

No. _____

In the
Supreme Court of the United States

DELBERT TYLER TREVINO
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petition for Writ of Certiorari

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Question Presented

Whether 18 U.S.C. § 922(n)'s prohibition on the receipt of firearms and ammunition while under indictment violates the Second Amendment.

Parties to the Proceeding

The Petitioner in this case is Delbert Tyler Trevino. The Respondent is the United States of America. No corporate parties are involved in this case.

Related Proceedings

This case arises from the following proceedings: *United States v. Trevino*, No. 2:23-cr-00066-RB-1 (D.N.M. Nov. 12, 2024); and *United States v. Trevino*, No. 24-2170 (10th Cir. May 21, 2026). No other proceedings directly relate to this case. *See* Sup. Ct. Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Tenth Circuit’s unreported order and judgment affirming Petitioner’s conviction is available at 2026 WL 1430375 and in the Appendix at 1a–25a. The district court’s unreported memorandum opinion and order denying Petitioner’s motion to dismiss is available at 2023 WL 8237053 and in the Appendix at 26a–39a.

Basis for Jurisdiction

The Tenth Circuit entered judgment on May 21, 2026. On August 12, 2026, Justice Gorsuch extended the time to file this petition to September 18, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

The Second Amendment 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.

18 U.S.C. § 922(n) provides:

It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to . . . receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 921(a)(14) provides:

The term “indictment” includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.

Introduction

In 2022, Petitioner Delbert Tyler Trevino used his loyalty card to purchase ammunition at a local sporting goods store two times. Based on those two transactions, the government tried and convicted him under 18 U.S.C. § 922(n), which categorically prohibits the receipt of a firearm or ammunition while under indictment. A few months earlier, Mr. Trevino had pled guilty to state felony charges, but the court deferred entry of judgment and placed Mr. Trevino on community supervision. For five years, Mr. Trevino’s indictment would remain pending—and if he complied with his conditions of supervision, then it would be dismissed without entry of a felony conviction. Although Mr. Trevino *still* has no state felony convictions, a jury found him guilty of violating § 922(n), which means that he may never own a firearm again.

Section 922(n)’s prohibition on receiving firearms and ammunition is unconstitutional under the Second Amendment. If the government chooses to regulate conduct covered by the Second Amendment, it must prove that its regulation is “consistent with this Nation’s historical tradition of firearm regulation.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022). It cannot meet that burden here. No historic English or American laws forbade defendants from possessing or buying firearms or ammunition while awaiting trial. And “[t]he historical laws on which [the government] relies targeted different kinds of people, did so for different reasons, and operated in different ways.” *United States v. Hemani*, 146 S. Ct. 1677, 1694 (2026).

This Court’s review is warranted. While the courts of appeals have upheld the constitutionality of § 922(n), they cannot agree on a rationale. The Tenth Circuit, like

several other courts of appeals, has held that § 922(n) is consistent with the incidental burden that incarceration might place on an indictée’s gun rights in the Founding Era if a magistrate chose to detain him before trial. *United States v. Ogilvie*, 153 F.4th 1098, 1106–11 (10th Cir. 2025). The Fourth Circuit, by contrast, has rejected the pre-trial detention analogue because § 922(n) is intended to “keep[] arms away from those who might misuse them,” while pretrial detention did not “serve[] preventive ends” in the Founding Era. *United States v. Jackson*, 152 F.4th 564, 570–71 (4th Cir. 2025). The Fourth Circuit sustained § 922(n)’s prohibition, but it did so by reference to Founding Era surety laws that targeted the misuse of firearms—reasoning no other court of appeals has adopted. *See id.* at 575–77. And it relied on laws disarming “dis-trusted group[s]” like Catholics, *id.* at 577–79, a rationale thoroughly undermined by this Court’s jurisprudence, including *Wolford v. Lopez*, 146 S. Ct. 2032, 2053 (2026).

The courts of appeals cannot settle on a historical analogue in support of § 922(n)’s prohibition because there is none: This country lacks any relevant historical tradition of automatically stopping people from acquiring firearms or ammunition to maintain public safety, based solely on unproven allegations of prior misconduct, and without any judicial process or timely opportunity to contest the prohibition.

The question presented is also deeply consequential. Section 922(n) effectively disarms millions of Americans each year by prohibiting them from acquiring not only firearms, but also the ammunition necessary for them to bear in self-defense any gun they may otherwise lawfully keep. Section 922(n) threatens otherwise lawful gun owners with up to five years of incarceration based on accusations alone, even though

the accused have yet to be convicted and are “shielded by the presumption of innocence, the bedrock, axiomatic and elementary principle” that “lies at the foundation of the administration of our criminal law.” *Betterman v. Montana*, 578 U.S. 437, 442 (2016) (quotation and alteration marks omitted). That disability can last for years, as defendants (like Mr. Trevino) seek to resolve their cases without a conviction that will deprive them of their Second Amendment rights permanently. And there is no countervailing public safety rationale that warrants § 922(n)’s intrusion: In every prosecution, judicial officers may detain the accused if necessary, or they may set individualized bond conditions restricting the possession of firearms and ammunition if justified in the case. That individualized judicial process is consistent with this country’s historic regulations. Section 922(n)’s indiscriminate and automatic disarmament, based on unproven misconduct alone, is not.

This Court should grant the petition for certiorari and reverse. Alternatively, the Court should grant the petition, vacate the decision below in light of *Hemani*, 146 S. Ct. at 1694, and remand to the courts of appeals.

Statement

A. In late 2020, Petitioner Delbert Tyler Trevino was indicted by a state grand jury in El Paso, Texas, for three non-violent felonies: car theft, drug possession, and possessing identifying information of others with intent to harm or defraud. App. 4a. Although he was released on bond, he was arrested again a short time later for shoplifting. App. 4a–5a. During that arrest, a local police officer noticed that he had a pistol and a rifle in his car and confiscated them “for safekeeping.” App. 5a.

