No. _____

IN THE
# Supreme Court of the United States

JESSE SHANE OWENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The question presented is whether courts must assess the elements 18 U.S.C. § 922(g)(8) and, if so, whether federal courts must consider a state's own law about the due process protections, or lack thereof, provided when the order issues. Of particular relevance to the question is this Court's *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) opinion, which issued after briefing in Mr. Owens' case.[1]

[1] Mr. Owens points the Court to the Solicitor General's petition filed in *United States v. Rahimi*, No. 22-915 (S. Ct. docketed Mar. 21, 2023), which presents the issue: Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face. Whether the *Rahimi* petition is granted would have bearing on Mr. Owens' case, and he respectfully suggests a decision on his petition could be deferred until the outcome in *Rahimi*.

## PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

## RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for South Carolina and the United States Court of Appeals for the Fourth Circuit:

- *United States v. Owens*, No. 19-4229, 2022 WL 17819294 (4th Cir. Dec. 20, 2022)
- *United States v. Owens*, No. 7:18-cr-674-HMH (D.S.C. March 28, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Jesse Shane Owens, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 19-4229, entered on December 20, 2022.

## OPINION BELOW

The Fourth Circuit panel issued its unpublished opinion on December 19, 2022, affirming Mr. Owens' conviction from the United States District Court for the District of South Carolina, but remanding for resentencing for an error related to the imposition of supervised release conditions. This unpublished opinion can be found as *United States v. Owens*, No. 19-4229, 2022 WL 17819294 (4th Cir. Dec. 20, 2022) and is reprinted in the Appendix to the Petition (Pet. App.) 1A-5A. The mandate issued the same day, on December 20, 2022. Pet. App. 7A. Mr. Owens did not file a petition for rehearing or rehearing en banc.

## JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment and the mandate on December 20, 2022. Pet. App. 6A-7A. On March 14, 2023, this Court extended the time to file the petition for writ of certiorari to May 18, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Mr. Owens' conviction is pursuant to 18 U.S.C. § 922(g)(8), which states:

> **(g)** It shall be unlawful for any person—
>
> *** * ***
>
> **(8)** who is subject to a court order that—
>
> **(A)** was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> **(B)** restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> **(C)(i)** includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> **(ii)** by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

## INTRODUCTION

Federal statute 18 U.S.C. § 922(g) makes it illegal for certain prohibited persons to possess a firearm, including people who are subject to defined domestic violence protection orders. Criteria about qualifying protective orders are elements that must be proven to obtain a conviction. At issue here is the element of notice and opportunity to participate in the hearing which resulted in issuance of the protective order. The question presented in this petition is whether the Fourth Circuit is required to address challenges to the state protective order elements to determine if the government met its burden, as most Circuits who have addressed this question have held, or, like the Fourth Circuit held, courts must accept the protective order at face value regardless of the state procedures and facts related to its issuance, similar to the way predicate convictions are counted for purposes of sentencing enhancements under 18 U.S.C. § 924(e). *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In particular, must courts defer to how the states define their emergency protective orders?

Here, Mr. Owens was given approximately 15-hours notice before the hearing regarding a potential protective order, was not allowed counsel when requested at the hearing and was informed that the issuing judge was not making any factual findings. However, South Carolina Code § 20-4-50(a) allows issuance of the protective order only if the allegations of abuse are shown by preponderance of the evidence. Additionally, the South Carolina Supreme Court held this type of protective order cannot result in collateral consequences. *See Moore v. Moore*, 657 S.E.2d 743 (S.C. 2008). Specifically, the court held that a protective order issued to

an emergency hearing is temporary and not a final adjudication on the merits, so the respondent is not "subject" to a court order as the term is used in 18 U.S.C. § 922(g)(8). *Id*. at 752, n.5. Yet, Mr. Owens, who had never been convicted of any crime, was sentenced to 80 months in federal prison, double the high-end of his guidelines range.

On appeal, the Fourth Circuit affirmed, refusing to address Mr. Owens' arguments related to the required element of notice and opportunity to participate. Instead, the Fourth Circuit, contrary to several Circuits who have reviewed the underlying facts related to the required elements of a protective order, claimed that state law could not dictate what federal crimes were prosecuted and Mr. Owens was precluded from mounting a collateral attack on the protective order. Pet. App. 3A-4A. The Fourth Circuit's affirmance on this issue was summarized in five sentences in the opinion. *Id*.

