No. 23-_____

IN THE

Supreme Court of the United States

MARLAND MAYNOR,

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

Brent Evan Newton
Counsel of Record
Attorney at Law
19 Treworthy Road
Gaithersburg, MD 20878
(202) 975-9105

Appointed Counsel for Petitioner

QUESTIONS PRESENTED

I.

Whether 18 U.S.C. § 922(g)(1) is facially unconstitutional under the Second Amendment.

First subsidiary question: Whether the plain-error standard applies to a facial constitutional challenge to a federal penal statute.

Second subsidiary question: Whether, at a minimum, this Court should hold this petition pending this Court's decision in *United States v. Rahimi*, No. 22-915 (cert. granted June 30, 2023), which will decide whether 18 U.S.C. § 922(g)(8) is facially unconstitutional.

II.

Whether the Fourth Circuit fundamentally "departed from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), by denying petitioner leave to file a supplemental brief raising a new, meritorious issue based on intervening Fourth Circuit precedent decided after the court had granted rehearing in petitioner's case on a different issue.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Marland Maynor, as the defendant-appellant, and the United States, as plaintiff-appellee. There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

None.

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OPINIONS BELOW

The decision of the Fourth Circuit affirming petitioner's judgment of conviction and sentence on rehearing (**Appendix A**) is unpublished but available at 2023 WL 4181229. The Fourth Circuit's decision on original submission (**Appendix B**) is reported at 776 Fed. App'x 126. The Fourth Circuit's order denying petitioner leave to file a supplemental relief (**Appendix C**) on rehearing is unreported.

JURISDICTION

The Fourth Circuit issued its opinion on rehearing and entered its judgment on June 26, 2023. **Appendix A.** This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the U.S. 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." U.S. Const. amend. II.

Section 922(g)(1) of Title 18, United States 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

A. Course of the Proceedings

On May 23, 2017, petitioner was charged in a one-count indictment with being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). Joint Appendix (JA) 13. On August 8, 2018, after a three-day trial, a jury convicted petitioner of that charge. JA 11. On November 8, 2018, the district court sentenced petitioner to 180 months of imprisonment and five years of supervised release under the Armed Career Criminal Act, 18 U.S.C. § 924(e). JA 120.

On petitioner's appeal to the Fourth Circuit, that court initially affirmed the district court's judgment on July 23, 2019, **Appendix B**, but later granted rehearing and ordered supplemental briefs on the question of whether petitioner's conviction was invalid in view of this Court's intervening decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). After this Court's subsequent decision in *Greer v. United* States, 141 S. Ct. 2090 (2021), which limited to the impact of *Rehaif*, the Fourth Circuit on rehearing rejected petitioner's *Rehaif* claim and affirmed his conviction and sentence. **Appendix A**.

B. Facts Relevant to First Question Presented

A federal grand jury returned an indictment charging petitioner with being a felon who unlawfully possessed a firearm in violation of 18 U.S.C. § 922(g)(1). JA 13. Petitioner's prior felony convictions included a 1999 conviction for attempted murder, for which he was sentenced to a 10-year term in state prison (and released from prison

and discharged from parole in 2009). Sealed Joint Appendix 175-77 (Presentence Report ¶¶ 36-42).[1] The jury convicted petitioner of the § 922(g)(1) offense. JA 11.

On appeal, in view of both a then-solid wall of circuit precedent and dicta in this Court's precedent against such a claim,[2] petitioner's opening brief on appeal to the Fourth Circuit did not challenge his § 922(g)(1) conviction under the Second Amendment. On June 23, 2022 – after petitioner's case was pending on rehearing in the Fourth Circuit on a different issue – this Court decided *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), which significantly altered the constitutional test to be applied to statutes prohibiting the possession of firearms. *See Range v. Attorney General United States of America*, 69 F.4th 96, 100-01 (2023) (en banc). *Bruen*'s new, originalist test focuses on "history and tradition" – in particular, whether our "Nation's historical tradition of firearms regulation supports depriving" an individual citizen or a class of citizens "of [their] Second Amendment right to possess a firearm." *Id.* at 101, 106 (discussing *Bruen*).

Although before this Court's decision in *Bruen* petitioner's appointed counsel in the Fourth Circuit moved to withdraw under *Anders v. California*, 386 U.S. 738

[1] At the time that petitioner possessed the firearm (as alleged in the indictment and found by the jury), petitioner was not under any type of parole, probation, or other type of criminal justice supervision. *See* Sealed Joint Appendix 175-77 (Presentence Report ¶¶ 36-42) (discussing all of petitioner's prior convictions and sentences).

