No. 26-5262

In the Supreme Court of the United States

JOSEPH CHARLES RIDDLE,

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

***AMICUS CURIAE* BRIEF OF THE OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE NORTHERN DISTRICT OF OKLAHOMA**

Julia L. O'Connell
Office of the Federal Public Defender
Northern District of Oklahoma

Jared T. Guemmer
Counsel of Record
Office of the Federal Public Defender
Northern District of Oklahoma
1 West 3rd Street
Suite 1225
Tulsa, Oklahoma 74103
(918) 581-7656
Jared_Guemmer@fd.org

Counsel for Amicus Curiae

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Interest of *Amicus Curiae*[1]

The Office of the Federal Public Defender for the Northern District of Oklahoma (FPD-NDOK) is a United States governmental entity under the Administrative Office of the United States Courts. It was created pursuant to the Criminal Justice Act of 1964 and the Criminal Justice Act Revision of 1984, 18 U.S.C. § 3006A, by the United States District Court for the Northern District of Oklahoma. FPD-NDOK is represents indigent criminal defendants charged with crimes in the United States District Court for the Northern District of Oklahoma. FPD-NDOK is within the statutory jurisdiction of the United States Court of Appeals for the Tenth Circuit, from which the decision below originates.

A list of cases in which FPD-NDOK is currently litigating the constitutionality of 18 U.S.C. § 922(g)(1), as applied to the defendant, includes:

- *United States v. Jackey Nunamaker*,
  SCOTUS No. 25-7571

- *United States v. Phillip Wallace Jr.*,
  10th Cir. No. 25-5074

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[1] No counsel for a party authored this Brief in whole or in part, and no person other than *Amicus* or its counsel made a monetary contribution to its preparation or submission. On August 26, 2026, all counsel of record were given timely notice of *Amicus's* intent to file this Brief.

- *United States v. Kyle Smith*, 10th Cir. No. 25-5081

- *United States v. D-Rayle Nelson* 10th Cir. No. 25-5086

- *United States v. Jason Ellett* 10th Cir. No. 25-5140

Due to the Tenth Circuit's current approach to resolving constitutional challenges to the application of 18 U.S.C. § 922(g)(1), FPD-NDOK's clients are left with no avenue for relief until this Court takes action.

As *Amicus Curiae*, FPD-NDOK believes this Court should grant the Petition for Writ of Certiorari and answer at least the first question presented: Whether defendants may make as-applied challenges to 18 U.S.C. § 922(g)(1) or if that statute is constitutional regardless of the nature of the prior offenses committed.

FPD-NDOK believes this Court should also grant the Petition on the second question presented and lay to rest the debate over who may possess firearms. Too many Americans have been sent to prison for exercising the rights granted to them by the Second Amendment. Simply sending the issue back to the circuits for further development would lead to new, different splits that would exacerbate the current problems: Some Americans would go to prison while others, with the same backgrounds, would have their rights protected.

Summary of the Argument

When it comes to the Second Amendment and 18 U.S.C. § 922(g)(1), the state of the law across the country is fractured in a manner that cannot be tolerated. The battle lines have been drawn, and the trenches have been dug. Both sides of the circuit split are unwilling to give an inch, and the reality facing American citizens is this: Depending on where they live, the Constitution means something different there than it does in other places.

In six circuits, the law is that all felons, regardless of the nature of their prior criminal activity, may be prosecuted for possessing firearms. In three circuits, the door is open to as-applied challenges that allow, in theory, some individuals to possess firearms. And two additional circuits may be open to as-applied challenges, but they have not yet confirmed that such challenges are capable of succeeding.

The Tenth Circuit, from which this case originates, refuses to even consider the possibility that a defendant may succeed on an as-applied challenge. Instead, the Tenth Circuit has concluded that one of its precedents predating this Court's decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), controls the outcome of all constitutional challenges to 18 U.S.C. § 922(g)(1). Where other circuits have engaged in the *Bruen* analysis, the Tenth Circuit steadfastly refuses.

Moreover, the consistent refusal of some circuits to consider as-applied challenges has led to Americans in those circuits going to prison while similarly situated Americans in other circuits—especially the Fifth Circuit—have their right to possess firearms explicitly protected by published decisions.

