

No. _____

In the
Supreme Court of the United States

Mark Anthony Roy,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTION PRESENTED

Whether the Second Amendment forbids application of 18 U.S.C. §922(g)(1) to persons who have no conviction for violent conduct, nor any offense more serious than burglary of a building, unlawful carrying of a firearm, or simple possession of a small amount of drugs?

PARTIES TO THE PROCEEDING

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Anthony Roy seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Roy*, 2023 WL 3073266 (5th Cir. April 25, 2023)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on April 25, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTE AND CONSTITUTIONAL PROVISION

18 U.S.C. §922 provides in relevant part:

(g) It shall be unlawful for any person—

(1) 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.

The Second Amendment 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.

STATEMENT OF THE CASE

A. Proceedings in District Court

Mark Anthony Roy pleaded guilty without a plea agreement to a single-count indictment charging possession of a firearm after felony conviction, 18 U.S.C. § 922(g)(1). (Record in the Court of Appeals, 19, 33, 35, 36). Mr. Roy was charged via Criminal Complaint with possessing a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1).

The district court adopted the Guideline Calculations from the Presentence Investigation Report and PSR Addendum: offense level 24, criminal history category III, and advisory guideline range of 63–78 months in prison. (Record in the Court of Appeals, 145–147, 171, 151, 158, 172). The Report reflected felony convictions for unlawful carrying of a weapon (two), burglary of a building (one), and simple possession of a small amount of drugs (two), as well as two misdemeanor marijuana convictions. (Record in the Court of Appeals, 147-151). The court imposed a within-guideline-range sentence of 75 months in prison, three years of supervised release, forfeiture of the firearm, and a \$100 special assessment. (Record in the Court of Appeals, 133–135).

B. Proceedings in the Court of Appeals

Petitioner appealed, contending that the Second Amendment and the Commerce Clause of Article I, Section Eight of the United States Constitution placed his conduct beyond the power of Congress to prohibit. The court of appeals rejected

the Commerce Claim as foreclosed by Circuit precedent. [Appendix A]. It rejected the Second Amendment claim on plain error review “[b]ecause there is no binding precedent explicitly holding that § 922(g)(1) is unconstitutional and because it is not clear that [*New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, __U.S.__, 142 S. Ct. 2111 (2022)] dictates such a result...” [Appendix A].

REASONS FOR GRANTING THE PETITION

The courts of appeals have divided as to the constitutionality of 18 U.S.C. §922(g)(1). Further, this Court has granted certiorari in a case that will decide the constitutionality of a related statute.

The Second Amendment guarantees “the right of the people to keep and bear arms.” Yet 18 U.S.C. 922(g)(1) denies that right, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. In spite of this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges. *See United States v. Moore*, 666 F.3d 313, 316-317 (4th Cir. 2012)(collecting cases). This changed, however, following *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, __U.S.__, 142 S. Ct. 2111 (2022). *Bruen* held that where the text of Second Amendment plainly covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation’s historical tradition of gun regulation. *See Bruen*, 142 S. Ct. at 2129-2130. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id.* at 2127-2128.

After *Bruen*, the courts of appeals have split as to whether 18 U.S.C. §922(g)(1) trenches on rights protected by the Second Amendment. The Third Circuit has sustained the Second Amendment challenge of a man previously convicted of making a false statement to obtain food stamps, notwithstanding the felony status of that offense. See *Range v. Attorney General of the United States*, 69 F.4th 96 (3rd Cir. 2023). By contrast, the Eighth Circuit has held that §922(g)(1) is constitutional in all instances, at least against Second Amendment attack. See *United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023). And the Seventh Circuit thought that the issue could be decided only after robust development of the historical record, remanding to consider such historical materials as the parties could muster. See *Atkinson v. Garland*, 70 F.4th 1018, 1023-1024 (7th Cir. 2023).

This circuit split plainly merits certiorari. It involves a direct conflict between the federal courts of appeals as to the constitutionality of a criminal statute. The statute in question is a staple of federal prosecution.¹ It criminalizes primary conduct in civil society – it does not merely set forth standards or procedures for adjudicating a legal dispute. A felon living in a neighborhood beset by crime deserves to know whether he or she may defend himself against violence by possessing a handgun, or whether such self-defense is undertaken only on pain of 15 years imprisonment.

¹ See United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 20, Federal Offenders Sentenced under Each Chapter Two Guideline, p.2 (FY 2022) (showing that 9,367 people were sentenced under USSG §2K2.1 in FY 2022, which governs prosecutions under 18 U.S.C. §922(g)), available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table20.pdf>, last visited July 20, 2023.

