouse an applicant could walk into. The sheriff who administered it stood for election among the people he disarmed and shopped at the same grocery store. A state legislature that banned concealed carry faced constituents at the next election who lived under the ban and could judge for themselves whether it was working. If the rule was wrong, the people who bore it could say so to the person who wrote it, and could replace him through that greatest of our nation's creations, local and accountable democracy.

None of that describes the federal government today, and none of it described the federal government in 1791.

The founding generation had a recent and particular experience of firearms regulation imposed by a government in which it had no voice. As this Court recounted in *Heller*, "what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists," and "[i]n the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas." 554 U.S. at 594. The right the Second Amendment codified was in substantial part a response to disarmament by a sovereign too distant to answer for it. It would be a strange reading of that Amendment to hold that enactments of the governments closest to the people, adopted under an authority nobody doubted they possessed, supply the constitutional warrant for prohibitions issued by a government of the kind whose conduct from afar provoked the Amendment in the first place.

Federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "increases opportunity for citizen involvement in democratic processes." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). It "secures to citizens the liberties that derive from the diffusion of sovereign power," and it does so because "state governments remain responsive to the local electorate's preferences" and "state officials remain accountable to the people." *New York v. United States*, 505 U.S. 144, 168, 181 (1992). The design depends on "two distinct and discernible lines of political accountability." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) citing The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.") Those cases are usually invoked for what the federal government may not do to the States. They rest on a premise that bears equally on what the federal government may borrow from them.

This is also the better explanation of the silence in the federal record. The federal government did not stay out of civilian firearms regulation for a century and a half because Congress was inattentive, or because the problem had not arisen, or because felons were being hanged instead. It stayed out because the subject belonged to the governments that lived with the consequences. The right to keep and bear arms is exercised in a particular place, under particular conditions, among particular neighbors. What a dense commercial block required was not what a county of ranchers required, and the historical record reflects exactly that, varying town by town and State by State. Those town by town and state by state concerns remain to this day; the needs of New York City are not the needs of Montana ranchers. The tradition of firearms regulation has taken many forms to cover those concerns. The one form the tradition never took is a single nationwide criminal prohibition administered from a distant capital.

E. The federal record is thin for reasons that prove the point.

Before 1934 Congress was not entirely absent from the subject of firearms, and petitioners do not claim otherwise. Its enactments took a revealing form. The Militia Act of 1792 ran the other way, requiring citizens to arm themselves. Ch. 33, § 1, 1 Stat. 271. Congress regulated the arms trade with Indian tribes under its Indian Commerce power. It taxed firearms under its taxing power. In the 1920s it excluded concealable firearms from the mails under its postal power. And it legislated for the territories, where it held a general legislative authority it has never held over a State, which is one reason *Bruen* itself gave territorial enactments reduced weight. 597 U.S. at 67-70.

Each of those is Congress acting inside an enumerated power, on commerce or the mails or revenue or a territory. Not one is a prohibition on a citizen inside a State possessing a firearm because of who he is.

When Congress finally reached firearms generally in 1934, it did so through taxation, and this Court sustained the statute as a revenue measure. *Sonzinsky v. United States*, 300 U.S. 506 (1937). The first federal status-based restriction came in 1938 and reached only persons convicted of a "crime of violence." Federal Firearms Act, ch. 850, 52 Stat. 1250. The statute under which petitioners stand convicted dates to 1968. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220.

The Eighth Circuit's premise that "legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms," *Jackson*, 110 F.4th at 1125, is accurate enough as to the legislatures that did so. But Congress was never among them.

F. The explanation the circuits have given for the silence does not reach this case.

Several courts have explained the absence of founding-era felon-disarmament laws by observing that felonies were then punishable by death and by forfeiture of the whole estate, so that a separate disarmament statute would have been superfluous. *See, e.g., Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019); *Diaz*, 116 F.4th at 467-69; *Zherka*, 140 F.4th at 78-80. Whatever the force of that explanation on its own terms, it answers a different question.