Mr. Riddle's case demonstrates the absurdity of the current state of the law and the dire consequences that follow from it. In the Fifth Circuit, a man with a substantially identical prior felony conviction had his Second Amendment rights vindicated and his Section 922(g)(1) conviction vacated. This Court declined to reconsider that result when it denied the United States' petition for a writ of certiorari.

The Petition frames its first question as whether those circuits that hold all felons may categorically be prosecuted and imprisoned for possessing firearms have correctly concluded that as-applied challenges cannot prevail. This Court should grant the Petition on that question so that it may address the circuit split that is causing the Constitution to mean different things in different parts of the country.

The Petition's second question, though it appears specific to the Petitioner, necessarily invites this Court to examine the appropriate test for determining whether an individual's convictions justify permanent disarmament under threat of imprisonment. To date, the only circuit attempting to develop the law on that matter is the Fifth Circuit. But its approach reflects a complex whack-a-mole strategy that relies upon dubious historical and constitutional analysis. In resolving the Petition's second question, this Court has the opportunity to put to rest the constitutional divide plaguing the country. It should take it.

ARGUMENT

"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." U.S. Const. amend. II. In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, this Court firmly established the constitutional test used to resolve questions concerning the legality of regulations impacting the bearing of arms: First, a court must ask whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. 1, 24 (2022). If the answer is yes, "the Constitution *presumptively* protects that conduct." *Id.* (emphasis added). The government bears the burden to overcome that presumption and establish a regulation's constitutional permissibility by "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* Then, and only then, "may a court conclude that the individual's conduct falls outside the Second Amendment's *unqualified command*." *Id.* (internal quotation marks omitted and emphasis added). With respect to the second step—consistency with historical tradition—this Court suggested that courts should consider "whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation." *Id.* at 27. However, this Court also made it clear that the burden of producing this historical precedent lay with the government, not with the defendant or even the courts; it even discouraged courts from "sift[ing] the historical materials for evidence to sustain" the regulation because "[t]hat is the [government's] burden." *Id.* at 60.

In *United States v. Rahimi*, 602 U.S. 680 (2024), this Court further elaborated on the *Bruen* test and explained that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* at 692. "Why and how the regulation burdens the right are central to this inquiry." *Id.* Where laws at the founding were designed to address a specific problem, that serves as "a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id.* On the other hand, even where a law might regulate firearms for permissible reasons, "it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Id.*

I. The entrenched circuit split will not resolve on its own, and this case demonstrates the necessity of resolving it.

The Petition accurately describes the current circuit split concerning as-applied challenges. (Pet. 2–3 & 7–10). This Brief will not rehash those points.

A. The Tenth Circuit has held that prohibitions on felons possessing firearms are presumptively valid, even though this Court has repeatedly explained that restrictions on conduct that falls within the plain language of the Second Amendment are presumed unlawful.

Following this Court's decision in *Bruen*, the Tenth Circuit issued its original decision in *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023). In that case, the Tenth Circuit panel relied upon a two-sentence analysis set forth in *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), to conclude that Section 922(g)(1) is constitutional as applied to all felons. 80 F.4th at 1199 & 1202. The *Vincent* panel concluded it was bound to follow *McCane*'s holding because *Bruen* did not abrogate *McCane*, and it explained that a subsequent panel of the Tenth Circuit may not disregard a prior precedent opinion of the circuit unless a Supreme Court decision "indisputably and pellucidly abrogated" that prior precedential opinion. 80 F.4th at 1200.

This Court's decision in *Bruen* indisputably created a new test, and that test held conduct to be presumptively protected when it falls within the plain text of the Second Amendment. 597 U.S. at 24. Yet the panel in *Vincent v. Garland* held that *McCane* remained binding precedent even though *McCane* applied no test and treated felon-in-possession regulations as presumptively lawful rather than presumptively unlawful. *See* 573 F.3d at 1047.

Following this Court's decision in *Rahimi*, this Court granted certiorari, vacated the *Vincent v. Garland* panel's decision, and remanded for further consideration in light of *Rahimi*. *Vincent v. Garland*, 144 S. Ct. 2708 (2024).

On remand, the Tenth Circuit issued the decision below. In an even shorter opinion, the panel explained that *McCane* "relied on *Heller*'s instruction that felon dispossession laws are presumptively valid." *Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025). It concluded that "[t]his presumption was reaffirmed in *Rahimi*. So *Rahimi* doesn't clearly abrogate the presumptive validity of § 922(g)(1)." *Id.* (internal citation omitted). Subsequently, the panel held "that *McCane* remains binding." *Id.* at 1266.