If the Court grants certiorari to decide the constitutionality of §922(g)(1), it should hold the instant case pending the outcome, then grant certiorari, vacate the judgment below, and remand if the outcome recognizes the unconstitutionality of §922(g)(1) in a substantial number of cases. There is good reason to believe that any Second Amendment challenge could include Petitioner. His prior felony convictions consist of two charges of unlawfully carrying a gun, one charge of burglarizing a building, and two charges of possessing a small amount of drugs. *See* (Record in the Court of Appeals, at 147-151). In other words, he lacks any conviction for violent crime. As some judges embracing Second Amendment challenges have held a citizen's dangerousness to be a critical factor in assessing Second Amendment rights, there is good reason to think he may receive relief if the Second Amendment limits the scope of §922(g)(1). *See Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019)(Barrett, J., dissenting), *abrogated by* Bruen ("History does not support the proposition that felons lose their Second Amendment rights solely because of their status as felons. But it does support the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous."); *Binderup v. Att'y Gen. United States of Am.*, 836 F.3d 336, 356 (3rd Cir. 2016)(en banc), *abrogated by* Bruen; *see also United States v. Williams*, 616 F.3d 685, 693 (7th Cir.2010) ("[W]e recognize that § 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent.").

Further, this Court may well find that the Second Amendment supports a broad or facial challenge to §922(g)(1). The dissenters in *Range* expressed serious

doubts as to whether the logic of that decision could be contained to those convicted of relatively innocuous felonies. *See e.g. Range*, 69 F.4th at 131-132 (Krause, J., dissenting). Likewise, the Seventh Circuit has expressed doubt as to whether the Second Amendment distinguishes between violent and non-violent felonies. *See Atkinson*, 70 F.4th at 1023. And the Southern District of Mississippi has sustained a Second Amendment challenge to a defendant previously convicted of aggravated assault and manslaughter. *See United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *2-3 (S.D. Miss. 2023). In its view, the government's authorities showed a right only to punish those who possessed a firearm after conviction of a death-eligible offense, or after a finding of dangerousness that prospectively disarmed the defendant. *Bullock*, 2023 WL 4232309, at *2-3.

It is true that the Second Amendment challenge was not preserved in district court, and that any review will therefore eventually have to occur on the plain error standard. *See Fed. R. Crim. P. 52(b)*. This means that to obtain relief Petitioner must show error, that is clear or obvious, that affects substantial rights, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). But as shown above, there is at least a reasonable probability that the Defendant could establish clear or obvious violation of his Second Amendment rights if this Court evaluates the constitutionality of §922(g)(1), which it should quickly do. And the obviousness of error may be shown any time before the expiration of direct appeal. *Henderson v. United States*, 568 U.S. 266 (2013). Finally, a finding that the Defendant has been sentenced to prison for

exercising a basic constitutional right would affect the outcome and cast doubt on the fairness of the proceedings, to say the least.

Alternatively, this Court should hold the instant Petition pending the outcome of *United States v. Rahimi*, 22-915, __U.S.__, 2023 WL 4278450 (June 30, 2023)(granting cert.), which will decide the constitutionality of 18 U.S.C. §922(g)(8). That statute forbids firearm possession by those subject to a domestic violence restraining order.

Of course, if *Rahimi* prevails in that case, it will tend to support constitutional attacks on other sections of §922(g). Likely, a victory for *Rahimi* will involve a rejection of the government’s contention that the Second Amendment is limited to those Congress terms “law abiding.” See *United States v. Rahimi*, 61 F.4th 443, 451-453 (5th Cir. March 2, 2023)(considering this argument), *cert. granted* 2023 WL 4278450 (June 30, 2023). It will also require the Court to consider and reject historical analogues to §922(g)(8), including some that have been offered in support of §922(g)(1). **Compare** *Rahimi*, 61 F.4th at 456-457 (considering government’s argument that Congress could disarm those subject to restraining orders because some states disarmed enslaved people and Native Americans at founding), **with** *Range*, 69 F.4th at 105-106 (considering government’s argument that Congress could disarm felons because some states disarmed enslaved people and Native Americans at founding). But even if *Rahimi* does not prevail, the opinion may be of significant use to Petitioner. If, for example, this Court were to decide that *Rahimi* may be stripped of his Second Amendment rights because he is objectively dangerous,

Petitioner may argue that his convictions do not mark him as such. In short, the Court has granted certiorari in a closely related issue, and should hold the instant Petition.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 21st day of July, 2023.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner