

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

The government incorrectly claims that Mr. Owens did not raise the issues of notice and opportunity to participate on appeal, as raised in his petition, urging this Court to deny the petition on that basis. BIO at 5-6. However, as even the headers of Mr. Owens' appellate court briefs show, the crux of his argument was whether South Carolina's domestic protective order met the elements of 18 U.S.C. § 922(g)(8), the first of which is whether the protective order hearing was noticed and the person had an opportunity to participate. C.A. Br. at 20-24, C.A. Reply Br. at 8-9. Therefore, it follows that the government's argument that this Court should deny the petition because Mr. Owens misapprehended the courts of appeal decisions he cited regarding an appropriate analysis of the notice and opportunity element of § 922(g) is also not a basis for denial. BIO at 6-7.

Finally, the government claims that it is unnecessary to hold Mr. Owens' petition until this Court decides *United States v. Rahimi*, No. 22-915 (S. Ct. docketed Mar. 21, 2023). BIO at 5, 9. Mr. Owens submits that the now-existing circuit split on the constitutionality of the very statute underlying Mr. Owens' conviction warrants a deferral and possible grant, vacate and remand (GVR) of his petition, which this Court possesses the authority to do.

I. The Fourth Circuit failed to address Mr. Owens' argument, much less apply the correct standard, that the notice and opportunity elements were proven

The Fourth Circuit summed up Mr. Owens' challenge to whether the South Carolina protective order met the elements of § 922(g) in a single paragraph. Pet. App. 3A-4A. The Fourth Circuit summarily dismissed Mr. Owens' argument by

asserting federal courts are not bound by state courts' interpretation of federal law and couching Mr. Owens' argument as a collateral attack on the state protective order. *Id.* As indicated in his petition, particularly in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) and the analysis done in other circuits, the Fourth Circuit should have considered South Carolina law and analyzed whether the process by which the protective order issued against Mr. Owens satisfied the notice and opportunity element of § 922(g)(8). Pet. at 8-9, 10-12.

The government incorrectly argues that Mr. Owens did not raise this issue at the Fourth Circuit. BIO at 5-6. The government relies on the district court's findings about the notice and opportunity to participate element to support its arguments. BIO at 6. The government must point to the district court's finding because, as indicated, the Fourth Circuit failed to address this issue, although Mr. Owens raised it. And, contrary to the government's assertion, Mr. Owens does not confuse the Fourth Circuit's holding about collateral challenges. BIO at 6-7. He is well-aware the Fourth Circuit can review whether the elements of notice and opportunity to participate were met. The Fourth Circuit erred by not considering the issues Mr. Owens raised about that element.

Furthermore, the government attempts to distinguish Mr. Owens' case from *United States v. Bramer*, 956 F.3d 91 (2d Cir. 2020), on which Mr. Owens relied to show he was challenging whether the elements of the offense were proven. Pet. at 10-11; BIO at 6. In *Bramer*, a state protective order issued against the defendant, who later tried to purchase a firearm and indicated on the required form that he

was not subject to a protective order. 956 F.3d at 92-93. The Second Circuit held certain factors must be considered to determine if the opportunity to participate was meaningful. *Id.* As Mr. Owens argued, the Fourth Circuit failed to assess the notice and opportunity element. Pet. App. at 3A-4A.

In sum, this Court should grant certiorari to clarify the appropriate standard for determining the elements of 18 U.S.C. § 922(g)(8).

II. This Court can hold this case in abeyance and GVR under its broad authority in light of *Rahimi*

Finally, the government urges this Court to deny the petition outright rather than hold it for the outcome of *Rahimi*, No. 22-915 (S. Ct. docketed Mar. 21, 2023). BIO at 5, 9. Mr. Owens submits that GVR would be appropriate if *Rahimi* is affirmed by this Court. “Title 28 U.S.C. § 2106 appears on its face to confer upon this Court a broad power to GVR: ‘The Supreme Court or any other court of appellate jurisdiction may ... vacate ... any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and ... require such further proceedings to be had as may be just under the circumstances.’” *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996). This Court recognized it exercises its GVR power for numerous reasons, including its own decisions, changed factual circumstances and decisions from the state’s highest courts. *Id.* at 166-67 (citations omitted). “[T]he GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review.” *Id.* at 168.

On the same day *Lawrence* issued, this Court issued a GVR in a criminal case, in part because “the only opinion below did not consider the import of a recent Supreme Court precedent that both parties now agree applies” and because the petitioner was languishing in jail, through no fault of his own, without having had the issue reviewed by the appellate court. *Stutson v. United States*, 516 U.S. 193, 195 (1996).

The briefs in Mr. Owens’ case were completed and submitted to the Fourth Circuit on September 26, 2019. The Fourth Circuit released its opinion in *Owens* on December 20, 2022, approximately one month before he was to be released to a halfway house after serving a sentence almost double the high-end of his guideline range. Pet. App. 1A. The Fifth Circuit opinion in *Rahimi* was filed on March 2, 2023. Mr. Owens raised the issue of *Rahimi* in his petition as a possible resolution by the Court’s GVR power, rather than as an issue for this Court to address, because the lower courts should be allowed to consider the issue first. As this Court held related to an issue of law raised to this Court about a case that had already issued at the time the petition was filed, “we believe that the Court of Appeals should have an opportunity to decide whether to entertain these arguments in the first instance.” *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020); *see also Murphy v. Aurora Loan Servs., LLC*, 699 F.3d 1027, 1033-34 (8th Cir. 2012), *as corrected* (Nov. 28, 2012) (“where the parties did not adequately develop an issue, remanding to allow the district court to address the matter in the first instance is appropriate.”); *United States v. Smith*, 954 F.3d 446, 452 (1st Cir. 2020) (“The

parties have not sufficiently briefed this issue on appeal, so we leave it to the district court to decide in the first instance on remand.”). A GVR certainly is an appropriate remedy if *Rahimi* is affirmed, especially since the issue goes to the constitutionality of Mr. Owens’ conviction and did not issue until after the Fourth Circuit filed its opinion. Pet. App. 1A.

Therefore, this Court under its broad authority can GVR Mr. Owens’ case so the Fourth Circuit can address the impact of *Rahimi*, if any, rather than Mr. Owens’ trying to argue that issue in the first instance before this Court.

CONCLUSION

For the foregoing reasons and those outlined in the petition, this Court should grant certiorari.

Respectfully submitted,

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July 28, 2023