

No. _____

IN THE
Supreme Court of the United States

RICHARD BARGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since the Court issued its ruling in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022), frontline defense lawyers and prosecutors, along with district courts, and courts of appeals, have grappled with how the holding applies to § 922(g)(1). Is the statute facially invalid? Is it subject to as-applied challenge? If so, how does that challenge work? Criminal defense lawyers and prosecutors have spent hours upon hours litigating these issues. District courts and appellate courts have expended massive amounts of time and energy ruling on these issues. Defense lawyers cannot stop raising the issue because this Court has not given us any final answers. Without answers from this Court, defense lawyers cannot tell clients that challenging the constitutionality of § 922(g)(1) is frivolous, even if the applicable court of appeals has rejected the argument. So, we must keep filing motions. We are stuck in purgatory, or ground hog day, or whatever metaphor strikes your fancy.

Perhaps the Court needed to flesh out *Bruen* on lesser used subsections of § 922(g) before tackling subsection (g)(1). *United States v. Rahimi*, 602 U.S. 680 (2024) (§ 922(g)(8)); *United States v. Hemani*, 146 S. Ct 1677 (2026) (§ 922(g)(3)). That’s understandable. But the time has come. We need an answer on § 922(g)(1) and we need it now.

The Question Presented is:

Whether 18 U.S.C. § 922(g)(1), the federal statute that prohibits anyone who has been convicted of “a crime punishable by imprisonment for a term exceeding one year” from possessing a firearm, violates the Second Amendment as applied to Petitioner, based solely on a decade old nonviolent drug distribution conviction.

PARTIES TO THE PROCEEDING

Petitioner is Richard Barge, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

United States v. Barge, No. 25-cr-00006 (October 6, 2025)

United States Court of Appeals (7th Cir.):

United States v. Barge, No. 26-1431 (July 9, 2026)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Barge respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The court of appeals' order summarily affirming Mr. Barge's conviction is attached as Appendix A. It is not reported. The district court's order denying Mr. Barge's motion to dismiss is attached as Appendix B.

JURISDICTION

The Seventh Circuit entered its order summarily affirming Mr. Barge's conviction on July 9, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment of 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)(1) of Title 18 of the U.S. Code provides:

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

STATEMENT OF THE CASE

The Seventh Circuit summarily affirmed the denial of Mr. Barge's as-applied challenge to § 922(g)(1) based on its decision in *United States v. Watson*, 171 F.4th 1012 (7th Cir. 2026). Appendix A. *Watson* held that § 922(g)(1) is subject to as-applied challenge but found the statute constitutional when applied to a defendant convicted of a drug distribution felony. The Circuit had stayed hundreds of § 922(g)(1) cases pending its decisions in *United States v. Prince*, 171 F.4th 1009 (7th Cir. 2026), addressing a facial challenge to § 922(g)(1), and *Watson*, an as-applied challenge to § 922(g)(1). Following its decisions in *Prince* and *Watson* (issued the same day), the Circuit began summarily affirming district court denials of as-applied challenges to § 922(g)(1) where the defendant has a prior drug distribution conviction. Because Mr. Barge has a prior conviction for distributing less than 10 grams of heroin, his conviction was summarily affirmed based on *Watson*. Appendix A.

I. Petitioner's § 922(g)(1) Conviction Rests on a Nonviolent Drug Offense.

From March to May 2024, law enforcement was monitoring the calls to and from Deandre Wright's phone as part of a drug investigation. Law enforcement intercepted a series of calls between Wright and Mr. Barge in which the two discussed Mr. Barge buying two firearms from Wright. Mr. Barge ultimately met Wright in Chicago on May 17, 2024, and purchased a Glock handgun outfitted with a "switch." The switch allowed the gun to fire multiple bullets with one squeeze of the trigger, making it a machinegun for purposes of federal law. *See* 26 U.S.C. § 5845(b) (defining

“machinegun”). At the time Mr. Barge bought the gun, he had several prior felony convictions, including Illinois convictions for retail theft, burglary, manufacturing or delivering less than 10 grams of heroin, and attempted burglary. PSR ¶¶ 39, 40, 42, 44. He also had an Indiana felony conviction for theft. PSR ¶ 47.

A grand jury in the Northern District of Illinois returned an indictment against Mr. Barge and Wright. The indictment charged Mr. Barge with possessing a machinegun and being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(o)(1) and (g)(1). Wright was charged with transferring a machinegun in violation of 18 U.S.C. § 922(o)(1).

Mr. Barge filed a motion to dismiss the indictment arguing § 922(g)(1) was unconstitutional under *Bruen*. R.54.¹ Mr. Barge argued his conduct was covered by the plain language of the Second Amendment, and the government could not meet its burden to show a history of categorically banning felons from possessing firearms. *Id.* at 3-8, 11-13. Additionally, he argued none of his prior felony convictions were violent and were not “indicative of a present threat of danger.” *Id.* at 9-10. Accordingly, he claimed, § 922(g)(1) was unconstitutional as applied to him, even if it was not facially unconstitutional. *Id.* at 8-11.