It explains why no legislature of any kind wrote a felon-disarmament statute in 1791. It does not explain why the federal government wrote no civilian firearms statute of any kind, about anyone, for a century and a half, while the States wrote them. Capital punishment did not stop Massachusetts from regulating powder storage in Boston, or Kentucky from banning concealed carry, or Tombstone from requiring visitors to check their guns. Those governments legislated about firearms constantly. Congress did not. The silence petitioners rely on is not the narrow silence about felons. It is the total silence of one particular sovereign across the entire relevant period, and it stands in front of a wall of activity by every other sovereign in the country.

III. The rule petitioners seek would narrow federal authority while leaving state and local authority entirely intact.

Petitioners do not ask this Court to hold that no American government may prohibit felons from possessing firearms. They ask it to hold that the government enacting such a prohibition must justify it with its own history.

The historical record the government marshals in § 922(g) cases is not a grudging or marginal record. It is enormous. Colonial assemblies regulated the sale of arms and the storage of powder. Massachusetts forbade keeping a loaded firearm in a Boston dwelling. Antebellum legislatures across the South and the Midwest banned concealed carry, and state supreme courts sustained those bans as consistent with the right to bear arms. *Nunn v. State*, 1 Ga. 243, 250-51 (1846); *State v. Reid*, 1 Ala. 612, 616-17 (1840). Cattle towns and mining camps required visitors to check their guns on arrival. Tombstone, Ariz., Ordinance No. 9, § 1 (Apr. 19, 1881). By the first decades of the twentieth century most States had adopted licensing or permitting regimes.

That tradition is real, dense, and old. It is also, without exception in the period *Bruen* treats as controlling, the work of colonies, States, counties, and towns.

Taking that record seriously as what it is, rather than as an undifferentiated national inheritance available to whichever government happens to want it, does not produce less regulation. It produces regulation by the governments that built the tradition, resting on the strongest *Bruen* footing available to anyone.

A municipal ordinance requiring firearms to be checked in a business district would stand on the authority of Tombstone and Dodge City and Wichita, which is to say on the authority of towns that did exactly that. A county permitting scheme would stand on the licensing statutes that swept the States in the early twentieth century. A state storage law would stand on Boston in 1783 and Massachusetts in 1792. In each case the modern law would be matched to a historical analogue enacted by the same kind of sovereign, exercising the same power, for the same reasons. That is the most any government can offer under *Bruen*'s method, and under petitioners' rule these governments can offer it.

But the federal government can offer nothing of its own. When it borrows the history of sovereigns holding plenary power to justify an exercise of its own enumerated powers, it inverts the design of federalism.

Consider two enactments. A town of four thousand people adopts an ordinance requiring anyone entering the business district to leave a handgun with the marshal. A century and a half ago, towns of about that size did exactly that, commonly enough that nobody thought it remarkable. Under the rule petitioners urge, the ordinance rests on firm ground, because the town is doing what towns have always done.

Next, Congress enacts the identical rule for every business district in the country. The text is the same. The burden on the citizen is the same. The stated justification is the same. Under the rule the courts of appeals have assumed, the federal statute is as secure as the ordinance, because the ordinance belongs to "this Nation's historical tradition" and the tradition belongs to everyone. Under the rule petitioners urge, the two are not alike, because the town is doing what towns have always done and Congress is doing what Congress has never done.

Whether the federal statute in that example is constitutional is a real question with a real answer. The courts of appeals have not given one. They have assumed there is no question.

The rule petitioners seek also does work that Members of this Court have said needs doing. It supplies a determinate first step for an inquiry Justice Jackson found the lower courts unable to run consistently, and it disciplines the level-of-generality problem Justice Barrett identified by fixing the one variable capable of being fixed. Reasonable judges will always differ about how similar two burdens are, or how many analogues make a tradition. Who enacted a statute is not a matter of degree. It is a fact, and it grounds future second amendment jurisprudence in such facts.

Finally, the rule would end a practice that deserves more attention than it has received. A substantial part of the status-based disarmament record on which courts now rely consists of laws whose purpose was to disarm people the enacting sovereign regarded as unfit to be armed on grounds no court would accept today. Colonial and state statutes disarmed Catholics, Native Americans, enslaved people, and free Black residents. After the Civil War, southern legislatures wrote firearms restrictions into the Black Codes. 1865 Miss. Laws 165. Congress's response was to affirm the right, declaring in the Freedmen's Bureau Act that "the constitutional right to bear arms" belonged to all citizens without regard to race. Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77; *see McDonald*, 561 U.S. at 771-73. Those state enactments are now invoked, at a level of generality high enough to strip them of their content, as proof that legislatures have always disarmed disfavored categories of people. They are offered in support of a federal felony. Whatever else may be said of that inheritance, it is a peculiar foundation for a federal criminal statute, and it looks solid only so long as the identity of the sovereign that laid it is treated as beside the point.

None of this asks the Court to decide how much firearms regulation is wise; that is a question upon which our federalist system of government directs the States to experiment. Lopez, 514 U.S. at 581 (Kennedy, J., concurring)("While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.") Petitioners only ask the Court to decide which government the Second Amendment's historical test is measuring, and to say so, so that the answer is a holding rather than an assumption.

IV. Both cases present the question cleanly, and they should be heard together.

The question was preserved at every stage in both cases, by pretrial motion to dismiss, by a plea that reserved it, and by briefing in the court of appeals. The historical account on which it rests is undisputed in both. In neither case has the government identified a founding-era or Reconstruction-era federal civilian firearms prohibition, because there is none to identify.

Gaines presents the question with a complete record of how the courts below handled it. He raised it by motion in the district court, briefed it on the merits in the court of appeals in the same terms presented here, met a government brief that answered with foreclosure rather than with history, received a panel opinion that did not engage it, and pressed it again in a petition for rehearing en banc that framed it as a question of exceptional importance. The Eighth Circuit denied that petition without a recorded dissent. If this Court wishes to satisfy itself that the question was fairly put to the court of appeals and deliberately left unanswered, the Gaines record supplies the answer. His appeal also raised a Sentencing Guidelines question that petitioners do not present here and that this Court would have no occasion to reach.

Rubingh presents the question standing alone. He raised it by motion to dismiss, and when the motion was denied he entered a conditional plea under Federal Rule of Criminal Procedure 11(a)(2) reserving it, with an express right to withdraw the plea if he prevails. The constitutional question is the only question in his case. The record is short, the government did not contest the history, and the consequence of a reversal is fixed by the plea agreement itself.

That Rubingh moved for summary affirmance does not diminish the judgment or his stake in it. He moved because a panel of the Eighth Circuit was bound by *Gaines* and because a final judgment was the only route to this Court, and said so in the motion itself. App. 5a. The Eighth Circuit granted the motion under its Rule 47A. The resulting judgment is a final decision of a United States court of appeals, adverse to Rubingh in every respect, and reviewable under 28 U.S.C. § 1254(1).

Neither case is the better vehicle. They are one question in two postures, and each supplies what the other does not. Gaines shows the question fully litigated and expressly declined below. Rubingh shows it isolated from every other issue, in a posture where the remedy is already spelled out. Together they give this Court two records from the same court of appeals, four months apart, on one question, with complementary procedural histories. If some feature of one record should prove unsuitable, the other stands on its own.

Consolidation is straightforward. Both judgments come from the same court of appeals. Both turn on the same question. The second rests expressly on the first, and the motion that produced it said so. Rule 12.4 provides that where two judgments from the same court "involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices." These questions do not merely relate. They are the same question, raised by the same counsel, in the same words.

CONCLUSION

Bruen made the metric of history decisive and then supplied only part of it. Courts have been told to ask how and why a historical law burdened the right to bear arms. They have not been told whether it matters who burdened it. In every prosecution under 18 U.S.C. § 922(g), that omission is silently answered in a way that allows a federal government of enumerated powers to steal the rich history of federalism and bend it to its own ends to regulate in spheres never enumerated to it.

The writ of certiorari should be granted, the two judgments should be reviewed together, and the cases should be consolidated for briefing and argument.

Respectfully submitted,

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