No. ______

IN THE

Supreme Court of the United States

LEONARD J. HIGGINS,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

PARTIES TO THE PROCEEDING

Leonard Higgins, petitioner on review, was the appellant-defendant below.

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

No corporate parties are involved in this case.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the court of appeals is unreported but is available at 2026 WL 2167842 and is reproduced in Appendix A at pages 1-2. The decision of the district court is not reported but is available at 2024 WL 4370945 and is reproduced in Appendix C at page 8. The magistrate judge's report and recommendation is not reported but is available at 2024 WL 4371536 and is reproduced in Appendix B at pages 3-7.

JURISDICTION

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

The court of appeals entered its judgment on July 28, 2026. Mr. Higgins did not file a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are:

The Second Amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Section 922(g), of Title 18 of the United States Code provides, in pertinent part:

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

INTRODUCTION

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

These citizens are forever barred by statute from possessing a firearm for any reason—even if one is needed for lawful self-defense—in any place, including their own homes and vehicles. *See* 18 U.S.C. § 922(g)(1). Violating the statute can result in imprisonment for up to 15 years. *See* 18 U.S.C. § 924(a)(8). This is true even though

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[1] The Economic Impacts of the 2020 Census and Business Uses of Federal Data, (May 22, 2019) at 12. Available at https://www.jec.senate.gov/public/_cache/files/42e1f0bd-c8c0-4a71-812c-39a53d303256/chrg-116shrg37080.pdf (last accessed Aug. 16, 2026)

[2] The study referred to in Dr. Eberstadt's testimony was "The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010" published in Demography. 2017 October; 54(5): 1795-1818. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5996985/pdf/nihms963104.pdf (last accessed Aug. 16, 2026)

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

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

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

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

This Court should grant a writ of certiorari to resolve this entrenched circuit split.

STATEMENT OF THE CASE

A. Factual Background

Leonard Higgins was waiting at for his train to travel from Kansas City to St. Louis when he was randomly stopped by the police. (PSR at 4). The police asked for identification, and Mr. Higgins provided his identification card. (PSR at 4). Eventually, the police sought permission to search his backpack, and Mr. Higgins refused (but told the police that he had a personal amount of marijuana). (PSR at 5). After the police placed him in handcuffs, Mr. Higgins informed the police that he had a weapon in his backpack and consented to the police searching his backpack. (PSR at 5). After searching it, the police later found a Sig Sauer pistol, and also discovered that Mr. Higgins was a convicted felon. (PSR at 4-5).

Mr. Higgins was indicted for unlawfully possessing a firearm under 18 U.S.C.

§ 922(g)(1) (R. Doc. 119at 1). He moved to dismiss the indictment under *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), arguing that the statute was unconstitutional on its face and as applied to him because it violated the Second Amendment (R. Doc. 32 at 1). After his motion to dismiss was denied below, he proceeded to trial, where he was eventually found guilty as charged by the jury. (R. Doc. 84).

B. Legal Background

In his motion to dismiss, Mr. Higgins argued that § 922(g)(1) is not consistent with this Nation's history of firearm regulation because there are no historical statutes or relevantly similar analogues that would permit permanently banning citizens convicted of felonies from possessing firearms (R. Doc. 32). Mr. Higgins contended the statute was unconstitutional both on its face and as applied to him. (R. Doc. 32).

The magistrate court issued a Report and Recommendation to deny the motion to dismiss (R. Doc. 44). The district court eventually adopted the report and recommendation, denying the motion to dismiss, concluding that the Indictment did not violate the Second Amendment either on its face or as applied to Mr. Higgins. (R. Doc. 54).

Mr. Higgins appealed to the Eighth Circuit, which found his "arguments as to the constitutionality of section 922(g)(1) are foreclosed by circuit precedent." 2026 WL 2167842, at *1 (8th Cir. July 28, 2026).

REASONS FOR GRANTING THE PETITION

I. The circuits are split as to whether individuals with felony convictions may challenge the constitutionality of § 922(g)(1) as applied to their individual circumstances.