The government argued that the plain text of the Second Amendment did not apply to Mr. Barge due to his prior felony convictions. R.60 at 17-24. Alternatively, the government argued that if the Second Amendment did apply to Mr. Barge, the Nation’s history of disarming “untrustworthy adherents to the law” justified Mr.

¹ We refer to district court filings as “R.____”, and filings in the court of appeals as “C. of A.____”.

Barge's disarmament. *Id.* at 29-47. Finally, the government argued that § 922(g)(1) was constitutional as applied to Mr. Barge given his prior Indiana theft conviction. *Id.* at 50-56.²

The district court denied Mr. Barge's motion to dismiss. Appendix B. The district court found § 922(g)(1) facially constitutional based on the English and American history of disarming untrustworthy individuals and imposing death sentences on most felons, justifying the lesser penalty of disarmament. *Id.* at 2-4. It also denied Mr. Barge's as applied challenge, because he did not provide historical examples of laws distinguishing between violent and non-violent felons. *Id.*

Mr. Barge entered a conditional guilty plea to the felon in possession count. R.84; 87, and the government agreed to dismiss the machinegun count. R.87. The district court sentenced Mr. Barge to 22 months' imprisonment followed by 3 years of supervised release. R.109. Mr. Barge filed a timely notice of appeal.

II. The Seventh Circuit Denies Petitioner's As-Applied Challenge to § 922(g)(1).

Shortly after Mr. Barge filed his notice of appeal, the Seventh Circuit issued its opinion in *Watson*. Chief Judge Brennan, acknowledging the "challenges" of the history-and-tradition analysis, identified two historical traditions to uphold § 922(g)(1) as applied to *Watson*: first, the categorical disarmament of groups the legislature deemed "dangerous"—including slaves and Native Americans—and

² A footnote in the government's response explained it was relying on Mr. Barge's Indiana felony theft conviction as the disqualifying felony because it had not received confirmation of Mr. Barge's Illinois felony convictions. The PSR confirmed the Illinois felony convictions and their details. Mr. Barge did not object to the PSR or challenge the existence of those convictions in the district court.

second, the principle that the “greater includes the lesser,” or that because legislatures at the Founding could impose the death penalty for serious crimes, they could also impose the lesser restriction of disarmament. *Watson*, 171 F.4th at 1018-23.

Rather than connect the “why” or “how” of those traditions to the “why” or “how” of *Watson*’s conviction under § 922(g)(1), however, the panel invoked “common sense.” *Id.* at 1023-24. It asserted, without citation to anything in § 922, that “Congress reasonably determined that a felony drug conviction is a ‘dangerous’ crime.” *Id.* at 1023.

The panel went on to suggest that “[f]ederal caselaw well substantiates that drugs and guns together are dangerous.” *Id.* at 1024. But it cited only cases involving conduct in which firearms were actually used, or at heightened risk of being used, during the course of a drug crime. See *Muscarello v. United States*, 524 U.S. 125, 126, 132 (1998) (analyzing 18 U.S.C. § 924(c)(1), which imposes mandatory prison time upon a person who “uses or carries a firearm” “during and in relation to” a “drug trafficking crime”); *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 287 (2025) (describing Mexico’s “gun violence problem” and explaining that cartels use firearms “to commit serious crimes—drug dealing, kidnapping, murder, and others”); *Richards v. Wisconsin*, 520 U.S. 385, 391 n.2 (1997) (making vague reference to the “link[] between drugs and violence” in a case evaluating the propriety of a no-knock entry in a felony drug investigation). The panel also invoked 18 U.S.C. § 924(c), which punishes firearm possession or use during a drug crime, and

U.S.S.G. § 2D1.1(b)(1), which enhances sentences on the same basis. *Id.* The panel thus concluded that “[a] dealer of illegal drugs is more than just irresponsible; he is a threat to the physical safety of society.” *Id.*

Because Mr. Barge has a prior conviction for delivering drugs, he had to acknowledge that under *Watson*’s holding his as-applied challenge to § 922(g)(1) failed even though the offense did not involve any violence. C. of A. 7 at 10-13. The government filed a motion for summary affirmance, which the Seventh Circuit granted. Appendix A.

REASONS FOR GRANTING THE PETITION

There is a deeply entrenched circuit split over whether § 922(g)(1) is subject to an as-applied constitutional challenge. The Second, Fourth, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits have held that § 922(g)(1) is not subject to an as-applied challenge under *Bruen*. The Third, Fifth, Sixth, and Seventh Circuits, in contrast, have held that § 922(g)(1) is subject to an as-applied challenge under *Bruen*. The First Circuit has not yet ruled on the issue. That is reason enough for the Court to grant Mr. Barge’s petition. But there’s more.

