No. _____

In the Supreme Court of the United States

_____

Rene Rigoberto Rodriguez,
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

_____

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QUESTIONS PRESENTED

I. Mr. Rodriguez pleaded guilty to violating 18 U.S.C. § 922(n), which criminalizes the receipt of a firearm for anyone under felony indictment. On appeal, Mr. Rodriguez attacked the statute of conviction as unconstitutional. Applying the plain-error standard of review, the Fifth Circuit declared the error alleged to be insufficiently clear. To support the point, it cited district court opinions upholding § 922(n) as constitutional based on similarities to historical surety laws and laws disarming groups perceived to be dangerous. Those same arguments are now before the Court in *United States v. Rahimi*, No. 22-915.

The question presented is:

Whether a ruling in Mr. Rahimi's favor would affect the Fifth Circuit's plain-error analysis concerning the constitutionality of § 922(n).

LIST OF PARTIES

Rene Rigoberto Rodriguez, petitioner on review, was the Defendant-Appellant below. The United States of America, respondent on review, was Plaintiff-Appellee. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Rene Rigoberto Rodriguez*, No. 3:20-CR-354-E, U.S. District Court for the Northern District of Texas. Judgment entered on September 16, 2022.

- *United States v. Rene Rigoberto Rodriguez*, No. 22-10896, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on June 16, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Rene Rigoberto Rodriguez respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unreported opinion is available on Westlaw's electronic database at 2023 WL 4044409 and reprinted at Pet.App.a1-a2.

JURISDICTION

The Court of Appeals issued its panel opinion on June 16, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves the offense defined at 18 U.S.C. § 922(n):

> It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

This petition also involves the Second Amendment to the United States Constitution:

> 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.

STATEMENT OF THE CASE

Mr. Rodriguez pleaded guilty to violating 18 U.S.C. § 922(n). A grand jury in the Northern District of Texas alleged his receipt of a firearm while "under indictment for a crime punishable by imprisonment for a term exceeding one year." Indictment at 1, *United States v. Rene Rigoberto Rodriguez*, Case No. 3:20-CR-354-E (N.D. Tex. Aug. 5, 2020), ECF No. 1. He pleaded guilty to the offense alleged in the one-count indictment but did not enter into a plea agreement with the government. *See* Factual Resume at 3, *United States v. Rene Rigoberto Rodriguez*, Case No. 3:20-CR-354-E (N.D. Tex. Apr. 8, 2022), ECF No. 24. Mr. Rodriguez did not raise a Second Amendment challenge to the constitutionality of § 922(n) before the district court.

Mr. Rodriguez raised a plain-error Second Amendment claim on appeal. A district court in the Western District of Texas had recently declared § 922(n) unconstitutional, and the government's appeal from that decision was pending at the Fifth Circuit when Mr. Rodriguez filed his initial brief with the same court. Appellant's Initial Brief at 2-3, *United States v. Rene Rigoberto Rodriguez*, Case No. 22-10896 (5th Cir. Dec. 5, 2022), ECF No. 17. A ruling in the defendant's favor in the pending appeal, Mr. Rodriguez argued, would resolve the first and second prongs of plain-error review in his favor. *Id*. at 4-11.

The Fifth Circuit rejected Mr. Rodriguez's appeal before ruling on the constitutionality of § 922(n) in the other case. This sequence affected his ability to show clear or obvious error. The claim advanced by Mr. Rodriguez, the Fifth Circuit

ruled, was neither clear nor obvious given the lack of binding authority on the matter. Pet.App.a.2 ("There is no binding precedent holding § 922(n) unconstitutional, and it is not clear *Bruen* dictates such a result."). The Fifth Circuit supported this analysis with reference to another unpublished decision rejecting the same plain-error claim for the same reason. *Id.* (citing *United States v. Avila*, 2022 WL 17832287, at *2 (5th Cir. Dec. 21, 2022)). That opinion, in turn, cited to a district court order rejecting a Second Amendment challenge to § 922(n). *Avila*, 2022 WL 17832287, at *2 (citing *United States v. Kays*, 624 F. Supp.3d 1262, 1268 (W.D. Okla. 2022)).

In the district-court order cited by the Fifth Circuit, the Western District of Oklahoma upheld § 922(n) after declaring historical surety laws "proper historical analogues" to the challenged statute. *Kays*, 624 F. Supp.3d at 1268. Surety laws, the district court reasoned, were similar to § 922(n) because both burdened an individual's right to possess firearms "only if another could make out a specific showing of reasonable cause to fear an injury, or breach of the peace." *Id.* (quoting *N.Y. State Rifle & Pistol Ass'n, Inc., v. Bruen*, 142 S. Ct. 2111, 2148 (2022)). Surety laws, the district court continued, affected an individual's right to carry a gun in public, but § 922(n) "simply limits an individual's right to receive a firearm during the pendency of an indictment." *Id.* On these premises, the district court identified the historical surety laws cited by the government as sufficient proof of § 922(n)'s constitutionality and denied the defendant's motion to dismiss. *Id.* Five other district courts have upheld § 922(n) as constitutional based on the same reasoning.

United States v. Adger, 2023 WL 3229933, at *4 (S.D. Ga. May 3, 2023), *report and recommendation adopted by* 2023 WL 3627840 (S.D. Ga. May, 24, 2023); *United States v. Bartucci*, ___ F. Supp.3d ___, 2023 WL 2189530, at *9-10 (E.D. Cal. Feb. 23, 2023); *United States v. Gore*, 2023 WL 2141032, at *4 (S.D. Ohio Feb. 21, 2023); *United States v. Simien*, ___ F. Supp.3d ___, 2023 WL 1980487, at *7 (W.D. Tex. Feb. 10, 2023); *United States v. Rowson*, ___ F. Supp.3d ___, 2023 WL 431037, at *23 (S.D.N.Y. Jan. 26, 2023).

Other district courts have upheld § 922(n) against constitutional challenge based on the existence of historical laws disarming groups perceived to be dangerous. A district court in the Southern District of New York, for example, declared § 922(n) constitutional given the existence of "laws that disarmed groups of people perceived as *per se* dangerous, on the basis of their religious, racial, and political identities." *Rowson*, 2023 WL 431037, at *21. "[A] law that would disarm a group based on race, nationality, or political point of view—or on the assumption that these characteristics bespoke heightened dangerousness—would be anathema," the district court conceded, "and clearly unconstitutional." *Id.* at 22 (citing *Drummond v. Robinson Twp.*, 9 F.4th 217, 228 n.8 (3d Cir. 2021)). The district court nevertheless dismissed these concerns as out of step with the Second Amendment's "historical," rather than "normative," analysis. *Id.* § 922(n), like the laws disarming groups perceived to be dangerous, similarly "impose[d] a partial limit on the firearms rights of a group of persons defined by an objective characteristic that is a fair proxy for dangerousness." *Id.* This meant, the district

court concluded, that § 922(n) "fits within the tradition of firearms regulation" in existence "at the time of the nation's founding." *Id.* Five other district courts have adopted the same analysis to uphold § 922(n) against Second Amendment challenge. *Adger*, 2023 WL 3229933, at *4-5, *report and recommendation adopted by* 2023 WL 3627840 (S.D. Ga. May, 24, 2023); *United States v. Jackson*, ___ F. Supp.3d ___, 2023 WL 2499856, at *16 (D. Md. Mar. 13, 2023); *Bartucci*, 2023 WL 2189530, at *7-8; *Gore*, 2023 WL 2141032, at *3; *United States v. Kelly*, 2023 WL 17336578, at *5 (M.D. Tenn. Nov. 16, 2022).

In *United States v. Rahimi*, the Fifth Circuit Court of Appeals rejected the historical analogues adopted by the various district courts upholding § 922(n). 61 F.4th 443, 457, 459-60 (5th Cir. 2023). That case presented a preserved Second Amendment challenge to the constitutionality of 18 U.S.C. § 922(g)(8), which criminalizes the possession of a firearm by those subject to domestic-violence restraining orders. *Id.* at 448. The government attempted to establish § 922(g)(8)'s constitutionality by pointing to "laws in several colonies and states that disarmed classes of people considered to be dangerous." *Id.* at 456. The Fifth Circuit rejected this argument. The dangerousness laws cited by the government, unlike § 922(g)(8), were designed to preserve "political and social order." *Id.* at 457. Section § 922(g)(8), by contrast, was enacted to protect "an identified person from the threat of 'domestic gun abuse.'" *Id.* (quoting *United States v. McGinnis*, 956 F.3d 747, 758 (5th Cir. 2003)). The Fifth Circuit likewise rejected historical surety laws as sufficiently analogous to prove § 922(g)(8)'s constitutionality. *Id.* at 459-60. Those