The Second Amendment gives all Americans the right to keep and bear arms. U.S. Const., Amend. II. In *Bruen*, this Court held that the scope of the right is determined by constitutional text and history. 597 U.S. at 17. The Court used a two-step analysis. At step one, a court determines whether the Second Amendment's plain text covers an individual's conduct. *Id*. If so, the Constitution presumptively protects that conduct. *Id*. This step has not proven difficult to apply.

At step two, the government must establish that its regulation is consistent with the Nation's historical tradition of firearm regulation. *Id*. A modern statute such as the felon-in-possession statute is analogous to a historical statute if both are "relevantly similar." *Id*. at 29. A court must analyze "how" and "why" the regulation burdens an individual's right to armed self-defense. *Id*. Central to that analysis is "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id*. The statutes need not be identical, but they also cannot be lumped into a category so broad that it encompasses "outliers that our ancestors would never have accepted." *Id*. at 30.

Step two of *Bruen* analysis has proven challenging to apply. Because there are no Founding-era statutes that prohibited felons from possessing firearms, the only way for the government to justify § 922(g)(1) is to identify historical analogues that were similarly justified and imposed comparable burdens. *Range*, 124 F.4th at 229 (earliest statute to prohibit possession of firearms by felons was the Federal Firearms Act of 1938, and it applied only to violent criminals). But lower courts have been flummoxed as to what level of generality is acceptable when hunting for historical analogues. *United States v. Rahimi*, 602 U.S. 680, 742, n. 1 (2024) (Jackson, J., concurring) (collecting cases from lower courts seeking guidance on how to apply *Bruen*'s test).

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

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

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

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

Recently this Court examined whether a regular user of marijuana could be stripped of his Second Amendment right to possess a firearm under 18 U.S.C. § 922(g)(3). *United States v. Hemani*, 608 U.S. ---, 146 S.Ct. 1677 (2026). The answer was a resounding no:

> We do not question that sometimes an individual's unlawful use of marijuana (or any other controlled

> substance) may render him a danger to others. But, again, the government disclaims the need to show anything like that in this case. Instead, it asks us to conclude that anyone who regularly uses marijuana is categorically violent and dangerous without any further showing….
> [A]ffording the government that kind of 'broad power to designate any group as dangerous and thereby disqualify its member from having a gun' would risk allowing it to 'quickly swallow' the Second Amendment. *Kanter v. Barr*, 919 F.3d 437, 465 (CA7 2019) (Barrett, J., dissenting).

Id. at 1693.

The government has followed the same playbook it used in *Hemani* to justify § 922(g)(1). All felons, the government says, are categorically violent and dangerous and no further showing must be made. Even those who were never convicted of a violent offense must be permanently disarmed. And if they merely possess a firearm subsequent to a felony conviction, they shall be imprisoned for up to fifteen years. Permanent loss of a constitutional right and lengthy imprisonment is required even if the citizen is not violent and dangerous. What's more, a citizen cannot protest such treatment via an as-applied challenge to the constitutionality of § 922(g)(1).

Some circuits agree, justifying the statute's categorical dispossession of all felons by looking to historical laws that prohibited classes of individuals perceived to be dangerous from possessing firearms. Historically, our Nation has prohibited disfavored groups such as Protestants, Catholics, Native Americans, enslaved Blacks, and Loyalists from possessing firearms. And, in the past, some felons were executed, and those who weren't suffered forfeiture of their estate, including firearms.

Other circuits have rejected *Bruen* analysis that operates at such a high level of generality. Three circuits have gleaned the historical record and found numerous instances in which individuals could possess firearms even though they belonged to a class perceived to be dangerous. These circuits endorse as-applied challenges. The circuits are in disarray as to the degree of similarity required between an analogue and § 922(g)(1), and they are split as to whether defendants may make as-applied challenges to the statute. The confusion on the level of generality question and the division regarding the viability of as-applied challenges will not resolve without this Court's intervention.

