

No. _____

In the Supreme Court of the United States

KYLE THOMAS SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Question 1: Whether the Second Amendment permits an as-applied challenge to the constitutionality of 18 U.S.C. § 922(g)(1) when that challenge is premised on the non-violent and non-dangerous nature of the defendant's prior convictions.

Question 2: If as-applied challenges can succeed, what is the standard by which courts should evaluate a person's prior convictions to determine if those convictions allow Congress to disarm that person under penalty of imprisonment?

PARTIES TO THE PROCEEDINGS

Petitioner is Kyle Thomas Smith, and he was the defendant and appellant in the proceedings below. Respondent is the United States of America, and it was the plaintiff and appellee in the proceedings below.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

District Court (*United States v. Smith*, Case No. 24-CR-00406-GKF):

On February 3, 2025 the United States District Court for the Northern District of Oklahoma entered its Opinion and Order denying Mr. Smith's motion to dismiss the indictment. (*See* Pet. App., at a006–a020). The District Court entered its Judgment and Commitment on May 15, 2025. (*See* Pet. App., at a021–a028).

United States Court of Appeals for the Tenth Circuit (Case No. 25-5081):

Mr. Smith appealed the denial of his motion to dismiss the indictment. On July 6, 2026, the United States Court of Appeals for the Tenth Circuit affirmed the District Court's ruling. The Tenth Circuit's unpublished opinion may be accessed at 2026 WL 1947846. (*See* Pet. App., at a002–a005).

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PETITION FOR WRIT OF CERTIORARI

Kyle Thomas Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Order and Judgment of the Tenth Circuit is an unpublished decision that may be accessed at 2026 WL 1947846. (Pet. App., at a002–a005). The District Court’s Opinion and Order denying Mr. Smith’s Motion to Dismiss the Indictment and its Judgment and Commitment are reproduced in the appendix. (Pet. App., at a006–a020).

JURISDICTION

The Tenth Circuit entered judgment on July 6, 2026. Petitioner did not seek rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution declares:

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

The statute of prosecution, 18 U.S.C. § 922(g)(1), states:

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 . . . possess in or affecting commerce, any firearm or ammunition. . . .

18 U.S.C. § 921(a)(20) provides:

The term “crime punishable by imprisonment for a term exceeding one year” does not include –

(A) Any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) Any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

INTRODUCTION

Mr. Smith asks this Court to grant his petition for writ of certiorari, vacate the decision of the Tenth Circuit, and remand for further proceedings. The Tenth Circuit’s decision below was compelled by that Circuit’s binding precedential decision in *Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th Cir. 2025).

Since this Court’s decision in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), multiple circuit splits have developed as courts wrestle with applying the *Bruen* analysis to challenges made to 18 U.S.C. § 922(g)(1).

The Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have upheld the constitutionality of 18 U.S.C. § 922(g)(1) on a categorical basis as to all felons regardless of the nature of their prior convictions.¹ The Tenth and Eleventh Circuits reject application of the *Bruen* analysis in its entirety as to felons. *See Vincent*, 127 F.4th at 1265–66; *Dubois*, 139 F.4th at 892–94. The Third, Fifth, and Sixth Circuits have opened the door to challengers who claim their prior felony convictions do not permanently disqualify them from possessing firearms.² *Range v. Att’y Gen.*, 124 F.4th 218, 222–23 (3d Cir. 2024) (en banc); *United States v. Diaz*, 116 F.4th 458, 467–70 (5th Cir. 2024); *United States v. Williams*, 113 F.4th 637, 661–62 (6th Cir. 2024).

¹ *See Zherka v. Bondi*, 140 F.4th 68 (2d Cir. 2025); *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024); *United States v. Duarte*, 137 F.4th 743, 748 (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, 892–94 (11th Cir. 2025).