[2] *See United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (citing several circuit courts' cases rejecting Second Amendment challenges to § 922(g)(1)); *see also District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]").

(1967),[3] petitioner himself – after this Court's decision in *Bruen* – filed a *pro se* brief challenging his conviction under the Second Amendment. **Appendix D**. The Fourth Circuit's opinion on rehearing necessarily rejected that argument by stating that "we have reviewed the entire record in this case and have found no meritorious grounds for appeal." **Appendix A**, at 4.

C. Facts Relevant to Second Question Presented

The district court's written judgment contains materially different discretionary, "special" conditions of supervised release than the "special" conditions orally pronounced by the court at sentencing. In particular, the written judgment contains four conditions that *require* petitioner to participate in different programs while on supervised release (including substance abuse and mental health treatment).[4] No discretion is afforded to the supervising probation officer concerning

[3] Petitioner's counsel filed a motion to withdraw under *Anders* on June 21, 2022 – two days before *Bruen* was decided. *See* Fourth Circuit Docket Entry Number 102. Counsel's motion noted that "[b]ecause this Court now has denied appellant leave to raise [a] new issue [on rehearing], appellant is limited to briefing only the *Rehaif* issue on rehearing (which, as discussed below, is an issue that counsel deems to be frivolous)." Appointed Counsel's Motion to Withdraw, at 2 n.1.

[4] The written judgment provides, in relevant part, that:

1. You ***must participate*** in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will ***supervise your participation*** in the program (provider, location, modality, duration, intensity, etc.).
2. You ***must submit*** to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with testing methods.
3. You ***must participate*** in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will ***supervise your participation*** in the program (provider, location, modality, duration, intensity, etc.).
4. You ***must participate*** in a vocational services program and follow the rules and regulations of that program. Such a program may include job readiness training and skills development training.

(continued)

whether petitioner should participate in any of those programs. Conversely, at sentencing, the district court's orally-pronounced conditions afforded the probation officer discretion to require appellant's participation in the four programs "as deemed necessary."[5] That is, in the district court's orally-announced conditions, each of these four discretionary conditions were not to be automatically imposed on petitioner upon his release from prison. Yet they are automatic according to the court's written conditions.

After the Fourth Circuit initially affirmed petitioner's conviction in 2019 and while petitioner's petition for rehearing on the *Rehaif* issue was pending, the Fourth Circuit rendered its decisions in *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020), and *United States v. Singletary*, 984 F.3d 341 (4th Cir. 2021). Those cases held for the first time that any "[1] [d]iscretionary conditions [of supervised release] that appear for the first time in a subsequent written judgment . . . are nullities[,] [2] the defendant has not been sentenced to those conditions, and [3] a remand for resentencing is required." *Singletary*, 984 F.3d at 344 (citing *Rogers*).

JA 196 (emphasis added) (attached hereto as **Appendix E**).

[5] At sentencing, the court orally stated:

> I'm going to place the Defendant on supervised release for a period of five years with the mandatory and standard conditions of supervision adopted by the Court and the following additional conditions: That he shall satisfactorily participate in a vocational program ***as deemed necessary by the probation officer***. That he shall participate in a mental health treatment program ***as deemed necessary by the probation officer***. That he shall participate in any substance abuse treatment program ***as deemed necessary***, and shall submit to substance abuse testing ***as deemed necessary*** during this five year period of supervised release.

JA 159 (emphasis added).

After those decisions, petitioner moved the Fourth Circuit for leave to file a supplemental brief raising a *Rogers/Singletary* claim based on the fact that the district court's written judgment contained materially different discretionary conditions of supervised release than the court's orally announced conditions. On June 21, 2021, in a two-to-one decision, the Fourth Circuit denied petitioner leave to raise the new issue. **Appendix C**. Chief Judge Gregory stated that he had voted to grant petitioner leave to file a supplemental brief. *Id.*

On June 26, 2023, the Fourth Circuit issued a decision on rehearing, which affirmed the district court's judgment. **Appendix A**. That decision did not address the *Rogers/Singletary* issue.

REASONS FOR GRANTING THE PETITION

I.
This Court should grant certiorari in order to decide whether 18 U.S.C. § 922(g)(1) is facially unconstitutional.

A. This Issue Is Properly Before this Court.

Before addressing why the Second Amendment issue raised in this petition is worthy of review by this Court, petitioner initially will address why that issue is properly before this Court.

First, although the issue was not raised in petitioner's opening brief filed in the Fourth Circuit, petitioner raised a Second Amendment challenge to his conviction in a *pro se* supplemental brief after petitioner's appointed counsel moved to withdraw under *Anders*. **Appendix D**. The Fourth Circuit necessarily ruled on that issue, albeit without explicitly discussing it, when it stated that "we have reviewed the

entire record in this case and have found no meritorious grounds for appeal." **Appendix A**, at 4. In any event, at least when this Court is reviewing the judgment of a United States Court of Appeals (as opposed to a state court), this Court may decide a question raised for the first time in a petition for writ of certiorari. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

Second, although petitioner did not raise a Second Amendment challenge to the indictment in the district court (and, instead, raised such a challenge to his conviction for the first time in his supplemental brief filed in the Court of Appeals), this Court may properly address that issue under the plain-error standard. *See Silber v. United States*, 370 U.S. 717, 718 (1962) (per curiam); *see also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906-07 (2018). This Court's intervening decision in *Bruen*, *supra*, in June 2022 renders the constitutional error plain on petitioner's appeal. *See Henderson v. United States*, 568 U.S. 266 (2013) (holding that an error may become "plain" based on an intervening appellate decision rendered in another case during a defendant-appellant's appeal).

Alternatively, assuming *arguendo* that this Court's decision in *Bruen* did not sufficiently make the law "plain" for purposes of Rule 52(b), the recently "evolving" nature of the Second Amendment issue[6] presented here militates in favor of this Court's *de novo* review. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256-

[6] *See, e.g.*, *Range v. Attorney General United States of America*, 69 F.4th 96 (3d Cir. 2023) (en banc) (finding that 18 U.S.C. § 922(g)(1) violates the Second Amendment as applied to the appellant in that case); *United States v. Bullock*, ___F. Supp.3d ___ , 2023 WL 4232309 (S.D. Miss. 2023) (finding that 18 U.S.C. § 922(g)(1) violates the Second Amendment as applied to the defendant in that case).

57 (1981) ("'Plain error' review under [Federal] Rule [of Civil Procedure] 51 is suited to correcting obvious instances of injustice or misapplied law. A court's interpretation of the contours of municipal liability under [42 U.S.C.] § 1983 . . . hardly could give rise to plain judicial error since those contours are currently in a state of evolving definition and uncertainty. . . . We undertake review here in order to resolve one element of the uncertainty, . . . and it would scarcely be appropriate or just to confine our review to determining whether any error that might exist is sufficiently egregious to qualify under Rule 51. The very novelty of the legal issue at stake counsels unconstricted review.").

Strictly applying the non-jurisdictional plain-error standard to a criminal defendant's claim that the federal penal statute under which he was prosecuted is facially unconstitutional would be unjust and illogical. If the penal statute under which a defendant was convicted is unconstitutional, an appellate court should not refuse to invalidate the defendant's conviction merely because he did not raise that issue in a lower court. *Cf. Class v. United States*, 138 S. Ct. 798, 805 (2018) (holding that a criminal defendant's unconditional guilty plea does not bar the defendant's right on appeal to challenge the constitutionality of the penal statute under which he was convicted because that type of claim "call[s] into question the Government's power to constitutionally prosecute him") (citation and internal quotation marks omitted); *see also United States v. Cotton*, 535 U.S. 625, 630 (2002) (holding that, in contrast to "defects in subject-matter jurisdiction [that] require correction regardless of whether the error was raised in district court," constitutional challenges that are

subject to waiver raised for the first time on appeal must be addressed under the "plain-error" standard).

Because a criminal defendant cannot waive a challenge to being prosecuted under a facially unconstitutional penal statute – just as a party in a civil or criminal case cannot waive a challenge to the court's subject-matter jurisdiction – this Court should not apply the plain-error standard to a defendant's facial challenge to the constitutionality of the penal statute under which he was convicted in the district court. *See generally Hiett v. United States*, 415 F.2d 664, 666 (5th Cir. 1969) ("It is well settled that if the statute under which appellant has been convicted is unconstitutional, he has not in the contemplation of the law engaged in criminal activity; for an unconstitutional statute in the criminal area is to be considered no statute at all."). Instead, this Court should engage in *de novo* review.

Finally, although petitioner's Second Amendment challenge to his conviction in the Fourth Circuit was an as-applied challenge, this Court has indicated that an as-applied constitutional challenge necessarily preserves a "facial" challenge as well. *See Citizens United v. Federal Election Com'n*, 558 U.S. 310, 330 (2010) (doubting whether "a party could somehow waive a facial challenge while preserving an as-applied challenge"); *see also id.* at 331 ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.").

Therefore, petitioner's facial Second Amendment challenge to his § 922(g)(1) raised in this petition is properly before this Court, and this Court should engage in *de novo* review of petitioner's claim.

B. This Court Should Grant Certiorari and Decide Whether 18 U.S.C. § 922(g)(1) Is Facially Unconstitutional Under the Second Amendment.

In the wake of this Court's June 2022 decision in *Bruen*, at least two federal courts – the en banc Third Circuit and a federal district court in the Southern District of Mississippi – have sustained as-applied challenges to § 922(g)(1) under the Second Amendment. *Range v. Attorney General United States of America*, 69 F.4th 96 (3d Cir. 2023) (en banc); *United States v. Bullock*, ___F. Supp.3d ___ , 2023 WL 4232309 (S.D. Miss. 2023). The reasoning of those decisions equally applies to a *facial* challenge: the government is unable to offer any evidence that the Framers of the Second Amendment believed that convicted felons (even those previously convicted of "violent" felonies) should be forever deprived of their right to possess firearms after being released from prison. *See Range*, 69 F.3d at 106 ("[W]e hold that the Government has not shown that the Nation's historical tradition of firearms regulation supports depriving Range of his Second Amendment right to possess a firearm [based on his felony conviction]."); *Bullock*, 2023 WL 4232309, at *30 ("Missing from [the government's] brief . . . is any example of how American history supports § 922(g)(1), much less the number of examples *Bruen* requires to constitute a well-established tradition. The government has, therefore, not met its burden.").

There is simply no way to limit the rationale of those two decisions – which both apply the new *Bruen* test – to as-applied Second Amendment challenges. Their

reasoning, and application of this Court's decision in *Bruen*, apply equally to facial challenges. *See Range*, 69 F.3d at 113 (Shwartz, J., dissenting, joined by Restrepo, J., dissenting) ("While my colleagues state that their opinion is narrow, the analytical framework they have applied to reach their conclusion renders most, if not all, felon bans unconstitutional."); *id.* at 116 ("[T]he Majority's analytical framework leads to only one conclusion: there will be no, or virtually no, felony or felony-equivalent crime that will bar an individual from possessing a firearm.").

Simply put, because there is no evidence that the Framers believed that a previously convicted felon – regardless whether his prior offense was violent or non-violent – should be prohibited from possessing a firearm after being released from prison, the originalist approach of this Court to the Second Amendment in *Bruen* dictates that § 922(g)(1) is facially unconstitutional.

C. At the Very Least, this Court Should Hold this Petition Pending this Court's Decision in *United States v. Rahimi*, No. 22-915 (cert. granted June 30, 2023).

At a minimum, this Court should hold this petition pending this Court's ultimate decision in *United States v. Rahimi*, No. 22-915 (cert. granted June 30, 2023). In *Rahimi*, this Court will decide whether 18 U.S.C. § 922(g)(8) – which prohibits persons under domestic violence restraining orders from possessing firearms – is facially unconstitutional. This Court's decision in that case may inform how this Court (or the Fourth Circuit on remand) should decide the Second Amendment issue in petitioner's case.

II.

The Fourth Circuit fundamentally erred on rehearing by refusing to grant petitioner leave to file a supplemental brief raising a meritorious claim challenging petitioner's 180-month prison sentence that only had been recognized by the Fourth Circuit after that court had affirmed petitioner's judgment on original submission.

As discussed above, petitioner unsuccessfully sought leave to file a supplemental brief on rehearing based on intervening Fourth Circuit decisions supporting petitioner's new argument for resentencing. *See United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020); *United States v. Singletary*, 984 F.3d 341 (4th Cir. 2021). Those decisions for the first time provided authority to challenge petitioner's prison sentence based on material differences in the conditions of supervision set forth in a district court's oral sentence and subsequent written judgment. Before *Rogers* was decided, the Fourth Circuit followed a different approach – the change in which has resulted in many dozen reversals of sentences by the Fourth Circuit on plain-error review under *Rogers* and *Singletary*, often after *Anders* briefs have been filed.[7] *See, e.g.*, *United States v. Frink*, No. 18-4738, 2022 WL 885140, at *2 n.2 (4th Cir. Mar. 25, 2022) (noting that "[w]e recognize that the district court did not have the benefit of our