laws, the Fifth Circuit explained, "did not prohibit public carry, much less possession of weapons, so long as the offender posted surety." *Id*. at 460 (citing *Bruen*, 142 S. Ct. at 2149). By contrast, "§ 922(g)(8) works an absolute deprivation of the right, not only publicly to carry, but to *possess* any firearm, upon entry of a sufficient protective order." *Id*.

This Court will soon address the Fifth Circuit's analysis. This Court granted certiorari in *United States v. Rahimi*, No. 22-915, and the government has reiterated both analogues rejected as insufficient by the Fifth Circuit in an attempt to save § 922(g)(8). Brief for the United States at 13-15, 22-24, *United States v. Rahimi*, No. 22-915 (Aug. 14, 2023). A handful of district courts have upheld § 922(n) based on the same historical examples. Despite its ruling in *Rahimi*, the Fifth Circuit relied on those district-court orders to reject Mr. Rodriguez's plain-error challenge as insufficiently clear. An opinion in Mr. Rahimi's favor would affect the claim advanced below and require a second look by the Fifth Circuit as to the clarity of the error alleged.

REASONS FOR GRANTING THIS PETITION

I. The Court should hold this petition pending its decision in *United States v. Rahimi*.

a. An opinion in Mr. Rahimi's favor would affect the clarity of the error alleged by Mr. Rodriguez.

When pressed to defend § 922(n), the government routinely points to historical surety laws and those disarming groups perceived to be dangerous. It did so in this case in response to Mr. Rodriguez's plain-error challenge. Appellee's Brief

at 10-18, 20-22, *United States v. Rene Rigoberto Rodriguez*, Case No. 22-10896 (5th Cir. Jan. 3, 2023). After a district court in the Western District of Texas declared § 922(n) unconstitutional, the government offered the same historical evidence to the Fifth Circuit to support § 922(n). Appellant's Brief for the United States at 35-47, *United States v. Jose Gomez Quiroz* (5th Cir. Dec. 30, 2022). The Fifth Circuit has not yet issued a ruling in that case, and no other circuit courts of appeals have conclusively addressed § 922(n). Without binding appellate authority, district courts have come out on both sides. Some, as described above, have accepted the surety and dangerousness laws cited by the government as sufficient historical analogues for § 922(n). *See, e.g.*, *Rowson*, 2023 WL 431037, at *21-23. Others have rejected those same laws as historical precursors to § 922(n) on their way to declaring the statute unconstitutional. *See, e.g.*, *United States v. Stambaugh*, 641 F. Supp.3d 1185, 1190-93 (W.D. Okla. 2022); *United States v. Quiroz*, 629 F. Supp.3d 511, 520-21, 525-26 (W.D. Tex. 2022).

The same basic claims will be before this Court in *Rahimi*. To defend § 922(g)(8), the government initially refers this Court to English and American laws aimed at disarming individuals thought to be "dangerous." Brief for the United States at 14-15, 22-24, *United States v. Rahimi*, No. 22-915 (Aug. 14, 2023). It then depicts historical surety laws as within the same tradition of firearm regulation. *Id.* at 24. "Those laws," the government argues, "confirm that irresponsible individuals were subject to special restrictions that did not (indeed, could not) apply to ordinary,

law-abiding citizens." *Id.* The Fifth Circuit considered and rejected both analogues as insufficient to save § 922(g)(8). *See Rahimi*, 61 F.4th at 457, 459-60.