The circuits that allow as-applied challenges vary wildly in how they apply this Court’s case law to resolve challenges. Worse, the circuits are relying on ugly historical precedents of disarming citizens based on their religious beliefs or membership in disfavored classes, i.e., Native Americans and formerly enslaved persons, to define the scope of the Second Amendment. This Court specifically rejected that reasoning in *Wolford v. Lopez*, 146 S. Ct 2032 (2026). It is unconscionable that the scope of a fundamental constitutional right is being defined by discriminatory episodes of disarmament that the Bill of Rights and the Fourteenth Amendment purposefully rejected.

Finally, as explained in the question presented, defense lawyers and prosecutors need answers from this Court on § 922(g)(1)’s constitutionality. In fiscal year 2025, 10.8% of defendants sentenced in federal court (7,245 out of 66,662) were sentenced for offenses involving § 922(g). U.S. Sent’g Comm’n, Quick Facts: 18 U.S.C. § 922(g) Firearms (Fiscal Year 2025) (available at

<https://www.ussc.gov/research/quick-facts/section-922g-firearms>) (last visited September 4, 2026). Of the 7,245 individual defendants whose sentences involved § 922, 89% were convicted under subsection (g)(1). *Id.* That means last fiscal year defense lawyers had to deal with *Bruen* and its application to § 922(g)(1) 6,448 times.

In each case we had to discuss *Bruen*, and in most cases file motions challenging the § 922(g)(1) charge. The average non-ACCA § 922(g) sentence is 70 months' imprisonment. *Id.* For a defendant facing significant prison time, any potential challenge to § 922(g)(1) is worthwhile when their lawyer is forced to admit that a challenge is not frivolous because no one knows how this Court will rule on the issue. After all, some courts have found § 922(g)(1) facially unconstitutional and some have found it unconstitutional as applied. The vast confusion in the lower courts means a challenge is not frivolous even if the applicable court of appeals has issued an opinion upholding § 922(g)(1) because no one knows how this Court will rule on the issue. It is time for the Court to end this chaos.

I. The Courts of Appeals Are Split on the Availability of As-Applied Challenges to Section 922(g)(1).

The Seventh Circuit's decision in *Watson* contributes to a deep division in the courts of appeals over the threshold question of whether an individual may raise an as-applied challenge to § 922(g)(1) at all. Until this Court resolves that split, an individual's ability to invoke the Second Amendment in relation to the statute depends on geography. In some circuits, he may be imprisoned and permanently stripped of a constitutional right without even the opportunity to raise an as-

applied claim; in others, he may argue, and prevail, that § 922(g)(1) is unconstitutional as applied to him. This conflict underscores the need for this Court to weigh in regarding the proper framework for Second Amendment challenges under § 922(g)(1).

In addition to the Seventh Circuit, which entertained Watson’s as-applied challenge,³ the Fifth Circuit has recognized as-applied challenges under § 922(g)(1). In *United States v. Hembree*, 165 F.4th 909 (5th Cir. 2026), the panel held § 922(g)(1) unconstitutional as applied to a defendant whose sole predicate felony was possession of methamphetamine. It emphasized that the government bears a “heavy” burden to show that the challenged law is “relevantly similar to laws that our tradition is understood to permit,” and concluded that the government had failed to carry that burden. *Id.* at 912, 916. The court also refused to treat simple possession as categorically “dangerous” enough to justify permanent disarmament. *Id.* at 917–18; *see also United States v. Martin*, 2026 WL 1180541, at *1 (5th Cir. Apr. 30, 2026) (following *Hembree* and holding § 922(g)(1) unconstitutional as applied to a defendant whose predicate conviction was also for drug possession).

As-applied challenges are also available in the Third Circuit. In *Range v. Attorney General*, 124 F.4th 218 (3d Cir. 2024) (en banc), the court held § 922(g)(1) unconstitutional as applied to an individual convicted of food-stamp fraud. The court reasoned that the government’s asserted historical traditions were “far too broad” to justify Range’s penalty, emphasizing that “the Founding-era practice of

³ *Watson* “reserve[d] ruling on an as-applied challenge to § 922(g)(1) under the Second Amendment by a felon whose predicate felony offense is not ‘dangerous.’” *Watson*, 171 F.4th at 1025.

punishing some nonviolent crimes with death 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 229, 231.

The Sixth Circuit has not yet invalidated § 922(g)(1) as applied to a particular defendant, but it has acknowledged the viability of doing so. In *United States v. Williams*, the court suggested that a person convicted of a felony who can show he poses no danger may fall outside § 922(g)(1)’s constitutional reach. 113 F.4th 637, 662 (6th Cir. 2024). The court further observed that the administrative relief mechanism in 18 U.S.C. § 925(c)—through which ATF could restore firearm rights to qualifying felons—“remains practically unavailable” because Congress has historically denied funding for the program. *Id.* at 661.