This case presents an excellent vehicle to resolve how the elements of § 922(g)(8) should be reviewed in light of the Circuits' split on this issue. Resolution of this issue will set parameters on the reach of the statute. This Court has traditionally rejected expansive readings of statutes that result in far-reaching criminal liability beyond Congressional intention. *Jones v. United States*, 529 U.S. 848, 857 (2000) (in rejecting the government's argument that private homes fell within the purview of the federal statute, this Court noted: "Were we to adopt the Government's expansive interpretation of § 844(i) [a federal arson statute], hardly a building in the land would fall outside the federal statute's domain."). If the Fourth

Circuit's position is applied, there would be virtually no protective order which did not result in federal criminal liability if the restricted party had a gun, no matter the circumstances. This type of analysis also would eliminate the need for the government to prove the underlying elements, regardless of the circumstances. The reach of § 922(g)(8) is even more important now than when Mr. Owens' submitted his briefs, in light of cases calling into question the constitutionality of § 922(g)(8)—*New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) and *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023).

This Court should grant certiorari and reverse.

## STATEMENT OF THE CASE

In 2018, Jesse Shane Owens, Petitioner, was found in possession of several guns and ammunition while subject to a state emergency protective order. The government indicted Mr. Owens on two firearms-related counts, possession of guns and ammunition while under a domestic-violence protective order, in violation of 18 U.S.C. § 922(g)(8). Mr. Owens elected to proceed to a bench trial on Count 1, which occurred on December 11, 2018. The government dismissed Count 2.

### *Pre-Trial Motion and the Trial*

Before trial, Mr. Owens filed a motion to dismiss or, in the alternative, memorandum to support his defense. JA 1-60.[2] Mr. Owens' defense was that the elements to prove a violation of § 922(g)(8) were lacking in this case, specifically that Mr. Owens was not afforded actual notice and an opportunity to be heard

[2] "JA" refers to the Joint Appendix filed with the Fourth Circuit at ECF Nos. 17-18.

before the emergency protective order issued. JA 22-24. South Carolina's Protection from Domestic Abuse Act, under which the protective order issued against Mr. Owens, requires that the respondent be informed of the right to retain counsel, a requirement that is meaningless if the respondent is not actually allowed to obtain counsel. S.C. Code § 20-4-40(c). Mr. Owens was served with the petition approximately 15 hours before the hearing. JA 16-17. Furthermore, Mr. Owens asked about obtaining counsel during the hearing. JA 18. The court informed Mr. Owens that service of the petition less than 24 hours before the hearing was sufficient and did not allow him to obtain counsel before the hearing. JA 18.

The emergency protective order issued without any findings of fact that Mr. Owens perpetrated any abuse, or that he was a credible threat to his wife or child. S.C. Code § 20-4-50(a) sanctions issuance of emergency protective orders only when the petitioner shows the allegation of abuse by preponderance of the evidence. Mr. Owens relied on *Moore*, 657 S.E.2d 743, in which the South Carolina Supreme Court held that the emergency hearing proceedings implicate substantive due process, are not meant to afford the respondent (here, Mr. Owens) time to obtain counsel and, therefore, are not meant to be used for collateral consequences. As *Moore*, 657 S.E.2d at 749 noted, a hearing for an emergency protective order can occur within hours of notice to the respondent, which does not provide a meaningful opportunity for someone noticed to obtain counsel.

The sole issue at trial was whether Mr. Owens was a prohibited person based on whether the state protective order satisfied the elements of 18 U.S.C. § 922(g)(8).

Mr. Owens argued that the emergency hearing proceedings in South Carolina do not comply with due process notice and opportunity to be heard requirements. In support of the arguments, Mr. Owens argued that the emergency hearing proceedings implicate substantive due process, are not meant to afford the respondent (here, Mr. Owens) time to obtain counsel and, therefore, are not meant to be used for collateral consequences. JA 20-22; JA 80-87; JA 91-96.