[7] *See, e.g.*, *United States v. Beverly*, No. 22-4548, 2023 WL 3993020, at *1-*2 (4th Cir. June 14, 2023) (unpublished) (in a case in which the defendant-appellant's attorney filed an *Anders* brief, the Fourth Circuit *sua sponte* reversed the defendant-appellant's prison sentence and remanded for resentencing under *Rogers* and *Singletary*); *United States v. Eleidy*, No. 21-4140, 2023 WL 2300393, at *1-*2 (4th Cir. Mar. 1, 2023) (unpublished) (same); *United States v. Sanchez*, No. 20-4342, 2022 WL 168547, at *1 (4th Cir. Jan. 19, 2022) (unpublished) (same); *United States v. Crudup*, No. 19-4569, 2021 WL 4947145, at *1-*2 (4th Cir. Oct. 25, 2021) (unpublished) (same).

Notably, two of the judges on the panel in *Sanchez* – Chief Judge Gregory and Judge Agee – also were on petitioner's panel. Yet the panel in petitioner's case – over Chief Judge Gregory's dissent – inexplicably refused to address the *Rogers*/*Singletary* issue.

decision in *Rogers* at the time of Frink's sentencing" in 2018; *sua sponte* vacating the defendant-appellant's prison sentence and remanding for resentencing).

The Fourth Circuit fundamentally erred by not granting petitioner's request to benefit from the court's intervening precedent – decided after both petitioner's sentencing hearing and the Fourth Circuit's initial decision in petitioner's case on appeal – that provides the right to complete resentencing for a defendant in petitioner's situation. The Fourth Circuit inexplicably treated petitioner differently than defendant-appellants in dozens of other recent appeals in which the Fourth Circuit has itself *sua sponte* raised *Rogers/Singletary* errors and reversed defendant-appellants' sentences (after *Anders* briefs have been filed).[8]

It was unjust for the Fourth Circuit to have left petitioner's sentence intact under those circumstances. The Fourth Circuit thus fundamentally "departed from the accepted and usual course of judicial proceedings," SUP. CT. R. 10(a), which warrants this Court's intervention. "[I]t is not insignificant that this is a criminal

[8] In petitioner's counsel's motion to withdraw filed pursuant to *Anders*, counsel stated that:

> As explained in appellant's motion for leave to raise a new issue on rehearing, undersigned counsel believes that there is a nonfrivolous – indeed, a ***meritorious*** – sentencing issue in appellant's case based on this Court's 2020 and 2021 decisions in *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020), and *United States v. Singletary*, 984 F.3d 341 (4th Cir. 2021), which counsel asked for permission to raise for the first time on rehearing. However, this Court's denial of that motion has limited counsel to brief only the frivolous *Rehaif* issue discussed above. Because counsel cannot ethically make a frivolous argument on appeal, he moves to withdraw as appellant's appointed counsel.

Appointed Counsel's Motion to Withdraw, at 6 n.3 (4th Cir. Docket Entry Number 102) (emphasis in original).

case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam).

Without this Court's intervention, petitioner will be left without a remedy for the *Rogers/Singletary* error in his case. His direct appeal counsel who filed his original opening brief cannot be faulted for not having raised an issue that was then not supported by Fourth Circuit precedent. Thus, petitioner will not be able to raise a viable ineffective-assistance-of-counsel claim in a post-conviction motion under 28 U.S.C. § 2255. And petitioner's counsel on rehearing (who differed from petitioner's original appellate counsel) attempted to raise the *Rogers/Singletary* issue in a supplemental brief, yet the Fourth Circuit refused counsel's request to do so.

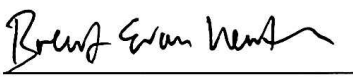
In the interests of justice, this Court should grant certiorari, vacate the Fourth Circuit's judgment, and remand with instructions to grant petitioner leave to file a supplemental brief raising the *Rogers/Singletary* issue. *See* 28 U.S.C. § 2106 ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

CONCLUSION

The Court should grant the petition for a writ of certiorari and address the merits of petitioner's facial challenge to his conviction under the Second Amendment. Alternatively, at a minimum, this Court should vacate the Fourth Circuit's judgment and remand with directions to permit petitioner to raise his *Rogers/Singletary* claim.

July 11, 2023

Respectfully submitted,



Brent Evan Newton
Counsel of Record
19 Treworthy Road
Gaithersburg, Maryland 20878
(202) 975-9105
brentevannewton@gmail.com