In the Second, Fourth, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits, by contrast, such challenges are categorically unavailable, leaving defendants like Hembree, Martin, and Range permanently disarmed or imprisoned. *See Zherka v. Bondi*, 140 F.4th 68, 74–79, 91–93 (2d Cir. 2025); *United States v. Hunt*, 123 F.4th 697, 700 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1125–26 (8th Cir.), *reh’g en banc denied*, 121 F.4th 656 (8th Cir. 2024); *United States v. Duarte*, 137 F.4th 743, 750–52, 761–62 (9th Cir. 2025) (en banc); *Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th Cir. 2025); *United States v. Dubois*, 139 F.4th 887, 888–89 (11th Cir. 2025); *Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019). Finally, the First Circuit has left for another day “whether as-applied challenges may be

properly brought as to § 922(g)(1).” *United States v. Fort*, 176 F.4th 1, 7 (1st Cir. 2026).

The stakes of this conflict cannot be overstated. Section 922(g)(1) is one of the most frequently prosecuted provisions in the federal criminal code. In 2022, convictions under the statute accounted for nearly 12% of all federal criminal cases. *See* Supp. Br. for the Federal Parties, *Garland v. Range*, No. 23-374, at 5-6 (June 24, 2024). And in 2024, approximately 90% of all § 922(g) convictions fell under § 922(g)(1). U.S. Sent’g Comm’n, Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses (Fiscal Year 2024). The circuit split means thousands of individuals may seek as-applied relief while thousands of others are denied even the opportunity to raise such a claim—an intolerable state of affairs in cases involving imprisonment and the loss of a constitutional right.

Apart from the disagreement among the circuits, § 922(g)(1) demands this Court’s attention because it operates on a massive scale to strip millions of Americans of what this Court has called a “fundamental righ[t] necessary to our system of ordered liberty.” *Rahimi*, 602 U.S. at 690; Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, 54 *Demography* 1795, 1806 (2017) (estimating that 19 million Americans had a felony record as of 2010). The statute’s sweep also compounds the well-recognized problem of overcriminalization in this country; “criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something.” *Nieves v.*

Bartlett, 587 U.S. 391, 412 (2019) (Gorsuch, J., concurring in part and dissenting in part). Given the sheer volume of prosecutions under § 922(g)(1), its constitutionality is an important question worthy of this Court’s review.

II. Reliance on the Disarmament of Groups Now Protected by the First and Fourteenth Amendments Cannot Justify § 922(g)(1).

The Seventh Circuit’s opinion in *Watson* relied upon some of the most ignominious chapters in Anglo-American law to reject an as-applied challenge to § 922(g)(1). The panel recounted how English sovereigns disarmed Catholics, political dissidents, and the Welsh, and then turned to colonial and early American laws disarming enslaved persons, Native Americans, and free Black people. *Watson*, 171 F.4th at 1020-22. From these laws, the panel distilled the principle that “legislatures deemed groups ‘dangerous’ and categorically disarmed them.” *Id.* The panel acknowledged that “this sad tradition includes laws repugnant by today’s standards” and that “[m]any of these laws would violate the Fourteenth Amendment.” *Id.* Despite these obvious problems, the panel concluded, “for this analysis their import cannot be ignored. These laws reflect the boundaries of the legislature’s power to enact class-wide disarmament laws consistent with the Second Amendment.” *Id.* The Sixth Circuit used the same analysis. *Williams*, 113 F.4th at 655 (“Classifying people as dangerous simply because of their race or religion was wrong from the beginning and unconstitutional from 1868. Nevertheless, these pre-Fourteenth Amendment laws provide insight into how early Americans conceived of the right to bear arms embodied in the Second

Amendment.”). And the Fifth Circuit followed suit. *United States v. Kimble*, 142 F.4th 308, 315 (5th Cir. 2025) (quoting *Williams*).

This Court rejected this analysis in *Wolford*, issued about 3 months after *Watson*. In that case, Hawaii tried to rely on a Louisiana statute that disarmed formerly enslaved people to support its law prohibiting the carrying of a firearm onto private property open to the public without explicit permission from the property owner. *Id.* at 2053. The Court emphatically rejected the argument, noting the statute in question was part of Louisiana’s “Black Code” and was designed “to perpetuate the subjugation of blacks.” *Id.* The Court refused to use that repugnant statute to define the right to keep and bear arms. The Court noted the Fourteenth Amendment was designed to reject this very type of discrimination against formerly enslaved people and to ensure their rights to keep and bear arms. *Id.* The Court concluded, “[u]nless we put history entirely out of our minds, Hawaii’s claim that this tainted artifact illuminates the original understanding of the right to keep and bear arms cannot be taken seriously.” *Id.*; *see also Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring) (“in using pre-ratification history, courts must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind”).

The Seventh Circuit’s analysis flatly contradicts *Wolford*. The panel built its entire analytical framework on “tainted artifact[s]” the Constitution “left behind.” *Wolford*, 146 S. Ct at 2053; *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring). The panel’s conclusion that “[t]hese laws reflect the boundaries of the legislature’s

power to enact class-wide disarmament laws consistent with the Second Amendment,” *Watson*, 171 F.4th at 1022, has now been flatly rejected by this Court. *Wolford*, 146 S. Ct at 2053. That fact alone supports this Court granting Mr. Barge’s petition, vacating the Seventh Circuit’s judgment, and remanding for reconsideration in light of *Wolford*.