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

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

1. Third Circuit

At step two of *Bruen* analysis, the Third Circuit rejected the government's argument that "status-based restrictions" imposed by Founding-era governments to "disarm[] groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks" justified stripping Range of his Second Amendment right to possess a firearm simply because he had a prior conviction for food stamp fraud. *Range*, 124 F.4th at 222-23, 229. That these groups were deemed dangerous in the Founding era, did not justify a categorical rule that all felons may be disarmed because all felons are dangerous and will likely misuse firearms. *Id*. at 230. Such a broad principle operates "'at such a high level of generality that it waters down the right.'" *Id*., quoting *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring).

Range also rejected the argument that the statute's permanent dispossession of felons could be justified by the historical use of the death penalty to punish many felony offenses. *Id*. That some nonviolent crimes were punished with death in the Founding era "does not suggest that the *particular* (and distinct) punishment at issue here—de facto lifetime disarmament for all felonies and felony-equivalent misdemeanors—is rooted in our Nation's history and tradition." *Id*. at 231 (emphasis in the original).

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

2. Sixth Circuit

The Sixth Circuit in *Williams* was comfortable with deriving a broad principle that Congress may disarm individuals it believes to be dangerous based on some of the same historical sources rejected in *Range* but said each time "governments labeled whole classes as presumptively dangerous," "individuals could demonstrate that their particular possession of a weapon posed no danger to peace." 113 F.4th at 657. Like "the justices of the peace of old," judges can make "fact-specific" dangerousness determinations "depending on the unique circumstances of the individual defendant." *Id.* at 660-61. The court put the burden on the individual to prove he did not belong in the class prohibited from possessing firearms. *Id.* at 661. "The relevant principle from our tradition of firearms regulation is that, when the legislature disarms on a class-wide basis, individuals must have a reasonable opportunity to prove they don't fit the class-wide generalization." *Id.*

3. Fifth Circuit

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

The Fifth Circuit parted company with the Third and Sixth Circuits when it declined to "embrace the view that courts should 'look beyond' a defendant's predicate conviction 'and assess whether the felon's history or characteristics make him likely to misuse firearms.'" *United States v. Kimble*, 142 F.4th 308, 318 (5th Cir. 2025). The relevant consideration is the defendant's prior felony convictions; not unproven conduct charged contemporaneously with the § 922(g)(1) charge or prior conduct that did not result in a felony conviction. *Id.*

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

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

1. Eighth Circuit

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

According to *Jackson*, there is "no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons." *Id*. In other words, no individual within a prohibited category may challenge the constitutionality of § 922(g)(1) as applied to them. *Id*. They can be stripped of their Second Amendment rights even if they are not violent or dangerous. *Id*. Unlike the Sixth Circuit in *Williams*, *Jackson* addressed none of the historical instances in which individuals could challenge their inclusion in a prohibited category of people.

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

In an earlier, pre-*Rahimi* dissent, Judge Stras did an exhaustive historical analysis adhering to *Bruen*'s call for *relevantly* similar analogues because: "It is not as simple as saying some groups lost their arms, so felons should lose them too." *United States v. Jackson*, 85 F.4th 468, 470 (8th Cir. 2023). Historical prohibitions on Catholics, enslaved people, and Loyalists were designed to lessen the danger of armed rebellion and insurrection. *Id*. at 470-72. The right to bear arms belonged to "the people" and felons cannot be excluded from Second Amendment protection on the theory they are not virtuous. *Id.* at 472. Historically, not all felonies were punishable by death, thus felons cannot be categorically and permanently disarmed. *Id.* at 473. Forfeiture only covered the specific firearm used in the commission of a crime, not all firearms possessed by the offender. *Id.* at 474.

2. Second and Ninth Circuits

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

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

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

These proposals indicate that historical analogues to felon-in-possession statutes were contemplated, but rejected, at the Founding, which undermines *Zherka*'s assertion that the death penalty was so "ubiquitous in America during the Founding era and until the nineteenth century" that the Founders never contemplated the collateral consequences of felony convictions. *Zherka* explains this contradiction saying that efforts at penal reform "mobilized in states across the nation during the late 18th and 19th centuries" resulted in laws that imposed terms of imprisonment for crimes formerly punished by death. 140 F.4th at 83.

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

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

These judges would not have relied on *dicta* in *District of Columbia v. Heller*, 554 U.S. 570, 626, 627, n.26 (2008), that said firearm prohibitions on felons were presumptively lawful and nothing in *Heller* should cast doubt on longstanding prohibitions on the possession of firearms by felons. *Id*. at 784. And they rejected the argument that the greater punishments of death and estate forfeiture for felons in 1791 justified § 922(g)(1)'s lesser restriction of permanent disarmament, because the death penalty was not the standard penalty for all convicted felons, and even for those crimes deemed capital, death sentences were not always carried out. *Id*. at 785, 787-88. Setting history aside, the argument fails because it does not explain the gun rights of felons who were not executed, discharged their prison terms, and returned to society. *Id*. at 790. And the theory falls apart because the government cannot strip felons of their other constitutional rights because "'[d]ead men do not speak, assemble, or require protection from unreasonable searches and seizures.'" *Id*., quoting *Jackson*, 85 F.4th at 474 (Stras J., dissent).

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

3. Fourth, Tenth, and Eleventh Circuits

The Eleventh Circuit concluded that neither *Bruen* nor *Rahimi* undermined its earlier precedent, which upheld the constitutionality of § 922(g)(1) relying largely on *Heller*'s *dicta* about longstanding prohibitions on the possession of firearms by felons. *United States v. Dubois*, 139 F.4th 887, 893 (11th Cir. 2025). The Tenth Circuit did the same in *Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025).

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

* * *

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

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

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

As Judge Stras pointed out, the Circuits which preclude as-applied challenges, "turn[] constitutional law upside down, insulating felon-dispossession laws from Second Amendment scrutiny of *any* kind." *Jackson*, 121 F.4th at 658. Facial challenges are disfavored but outside the Third, Fifth, and Sixth Circuits they are the only challenge a defendant may bring. *Id*. This not only turns constitutional law upside down, it turns *Bruen* upside down. It gives Congress the power to disarm any group of people it deems dangerous by making any conduct a felony offense, thereby ceding to Congress the power to diminish the scope of the Second Amendment. *Bruen*, 597 U.S. at 26 (when it comes to firearm regulations courts should not defer to legislative interest balancing; courts defer only to the Second Amendment).

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

If dangerousness is the touchstone for firearm dispossession, then, as a matter of due process, felons must be able to challenge whether they fall within the dangerous category before their possession of a firearm can result in criminal punishment under a statute that irrefutably presumes dangerousness based on status rather than individual circumstances. *See*, *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 544 (1942) (Stone, J., concurring) (law permitting sterilization of all habitual offenders without allowing an individual to contest whether criminal tendencies were inheritable was unconstitutional); *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (irrebuttable presumption that unwed fathers were unfit to parent their children, and consequent denial of hearing, violated due process); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (suspending driver's license of uninsured motorist involved in an accident without hearing on issue of fault or liability violated due process).

In *Stanley v. Illinois*, this Court examined an Illinois statute that made children of unwed mothers wards of the state upon the death of their mother. 405

U.S. at 646. The term "parent" was statutorily defined as the father or mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, or an adoptive parent, but it did not include unwed fathers. *Id*. at 650. In what was called a "dependency proceeding," once the state showed the father was not married to the mother, the unwed father was deemed unfit, and the state was not required to prove unfitness in fact. *Id*.