In early 2022, Mr. Trevino pled guilty to the three felonies, but the state court did not enter judgment. App. 5a. Instead, it deferred adjudication for five years and placed Mr. Trevino on community supervision. App. 5a. For those five years, Mr. Trevino’s indictment would remain pending, and if he violated the terms of his supervision then the court had the authority to adjudge him guilty of the original charges. App. 27a; Tex. Code Crim. Proc., art. 42A.108. If Mr. Trevino complied with the conditions of his release, however, the state court would be required to dismiss the charges against him. App. 27a; Tex. Code Crim. Proc., art. 42A.111 (“shall”).

By the summer of 2022, Mr. Trevino had received permission to move to New Mexico, where he obtained a job as a surgery technologist at a veterinary hospital. App. 5a, 7a. Before leaving, the El Paso police department returned the guns they had confiscated to Mr. Trevino. App. 5a–6a. Mr. Trevino used his rifle for target practice, App. 7a, and he twice went to a local sporting-goods store and bought ammunition for his firearms, App. 6a. For both purchases, he used his own name and his own loyalty account number. App. 6a–7a.¹

While Mr. Trevino was housesitting for a coworker that fall, the police executed a search warrant of the residence and seized his rifle. App. 8a.² They determined that

¹ Mr. Trevino’s court-ordered conditions of supervision have always prohibited gun possession. Although he agreed not to possess ammunition in order to transfer his supervision to New Mexico, that condition was never imposed by any court.

² The police were investigating Mr. Trevino for a separate offense with which he has never been charged.

the rifle's barrel was less than 16 inches long. App. 8a. They also learned that Mr. Trevino had purchased ammunition in the summer. App. 20a.

B. Mr. Trevino was charged with firearms offenses in a series of indictments in the U.S. District Court for the District of New Mexico. Initially, he was charged with a single count of possessing an unregistered short-barrel rifle in violation of 26 U.S.C. § 5861(d). App. 9a. A superseding indictment added two charges under 18 U.S.C. § 922(n): one for receiving ammunition while under felony indictment and one for receiving a firearm while under felony indictment. App. 27a.

Mr. Trevino filed a timely motion to dismiss the § 922(n) charges, arguing that they violated the Second Amendment under the framework set forth in *Bruen, supra*, 597 U.S. 1. The district court denied the motion. App. 27a. The court explained that “the plain text of the Second Amendment covers Trevino’s conduct.” App. 31a, 34a. Nonetheless, it concluded that the government satisfied its burden of showing “that § 922(n) is consistent with our country’s historical tradition of firearms regulation and, therefore, does not violate the Second Amendment.” App. 26a. Specifically, the court determined that historical regulations that applied to pretrial indictees, “including restrictions on the right to possess arms via surety laws,” operated to “ensure defendants’ presence at trial and to preserve the safety of our communities,” which defeated any facial challenge to § 922(n). App. 39a.

Shortly before trial, the government obtained a second superseding indictment that replaced the § 922(n) receipt-of-a-firearm allegation with a second § 922(n) receipt-of-ammunition charge. At trial, Mr. Trevino unsuccessfully renewed his motion

dismiss, and the jury convicted him on all counts. The district court sentenced Mr. Trevino to 80 months in prison, and he timely appealed. Relevant here, he argued that § 922(n), and its prohibition on receiving ammunition while subject to felony indictment, violates the Second Amendment.

C. The court of appeals affirmed, as Mr. Trevino’s constitutional challenge to § 922(n) was foreclosed by binding circuit precedent. App. 9a. While Mr. Trevino’s appeal was pending, the Tenth Circuit had issued a published decision holding “that § 922(n) is constitutional on its face” because it is “relevantly similar to pretrial detention and bail at the founding.” *Ogilvie*, 153 F.4th at 1101, 1111 (quotation omitted). The court had viewed “new research” as “challenging the conventional belief that pretrial detention at the founding dealt with only the defendant’s appearance at trial.” *Id.* at 1111. Despite what it saw as a mixed historical record, the court was “persuad[ed]” that “public safety” represented “at least one of the justifications” for pretrial detention and bail at the founding, and thus those historical practices were sufficiently “comparable” to § 922(n). *Id.*

Today, Mr. Trevino’s state court indictment remains pending. He may well never be convicted of a state felony. Because he purchased ammunition before his state indictment was completely resolved, however—and because of § 922(n)—he is a federal felon forever divested of his Second Amendment rights.

Reasons for Granting the Petition

The presumption of innocence is a bedrock principle of our legal system. But § 922(n) has effectively disarmed millions of people since its passage, often for years

at a time, based on the filing of charging documents alone. Section 922(n) has also generated significant disagreement among the lower courts about which historical laws might support its constitutionality. This disagreement reveals three things. First, the lower courts are in need of additional guidance about how to apply this Court’s Second Amendment jurisprudence. Second, § 922(n)’s categorical prohibition on the receipt of firearms and ammunition is unconstitutional. And third, § 922(n) is completely unnecessary, as magistrates in every felony case are authorized to decide whether to detain or disarm a defendant before trial based on individualized community safety concerns—a practice that the historical record supports.

This Court should grant the petition and reverse. Or, at least, it should grant, vacate, and remand in light of *Hemani*, 146 S. Ct. at 1686.

I. Courts are in need of additional guidance, as they cannot agree which historical laws support the constitutionality of 18 U.S.C. § 922(n).