III. The Seventh Circuit’s Decision is Incorrect Because It Rests on Faulty Historical Analogies.

A. Even Accepting a Tradition of Disarming Groups Deemed “Dangerous,” the Historical Analogy Fails Because the “Why” Does Not Match.

Under *Bruen*, *Rahimi*, and *Hemani*, the central inquiry is whether a modern regulation and its asserted historical analogues are “relevantly similar” in both “why” and “how.” *Bruen*, 597 U.S. at 29; *Rahimi*, 602 U.S. at 692; *Hemani*, 146 S. Ct at 1686. The “why” asks whether the modern and historical regulations address comparable problems for comparable reasons. The “how” asks whether they impose comparable burdens on the right. The more a modern law “diverges from traditional laws in purpose and operation, the less likely it is to survive review.” *Hemani*, 146 S. Ct at 1686.

In *Rahimi*, this Court demonstrated what a proper match looks like. Section 922(g)(8) survived constitutional scrutiny because it applied to individuals “found by a court to pose a credible threat to the physical safety of another,” and the historical surety and going-armed laws burdened the right for relevantly similar reasons—they, too, “involved judicial determinations of whether a particular defendant likely would threaten or had threatened another.” 602 U.S. at 698–99,

702. In short, both laws imposed firearm-related restrictions only after a particularized determination that a specific person presented a likely risk of physical danger. *Id.* at 698–99.

The “why” behind the historical tradition invoked by the Seventh Circuit—disarming groups deemed “dangerous”—does not match the “why” of § 922(g)(1). The old traditions were rooted in a narrow concern: rebellion against the sovereign, insurrection against the political order, or organized violence against the community.⁴ *Duarte*, 137 F.4th at 797 (VanDyke, J., concurring in part and dissenting in part) (citing Jamie G. McWilliam, *Refining the Dangerousness Standard in Felon Disarmament*, 108 Minn. L. Rev. Headnotes 315, 324–25 (2024)). Section 922(g)(1) is worlds apart from that tradition. It punishes the simple fact of possession combined with the fact of a prior conviction for any “crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 922(g)(1). The statute makes no distinction between violent and nonviolent predicate offenses—let alone offenses posing a risk to the sovereign or governing political order. Section 922(g)(1) sweeps in food-stamp fraud, after all.

B. The “Greater Includes the Lesser” Rationale Is Also Flawed.

Unwilling to rest its holding solely on the first regime, the Seventh Circuit turned to a second: the principle that because founding-era legislatures could

⁴The Fifth Circuit in *Rahimi* also pointed out that such laws “may well have been targeted at groups excluded from the political community—i.e., written out of ‘the people’ altogether—as much as they were about curtailing violence or ensuring the security of the state.” *United States v. Rahimi*, 61 F.4th 443, 457 (5th Cir. 2023).

impose the death penalty for “felonies,” they could also impose the lesser restriction of disarmament. *Watson*, 171 F.4th at 1022-23.

As an initial matter, a “felony” at the Founding “was a good deal narrower than now.” *Lange v. California*, 594 U.S. 295, 311 (2021); *see also Tennessee v. Garner*, 471 U.S. 1, 14 (1985). Many offenses that are classified as felonies today—including drug offenses like Petitioner’s—were not criminal at all at the Founding, let alone punishable by death. *Garner*, 471 U.S. at 14. Thus, even on its own terms, the greater-includes-the-lesser theory cannot apply to Petitioner because the “greater” punishment (death for heroin distribution) was never available in the first place.

The theory is flawed on another level. As then-Judge Barrett recognized in *Kanter*, the historical support for the premise that all felonies were punishable by death is “shaky.” 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting). “During the period leading up to the founding, the connection between felonies and capital punishment started to fray.” *Id.* at 459. The colonies “further limited the scope of crimes eligible for the death penalty relative to the English Common Law,” and even for those crimes that were capital, “[t]he colonies carried out the death penalty ‘pretty sparingly.’” *Duarte*, 137 F.4th at 788 (VanDyke, J., concurring in part and dissenting in part); *Folajtar v. Att’y Gen.*, 980 F.3d 897, 920 (3d Cir. 2020) (Bibas, J., dissenting). If the claimed “greater” capital punishment of all felonies “was in fact a historical fiction,” then the greater-includes-the-lesser rationale cannot work. *Duarte*, 137 F.4th at 790 (VanDyke, J., concurring in part and dissenting in part).

And even if legislatures at the Founding could have imposed death for all felonies, the greater-includes-the-lesser reasoning leads to absurd results when applied to other constitutional rights. “[W]e wouldn’t say that the state can deprive felons of the right to free speech because felons lost that right via execution at the time of the founding.” *Kanter*, 919 F.3d at 461–62 (Barrett, J., dissenting). “No one suggests that [someone with a felony conviction] has no right to a jury trial or [to] be free from unreasonable searches and seizures.” *Williams*, 113 F.4th at 658. “The obvious point that the dead enjoy no rights does not tell us what the founding era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society.” *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting).