The private interest of an unwed father in raising his children undeniably warranted deference, while the state, too, had a compelling interest in protecting the welfare of children. *Id*. at 651-52. The Court said it was not asked to decide whether the state had a legitimate interest but "to determine whether the means used to achieve these ends are constitutionally defensible." *Id*. at 652. The state could not achieve its goal without holding a hearing to determine whether the father was unfit, because separating children from a fit parent served no purpose and undermined the state's goal. *Id*. at 652-53. The Court found such a scheme "repugnant to the Due Process Clause" because it deprived a father of his children without reference to the very factor (fitness as a parent) that the state deemed fundamental to its statutory scheme. *Id*. at 653. While it was possible that most unmarried fathers were not fit parents, the Court said, all unmarried fathers don't fall in that category. *Id*. at 654.

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

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

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

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

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

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

Declaring a statute unconstitutional on its face is said to "frustrate[] the intent of the elected representatives of the people." *Id*. at 451. Here, the question is whether Congress, by enacting § 922(g)(1), has subverted the right of the people to keep and bear arms as the scope of that right was defined by the people when the Second Amendment was adopted. Finding the felon-in-possession statute unconstitutional on its face under *Bruen* would uphold the will of the people, not frustrate it, by permitting nondangerous people to exercise their right to bear arms.

Congress has no power to expand or contract the historical scope of the right enshrined in the Constitution. Yet Congress has steadily encroached on the Second

Amendment since passing the Federal Firearms Act of 1938. What began as a prohibition on firearm possession by violent felons convicted of murder, rape, kidnapping, and burglary, has been extended to all those convicted of a crime punishable by more than one year of imprisonment. *Range*, 124 F.4th at 229. The typical need for judicial restraint in declaring a statute unconstitutional is not present here.

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

2. The Second Amendment is not a subordinate right.

The overbreadth doctrine should extend to Second Amendment cases because there is no reason to treat the Second Amendment as a subordinate right when it comes to an overly broad statute that reaches constitutionally protected conduct. Both the First and the Second Amendments guarantee fundamental rights to engage in primary conduct without government interference. U.S. Const., Amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, *shall not be infringed*") (emphasis added); U.S. Const., Amend. I ("Congress shall make no law … abridging the freedom of speech …").

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

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

In *Aptheker v. Secretary of State*, this Court addressed a challenge to the Subversive Activities Control Act, which prohibited a member of a registered Communist organization from applying for or using a passport to travel. 378 U.S. 500, 501 (1964). The Court held that the statute "too broadly and indiscriminately restrict[ed] the right to travel and thereby abridge[d] the liberty guaranteed by the Fifth Amendment." *Id.* at 505. The Court acknowledged that Congress' "power to safeguard our Nation's security is obvious and unarguable," but found the statute unconstitutional on its face because it was not narrowly drawn and made it a crime to travel for wholly innocent purposes. *Id.* at 509, 511.

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

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

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

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

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

Because the felon-in-possession statute is unconstitutional in so many of its applications, the question is whether a limiting construction can be applied to render it constitutional or must it be invalidated. Normally, if a statute is not substantially overbroad, the extent to which it is overbroad may be "cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Through the accretion of case-by-case analysis, courts may formulate limiting constructions of an overly broad or vague statute *if* the statute is "readily susceptible" to such a construction. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997). As-applied challenges can save a broad, but not substantially overbroad, statute.

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

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

In *United States v. Stevens*, 559 U.S. 460, 482 (2010), this Court analyzed a federal statute that criminalized depictions of animal cruelty and found it facially invalid due to its substantial overbreadth. The statute criminalized the creation, sale, or possession of depictions of animal cruelty if done for commercial gain. *Id*. at 464-65. The definition of animal cruelty included any depiction of a living animal being wounded or killed. *Id*. An exception was made for depictions having "serious religious, political, scientific, educational, journalistic, historical or artistic value." *Id*. at 465.

The Court concluded the statute was of "alarming breadth," with a substantial number of its applications involving no cruelty to animals. *Id*. at 474.

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

The felon-in-possession statute makes it unlawful for "any person … who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. To confine the scope of the statute to the historical tradition of firearm regulation identified in *Jackson*—the disarmament of those who "presented an unacceptable risk of danger if armed"—requires rewriting of the statute, not mere excision. As in *Stevens*, this Court should decline to rewrite the statute.