The declaration in *McCane* (that felon-in-possession restrictions are presumptively lawful) simply cannot coexist with the test set forth in *Bruen* (holding conduct covered by plain text of Second Amendment to be presumptively protected). A test that would find 18 U.S.C. § 922(g)(1) presumptively unlawful and require the United States to carry its historical tradition burden *must* override an earlier circuit decision declaring that same statute presumptively lawful. Yet the Tenth Circuit refuses to even consider applying the *Bruen* standard for Second Amendment challenges to 18 U.S.C. § 922(g)(1).

B. This case reflects, in stark terms, the danger of allowing the circuit split to continue festering like an open wound. Mr. Riddle is imprisoned because he had the misfortune of living within the Tenth Circuit instead of the Fifth Circuit.

This Court's test, as set forth in *Bruen*, "uses history and tradition . . . to identify the scope of the legislature's power to take [the right to bear arms] away." *United States v. Diaz*, 116 F.4th 458, 466 (5th Cir. 2024) (quoting *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting)). An individual's right to armed self-defense cannot change based upon the jurisdiction in which he lives. The Constitution cannot abide such disparities in the law's application. Yet, those are precisely the kinds of disparities occurring across the country due to the circuit split regarding as-applied challenges to 18 U.S.C. § 922(g)(1).

Mr. Riddle's case is a concrete example of the impact the circuit split has on the lives of ordinary American citizens. Mr. Riddle has only one prior felony conviction: He failed to pay child support, and his failure reached the threshold that the State of Arkansas considered a felony criminal offense.

Just last year, in *United States v. Cockerham*, the Fifth Circuit held that the Second Amendment was violated when the United States prosecuted a man for violating 18 U.S.C, § 922(g)(1) based upon his prior felony conviction for failure to pay child support. 162

F.4th 500, 503–04 (5th Cir. 2025), *cert. denied*, --- S. Ct. ---, No. 25-1029 (June 8, 2026). "[W]e are unable to find a historical basis for disarming Cockerham for the rest of his life, just because he was once convicted of failure to pay child support." *Id.* at 510. The United States sought this Court's intervention, and it declined to take up the case. *United States v. Cockerham*, --- S. Ct. ---, No. 25-1029 (June 8, 2026).

It is impossible to overstate the injustice done when one man goes free—with his rights vindicated—and another sits in prison because he has the misfortune of possessing a firearm in the wrong part of the country. In the Tenth Circuit, Mr. Riddle received a sentence of 18 months imprisonment; if he were in the Fifth Circuit, Mr. Riddle would be a free man with the right to possess and use firearms for self-defense.

Nor is this the end of the circuit conflicts. The Fifth Circuit has also held that simple possession of controlled substances (such as methamphetamine) does not permit the permanent disarmament of Americans. *United States v. Hembree*, 165 F.4th 909, 918 (5th Cir. 2026). It continues to expand the number of offenses that do not permit disarmament, *see, e.g.*, *United States v. Debrow*, 184 F.4th 402 (5th Cir. 2026) (holding aggravated criminal damage to property does not support disarmament) while every other circuit in the country sits stagnant.

While there is much to criticize regarding the Fifth Circuit's methods of resolving Second Amendment challenges to 18 U.S.C. § 922(g)(1), at least the Fifth Circuit can be commended for trying to resolve those challenges. But as it makes strides in exploring the legal impact of *Bruen* on Section 922(g)(1), every other circuit remains idle and waits for this Court to answer the difficult questions. The result? Americans sitting in prison who would not be there if they lived in the Fifth Circuit. Who should not be in prison at all because their prosecution violates their constitutional right to possess firearms.

The Fifth Circuit is beginning to recognize the problems inherent to the circuit split: "Convictions under § 922(g)(1) carry serious consequences, incarcerating individuals for crimes they could not anticipate and doing so dissimilarly across the country." *Debrow*, 183 F.4th at 406.

This Court must address the circuit split. At a minimum, it must resolve the question of whether Section 922(g)(1) may be challenged on an as-applied basis or if all felons may categorically be banned from possessing firearms. And the United States does not seem to disagree.

The United States also wishes for this Court to answer the questions presented in this Petition and to resolve the constitutional split plaguing the country. *See Cockerham*, SCOTUS No. 25-1029; *United States v. Hembree*, SCOTUS No. 25-1219. It seems likely it will file another petition following the Fifth Circuit's decision in *Debrow*, 183 F.4th 402. But, it only seeks intervention in cases in which it is not the prevailing party. It does not join petitioners' requests for this Court's intervention. Unlike individuals who truly have no incentive to risk giving up their hard-won victories—and often their freedom—the United States does not have a special incentive to limit itself to cases in which it has lost. If the United States prevails on the merits in this Court, then it likely prevails in all cases, including those in which it previously lost. If anything, the United States should consistently be supporting petitioners like Mr. Riddle so that this matter can finally resolved on the merits and put to rest.

C. The Second Amendment protects the individual rights of Americans to possess firearms for self-defense. A categorical bar on felons possessing firearms, without consideration of the crimes they committed, is nonsensical.

The Second Amendment is fundamentally a right to defend oneself against harm. *Dist. of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (concluding that the right to bear arms for self-defense was "the *central component* of the right itself" (emphasis in original)), 616 ("It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense."), & 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

The term "felon" borders on meaningless. At the founding, it was "a term of loose signification." THE FEDERALIST No. 42 (James Madison). As Madison explained, the meaning of the term "felony" "is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws." *Id.* In this respect, he was critical of relying upon definitions of the term as it was understood either in England or even among the colonies and states. *Id.*

This term of loose signification at the founding has been watered down even further in modern times. This Court has recognized that the classification of crimes as "felonies" has greatly expanded since the founding: "[I]n earlier times the gulf between the felonies and the minor offences was broad and deep, today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies." *Tennessee v. Garner*, 471 U.S. 1, 14 (1985) (internal quotation marks and citations omitted).

A categorical bar on "felons" possessing firearms is folly. To treat one who fails to pay child support as being on equal footing—for Second Amendment purposes—as someone who commits armed robbery is absurd. Yet that is precisely what the majority of circuits across the country are doing.

FPD-NDOK agrees with Judge Bibas of the Third Circuit that "[a]s an original matter, the Second Amendment's touchstone is dangerousness." *Folajtar v. Att'y Gen.*, 980 F.3d 897, 924 (3d Cir. 2020) (Bibas, J., dissenting). This aligns with Justice Barrett's dissent in *Kanter v. Barr* while on the Seventh Circuit:

> The historical evidence . . . support[s] a . . . proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This is a category simultaneously broader and narrower than "felons"—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness.

919 F.3d at 454 (Barrett, J., dissenting).

III. A categorical bar on felons possessing firearms is devoid of constitutional justification. So far, only the Fifth Circuit is developing jurisprudence regarding the constitutionality of 18 U.S.C. § 922(g)(1), but its approaches are constitutionally infirm, and they amount to little more than a complex game of whack-a-mole. This Court must create a test that may be more widely and consistently applied.

If we accept the premise of Justice Barrett's dissent in *Kanter* and Judge Bibas's dissent in *Folajtar*, the courts are still left with another question to answer: How should courts determine who can possess firearms and who cannot, based upon their criminal history? No matter what approach is ultimately taken to resolve the "dangerousness" question, it must provide clear, predictable answers that allow courts to provide consistent outcomes and, more significantly, to allow law enforcement, prosecutors, and citizens to determine if conduct is properly prohibited by law and subject to criminal punishment.

If prohibitions on the possession of firearms by felons came with mere civil penalties, a looser approach to the dangerousness analysis might be appropriate. But these prohibitions impose criminal penalties. For example, a person convicted under 18 U.S.C. § 922(g)(1) faces potential imprisonment up to fifteen years. These criminal penalties compel a higher standard for clarity in determining whether a person's conduct is protected or may be criminally punished.

The absence of a clear standard risks creating a new constitutional problem: vagueness. The Fifth Circuit remains the only circuit even attempting to develop the law on this matter. However, the Fifth Circuit's approach is patchwork and suffers from both constitutional infirmities and practical challenges. Unfortunately, the Fifth Circuit's efforts at developing the law in this area demonstrate the vagueness problem.

The Fifth Circuit recognized the potential for as-applied challenges to Section 922(g)(1) in *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024). In

Diaz, the Fifth Circuit required the United States to "demonstrate that the Nation has a longstanding tradition of disarming someone with a criminal history analogous to" the defendant. 116 F.4th at 467. The Fifth Circuit concluded that *Bruen*'s historical tradition test requires that the predicate felony which serves as the basis of a Section 922(g)(1) charge be analogous to a felony offense punishable by death at the founding. *Id.* at 469–70. The rationale of *Diaz* seemed sensible enough; if an analogous felony committed at the time of the founding was punishable by death, then it was necessarily punishable by disarmament because death is both a more severe punishment and a more permanent one.

But constitutional analysis based upon this type of test is deeply flawed. First, as Justice Barrett explained while still sitting on the Seventh Circuit in *Kanter*, the availability and use of capital punishment for felonies waned in the American colonies and the states. 919 F.3d at 458–60 (Barrett, J., dissenting). Moreover, the concept of "civil death" by the early 1800s focused more on a loss of rights during the term of the felon's sentence—rather than a lifetime revocation of rights—but those rights were essentially restored after the sentence was completed. *Id.* at 460–61.

> Capital punishment was less pervasive than one might think. Outside the capital context, civil death applied exclusively to life sentences and only if authorized by statute—and even then, it was more modest than the

> ancient version because the convict retained some rights. Felons serving a term of years did not suffer civil death; their rights were suspended but not destroyed. In sum, a felony conviction and the loss of all rights did not necessarily go hand-in-hand.

Id. at 461. It is important to distinguish between the *availability* of death as a punishment and its *actual use* as a punishment. Where the typical case in the Nation's early years resulted in a punishment of less than death, the Fifth Circuit's approach in *Diaz* becomes less justified.[2]

The *Diaz* approach also captures what we would today call white-collar crime. For example, both forgery and counterfeiting were punishable by death at the founding. *See Folajtar*, 980 F.3d at 905. No rational person would ever consider these kinds of criminals "dangerous" in the sense that they would pose a greater risk to society than the average person if armed. Similarly mere theft—as opposed to more aggravated forms such as robbery—seems to also fall within the scope of *Diaz*'s analysis. *See United States v. Kimble*, 142 F.4th 308, 312 (5th Cir. 2025).

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[2] Judge Oldham in the Fifth Circuit presented a well-reasoned takedown of *Diaz*'s reliance upon capital punishment in his concurrence *United States v. Cordova*, 176 F.4th 381, 386–88 (5th Cir. 2026) (Oldham, J., concurring). Judge Oldham's broader analysis concerning inherently dangerous activities nonetheless suffers from flaws which will be addressed below.

Beyond these problems, the Fifth Circuit's reliance upon the availability of capital punishment requires complex historical analysis to determine if sufficiently analogous crimes existed at the founding and if those analogous crimes were punishable by death. This makes the test impossible to use as a predictor of future outcomes. It therefore prevents Americans (or their attorneys or law enforcement) from determining if their possession of firearms is constitutionally protected or if they may be prosecuted.

The Fifth Circuit has also adopted tests that consider dangerousness. The Fifth Circuit's first approach to considering dangerousness looks at whether the prior criminal conduct was an "inherently dangerous activity." *United States v. Kimble*, 142 F.4th 308, 316–17 (5th Cir. 2025). Exactly how a court determines what makes a past crime "inherently dangerous" is unclear. In *Kimble*, the Fifth Circuit explained that "drug dealing is notoriously linked to violence," which makes it "an inherently dangerous activity." *Id.* In *United States v. Allred*, it concluded that domestic violence, which required a minimum *mens rea* of recklessness, was "an inherently dangerous activity." 182 F.4th 448, 452 (5th Cir. 2026). Similarly, in *United States v. Palomares*, the Fifth Circuit concluded that alien smuggling in violation of 8 U.S.C. § 1324 was an "inherently dangerous activity" because it "often results in death and injury to both aliens and government agents." 183 F.4th 375, 377–78 (5th Cir. 2026).

In *United States v. Cordova*, although the Fifth Circuit did not use the term "inherently dangerous activity," its decision was clearly based upon that rationale. In *Cordova*, the defendant had a prior conviction for "evading arrest or detention with a motor vehicle," and the Fifth Circuit explained that "vehicular pursuits are often catastrophic." 176 F.4th 381, 382 (5th Cir. 2025). Therefore, the defendant's "decision to use a car to evade the police is probative of his dangerousness," and his doing so "posed a risk to fellow citizens and demonstrate[s] that he poses a credible threat to the physical safety of others." *Id.* at 382–83.