This Court's resolution of the broad historical claims advanced by the government in *Rahimi* will necessarily affect the Fifth Circuit's assessment of the error alleged by Mr. Rodriguez. One of the district courts upholding § 922(n) identified the existence of a felony indictment as "a fair proxy for dangerousness" and determined that historical laws aimed at disarming those perceived to be dangerous provided a sufficient analogue to § 922(n). *Rowson*, 2023 WL 431037, at *22. In *Rahimi*, the government advances the same claim before this Court. Brief for the United States at 14-15, 24, *United States v. Rahimi*, No. 22-915 (Aug. 14, 2023). If the government is right, Congress and state legislatures are free to identify groups as dangerous in the abstract and to punish any individual within that group for possessing or receiving a firearm. Neither § 922(g)(8) nor § 922(n) offend the Second Amendment if legislative judgment as to abstract risks of danger is the dividing line between constitutional and unconstitutional firearm restrictions. If, however, this Court rejects that level of generality, Mr. Rodriguez's plain-error challenge to § 922(n) deserves a second look. After all, the error alleged was insufficiently obvious only because district courts have adopted an approach to the Second Amendment this Court may well reject in *Rahimi*.

b. On plain-error review, the clarity of the error alleged is judged at the time of appellate disposition.

A decision in Mr. Rahimi's favor would affect the Fifth Circuit's plain-error analysis in this case. Whether an error is plain depends on the state of the law "at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468 (1997). Mr. Rodriguez's judgment is not yet final. *Gonzalez v. Thaler*, 565 U.S. 134, 149 (2012) (quoting *Clay v. United States*, 537 U.S. 522, 527 (2003)). An opinion in Mr. Rahimi's favor would render the Fifth Circuit's second-prong analysis obsolete and require a reassessment of the claim advanced below.

This has happened before. In *Johnson v. United States*, this Court declared the Armed Career Criminal Act's residual clause unconstitutionally vague. 576 U.S. 591, 597 (2015). A district court in the Southern District of Texas had previously imposed an ACCA-enhanced sentence against a defendant named Antonio Maldonado based in part on the residual clause. *United States v. Maldonado*, 638 F. App'x 360, 362 (5th Cir. 2016). The Fifth Circuit initially affirmed the sentence. *United States v. Maldonado*, 608 F. App'x 244, 244 (5th Cir. 2015). This Court then issued its opinion in *Johnson*, granted Mr. Maldonado's petition for certiorari, and vacated the Fifth Circuit's judgment. *Maldonado v. United States*, 136 S. Ct. 510, 511 (2015). Mr. Maldonado had not challenged the district court's application of the residual clause at his sentencing hearing, so the plain-error standard applied. *Maldonado*, 638 F. App'x at 362. The Fifth Circuit nevertheless recognized on remand its duty to reassess Mr. Maldonado's sentence in

light of *Johnson*: "The judgment against Maldonado was not final when *Johnson* was decided, and the *Johnson* decision announced law that applies in Maldonado's case." *Id.* The Fifth Circuit declared the district court's error sufficiently clear and reversed on plain-error review. *Id.* at 363.

A ruling in Mr. Rahimi's favor would likewise affect the Fifth Circuit's plain-error analysis in this case. As it stands, the strength of the historical analogues offered by the government to defend both § 922(g)(8) and § 922(n) remains unsettled. This Court's opinion in *Rahimi* will resolve that dispute. The arguments advanced by the government to defend both statutes are effectively identical, and a ruling from this Court as to one will affect the other. Since Mr. Rodriguez's judgment is not yet final, he could take advantage of a ruling in Mr. Rahimi's favor, and the Fifth Circuit would be obliged to consider that ruling upon remand. *Maldonado*, 638 F. App'x at 362.

c. If the Court rejects the historical analogues proffered by the government in *Rahimi*, it should grant this petition and remand to allow the Fifth Circuit a second look.

The Court should hold this petition pending its decision in *United States v. Rahimi*. An opinion in Mr. Rahimi's favor would affect the clarity of the error alleged by Mr. Rodriguez. At that point, the Fifth Circuit's plain-error analysis would "conflict[] with [a] relevant decision[] of this Court," and certiorari would be appropriate. Rule 10, RULES OF THE SUPREME COURT OF THE UNITED STATES. The outcome of this petition thus depends on the outcome of *Rahimi*. If the Court rules

in Mr. Rahimi's favor, it should grant this petition, vacate the Fifth Circuit's judgment, and remand for a reconsideration of the error alleged below.

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 September 14, 2023.

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