The Seventh Circuit noted that *Rahimi* employed a version of the greater-includes-the-lesser reasoning when it observed that “the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible” because going-armed laws imposed the greater punishment of imprisonment. 602 U.S. at 699; *Watson*, 171 F.4th at 1023. But as the Second Circuit explained in *Zherka*, 140 F.4th at 68, this Court was merely “point[ing] out that specific early weapons regulations (the ‘going armed’ laws) imposed more severe penalties than the disarmament statutes at issue in that case.” *Id.* at 83. This Court was not sanctioning “blanket reliance on eighteenth century capital punishment practice to validate any lesser deprivation later imposed on felons.” *Id.*

C. Combining Insufficient Historical Analogies Does Not Create a Sufficient Historical Tradition.

Confronted with two traditions that provide weak support for § 922(g)(1), the panel stacked them together in the apparent hope that their combined weight would be sufficient. *See Watson*, 171 F.4th at 1024 (concluding that “[t]aken together,” these traditions support disarming those with dangerous felonies” (quoting *United States v. Dubois*, 139 F.4th 887, 894 (11th Cir. 2025) (Pryor, C.J., concurring))).

But under *Bruen*, *Rahimi*, and *Hemani*, identifying numerous insufficient historical examples does not a sufficient historical tradition make. The government’s burden is to demonstrate that the challenged regulation is “relevantly similar” to historical laws in both purpose and operation—that is, to identify a coherent historical practice whose “why” and “how” actually track the modern statute. The Seventh Circuit identified no such practice. Instead, it cited one tradition (disarming groups deemed “dangerous”) that fails to match § 922(g)(1)’s justification as applied to Petitioner, and a second tradition (capital punishment for “felons”) that fails to match both justification and burden.

In repeatedly emphasizing that “why and how the regulation burdens the right are central to th[e] inquiry,” *Rahimi*, 602 U.S. at 692 (citing *Bruen*, 597 U.S. at 29), this Court has never suggested that the “why” can be cherry-picked from one tradition, and the “how” from another. Instead, this Court has explained that the laws should be considered “relevantly similar” only if they address a comparable problem for comparable reasons and place a comparable burden on the right holder. *Id.*; *Bruen*, 597 U.S. at 27–30. These metrics should not be independent boxes that can be checked by reference to entirely different historical regimes; they must

cohere in a single analogy that demonstrates the modern law is “consistent with the principles that underpin our regulatory tradition.” *Rahimi*, 602 U.S. at 692; *see also id.* at 771–72 (Thomas, J., dissenting) (criticizing approach that “takes pieces from” various historical analogues to support a statute’s constitutionality, when the proper question is “whether a single historical law has both a comparable burden and justification as § 922(g)(8), not whether several laws can be cobbled together to qualify”).

Hemani reinforces the point. This Court held that the government’s historical analogues—vagrancy laws, civil-commitment statutes, and surety laws—“targeted different kinds of people, did so for different purposes, and operated in different ways” than § 922(g)(3). 146 S. Ct. at 1687. The government in *Hemani* attempted precisely what the Seventh Circuit did here: it marshaled multiple historical traditions, each insufficient on its own, and urged the Court to view them as collectively establishing the required analogy. This Court instead evaluated each proffered tradition on its own merits and found each wanting. *Id.* at 1687–95.

The government may respond that this Court in *Rahimi* permitted reliance on “two distinct legal regimes” that shared a common tradition. *Id.* at 694. But this Court did so only because both the surety laws and going-armed laws “specifically addressed firearms violence,” *id.* at 694–95, and both “involved judicial determinations of whether a particular defendant likely would threaten or had threatened another.” *Id.* at 699. These were not disparate traditions stitched together at a high level of abstraction to compensate for each other’s shortcomings.

Indeed, as Justice Barrett cautioned in concurrence: “[A] court must be careful not to read a principle at such a high level of generality that it waters down the right.” 602 U.S. at 740 (Barrett, J., concurring).

Allowing the government to point to a tradition of disarming dangerous groups to supply one burden or justification, and the unrelated tradition of capital punishment to fill in the gaps, converts the analogical inquiry into a “regulatory blank check.” *Bruen*, 597 U.S. at 30. It is the kind of analysis that “allow[s] legislatures to creatively fashion new categorical exclusions, thereby effectively gutting the Amendment’s protections in a way that is at war with its original understanding.” *Duarte*, 137 F.4th at 767 (Collins, J., concurring).

This Court should grant certiorari to make explicit what *Bruen*, *Rahimi*, and *Hemani* already strongly indicate: that the government cannot satisfy its burden by mixing and matching different historical traditions and treating them as collectively adequate. The inquiry demands a coherent historical practice that is, standing alone, relevantly similar to the challenged regulation.