In the years since this Court’s decision in *Bruen*, perhaps no “federal law has generated more dissensus in the lower federal courts” than § 922(n). Jacob Charles, Duke Center for Firearms Law, *The Most Disputed Federal Law Post-Bruen* (May 3, 2023), at <https://firearmslaw.duke.edu/2023/05/the-most-disputed-federal-law-post-bruen>. “The disagreement over this law is deeper than just outcomes. Many of these courts disagree about how to apply the *Bruen* method.” *Id.*; see also Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L. J. 99, 105–106 & n.25 (2023). This Court’s review is warranted to resolve that tension in the lower courts and provide necessary guidance moving forward.

A. When the government regulates conduct covered by the Second Amendment, it bears the burden to “demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 17. While the government need not point to a “historical twin,” *United States v. Rahimi*, 602 U.S. 680, 692 (2024) (quoting *Bruen*, 597 U.S. at 30), it must “show[] that its contemporary regulation is ‘relevantly similar’ to ones ‘well established’ in the Nation’s history,” *Hemani*, 146 S. Ct. at 1686 (quoting *Bruen*, 597 U.S. at 28–30). That is, the “how” and “why” of the historical analogue and modern law must be “close enough” to enable a court to “infer” that “the restriction imposed by the modern law is likewise consistent” with the Second Amendment right. *Wolford*, 146 S. Ct. at 2044.

In the wake of *Bruen*, lower courts diverged as to the constitutionality of § 922(n). Some federal district courts invalidated § 922(n) as facially unconstitutional. *E.g.*, *United States v. Holden*, 638 F. Supp. 3d 931 (N.D. Ind. 2022); *United States v. Quiroz*, 629 F. Supp. 3d 511 (W.D. Tex. 2022).³ Others determined that § 922(n) was unconstitutional as applied. *United States v. McDaniel*, No. 22-CR-0176-BHL-1, 2024 WL 3964339 (E.D. Wis. Aug. 28, 2024); *United States v. Stambaugh*, 641 F.Supp.3d 1185 (W.D. Okla. Nov. 14, 2022). The majority of district courts to consider the issue, however, rejected challenges to the provision. *See United States v. Posada*, 670 F. Supp. 3d 402, 411 (2023) (collecting cases).

³ These decisions were later reversed on appeal.

B. The courts of appeals to consider constitutional challenges to § 922(n) have upheld the law, but they have done so on different grounds that reveal a fundamental disagreement about how to apply this Court’s recent Second Amendment precedent. These courts cannot agree on a historical analogue for § 922(n), variously relying on Founding Era pretrial detention, surety laws, and laws disarming supposedly dangerous groups because of their religion or political allegiances.

1. The Fifth, Sixth, Ninth, and Tenth Circuits have concluded that Founding Era pretrial detention and bail practices are a sufficient analogue to support § 922(n), at least in some of its applications. *See United States v. Quiroz*, 125 F.4th 713, 718–724 (5th Cir. 2025); *United States v. Gore*, 118 F.4th 808, 814–17 (6th Cir. 2024); *United States v. Stennerson*, 150 F.4th 1276, 1288–90 (9th Cir. 2025); *Ogilvie*, 153 F.4th at 1106–11. These courts contend that the “how” of the regulations match up, because at least some people accused of capital felonies in the Founding Era were required to be detained without bail and, “*ipso facto*,” could not “access” weapons for “the period between indictment and trial.” *Quiroz*, 125 F.4th at 718–19; *accord Gore*, 118 F.4th at 815–17; *Stennerson*, 150 F.4th at 1288–90; *Ogilvie*, 153 F.4th at 1106–07. As for the “why,” they maintain that one of the purposes animating Founding Era detention and bail practices was assuring public safety before trial, which they deem sufficiently similar to the purpose of § 922(n). *Quiroz*, 125 F.4th at 718–19 & n.16; *Gore*, 118 F.4th at 814–15; *Stennerson*, 150 F.4th at 1288; *Ogilvie*, 153 F.4th at 1110–11.

2. The Fourth Circuit, meanwhile, has rejected these practices as a sufficient analogue for § 922(n). *Jackson*, 152 F.4th at 570. That court has explained that “the ‘why’ of” § 922(n) is to “strike a balance between the public’s interest in keeping arms away from those who might misuse them and the rights of individuals to be free from government intrusion.” *Id.* Given that Founding Era indictees were only disarmed if *detained*—and because there is no evidence “that founding-era pretrial *detention* served preventive ends”—Founding Era pretrial detention and bail practices cannot support § 922(n) in any of its applications. *Id.* at 571 (emphasis added).

The Fourth Circuit nevertheless upheld the modern law in reliance on historical surety statutes that were triggered by the prior misuse of firearms, laws that no other court of appeals has relied upon. The court reasoned that “§ 922(n) and [those] surety laws share a key purpose—prevention,” and that both were “trigger[ed]” by a person’s “exercise[of] control in some way over a dangerous weapon.” *Jackson*, 152 F.4th at 575, 577 (emphasis omitted). The Fourth Circuit also emphasized that both involved impermanent firearms restrictions that were based on similar findings: for § 922(n), “probable cause that [one] already committed a felony”; and for misuse-of-firearm laws, “reasonable cause to fear that the accused would do a person harm or breach the peace.” *Id.* at 576 (quotation and alteration marks omitted).⁴

⁴ The Fifth Circuit, meanwhile, has observed that different category of surety laws—peace bonds—could be relied upon by “founding-era magistrates” to “require those

In addition, the Fourth Circuit invoked historic laws that disarmed groups of purportedly dangerous individuals like loyalists, Protestants, Catholics, and Native Americans. *Jackson*, 152 F.4th at 577. The court concluded that such laws “categorically” disarmed based on “membership in a distrusted group,” making them sufficient historical analogues for § 922(n)—and (apparently) for any modern law that disarms individuals with a “demonstrated disrespect for legal norms” or who are “potentially violent or dangerous.” *Id.* (quotations omitted).⁵

C. This disarray among the lower courts warrants this Court’s review. “Under *Bruen*, courts must, at a minimum, articulate workable principles of relevant similarity” between historical analogues. Blocher, *supra*, 133 Yale L. J. at 137. “[Y]et many post-*Bruen* cases have failed this basic requirement.” *Id.* “Predictably,” that failure has “created confusion,” leading courts to reach different results, and leaving legislatures and the public to “only speculate” as to whether firearm prohibitions might withstand constitutional scrutiny. *Id.* Without clear guidance, *Bruen* in practice “has meant that lower courts can simply choose whichever instrument they want

defendants suspected of future misbehavior to post a surety bond before their release.” *Quiroz*, 125 F.4th at 722. It did not claim that these peace bonds could be used to *disarm* those granted bail, and it did not rely on them as a stand-alone historic analogue. Instead, it simply noted that the requirement of peace bonds “confirm[s] that pretrial restrictions were not aberrations.” *Id.*

⁵ The Ninth Circuit bolstered its reliance on Founding Era pretrial detention and bail practices with similar reasoning. *See Stennerson*, 150 F.4th at 1288–89 (calling “statutes disarming Catholics and other groups perceived to be disloyal” part of “a history and tradition of . . . disarm[ing] groups or individuals whose possession of firearms would pose an unusual danger, beyond the ordinary citizen”).

in pruning each particular regulatory hedge before them.” Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. 79 (2023). That approach is untenable, and it creates unpredictability in the case law that “the [Supreme] Court will need to resolve.” *Id.*

II. The decision below is wrong; no historical laws support § 922(n)’s automatic disarmament of everyone under felony indictment.

Courts cannot agree about which historical laws support the constitutionality of 18 U.S.C. § 922(n) because none does. Section 922(n) effectively disarms people accused of a felony offense by categorically prohibiting them from acquiring both firearms and the ammunition that would allow them to bear any arms they might already lawfully possess—without judicial process, based solely on unproven allegations of prior misconduct, and with no timely opportunity to regain their rights. As the government acknowledged below, no historic English or American laws forbade criminal defendants from possessing or buying firearms or ammunition while awaiting trial. Nor has the government been able to justify the “how and why” of § 922(n)’s modern approach to firearm prohibition by analogy to any historical firearm regulation that did exist. *Bruen*, 597 U.S. at 17, 24–25, 29. The decision below is wrong.

A. Section 922(n) does not match the “why” of pretrial detention at the Founding or the “how” of any incidental burden it imposed.

The Tenth Circuit has held that § 922(n) is constitutional because “[p]retrial detention at the founding” involved a “loss of liberty” that incidentally “burden[ed] the Second Amendment right.” *Ogilvie*, 153 F.4th at 1106–07. That reasoning is faulty. In the Founding Era, jails and prisons may have banned firearms in their

facilities. But indictees detained before trial were only incidentally subject to such regulations, which “targeted different kinds of people, did so for different purposes, and operated in different ways.” *Hemani*, 146 S. Ct. at 1687.

1. For starters, pretrial detention and practices were not historic firearms regulations. Courts have presumed that “pretrial detention naturally entailed the loss of . . . access to weapons” in the Founding Era. *Quiroz*, 125 F.4th at 718–19 (quotation and alteration marks omitted); *see also Ogilvie*, 153 F.4th at 1106 (same); *Gore*, 118 F.4th at 815 (same); *Stennerson* 150 F.4th at 1288 (same); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983) (“We may presume that persons confined in gaols awaiting trial on criminal charges were also debarred from the possession of arms.”). If indeed pretrial detainees were “*ipso facto*” disarmed in this way, *Quiroz*, 125 F.4th at 718–19, that would have been because jails and prisons were prohibited places—locations that simply did not allow firearm inside—not because anyone indicted for felony offenses were “targeted” for disarmament, *Hemani*, 146 S. Ct. at 1687.

Notably, such location-focused regulations would have applied equally to everyone subject to incarceration in the Founding Era, including “vagrants, vagabonds, runaways, [and] disorderly persons.” Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1855, 1861–62 (May 2024) (quotation marks omitted) (noting that, “[f]or this group, there was no bail and no trial”); *see also* Kristin O’Brassill-Kulfan, *Vagrants and Vagabonds: Poverty and mobility in the early American republic* 2 (2019) (“Arrests for vagrancy—a category reserved for the poor,

wanderers, beggars, and those lacking ‘legal settlement’—were the ubiquitous result of a complex system of bureaucracy and policing of the poor and transient in the early American republic”). In places likely Philadelphia, this included a “disproportionate” share of Black people incarcerated pursuant to “colonial vagrancy statutes [that] were modified [in the early 19th century] to criminalize the early national poor just as African Americans rushed to the city in search of freedom.” Funk & Mayson, *supra*, at 1864 (alteration marks omitted) (quoting Jen Manion, *Liberty’s Prisoners: Carceral Culture in Early America* 13 (2015)). It happens to be that some felony indictees would have been subject to these jail rules as well; but—like vagrants and disproportionately impacted Black people—they were not “targeted” by them, as the Second Amendment requires. *Hemani*, 146 S. Ct. at 1687.⁶

2. Even if the incidental disarmament that apparently came with pretrial detention could be considered a historic firearms regulation targeting felony indictees, the *why* of the laws is fundamentally mismatched. As the court of appeals below recognized, the purpose of § 922(n) is to assure public safety before trial. *Ogilvie*, 153 F.4th at 1110–11. The sole purpose of pretrial detention at the Founding, however, was to guarantee that the defendant was available for punishment upon conviction.

⁶ In *Rahimi*, this Court explained that “imprisonment” as punishment for committing a specific offense in the Founding Era can justify the “lesser restriction” of “temporary disarmament” after similar findings of misconduct today. 602 U.S. at 699. That is a far cry from saying that all forms of custody in the Founding Era support the automatic disarmament of broad categories of people today, no matter who or what those laws targeted. Otherwise, taken to its logical extreme, this sentence from *Rahimi* would mean that the Second Amendment permits the automatic disarmament of all poor people, or all homeless people, or all itinerant workers.