² The First and Seventh Circuits have at least left the door unlocked, if not open. *United States v. Levasseur*, --- F.4th ---, 2026 WL 2731003, at *3–4 (1st Cir. 2026) (acknowledging circuit split on viability of as-applied challenges and denying relief based upon limited scope of appellant’s arguments); *United States v. Watson*, 171 4th 1012, 1024–25 (7th Cir. 2026) (concluding, at a minimum, that Second Amendment permits disarmament of “dangerous” felons).

This circuit split is unacceptable. The Constitution, and the rights it protects, cannot mean different things and apply differently depending on geographical location. When a right's existence depends upon which court has jurisdiction, it is no right at all. This Court should grant Mr. Smith's petition for writ of certiorari to address the circuit split that has led to some felons remaining free to exercise their right to bear arms while others are being incarcerated for exercising that right.

STATEMENT

A. Factual Background

On December 17, 2024, in Northern District of Oklahoma Case Number 24-CR-406-GKF, the United States charged Kyle Thomas Smith by Indictment with a single count of violating 18 U.S.C. § 922(g)(1): On November 30, 2024, Mr. Smith allegedly knowingly possessed a firearm after being convicted of an offense punishable by imprisonment for a term exceeding one year. The firearm at issue was a .22 caliber handgun with three rounds of ammunition. The Indictment listed three prior felony convictions:

1. Uttering a Forged Instrument in January 2013.
2. Felon in Possession of a Firearm in July 2022.
3. Third-Degree Burglary in July 2022.

Following entry of a guilty plea without a plea agreement after the District Court's denial of his motion to dismiss, the District Court sentenced Mr. Smith to thirty months in custody of the Bureau of Prisons. (Pet. App., at a021–a028).

B. Procedural History

Mr. Smith filed a motion to dismiss the indictment for failure to state an offense under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) on the basis that 18 U.S.C. § 922(g)(1) was unconstitutional as applied to him and his prior alleged convictions.

Following briefing by both parties, the District Court denied Mr. Smith's motion to dismiss. (Pet. App., at a006–a020). Mr. Smith appealed that denial and challenged the constitutionality of his statute of conviction. The Tenth Circuit issued an unpublished Order and Judgment affirming the District Court's ruling on July 6, 2026. (*See* Pet. App., at a002–a005). Mr. Smith did not seek rehearing.

REASONS FOR GRANTING THE PETITION

- I. There is a deeply entrenched circuit split in this country surrounding the constitutionality of 18 U.S.C. § 922(g)(1) and its application to defendants with certain kinds of prior convictions. This Court must resolve that split and ensure the Second Amendment’s protections extend equally to all American citizens.**

As explained in the Introduction to this Petition, a circuit split has divided the Nation with respect to the rights of individuals convicted of felonies to possess firearms. Six circuits categorically reject the rights of felons to possess firearms. Of those, two refuse to even apply the *Bruen* analysis when defendants challenge the constitutionality of 18 U.S.C. § 922(g)(1). The Tenth Circuit is one of those two circuits. Three circuits have opened the door to challenges. The Fifth Circuit openly welcomes such challenges, and it has held Section 922(g)(1) unconstitutional on multiple occasions. This extreme split cannot be allowed to continue. The fractured state of the law means that Americans are going to prison in some jurisdictions while others find their right to bear arms protected.

The Second Amendment’s right to bear arms is, at its core, the right to defend oneself against attack from those who aim to do harm. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (concluding that self-defense “was the central component” of the Second Amendment’s right to bear arms (emphasis omitted)); *see also id.*, at 628 (“[T]he inherent right of self-defense has been central to the Second Amendment right.”). The right of self-defense belongs to all individuals. As does the right of armed self-defense.

This Court’s test, as set forth in *Bruen*, “[U]ses history and tradition . . . to identify the scope of the legislature’s power to take [the right to bear arms] away.” *Diaz*, 116 F.4th at 466 (quoting *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting)). An individual’s right to armed self-defense cannot change based upon the jurisdiction in which he lives. The Constitution cannot abide such disparities in the law’s application. Yet, those are precisely the

kinds of disparities occurring across the country due to the circuit split concerning as-applied challenges to 18 U.S.C. § 922(g)(1).