IV. Under the Second Amendment, Assumptions About Dangerousness Should Not Be Allowed to Replace Evidence of It.

Even if the historical regimes discussed above establish that felons who are dangerous may be disarmed consistent with the Second Amendment, serious questions remain about how courts are to determine who qualifies as dangerous. That is yet another reason this case is a suitable vehicle for review: this Court can clarify that even under § 922(g)(1), the inquiry turns on evidence, not judicial presumptions about entire classes.

A. *Hemani* Forbids Reliance on Assumptions to Establish Categorical Dangerousness.

In *Hemani*, this Court made clear that the government cannot satisfy its burden under the Second Amendment by asking courts to accept, on faith, that the people it seeks to disarm are categorically dangerous. The government argued that § 922(g)(3) disarms unlawful drug users to “protect the public from ‘unusually dangerous’ individuals who will ‘misuse . . . firearms’ to commit ‘violent crime[s].’” 146 S. Ct. at 1689. This Court refused to credit that assertion, troubled by the government’s argument that “none of this turns on how much marijuana Mr. *Hemani* uses or what effect it has on him.” *Id.* at 1693. In sum, the government “asks us to conclude that anyone who regularly uses marijuana is categorically violent and dangerous without any further showing. All based on little more than its current say-so, one at odds with its own regulatory actions.” *Id.*

Regarding the purported connection between drugs and violence, moreover, this Court explained that “[w]ithout question, some unlawful users of controlled substances can pose a risk of violence.” *Id.* at 1692. But “it is far from obvious that 18 U.S.C. § 922(g)(3) confines its reach to those who are categorically and unusually dangerous.” *Id.* The lesson of *Hemani* is therefore clear: the Second Amendment demands more than a casual assumption that an entire class of people is dangerous. Instead, the inquiry requires proof that the defendant’s prohibited conduct makes him incapacitated, violent, or otherwise dangerous. *Id.* at 1693.

B. The Seventh Circuit Assumed, Without Any Evidence, That Drug Offenders Are Categorically Dangerous.

The same constitutional deficiency that doomed the government’s position in *Hemani* dooms its position here. The Seventh Circuit summarily affirmed the Petitioner’s conviction because he has a prior conviction for manufacturing or distributing less than 10 grams of heroin. The government did not present any evidence that the offense involved any violence. The State of Illinois sentenced Petitioner to a grand total of 24 months’ probation for the offense which Petitioner successfully completed. Based solely on the conviction alone the Seventh Circuit found Petitioner was forever disarmed. The Circuit’s finding in *Watson* that “Congress reasonably determined that a felony drug conviction is a ‘dangerous’ crime,” that should lead to permanent disarmament was not supported by any citation of Congressional findings. Just three appellate judges’ opinion about what “common sense” says about which citizens should enjoy the Second Amendment right to keep and bear arms.

The cases the Circuit cited in support of a general “danger” when guns and drugs are possessed together all involved situations in which firearms were actually used or at heightened risk of being used in connection with drug crimes. *See Muscarello*, 524 U.S. at 126, 132 (analyzing 18 U.S.C. § 924(c)(1), which imposes mandatory prison time upon a person who uses a firearm during a drug crime); *Smith & Wesson Brands*, 605 U.S. at 287 (explaining that cartels use firearms to commit crimes like drug dealing, kidnapping, and murder); *Richards*, 520 U.S. at 391 n.2 (referencing the “link[] between drugs and violence” in a case about no-knock warrants). Unlike this case, none of those cases involved a felon who

possessed a firearm apart from the drug activity in question. Petitioner possessed the gun in question 12 *years* after committing the drug offense.

Just as the government in *Hemani* asked this Court to “conclude that anyone who regularly uses marijuana is categorically violent and dangerous without any further showing,” the government here asked the Seventh Circuit to conclude that anyone with a prior drug-trafficking conviction is categorically violent and dangerous—again, without any further showing. 146 S. Ct. at 1693. The Seventh Circuit obliged, deeming it sufficient that Congress could have determined drug dealing to be dangerous. But, again, *Hemani* teaches that such “common sense” reasoning cannot substitute for the government’s affirmative burden to provide evidence that a regulation is consistent with the Second Amendment’s protections.

C. Empirical Data Do Not Support the Assumption That Drug Offenders Are Categorically Dangerous.

The Seventh Circuit’s assumption that drug dealers are categorically dangerous is especially problematic in light of available data. The Bureau of Justice Statistics in 2021, for example, released data tracking a sample population representing more than 400,000 state prisoners, which showed that, among those rearrested within five years, only 22.6% of drug-convicted releasees were rearrested for a violent crime. *See* Bureau of Justice Statistics, *Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012–2017)*, at 11 (July 2021). The 2005 cohort data are similar: within five years of release, only 24.8% of prisoners originally committed for drug offenses were arrested for a new violent crime. Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in*

2005: Patterns from 2005 to 2010, at 9 (Apr. 2014). In other words, the overwhelming majority of released drug offenders—roughly three-quarters—are not rearrested for a violent crime, even over a multi-year period. These figures do not support the proposition that drug offenders as a class are categorically dangerous.

The United States Sentencing Commission’s report on “Recidivism of Federal Drug Trafficking Offenders Released in 2010” is similarly telling. The Commission found that when drug-trafficking offenders were rearrested, their most serious new offense was violent only 27.6% of the time. *See id.* at 27 (Jan. 2022). The Commission’s 2016 career-offender report draws a related conclusion: the most serious post-release offense for drug-trafficking-only career offenders was another drug-trafficking offense (26.5%)—not a violent crime. *See U.S. Sent’g Comm’n, Report to the Congress: Career Offender Sentencing Enhancements*, at 42 (July 2016).

Also illuminating are the Bureau of Justice Statistics’ findings on the actual use of firearms by drug offenders. A 2016 survey of prison inmates found that state and federal prisoners serving time for drug offenses were far less likely to have possessed a firearm during the offense (8% state, 12% federal) than prisoners serving time for violent offenses (29% state, 36% federal). *See Bureau of Justice Statistics, Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016*, at 3–4 (Jan. 2019).

These figures undermine the Seventh Circuit’s assumption that drug offenders are “threat[s] to the physical safety of society.” *Watson*, 171 F.4th at 1024.

The empirical record shows that the vast majority of drug offenders do not reoffend violently and do not use firearms in their crimes. A legal framework that permits the government to permanently strip a constitutional right from millions of Americans based on a categorical presumption of dangerousness—without any obligation to demonstrate that the class or individual actually poses a threat of violence—cannot be squared with this Court’s repeated insistence that the government bears the burden of justifying firearm restrictions.

The Seventh Circuit’s reliance on its own “common sense” is, at bottom, an invitation to decide Second Amendment cases based on assumptions rather than evidence, and on judicial intuition rather than constitutional analysis.⁵ That method is precisely what *Hemani* rejected. The government there asked this Court to accept that all regular marijuana users are categorically dangerous. Here, the government asked the Seventh Circuit to accept that all drug traffickers are categorically dangerous. In neither instance did the government offer class-wide evidence that the statute of conviction identifies dangerous persons, or individualized evidence that the particular defendant was dangerous by virtue of that conviction. This Court should grant certiorari to make clear that what is impermissible under § 922(g)(3) after *Hemani* is equally impermissible under

⁵ The Third and Fifth Circuits have also held—or at least strongly suggested—that § 922(g)(1) is constitutional as applied to defendants with drug-trafficking convictions. See *United States v. Walters*, 151 F.4th 122, 134–35 (3d Cir. 2025); *Kimble*, 142 F.4th at 316–17. But those decisions suffer from the same core flaw present here: they simply assume, without evidentiary support, that drug traffickers are categorically violent.

§ 922(g)(1): neither the government nor the court may invoke “common sense,” i.e., its own say-so, to label an entire class of people “dangerous.”

V. Section 925(c) Does Not Cure the Constitutional Problem.

Toward the end of *Watson*, the Seventh Circuit invoked 18 U.S.C. § 925(c) for the proposition that “felon status does not necessarily mean permanent disarmament.” *Watson*, 171 F.4th at 1025. But § 925(c) offers no meaningful answer to Mr. Barge’s as-applied challenge. The statute authorizes the Attorney General to restore a felon’s firearm rights upon a showing that the person “will not be likely to act in a manner dangerous to public safety” and that the public interest supports rearmament. 18 U.S.C. § 925(c). Yet Congress defunded that program in 1992. *See Williams*, 113 F.4th at 661. As a result, the remedy “remains practically unavailable.” *Id.* In March 2025, the Attorney General took steps to breathe new life into the statute, *Watson*, 171 F.4th at 1025, and has now published a final rule regarding relief from federal firearm disabilities under § 925(c). *See* Application for Relief from Disabilities Rule, 91 Fed. Reg. 54054 (Aug. 20, 2026), <https://www.federalregister.gov/documents/2026/08/20/2026-16981/application-for-relief-from-disabilities-imposed-by-federal-laws-with-respect-to-the-acquisition>. The rule will take effect on September 21, 2026. Of course, the new rule was of no use to Mr. Barge, who possessed the gun at issue in 2024.

In any event, the government cannot be permitted to defeat an as-applied challenge because it might, in the Attorney General’s discretion, “reinstate” a

fundamental constitutional right. This Court rejected a similar argument in the First Amendment context. *United States v. Stevens*, 559 U.S. 460, 480 (2010). In *Stevens* the government tried to defend an unconstitutional statute reaching large swaths of protected speech by invoking its prosecutorial discretion and promising to only use the statute against “extreme” unprotected speech. The Court swiftly rejected that argument, retorting: “But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*.” *Id.* Just so here. The Second Amendment protects the right to keep and bear arms *against the government*. Claiming the government can infringe a citizen’s Second Amendment right to keep and bear arms because it may, in its mercy, allow the citizen to possess a firearm if the citizen asks nicely is perverse. The argument turns the idea of fundamental constitutional rights on its head and must be rejected out of hand.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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APPENDIX

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