See, e.g., Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. Rev. 837, 845 n.24 (2016) (“[A]ll the available evidence points to the fact that pretrial detention, both under the English common law and at the time the Constitution was written, was limited to flight risk.”); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 Ohio St. L.J. 723, 732-33 (2011); (“Bail historically served the sole purpose of returning the defendant to court for trial[.]”); William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 68-69 (1977) (“The function of bail [in the early republic was] thus limited to insuring the presence of a defendant before the court”); Evan Shapiro, *Section 3142(e) of the 1984 Bail Reform Act: Rebuttable Presumption or Mandatory Detention?*, 35 Buff. L. Rev. 693, 695 (1986) (similar).

a. In the Founding Era, neither legislatures nor the judiciary denied bail for the purpose of protecting the public before trial. See, e.g., Baradaran, *supra*, at 731 (“Bail was not denied based on justifications of public safety or dangerousness posed by these defendants[.]”); Duker, *supra*, at 68–69 (bail was not intended “to prevent the commission of crimes”). As Sir William Blackstone explained contemporaneously, detention was allowed in capital cases only to prevent offenders from being “[s]uffered to e[s]cape with impunity.” William Blackstone, 4 *Blackstone’s Commentary on the Laws of England* 294 (1765). Bond was considered insufficient in that circumstance because (1) one facing death would be willing to “forfeit” any quantum of money “to [s]ave hi[s] own life”; and (2) forfeited assets would be no “[s]atisfaction or indemnity . . . to the public.” *Id.*; see also *id.* (“[T]he public is entitled to demand

nothing le[ss] than the highe[s]t of [s]ecurity that can be given ; viz. the body of the accu[s]ed, in order to en[s]ure that ju[s]tice [s]hall be done upon him, if guilty.”); *id.* at 297 (pretrial incarceration is for “[s]afe cu[s]tody” of defendant).

It was not until the 1960s that judges began to invoke a defendant’s potential danger to the community before trial as a basis for denying bail. Alexa Van Brunt and Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next*, 108 J. Crim. L. & Criminology 701, 728 (2018). And denial of bail based on pretrial dangerousness was not actually authorized anywhere in the United States until the 1970s. *Id.* Because Founding Era pretrial detention laws had “little to do with protecting the public from categorically violent and unusually dangerous persons,” this Court should reject the analogue. *Hemani*, 146 S. Ct. at 1691.

b. In reaching a contrary conclusion about the *why* of historic bail denial, the Tenth Circuit relied on an anachronistic reading of a single sentence of another contemporaneous writer. *See Ogilvie*, 153 F.4th at 1110. Anthony Highmore, a late eighteenth-century commentator, wrote that bail could be denied at the time in order to preserve “the safety of the people . . . against the lawless depredations of atrocious offenders.” Anthony Highmore, *A Digest of the Doctrine of Bail in Civil and Criminal Cases* vii (1783). The Tenth Circuit understood this sentence to mean that “pretrial detention and bail at the founding addressed public safety concerns.” *Ogilvie*, 153 F.4th at 1110. But Highmore, who relied expressly and exclusively on Blackstone, had a different point: To the extent denial of bail preserved “the safety of the people,”

it did so by making sure that “atrocious offenders” were available to stand trial and thus punished for their past “lawless depredations.” See Highmore, *supra*, at vii (citing Blackstone, *supra*, at 297). In any event, an isolated and unsupported assertion of a single contemporaneous commentator cannot carry the government’s burden. See *Bruen*, 597 U.S. at 21 (finding persuasive *groups* of contemporaneous commentators who “*routinely* explained” law similarly) (emphasis added).

The court of appeals also cited “[s]cholarly debate” as to the purposes for which Founding Era courts denied bail, *Ogilvie*, 153 F.4th at 1111, but nowhere does that so-called debate persuasively challenge the historic record. The earliest articles cited by the Tenth Circuit are from the 1960s and 1970s—an era in which commentators first sought to justify pretrial detention based on dangerousness. These commentators concluded that this modern practice was actually centuries old, but they did not do so based on any direct evidence. Instead, they assumed so based solely on the existence of statutes precluding magistrates from granting bail in certain categories of cases. See H.H. Meyer, *Constitutionality of Pretrial Detention (pt. 1)*, 60 Geo. L. J. 1140, 1162–63 (1972) (assuming historic community-safety purpose based on “the large number of capital crimes”); Roman L. Hruska, *Preventive Detention: The Constitution and the Congress*, 3 Creighton L. Rev. 36, 47 (1970) (assuming historic community-safety purpose from “[t]he express right to bail in noncapital cases”); John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223, 1225 (1969) (assuming historic community-safety purpose from “legislative decisions to make bail unavailable to certain classes of dangerous offenders”).

Not only are these assumptions contrary to Blackstone’s contemporaneous explanation that bail was only denied in capital cases to ensure that defendants would be available for punishment if convicted, *supra*, at 294, they are not even supported by the laws the commentators purport to rely upon. Numerous federal crimes that might suggest that suspected perpetrators posed a threat to others—including manslaughter, malicious maiming, and confederacy to become a pirate—were non-capital offenses and therefore automatically bailable. Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the “Virtuous,”* 25 Tex. Rev. L. & Pol. 245, 280 (2021) (citing federal statutes). The same was true in many of the colonies, where seemingly dangerous crimes like “arson, burglary, and robbery, were absent from the colonists’ list of capital crimes.” Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 328, 349 (1982). And later articles are no more persuasive, as they do little more than parrot these earlier academics. *E.g.*, Sandra G. Mayson, *Dangerous Defendants*, 127 Yale L.J. 490, 502 n.46 (2018); Verrilli, *supra*, at 348 n.43.

Finally, the court of appeals cited the purposes behind historical practices when bail *was not* denied—and so indictees *were not* incidentally disarmed—reasoning that § 922(n) was also justified because “[i]ndividuals released on bail and their sureties had to guarantee ‘good behavior’ as a condition for release.” *Ogilvie*, 153 F.4th at 1111 (quotation omitted). Unlike pretrial incarceration, this guarantee of “good behavior” did not burden the right to keep and bear arms either directly or indirectly. And this Court’s Second Amendment jurisprudence is not concerned with

historical regulations that did not actually burden the right to keep and bear arms. *See Bruen*, 597 U.S. at 17 (asking only whether modern regulations are “consistent with this Nation’s historical tradition of firearm regulation”).

3. In addition, the “how” of Founding Era pretrial custody did not “impose a comparable burden on the right of armed self-defense.” *Bruen*, 597 U.S. at 3. Historically, pretrial custody was imposed by a judge, in open court, based on an evidentiary record—and, incidentally, those who were detained were unable to keep firearms with them while in the jail. In contrast, Section 922(n) automatically strips every single person charged by indictment or information with a felony of his ability to acquire firearms and ammunition, without regard to pretrial incarceration, and without any opportunity for judicial review.

a. When the Second Amendment was ratified, some states utilized a common law bail model, while others used a reformed or “dissenter” model that was adopted by the federal government and became the “consensus” bail model across the United States. Funk & Mayson, *supra*, at 1822–23, 1825–26. The systems differed in how often they required pretrial release or left the determination “to the magistrate’s discretion.” *Id.* at 1822–23. But each model descended from the “Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights,” which “required bail determinations to be made in open court sessions, with an evidentiary record, and in a timely manner.” *Id.* at 1828. And throughout Colonial America, these same basic procedural protections required a magistrate to hear evidence about

charges before deciding whether “the person accused should be either discharged, or bailed, or committed to prison.” *Id.* at 1829–32.

Under both the common law model and the dissenter model, the availability of bail turned on the nature of the charges and “the magistrate’s estimation of the defendant’s probable guilt,” which included consideration of the defendant’s criminal reputation. *Id.* at 1832–35 (common law model); *id.* at 1835–42 (dissenter model). Those denied bail were incarcerated, which presumably deprived them of “most liberties, including the ability to keep and bear arms” in the jail. *Jackson*, 152 F.4th at 571. Those granted bail were released and retained every aspect of their right to keep and bear arms, although magistrates could require sureties to guarantee a defendant’s “good behavior” during release. Funk & Mayson, *supra*, at 1853.

b. Section 922(n), by contrast, applies categorically and automatically upon the filing of a felony indictment or information, without regard to pretrial detention, and with no individualized determination regarding whether the charged individual should be effectively disarmed. 18 U.S.C. §§ 921(a)(14), 922(n). As this Court has recognized, historical laws that turned on individualized determinations cannot support a modern law that automatically and categorically burdens the Second Amendment right. *See Hemani* 146 S. Ct. at 1691.

B. No other court of appeals has identified a valid historical analogue for § 922(n).

1. The Fourth and Fifth Circuits—but not the Tenth Circuit—have relied on two types of surety laws to uphold § 922(n). Their analysis is deeply flawed.

The Fourth Circuit relied on surety laws that had nothing whatsoever to do with pretrial detention, bail, or felony indictment: those that targeted the misuse of firearms. *Jackson*, 152 F.4th at 575–77. In *Rahimi*, this Court relied in part on those laws to uphold 18 U.S.C. § 922(g)(8)’s prohibition on the possession of a firearm by anyone with a “restraining order [that] includes a finding that he poses ‘a credible threat to the physical safety’ of a protected person.” 602 U.S. at 693, 695–98 (quoting 18 U.S.C. § 922(g)(8)(c)(i)). Critically, however, surety laws could only operate to disarm someone based on a “judicial determination[]” of “probable ground to suspect [a particular defendant] of future misbehavior.” *Id.* at 695, 699 (quotation omitted). Section 922(g)(8)(c)(i) included similar procedural protections. But Section 922(n) is different: it automatically disarms a broad category of people without any judicial determination whatsoever.

The Fifth Circuit, meanwhile, discussed (though did not independently rely upon) the availability of peace bonds to magistrates who released pretrial defendants in the Founding Era, *Quiroz*, 125 F.4th at 722, but those laws are an even worse analog. Peace bonds did not impose any burden on the right to keep and bear arms. Instead, peace bonds were a device used in conjunction with pretrial release to “require those defendants suspected of future misbehavior to post a surety bond before their release.” *Id.* As discussed above, historical regulations that did not burden the right to keep and bear arms are irrelevant to the Second Amendment analysis, because they are not part of “this Nation’s historical tradition of firearm regulation,” *Bruen*, 597 U.S. at 17.

2. The Fourth and Ninth Circuits—but not the Tenth Circuit—have relied in part on the categorical disarmament of people disfavored because of their race, religion, or political allegiances. *Jackson*, 152 F.4th at 577–79 (Catholics, Protestants, Native Americans, and loyalists); *Stennerson*, 150 F.4th at 1288–89 (Catholics and loyalists). The analogy to laws disarming Catholic and Protestants—like analogies to laws disarming Black people—cannot survive this Court’s decision in *Wolford*, which precluded reliance on such discriminatory regulations. *See* 146 S. Ct. at 2053 (rejecting “reliance on . . . Black Codes that aimed to perpetuate the subjugation of blacks” because it is a “tainted artifact” that fails to “illuminate[] the original understanding of the right to keep and bear arms”).

As for laws disarming Native Americans and loyalists: even if they remain relevant to the Second Amendment inquiry after *Wolford*, they are not sufficiently similar to § 922(n) in why they burden the right. Founding Era statutes targeting Native Americans were almost certainly motivated by “the persistent state of conflict between the native inhabitants of the continent and the colonists.” *United States v. Pierret-Mercedes*, 731 F. Supp. 3d 284, 308 (D.P.R. 2024). Similarly, loyalists were not simply disarmed because they were part of “a distrusted group” who “demonstrated disrespect for legal norms” and were “potentially violent or dangerous,” as these circuit courts have suggested. *Jackson*, 152 F.4th at 577; *accord Stennerson*, 150 F.4th at 1288–89. They were disarmed because they were “existential threats to the cause of independence.” Pratheepan Gulasekaram, *Loyalty Disarmament and the*

Undocumented, 125 Colum. L. Rev. 29, 38 (March 21, 2025). In addition, loyalist disarmament laws operated differently: The subset of laws that went so far as to prohibit loyalists from bearing arms in self-defense, *see Quiroz*, 629 F. Supp. 3d at 519, nonetheless allowed for timely mechanisms for the restoration of the right—namely, the swearing of loyalty oaths. Gulasekaram, *supra*, at 40. Section 922(n) comes with no such escape hatch.⁷

C. The Tenth Circuit’s historical analysis is irreconcilable with *Hemani* and at least should be reconsidered in light of that case.

For many of the same reasons discussed above, the Tenth Circuit’s historical analysis is irreconcilable with the analysis in *Hemani*. If the Court does not grant plenary review to resolve the constitutionality of § 922(n), it should at minimum grant the petition, vacate the decision below, and remand for the court of appeals to consider the question presented in light of *Hemani*.

First, *Hemani* explained the *how* and *why* of historical regulations are not the only relevant considerations: It matters who the law “targeted” in the first place. 146 S. Ct. at 1694. Founding Era *pretrial detention laws* may have targeted those under felony indictment, but *pretrial detention laws* were not firearms regulations. Instead,

⁷ Certainly, some criminal defendants will be able to restore their Second Amendment rights by demanding trial and obtaining an acquittal on their felony charges. But that is a time consuming process and a rare outcome, as discussed below. Much more common is to enter a guilty plea that will ultimately lead to a restoration of rights—but only after enduring another year or ten of continued gun restrictions.

(courts have presumed) the act of incarcerating someone before trial incidentally triggered jail rules prohibiting access to firearms inside. Those rules targeted a location (jail). Perhaps they could be said to have targeted a group of people (the incarcerated). But that group of people was vast, including not just felony indictees but vagrants and those unable to pay their debts. In contrast, § 922(n) targets every single person charged with a felony by indictment or information, without regard to their bail status at the time. While there is an overlap between the people impacted by the laws, *Hemani* makes clear that is not sufficient.

Second, in *Hemani*, this Court rejected an analogy between § 922(g)(3)’s unlawful user provision and habitual drunkard laws, in part because the historical laws that the government identified “usually provided some form of process before an individual lost any of his liberties, even temporarily.” 146 S. Ct. at 1691. By contrast, the Court stressed, § 922(g)(3) “automatically divests an individual of his constitutional right to bear arms the moment he becomes an unlawful user and until he ends his drug use—all without any pre-deprivation process.” *Id.*

The analogy between § 922(n) and historical detention and bail practices suffers from the same defect. In England, bail determinations had to be made in open court sessions, with an evidentiary record, and in a timely manner. Funk & Mayson, *supra*, at 1828. And throughout Colonial America—in both consensus and dissenter jurisdictions—these same basic procedural protections required a magistrate to hear evidence about charges before making detention decisions. *Id.* at 1829–32. Section

922(n), however, applies categorically and automatically upon the filing of an indictment or information, with no individualized determination regarding whether the charged individual should be effectively disarmed. See 18 U.S.C. §§ 921(a)(14), 922(n).⁸ This difference in process is fatal after this Court’s decision in *Hemani*.

III. Millions of Americans have been disarmed by § 922(n) in violation of their Second Amendment rights.

The question presented is deeply consequential. Each year, § 922(n) disarms millions of Americans facing a felony indictment or information, even though many of those individuals will not end up with a felony conviction. Section 922(n) is also unnecessary. In essentially every jurisdiction, a local magistrate individually determines whether to detain or disarm a defendant before trial based on community safety concerns. That judicial process, accompanied by the same sort of procedural safeguards that accompanied disarmament in the Founding Era, is supported by the historical record—not § 922(n)’s indiscriminate and automatic prohibition on the acquisition of firearms or ammunition after felony indictment.

A. As many as two million people are charged with felonies every year in the United States. See Bureau of Justice Statistics, *Prosecutors in State Courts, 2020* 6–7 & Table 5 (Nov. 2024), at <https://bjs.ojp.gov/document/psc20.pdf> [hereinafter “BJS Report”]. Section 922(n) effectively and automatically disarms large numbers of

⁸ Indeed—although it minimized the problem—the Tenth Circuit “acknowledge[d] some differences between § 922(n) and pretrial detention at the founding,” including that “some states under the dissenter model may not have prescribed automatic detention for those indicted for capital crimes.” *Ogilvie*, 153 F.4th at 1108.

these men and women, often for years, as their cases wind through hundreds of different jurisdictions with different charging practices, different plea policies, different diversion programs, and different rates of delay.⁹

For hundreds of thousands of individuals, § 922(n) disarms them even though the indictment will not end in a felony conviction. In 2020, for instance, 17% (323,000) of the felony charges concluded nationwide were dismissed outright. *See* BJS Report, *supra*, at 7. Still more of those felony prosecutions resulted in acquittals on all felony counts,¹⁰ or pled down to misdemeanor offenses.¹¹ And 12% (228,000) of the concluded felony prosecutions—like the state charges against Mr. Trevino—were “closed by other dispositions (e.g., deferred prosecution, diversion, or referral to problem-solving courts).” BJS Report, *supra*, at 7.