- a. The United States also believes this circuit split must be resolved, and it has also sought this Court’s intervention.**

The United States also wishes for this Court to answer the questions presented in this Petition and to resolve the constitutional split plaguing the country. *See United States v. Cockerham*, SCOTUS No. 25-1029; *United States v. Hembree*, SCOTUS No. 25-1219. It seems likely the United States will file another petition following the Fifth Circuit’s decision in *United States v. Debrow*, 183 F.4th 402 (5th Cir. 2026). But the United States seeks this Court’s intervention only in cases in which it was not the prevailing party below. To date, it has not joined a defendant-petitioner’s request for this Court’s intervention.

Unlike individual defendants who truly have no incentive to risk giving up their hard-won victories—and often their freedom—the United States does not have a special incentive to limit itself to cases in which it has lost. If the United States prevails on the merits in this Court, then it likely prevails in all cases, including those in which it previously lost. Nonetheless, the fact that the United States also believes this circuit split must be resolved emphasizes the need for granting a petition for writ of certiorari to address these questions.

- b. The Tenth Circuit’s refusal to even consider *Bruen* in resolving challenges to 18 U.S.C. § 922(g)(1) is simply wrong.**

“A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In *Bruen*, this Court established the appropriate constitutional test to resolve questions concerning the legality of regulations impacting the bearing of arms: First, a court must ask whether “the Second Amendment’s plain text covers an individual’s conduct.” 597 U.S. at 24. If the answer is yes, “the

Constitution *presumptively* protects that conduct.” *Id.* (emphasis added). Then, the government bears the burden to overcome that presumption and establish a regulation’s constitutional permissibility by “demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* Then, and only then, “may a court conclude that the individual’s conduct falls outside the Second Amendment’s *unqualified command*.” *Id.* (internal quotation marks omitted and emphasis added). With respect to the second step—consistency with historical tradition—this Court suggested that courts should consider “whether ‘historical precedent’ from before, during, and even after the founding evinces a comparable tradition of regulation.” *Id.* at 27. However, this Court also made it clear that the burden of producing this historical precedent lay with the government, not with the defendant or the courts; it even discouraged courts from “sift[ing] the historical materials for evidence to sustain” the regulation because “[t]hat is the [government’s] burden.” *Id.* at 60.

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

Following this Court’s decision in *Bruen*, the Tenth Circuit issued its original decision in *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023). In that case, the Tenth Circuit panel relied upon

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

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

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

On remand, the Tenth Circuit issued another, even shorter opinion rejecting *Bruen*. The panel explained that *McCane* “relied on *Heller*'s instruction that felon dispossession laws are

³ The entirety of the analysis in *McCane* is as follows:

McCane first argues that in light of the Supreme Court's decision in *Heller*, in which the Court held that the Second Amendment provides an individual with a right to possess and use a handgun for lawful purposes within the home, § 922(g) violates the Second Amendment. The Supreme Court, however, explicitly stated in *Heller* that nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.

573 F.3d at 1047 (internal citations and quotation marks omitted).

presumptively valid.” *Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025). It concluded that “[t]his presumption was reaffirmed in *Rahimi*. So *Rahimi* doesn’t clearly abrogate the presumptive validity of § 922(g)(1).” *Id.* (internal citation omitted). Subsequently, the panel held “that *McCane* remains binding.” *Id.* at 1266.

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

c. *Rahimi* does not stand for the proposition that felon-in-possession prohibitions remain presumptively lawful.