The appellant was found guilty of Count 1 after a bench trial. The court issued its opinion and order on December 12, 2018. The district court's key holdings were that the state court could not prohibit federal courts from prosecuting Mr. Owens under § 922(g)(8) based on *Moore*, and that Mr. Owens was prohibited from collaterally attacking the underlying protective order. JA 106-07.

*Sentencing*

On February 13, 2019, the district court sentenced Mr. Owens to 80 months imprisonment, and imposed a three-year term of supervised release.[3]

*The Appeal and Disposition*

Mr. Owens appealed the decision of the district court that he was under a domestic protective order as defined in § 922(g)(8). His appeal focused on three issues: (1) whether his conviction and sentence should be vacated based on *Rehaif v. United States*, 139 S. Ct. 2191 (2019), because he was convicted based on an indictment that failed to allege all the elements of the offense charged; (2) the

[3] Mr. Owens received a resentencing on April 3, 2023, and was sentenced to 76 months imprisonment, which he had already served by the time of the resentencing hearing. The remand for resentencing was based on issues unrelated to this petition.

sufficiency of the protective order to satisfy the elements of § 922(g)(8); and (3) whether the district court imposed a procedurally and substantively unreasonable sentence based on the upward departure that was not noticed and failure to consider all the 18 U.S.C. § 3553(a) factors.

Specifically, Mr. Owens submitted to the Fourth Circuit that the emergency protective order to which Mr. Owens was subjected did not satisfy the elements of § 922(g)(8). Part of Mr. Owens' argument to the Fourth Circuit relied on the state case of *Moore*, 657 S.E.2d 743, which suggests this type of emergency order does not provide due process protections that warrant collateral consequences like a § 922(g) conviction. This position is bolstered by an opinion issued from this Court well after Mr. Owens submitted his briefs to the Fourth Circuit—*New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022). *Bruen* now instructs courts to consider only "constitutional text and history." 142 S. Ct. at 2128-29. If "the Second Amendment's plain text covers an individual's conduct," then pursuant to *Bruen* "the Constitution presumptively protects that conduct." *Id*. at 2129-30. To rebut the presumption, the government must show that a challenged law "is consistent with the Nation's historical tradition of firearm regulation." *Id*. South Carolina's interpretation of its emergency protective orders is a factor that should have been considered, not rejected out-of-hand by the Fourth Circuit, particularly now that *Bruen* has provided further guidance regarding the history and tradition of firearm regulation.

The Fourth Circuit issued an unpublished opinion, affirming the district court's judgment, but remanding for resentencing. App. 1A- 5A. In doing so, the Fourth Circuit, like the district court, held that it was not bound by the state law's interpretation of federal law and indicated Mr. Owens could not collaterally attack the "merits of the underlying state protective order." The Fourth Circuit never addressed the issue raised, which was whether the protective order adequately met the required elements of the federal statute. However, numerous circuit courts have addressed whether protective orders satisfy the notice and opportunity to participate element required for a § 922(g) conviction, not treated it as a collateral attack on the underlying order. *United States v. Bramer*, 956 F.3d 91 (2d Cir. 2020); *United States v. Marin*, 31 F.4th 1049, 1053 (8th Cir. 2022); *United States v. Young*, 458 F.3d 998, 1002 (9th Cir. 2006); *United States v. Kaspereit*, 994 F.3d 1202, 1211-1213 (10th Cir. 2021). As demonstrated by these circuit opinions, this issue has arisen both frequently and recently.

This petition follows, asking for relief from the opinion of the Fourth Circuit.

## REASONS FOR GRANTING THE PETITION

### THE FOURTH CIRCUIT FAILED TO ANALYZE MR. OWENS' CHALLENGE TO THE NOTICE AND OPPORTUNITY TO PARTICIPATE ELEMENTS OF 18 U.S.C. § 922(g)(8) AND ITS OPINION CREATES CONFLICT ABOUT THE STANDARD TO APPLY

This Court should grant the writ to address whether emergency domestic protective orders, like the one at issue in this case, satisfy the elements of notice and opportunity to participate in 18 U.S.C. § 922(g)(8). This case raises an important issue of federal law that should be settled by this Court, especially since

this Court issued a relevant case shortly before the Fourth Circuit's opinion here and the Fifth Circuit held that § 922(g)(8) violates the Second Amendment, which create conflicts likely to re-occur regularly unless settled by this Court.