⁹ Of course, some were already prohibited from possessing firearms by other statutes. *See, e.g.*, 18 U.S.C. § 922(g)(1) (disarming those with prior felony convictions).

¹⁰ No nationwide statistics track how many felony prosecutions end in acquittal. However, for fiscal year 2020–21, California reported that 426 of the 1,632 felony cases that went to trial (or approximately 26%) ended without a felony conviction. Judicial Council of California, *2022 Court Statistics Report: Statewide Caseload Trends 2011-12 through 2020-21* 83 (2022), at <https://courts.ca.gov/sites/default/files/courts/default/2024-12/2022-court-statistics-report.pdf>.

¹¹ In some jurisdictions, as many as 50% of all felony cases plead down to misdemeanors. *See, e.g.*, Denver District Attorney Data Dashboard, *Case Resolution*, at <https://data.dacolorado.org/2nd/case-resolution/> (last visited Aug. 24, 2026) (reporting quarterly rates in Denver between 31% and 53% from 2017 and 2025); Besiki Luka Kutateladze et al., *From Felonies to Misdemeanors: Exploring Variations and Reasons for Charge Reduction: A research & policy brief* (Feb. 13, 2023), at <https://prosecutorialperformanceindicators.org/wp-content/uploads/2023/02/Policy-Brief-From-Felonies-to-Misdemeanors.pdf> (reporting that 50% of felony filings were reduced to misdemeanors or violations in Manhattan in 2021).

Section 922(n)'s disability can last for many months or years. For many (if not all) of the cases reported closed due to deferral, diversion, or referral, the indictments or informations will technically remain pending for years. Every state offers some sort of deferred adjudication program; and, in many jurisdictions, deferral is authorized for some or most felony charges. *See* Collateral Consequences Research Center, *Judicial Diversion and Deferred Adjudication: A national survey* (March 1, 2022), at <https://ccresourcecenter.org/judicial-diversion-and-deferred-adjudication-a-national-survey/>. In Texas, for example, deferred adjudication with community supervision is available for any charge not explicitly excluded by statute, and in some cases will delay final resolution of a case for as long as 10 years. Tex. Code Crim. Proc. art. 42A.001 *et seq.*

Even without deferral, diversion, or referral, it can take significant time for a person to resolve his pending felony charges. For example, in Milwaukee County, Wisconsin, and San Francisco County, California, it is the norm for felony prosecutions to last a full year. Don Stemen, et al. *Time to Disposition in Felony Cases: A research and policy brief* 6 fig. 2 (Jan. 2024), at <https://prosecutorialperformanceindicators.org/wp-content/uploads/2024/01/PPI-Time-to-Disposition-in-Felony-Cases-FINAL-2024.pdf>. And in Broward County, Florida, it now takes nearly two years on average to resolve a felony case. *Id.* at 8 fig. 4.

B. Section 922(n) indiscriminately disarms individuals based solely on the existence of a pending indictment by prohibiting them from acquiring firearms or ammunition. Section 922(n)'s prohibition applies without regard to the specific charge

or quantum of evidence and without judicial oversight. Indeed, § 922(n) does not even require an indictment; it also applies to any “information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.” 18 U.S.C. § 921(a)(14). Section 922(n) may thus strip an individual of their Second Amendment rights with virtually no process at all. *See* Wayne R. LaFave, 4 *Crim. Proc.* § 14.2(a) (4th ed.) (explaining that approximately a dozen states “permit[] prosecution by ‘direct filing’ of an information, which does not require a preliminary hearing or grand jury review, “and not all of these states provide for some alternative form of judicial screening”).

That automatic, categorical disarmament is also unnecessary in essentially every single case, because judicial officers already have tools to disarm individual inditees where circumstances warrant. For those who are detained before trial, other laws prohibit them from accessing firearms while in custody, for security reasons; and if they have a gun inside of the jail anyway, they can be punished for that specific act. *See, e.g.*, 18 U.S.C. § 1791(a)(2); Cal. Penal Code § 4574; Fl. Stat. Ann. § 951.22(1); Mich. Comp. L. §801.262(2); Texas Penal Code § 46.03(a)(9). For those who are released on bond, other laws permit local judicial officers “in every state” to impose conditions of pretrial release that disarm based on individualized assessments of danger before trial, including conditions of release regarding the possession or acquisition of firearms and ammunition. Nat’l Conf. of State Legislators, *Pretrial Release Conditions* (updated Sept. 15, 2016), at <https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-conditions>. Similarly, deferred adjudication programs allow

judicial officers to impose conditions of probation or community supervision regarding the possession of firearms in the meantime. *See, e.g.*, N.Y. Crim. Pro. Law § 530.13 (any . . . condition[]”); Tex. Code Crim. Proc. art. 42A.301(a) (“any reasonable condition . . . that is designed to protect . . . the community”). Critically, however, such conditions can only be imposed where they are warranted based on an individualized judicial assessment—leaving § 922(n)’s automatic prohibition to sweep in those inductees for whom such conditions are unwarranted.

As discussed below, history supports this individualized process of temporary judicial disarmament, not § 922(n)’s indiscriminate and automatic legislative prohibition on the acquisition of ammunition by every single person under felony indictment. As in the Founding Era, felony defendants who are denied bail are held in locations that incidentally prohibit them from introducing weapons inside. And, as in the Founding Era, felony defendants granted bail are subject to having a local magistrate set individualized conditions designed to protect the community before trial, which can include a prohibition on the possession and acquisition of firearms and ammunition. Section 922(n) sweeps far beyond those Founding Era practices, and its categorical and widespread curtailment of Second Amendment rights warrants this Court’s review.

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Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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