The Tenth Circuit, in *Vincent v. Bondi*, concluded that this Court “reaffirmed” the presumptive lawfulness of statutes like 18 U.S.C. § 922(g)(1), which prohibit felons from possessing firearms. 127 F.4th at 1265. Therefore, according to the Tenth Circuit, Section 922(g)(1) is presumptively lawful, *see id.*, even after *Bruen* explicitly held that conduct falling within the plain text of the Second Amendment was presumptively protected (and would therefore trigger the step two analysis), 597 U.S. at 24. This conclusion has been repeated by other circuits, in some fashion or another. *See, e.g., Levasseur*, 2026 WL 2731003, at *2–3; *Hunt*, 123 F.4th at 703–04; 137 F.4th at 752; *Jackson*, 110 F.4th at 1129. But in doing so, these courts have stripped the statement in *Rahimi* of the context within which it was made.

In *Rahimi*, Zackey Rahimi argued that *Heller* invalidated a law that would prohibit gun possession in the home and, since Section 922(g)(8) led to a similar outcome, it too must be

invalidated. 602 U.S. at 699. The Supreme Court rejected this and noted that *Heller* referred to statutes causing similar outcomes as “presumptively lawful.” *Id.* But this was not an adoption of the *Heller* dicta as binding law; the question of whether firearms restrictions as to felons was not before the Court. Instead, this was a mere explanation for why *Heller* would not compel striking down every statute that had the collateral consequence of prohibiting firearm possession in the home.

Rahimi’s discussion of *Heller* should not be given any greater weight than this. As the Chief Justice emphasized in his conclusion, “In *Heller*, *McDonald*, and *Bruen*, this Court did not ‘undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment.’ Nor do we do so today.” 602 U.S. at 702. Thus, even the *Rahimi* Court acknowledges that *Heller* cannot be read to resolve questions not put before that Court. And the Chief Justice’s concluding comment seems to discourage using the *Rahimi* opinion as a vehicle to employ *Heller* to that end. It is not possible for some restrictions to be presumptively lawful, even without historical support, while most restrictions are presumptively unlawful unless there is sufficient historical support. Each regulation must be reviewed, and its constitutionality must be resolved, on its own merits.

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

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

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

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

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

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

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

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

- e. **This Court’s recent decision in *United States v. Hemani* proves that as-applied challenges to 18 U.S.C. § 922(g) may succeed.**

Just a few months ago, this Court held in *United States v. Hemani*, 608 U.S. 772, 794–95 (2026) that 18 U.S.C. § 922(g)(3) was susceptible to constitutional attack on an as-applied basis. There, this Court expressed discomfort with the United States’ theory: That it could “automatically strip Mr. Hemani of his Second Amendment right to possess a firearm because he uses marijuana a few times a week,” and “because he possessed a gun despite this prohibition, the government insists it may imprison him for up to 15 years and disarm him for life.” *Id.* at 794.

It makes no difference either if he keeps a firearm only in his home for self-defense, never misuses a gun while intoxicated, and never poses a danger to himself or others as a result of his marijuana use. The only thing the government must show, it says, is that an individual like Mr. Hemani regularly uses any amount of any controlled substance.

Id.

The shortcomings of the United States’ arguments in *Hemani* remain true here: “The historical laws on which” courts rely upon to categorically ban felons from possessing firearms “targeted different kinds of people, did so for different reasons, and operated in different ways.” *Id.* at 795. A categorical ban on felons possessing firearms threatens Americans with up to fifteen years’ imprisonment without consideration of why they have a firearm, whether they have ever misused a firearm, or whether they have ever demonstrated violent behavior towards others (or even towards property).

Bigamy is a felony in many states, including Oklahoma. *See* Okla. Stat. tit. 21, § 883 (2026). Bigamy may be a socially undesirable practice, but nothing about it demonstrates the culprit poses a danger to society if they possess a firearm. Yet federal courts around the country

are bound to hold that those convicted of bigamy are categorically prohibited from possessing firearms. By tying the constitutional right to possess a firearm to the length of potential imprisonment for a particular criminal action, federal courts cede to state legislatures the power to determine the scope of the constitutional right of self-defense.

f. The circuit split prohibiting felons, as a whole, from possessing firearms is causing extraordinary harm across the country.

In fiscal year 2025 alone, there were 7,245 convictions under 18 U.S.C. § 922(g). *See* U.S. Sent. Comm’n, *QuickFacts: 18 U.S.C. §922(g) Firearms Offenses* (June 2026), <https://www.ussc.gov/research/quick-facts/section-922g-firearms>. Section 922(g)(1) applies to nearly everyone who has committed any offense punishable by more than one year in prison, even those who have never engaged in criminal violence or misused a firearm. In other words, §922(g)(1) disarms millions of Americans. *See* 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, 1806–08 (2017) (estimating that, as of 2010, 19 million people in the United States had felony records).

Judges and scholars across the spectrum have recognized the extensive deprivation of rights to which it subjects individuals whose past crimes were nonviolent. “[T]he view that one’s express constitutional rights can be forfeited because one is ‘non-virtuous’ is generally rejected outside the context of the Second Amendment,” Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the “Virtuous”*, 25 *TEX. REV. L. & POL.* 245, 316 (2021) (criticizing application of section 922(g)(1) based on nonviolent crimes), and “there is no historical justification for completely and forever depriving peaceable citizens—even nonviolent felons—of the right to keep and bear arms,” Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 *WYO. L. REV.* 249,

286 (2020). Historical practice “do[es] not support ‘a broad prohibitory regime’ aimed at firearms in general.” *Christian v. James*, 176 F.4th 189, 208 (2d Cir. 2026) (Menashi, J., concurring in part). see also F. Lee Francis, *Defining Dangerousness: When Disarmament Is Appropriate*, 56 TEX. TECH L. REV. 593, 625 (2024) (“The right to bear arms ought to require a showing of true dangerousness to render a restriction constitutionally appropriate.”). “[L]egislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are dangerous. Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons.” Laura G. Abelson, *Reevaluating Felon-in-Possession Laws After Bruen and the War on Drugs*, 15 UC IRVINE L. REV. 871, 914 (2025) (quoting *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting)) (observing that section 922(g)(1) is “not narrowly tailored” to dangerous people, and urging that “prosecutors and legislators must be cognizant of the lasting effects of the War on Drugs and question the assumption that any prior felony conviction is an accurate proxy for dangerousness”).

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

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

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

The absence of a clear standard risks creating a new constitutional problem: vagueness. The Fifth Circuit remains the only circuit even attempting to develop the law on this matter. However, the Fifth Circuit's approach is patchwork and suffers from both constitutional infirmities and practical challenges. Unfortunately, the Fifth Circuit's efforts at developing the law in this area demonstrate the vagueness problem. It has adopted three different, but related, approaches to resolving the as-applied question. One approach looks to whether the prior felony conviction is analogous to a historical crime that was punishable by death. The second and third approaches aim to resolve the dangerousness question: Of these, one approach considers whether the conduct constitutes inherently dangerous activity, and the other asks whether the prior criminal conduct involved acts of violence.

a. Analogous Historical Felonies Punishable by Death – A test that captures nondangerous conduct, lacks meaningful historical support, and is too complex to be applied consistently or predictably.

The Fifth Circuit recognized the potential for as-applied challenges to Section 922(g)(1) in *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024). In *Diaz*, the Fifth Circuit required the United States to “demonstrate that the Nation has a longstanding tradition of disarming someone with a criminal history analogous to” the defendant. 116 F.4th at 467. The Fifth Circuit concluded that *Bruen*'s historical tradition test requires that the predicate felony which serves as the basis of a Section 922(g)(1) charge be analogous to a felony offense punishable by death at the founding.

Id. at 469–70. The rationale of *Diaz* seemed sensible enough; if an analogous felony committed at the time of the founding was punishable by death, then it was necessarily punishable by disarmament because death is both a more severe punishment and a more permanent one.

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

Capital punishment was less pervasive than one might think. Outside the capital context, civil death applied exclusively to life sentences and only if authorized by statute—and even then, it was more modest than the ancient version because the convict retained some rights. Felons serving a term of years did not suffer civil death; their rights were suspended but not destroyed. In sum, a felony conviction and the loss of all rights did not necessarily go hand-in-hand.

Id. at 461. It is important to distinguish between the *availability* of death as a punishment and its *actual use* as a punishment. Where the typical case in the Nation’s early years resulted in a punishment of less than death, the Fifth Circuit’s approach in *Diaz* becomes less justified.⁴

The *Diaz* approach also captures what we would today call white-collar crime. For example, both forgery and counterfeiting were punishable by death at the founding. *See Folajtar*, 980 F.3d at 905. No rational person would ever consider these kinds of criminals “dangerous” in the sense that they would pose a greater risk to society than the average person if armed. Similarly

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

mere theft—as opposed to more aggravated forms such as robbery—seems to also fall within the scope of *Diaz*’s analysis. See *United States v. Kimble*, 142 F.4th 308, 312 (5th Cir. 2025).

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

b. Felonies Involving Inherently Dangerous Activity – The return of the residual clause.

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

In *United States v. Cordova*, although the Fifth Circuit did not use the term “inherently dangerous activity,” its decision was clearly based upon that rationale. In *Cordova*, the defendant had a prior conviction for “evading arrest or detention with a motor vehicle,” and the Fifth Circuit explained that “vehicular pursuits are often catastrophic.” 176 F.4th 381, 382 (5th Cir. 2026).

Therefore, the defendant’s “decision to use a car to evade the police is probative of his dangerousness,” and his doing so “posed a risk to fellow citizens and demonstrate[s] that he poses a credible threat to the physical safety of others.” *Id.* at 382–83.

This approach suffers from a different problem than the capital punishment test: It is a resurrection of the residual clause. Like Jason, Dracula, or “some ghoul in a late-night horror movie,” *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398 (1993), the residual clause has crawled out of its grave after having been stabbed repeatedly by this Court’s quill pens for being unconstitutionally vague.⁵ It no longer haunts those facing increased sentencing penalties for violating its vague terms. Now, it hungers for constitutional rights. For this reason alone, this approach cannot be constitutionally sound; if the test is too vague when used in a statute, it is certainly too vague when defining the scope of constitutional rights.

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

⁵ The residual clause was used in statutes to expand the definition of a crime of violence or a violent felony to reach, for example “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” *See* 18 U.S.C. § 16(b).

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

c. Felonies Involving Violent Conduct – Should courts consider the facts underlying the prior offense, or constrain themselves to the elements of the underlying offense?

The Fifth Circuit’s second approach to dangerousness considers whether the prior felony conviction involved actual acts of violence. In *United States v. Schnur*, the Fifth Circuit upheld a conviction under 18 U.S.C. § 922(g)(1) on the grounds that the defendant’s prior convictions, including one for aggravated battery causing great bodily injury, was a “crime of violence” that demonstrated his dangerousness to society if armed. 132 F.4th 863, 869–70 (5th Cir. 2025). Similarly, in *United States v. Bullock*, the Fifth Circuit upheld a Section 922(g)(1) conviction where the defendant’s prior conviction involved misuse of “a firearm to harm others when he shot one individual, fired into a crowd of others, and in the process killed an innocent passerby.” 123 F.4th 183, 185 (5th Cir. 2024). This approach, which connects criminal history to acts of violence, is closer to the mark.

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

In *Debrow*, the Fifth Circuit rejected the United States’ invitation to consider conduct beyond the fact of the convictions, such as “unproven conduct charged contemporaneously with a defendant’s (g)(1) indictment or prior conduct that did not result in a felony conviction.” 183 F.4th at 405. Mr. Smith agrees that this limitation is appropriate, but it must be more precise. Courts

should not consider anything beyond the elements of the prior convictions because that is the conduct that is proven when a conviction is obtained (either by guilty plea or by trial). A case may be full of salacious allegations that make a defendant look like a monster, but, depending on the elements of the charge, the jury need not find those allegations to be true in order to find the defendant guilty of the charged offense. An approach that considers more than just the elements as the basis for deciding “which Americans go to jail for bearing arms,” *id.* at 405, inevitably leads to “inadequate notice, a fundamentality of our justice system,” *id.* at 406. Defendants must be able to know ahead of time whether their conduct is constitutionally protected or if they risk imprisonment. Fortunately, a test that permits that kind of predictability already exists.

d. The Categorical Approach – A test that specifically targets violent, dangerous conduct with predictable results.

The categorical approach, most commonly used to determine whether an offense constitute a crime of violence, *see, e.g., Taylor v. United States*, 495 U.S. 575, 600–02 (1990), is the most appropriate test for analyzing Second Amendment claims challenging application of 18 U.S.C. § 922(g)(1) to an individual. In applying the categorical approach, the standard for disarmament should be convictions for violent felonies—for these purposes, as defined in 18 U.S.C. § 924(e)(2)(B)(i)—and a limited class of offenses that, historically, demonstrate the perpetrator poses a unique danger to society if armed. This narrow class of offenses would include burglary, robbery, kidnapping, and arson. This Court may find a basis to include other enumerated offenses. This approach aligns with Congress’s earliest attempt to prohibit the possession of certain firearms by certain people based upon their criminal history. *See Federal Firearms Act of 1938*, Pub. L. 75-785, 52 Stat. 1250.⁶ It may be appropriate to include a third class of offense that leads to

⁶ The FFA of 1938 prohibited persons convicted of “crimes of violence” from possessing certain kinds of firearms. Crimes of violence included: “[M]urder, manslaughter, rape, mayhem,

disarmament: Any felony which involved, as an element, the use or attempted use of a firearm in its commission. This would catch the small number of offenses that do not qualify as crimes of violence but that nonetheless involved the use of a firearm in their commission.

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

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

kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.”

definition, then they may be charged and convicted under 18 U.S.C. § 922(g)(1). This elements-based approach works just as well when determining if an offense was committed using a firearm.

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

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

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

Moreover, this approach allows properly-trained law enforcement and prosecutors to determine whether an individual is violating the law or acting within their Second Amendment rights when they possess a firearm. If law enforcement incorrectly arrests someone, courts are

well-equipped to quickly resolve the error and dismiss the charges under this test. Further, citizens are positioned to obtain legal advice about whether their possession would be protected. Any other test leads to guesswork, protracted litigation, and individuals sitting in jail cells for conduct that is protected by the Constitution.

III. This case is an appropriate vehicle to resolve these questions.

The issues placed before this Court in this petition have been preserved at each step of the litigation process. In district court, Mr. Smith raised a proper motion to dismiss challenging the constitutionality of 18 U.S.C. § 922(g)(1) as applied to him and his prior felony convictions. On appeal, Mr. Smith specifically asserted the flaws of the Tenth Circuit’s application of *Bruen* and proposed that the categorical approach was the best method of resolving as-applied challenges to 18 U.S.C. § 922(g)(1).

The felonies that provide the basis of the charge against Mr. Smith are nonviolent and do not involve drug distribution. The indictment lists a conviction for uttering a forged instrument, being a felon in possession of a firearm, and third-degree burglary. As to the firearm charge, it cannot meaningfully serve as a basis to prohibit Mr. Smith from possessing a firearm because it would be an unconstitutional conviction itself unless Mr. Smith had some other, prior disqualifying offense. Mr. Smith’s third-degree burglary conviction is not generic burglary; that offense may be committed by breaking into vehicles. *See* Okla. Stat. tit. 21, § 1435 (2022). Notably, the district court considered the Third-Degree Burglary charge to be the only basis for prohibiting Mr. Smith from possessing a firearm. (*See* Pet. App., at 20).

CONCLUSION

For the reasons stated herein, this Court should grant the Petition for Writ of Certiorari and set a schedule for merits briefing in this matter.

Respectfully submitted,

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