This approach suffers from a different problem: It is a resurrection of the residual clause. Like Jason, Dracula, or "some ghoul in a late-night horror movie," *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398 (1993), the residual clause has crawled out of its grave after having been stabbed repeatedly by this Court's quill pens.[3] It no longer

[3] The residual clause was used in statutes to expand the definition of a crime of violence or a violent felony to reach, for example "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *See* 18 U.S.C. § 16(b).

This Court has thrice struck down the residual clause as unconstitutionally vague: *Johnson v. United States*, 576 U.S. 591 (2015) (striking down residual clause in 18 U.S.C. § 924(e)), *Sessions v. Dimaya*, 584 U.S. 148 (2018) (striking down residual clause in 18 U.S.C. § 16), and *United States v. Davis*, 588 U.S. 445 (2019) (striking down residual clause in 18 U.S.C. § 924(c)).

haunts those facing increased sentencing penalties for violating its vague terms. Now, it hungers for constitutional rights. For this reason alone, this approach cannot be constitutionally sound; if the test is too vague when used in a statute, it is certainly too vague when defining the scope of constitutional rights.

This is especially true when the scope of the constitutional right determines who goes to prison and who does not. The inherently dangerous activity standard expects individuals to identify whether their prior criminal history includes "inherently dangerous activities" or conduct that would lead to their constitutional rights being limited. Just as it was unreasonable—and a denial of due process—to expect defendants to anticipate increased sentencing punishments based upon the residual clause, it is unreasonable to expect citizens to predict whether their criminal history subjects them to prosecution based upon vague notions of "inherently dangerous activity."

The Fifth Circuit's second approach to dangerousness considers whether the prior felony conviction involved actual acts of violence. In *United States v. Schnur*, the Fifth Circuit upheld a conviction under 18 U.S.C. § 922(g)(1) on the grounds that the defendant's prior convictions, including one for aggravated battery causing great bodily injury, was a "crime of violence" that demonstrated his dangerousness to society if armed. 132 F.4th 863, 869–70 (5th Cir. 2025). Similarly, in *United States v.*

Bullock, the Fifth Circuit upheld a Section 922(g)(1) conviction where the defendant's prior conviction involved misuse of "a firearm to harm others when he shot one individual, fired into a crowd of others, and in the process killed an innocent passerby." 123 F.4th 183, 185 (5th Cir. 2024). This approach, which connects criminal history to acts of violence, is closer to the mark.

Schnur's decision, at least on its face, concerns only the elements of the crime of which the individual was convicted. *Bullock*, on the other hand, is more interested in the underlying factual basis for the conviction. Therein lies another matter for this Court to resolve: When examining an individual's challenge to the application of Section 922(g)(1), should courts look only to the alleged prior convictions set forth in an indictment, should it look to all criminal convictions—even those not in the indictment—and may it consider facts or allegations that may not have been proven?

In *Debrow*, the Fifth Circuit rejected the United States' invitation to consider conduct beyond the fact of the convictions, such as "unproven conduct charged contemporaneously with a defendant's (g)(1) indictment or prior conduct that did not result in a felony conviction." 183 F.4th at 405. FPD-NDOK agrees that this limitation is appropriate, but it must be more precise. Courts should not consider anything beyond the elements of the prior convictions because that is the conduct that is proven when a conviction is obtained (either by guilty plea or by trial). A case may be full of salacious allegations that make a defendant look like a monster, but, depending on the elements of the charge, the jury need not find those allegations to be true in order to find the defendant guilty of the charged offense. An approach that considers more than just the elements as the basis for deciding "which Americans go to jail for bearing arms," *id.* at 405, inevitably leads to "inadequate notice, a fundamentality of our justice system," *id.* at 406. Defendants must be able to know ahead of time whether their conduct is constitutionally protected or if they risk imprisonment. Fortunately, a test that permits that kind of predictability already exists.

The categorical approach, most commonly used to determine whether an offense constitute a crime of violence, *see, e.g.*, *Taylor v. United States*, 495 U.S. 575, 600–02 (1990), is the most appropriate test for analyzing Second Amendment claims challenging application of 18 U.S.C. § 922(g)(1) to an individual. In applying the categorical approach, the standard for disarmament should be convictions for violent felonies—for these purposes, as defined in 18 U.S.C. § 924(e)(2)(B)(i)—and a limited class of offenses that, historically, demonstrate the perpetrator poses a unique danger to society if armed. This narrow class of offenses would include burglary, robbery, kidnapping, and arson. This Court may find a basis to include other enumerated offenses. This approach aligns with Congress's earliest attempt to prohibit the possession of certain firearms by certain people based upon their criminal history. *See* Federal Firearms Act of 1938, Pub. L. 75-785, 52 Stat. 1250.[4] It may be appropriate to include a third class of offense that leads to disarmament: Any felony which involved, as an element, the use or attempted use of a firearm in its commission. This would catch the small number of offenses that do not qualify as crimes of violence but that nonetheless involved the use of a firearm in their commission.

This group of felonies—violent felonies, historically dangerous felonies, and felonies involving firearms—captures the criminal history of precisely the kind of people described by Justice Barrett in *Kanter*: "[T]hose who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." 919 F.3d at 454 (Barrett, J., dissenting). And it emphasizes "dangerousness" as the touchstone. Individuals who have committed these kinds of crimes have demonstrated that they are willing to engage in violent criminal conduct and cannot be trusted with firearms. Moreover, this standard still allows the average citizen who does not engage in violent criminal behavior to retain the ability to possess firearms for self-defense.

[4] The FFA of 1938 prohibited persons convicted of "crimes of violence" from possessing certain kinds of firearms. Crimes of violence included: "[M]urder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year."

Equally beneficial is the test itself. The categorical approach—and modified-categorical approach—has an extraordinary amount of jurisprudence surrounding it. This makes it an easier test to apply than anything the Fifth Circuit has crafted. Crimes that are categorically violent include as an element the use, attempted use, or threatened use of physical force against the person of another. *See, e.g.*, *United States v. Taylor*, 596 U.S. 845, 848 (2022); *Johnson v. United States*, 576 U.S. 591, 594 (2015). Where the prior offense has different manners in which it may be committed, and those different manners are themselves elements of the offense, the modified-categorical approach may be used to determine if the offense is a violent felony. *See Mathis v. United States*, 579 U.S. 500, 505–06 (2016). If a defendant has a conviction that satisfies this definition, then they may be charged and convicted under 18 U.S.C. § 922(g)(1). This elements-based approach works just as well when determining if an offense was committed using a firearm.

Similarly, for those enumerated offenses like burglary, robbery, kidnapping, and arson, the generic versions of those crimes, along with the categorical approach, can separate the truly dangerous offenses from the non-dangerous offenses. Generic burglary can rightly be considered a uniquely dangerous offense because it involves "a crime 'contain[ing] the following elements: an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime.' " *Id.* at 504. But not all crimes called "burglary" satisfy this definition, and therefore not all crimes called burglary should automatically disqualify a person from ever possessing a gun (and subjecting them to criminal penalties if they do possess a gun).

For example, in Oklahoma, Second-Degree Burglary may be committed by breaking into a vending machine or similar coin-operated device. Okla. Stat. tit. 21, § 1435 (2022). Those who break into a vending machine are not as dangerous as those who break into a building with the intent to commit a crime therein, and they should not be subject to the same limitations on their Second Amendment rights.

By adopting the categorical approach, this Court would be applying a test that focuses on the conduct actually engaged in by individuals to determine if Congress has the power to limit their access to firearms. It would reject approaches that create vague, unpredictable standards or that allow states to ensure that politically disfavored classes cannot possess firearms by making certain crimes reach the broadest conduct possible.

Moreover, this approach allows properly-trained law enforcement and prosecutors to determine whether an individual is violating the law or acting within their Second Amendment rights when they possess a firearm. If law enforcement incorrectly arrests someone, courts are well-equipped to quickly resolve the error and dismiss the charges under this test. Further, citizens are positioned to obtain legal advice about whether their possession would be protected. Any other test leads to guesswork, protracted litigation, and individuals sitting in jail cells for conduct that is protected by the Constitution.

CONCLUSION

For the reasons stated herein, this Court should grant Mr. Riddle's Petition for Writ of Certiorari as to both questions presented.

Respectfully submitted,

Julia L. O'Connell
Office of the Federal Public Defender
Northern District of Oklahoma

Jared T. Guemmer
Counsel of Record
Office of the Federal Public Defender
Northern District of Oklahoma
1 West 3rd Street
Suite 1225
Tulsa, Oklahoma 74103
(918) 581-7656
Jared_Guemmer@fd.org

Counsel for Amicus Curiae

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