The Fourth Circuit upheld Mr. Owens' conviction without ever addressing the issue he raised, which is whether South Carolina's procedures for issuing an emergency protective order satisfy the notice and opportunity to participate elements of § 922(g)(8), and whether states' interpretations of its emergency procedures bear on the § 922(g)(8) elements. This issue has been raised in several of the Circuits with varying outcomes. The Fourth Circuit diverged from all of them by declining to address the elements issue and instead evading the question by couching it as a collateral attack and as a question of whether state law can direct federal courts about what crimes it can prosecute. At a minimum, the Fourth Circuit should have evaluated whether the protective order to which Mr. Owens was subjected satisfied the § 922(g)(8) elements.

The issue of whether the elements of notice and opportunity to participate have been satisfied is frequently raised in federal courts. When questions about these elements arise, most circuits have analyzed the notice and opportunity to participate elements and considered factors about the particular case. For example, the Ninth Circuit reversed when the district court vacated the defendant's jury conviction for violating § 922(g)(8). *Young*, 458 F.3d 998. In doing so, the Court performed a lengthy analysis of what is required for a "hearing" and "opportunity to participate." *Id*. at 1004-1009 (citing cases from the Sixth, Seventh and Eighth

Circuits that had similarly analyzed these elements when challenged on appeal; *see United States v. Calor*, 340 F.3d 428, 431 (6th Cir. 2003); *United States v. Wilson,* 159 F.3d 280, 290 (7th Cir. 1998); *United States v. Lippman*, 369 F.3d 1039, 1042 (8th Cir. 2004)). The Second, Fifth and Tenth Circuits have also addressed the merits of appellants' arguments about the notice and opportunity to participate elements. *United States v. Bramer*, 956 F.3d 91 (2d Cir. 2020); *United States v. Banks*, 339 F.3d 267 (5th Cir. 2003); *United States v. Kaspereit*, 994 F.3d 1202 (10th Cir. 2021).

While minimal participation is required to prove the element, there are certain factors which must be considered. *Young*, 458 F.3d at 1009; *Kaspereit*, 994 F.3d at 1212, n.5 (collecting cases from the Fifth, Sixth, Eight and Ninth Circuits showing what will satisfy the elements); *Banks*, 339 F.3d at 272 (reversing the district court's dismissal of the indictments because the Circuit found the notice and participation requirements were met because the hearing "was set for a particular time and place, the defendant received notice of it, the defendant appeared in court with an attorney, the judge was present and ready to hear his case, the court had evidence before it that domestic violence had occurred, and the court gave the defendant an opportunity to be heard.").

But even though the requirements to satisfy the element might be minimal, the Second Circuit determined that the element of opportunity to participate was not proven when the defendant had only a single hearing before the protective order issued, was without counsel and nothing indicated he had a meaningful

exchange with the judge who issued the protective order. *Bramer*, 956 F.3d at 96-99. Contrary to the analysis applied in at least six other circuits, the Fourth Circuit simply failed to assess Mr. Owens' challenge to the elements of the offense of conviction. This was error.

If, alternatively, the analysis turns only on whether the protective order has issued—not whether it is a constitutionally valid order or meets the elements of the offense—as held by the Ninth Circuit, then the Fourth Circuit erred by not deferring to the state law about its own emergency protective orders. *See Young*, 458 F.3d at 1005 (Holding that § 922(g)(8) was not limited to valid restraining orders because "would be at odds with the statutory scheme as a whole."). This Court recently reiterated the deference due to states courts' interpretation of their own law in the context of sentencing-enhancing predicates: "Appreciating the respect due state courts as the final arbiters of state law in our federal system, this Court reasoned that it made sense to consult how a state court would interpret its own State's laws." *United States v. Taylor*, 142 S. Ct. 2015, 2025 (2022); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (In determining whether a state offense was a categorical match to the federal generic predicate, this Court held it looks at whether "the State would apply its statute to conduct that falls outside the generic definition of a crime."). Therefore, to the extent that the protective order itself is treated similarly to prior convictions for sentencing enhancement purposes, the Fourth Circuit should have deferred to state law to determine if it meets the requirements of § 922(g)(8).

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit in this case.

Respectfully submitted,

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