Because § 922(g)(1) is substantially overbroad and is not susceptible to a limiting construction it should be declared unconstitutional on its face. But even if the statute is not substantially overbroad, the only way to save the statute from facial invalidity is for this Court to hold that § 922(g)(1) is subject to as-applied challenges so the extent to which it is overbroad may be "cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16. Without this Court's intervention, the happenstance of geography allows some American citizens to defend their Second Amendment right to possess firearms against a § 922(g)(1) prosecution while others cannot.

III. The promise of a mechanism for restoration of Second Amendment rights to convicted felons cannot save § 922(g)(1) from unconstitutionality.

When the Omnibus Crime Control and Safe Streets Act of 1968 was enacted people prohibited from possessing firearms were meant to have a chance to regain their Second Amendment rights through 18 U.S.C. § 925(c). *See*, Withdrawing the Attorney General's Delegation of Authority, 90 Fed. Reg. 13080, 13081 (Mar. 20, 2025) to be codified at 27 CFR pt. 478 and 28 CFR pt. 0. Under the statute, the Attorney General could grant relief from disabilities "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest." 18 U.S.C. § 925(c).

The Attorney General delegated his authority as to firearm rights restoration to the Department of the Treasury which transferred responsibility to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). 90 Fed. Reg. at 13081. But Congress stopped funding the program in 1992 by forbidding the ATF from using any of its appropriated funds for staffing to process requests by individuals seeking restoration of their Second Amendment rights, rendering § 925(c) a nullity. *Id.* at 13082. Congress concluded the "40 man-years spent annually to investigate and act upon these investigations and applications" were too costly. *Id.*

In 2025, the Attorney General issued an interim final rule withdrawing her delegation of authority to the ATF to allow her "to build a new approach to implementing 18 U.S.C. 925(c) without the baggage of no-longer-necessary procedures." *Id.* at 13083. Later that year, the Attorney General issued a proposed regulation, "28 CFR Part 107—Relief from Disabilities Under the Gun Control Act."[4] The proposed regulation is highly restrictive and presumptively denies restoration, "absent extraordinary circumstances," to applicants convicted of a felony offense involving certain conduct.[5] Restoration is denied to any applicant who: has been convicted of a felony offense within the last five years; is currently serving a term of imprisonment; is on any form of supervision; or has had an application denied within the past five years.

The promise of a future mechanism for restoration does not make § 922(g)(1) constitutional for those who were wrongfully convicted under the statute without first being allowed to challenge the constitutionality of the statute as applied to them. Thus, the interim final rule withdrawing delegation to the ATF and the Attorney

[4] Regulations.gov (last accessed Aug. 16, 2026).

[5] Restoration is presumptively denied absent extraordinary circumstances for offenses involving the following conduct: the death of another person, sexual assault, human trafficking, kidnapping, domestic violence, animal abuse, burglary, robbery extortion, carjacking, arson, racketeering, assault, threats of violence, stalking, escape or rescue of a fugitive, terrorism, witness tampering; being a felon in possession of a firearm (unless the underlying conviction would not be subject to presumptive denial); manufacture, possession, transfer, or use of explosives; threatened violence or used, brandished, or discharged a firearm; is currently required to register as a sex offender; has, within the last ten years, been convicted of or served any part of sentence for distributing or possessing with intent to distribute a controlled substance; has, within the last ten years been convicted of or served any part of a sentence for a misdemeanor crime of domestic violence.

General's proposed rule regarding applications does nothing for federal prisoners who are serving a term of imprisonment under a statute unconstitutionally applied to them.

The promise of a means of restoration of gun rights does not lessen the need for this Court to resolve the entrenched circuit split as to whether § 922(g)(1) is subject to as-applied challenges. That some felons may regain their Second Amendment right to bear arms in the future is of cold comfort to those convicted without an opportunity to defend themselves against inclusion in a class deemed dangerous even though that label may not apply in their individual circumstances.

CONCLUSION

The Court should grant Mr. Higgins' petition for certiorari.

Respectfully submitted,

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