

IN THE SUPREME COURT OF THE UNITED STATES

RENE RIGOBERTO RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner is entitled to plain-error relief on his claim that 18 U.S.C. 922(n), the federal statute that prohibits receiving a firearm while under a felony indictment, violates the Second Amendment.

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No. 23-5629

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2023 WL 4044409.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2023. The petition for a writ of certiorari was filed on September 14, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of receiving a firearm while under felony indictment, in violation of 18 U.S.C. 922(n). Pet. App. 3a. He was sentenced to time served, to be followed by two years of supervised release. Id. at 4a-5a. The court of appeals affirmed. Id. at 1a-2a.

1. In 2019, a Texas grand jury indicted petitioner for possessing a controlled substance. C.A. ROA 112. He entered into a deferred-adjudication agreement under which he received two years of probation. Id. at 112, 116. Then, in April 2020 -- while still under indictment because of the deferred-adjudication agreement -- he pawned a firearm that had been stolen from a firearms dealer in a burglary two weeks earlier. Id. at 112.

A federal grand jury indicted petitioner for receiving a firearm while under felony indictment, in violation of 18 U.S.C. 922(n). C.A. ROA 8. Petitioner pleaded guilty without a plea agreement, id. at 71, 111, admitting that, on or about April 1, 2020, he "knowingly and unlawfully received a firearm," id. at 42. The district court sentenced him to time served, to be followed by two years of supervised release. Pet. App. 4a-5a.

2. The Fifth Circuit affirmed. Pet. App. 1a-2a. On appeal, petitioner had argued for the first time that Section 922(n) violated the Second Amendment. Ibid. Noting that petitioner had not raised that argument in district court, the court of appeals

reviewed it for plain error. Id. at 2a. The court determined that petitioner could not establish plain error because it had previously “rejected the argument that § 922(n) is clearly-or-obviously unconstitutional.” Ibid. (citing United States v. Avila, No. 22-50088, 2022 WL 17832287, at *2 (5th Cir. Dec. 21, 2022) (per curiam), cert. denied, 143 S. Ct. 2512 (2023)).

ARGUMENT

Petitioner does not ask this Court to grant plenary review in this case. He instead argues (Pet. 6-11) that the Court should hold the petition for a writ of certiorari pending its decision in United States v. Rahimi, No. 22-915 (argued Nov. 7, 2023). Because resolution of the question presented in Rahimi would not help petitioner establish plain error, the petition should instead be denied.

Petitioner acknowledges (Pet. 6) that, because he failed to raise his Second Amendment claim in the district court, it is reviewable only for plain error. See Fed. R. Crim. P. 52(b). To prevail under that standard, petitioner must establish (1) “an error” (2) that was “clear or obvious, rather than subject to reasonable dispute,” (3) that affected his “substantial rights,” and (4) that “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” Puckett v. United States, 556 U.S. 129, 135 (2009) (citation and internal quotation marks omitted). As explained in the government’s brief in opposition in Morrison v. United States, No. 22-7757 (cert. denied

Nov. 20, 2023), Section 922(n) is consistent with the Second Amendment.* Accordingly, petitioner cannot establish that the district court erred, much less clearly or obviously erred, in failing to hold Section 922(n) unconstitutional.

Contrary to petitioner's contention (Pet. 6-8), this Court's decision in Rahimi is unlikely to establish that his conviction under 18 U.S.C. 922(n) is clearly and obviously erroneous. Rahimi presents the question whether 18 U.S.C. 922(g)(8), the federal statute that disarms persons subject to domestic-violence protective orders, violates the Second Amendment on its face. See Pet. at I, Rahimi, supra (No. 22-915). Even if the Court holds that Section 922(g)(8) is invalid, its decision would not establish that Section 922(n) -- a different provision with different elements and different historical justifications -- is clearly or obviously unconstitutional. Instead, the government would have the opportunity to demonstrate that, despite any similarities with Section 922(g)(8), Section 922(n) nonetheless comports with "this Nation's historical tradition of firearm regulation." New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022). Thus, regardless of how this Court resolves Rahimi, petitioner could not establish plain error here.

Consistent with that view, this Court has denied, rather than held, other recent petitions raising unpreserved challenges to

* The government has served petitioner with a copy of its brief in opposition in Morrison, which is also available on the Court's electronic docket.

Section 922(n), see Morrison, supra (Nov. 20, 2023); Williams v. United States, No. 22-7707 (Oct. 2, 2023), as well as several recent petitions raising unpreserved challenges to Section 922(g)(1), the statute disarming convicted felons, see McCoy v. United States, No. 23-5360 (Oct. 10, 2023); Wilson v. United States, No. 23-5263 (Oct. 2, 2023); Roy v. United States, No. 23-5188 (Oct. 2, 2023); Hickcox v. United States, No. 23-5130 (Oct. 2, 2023). The same approach is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

WILLIAM A. GLASER
Attorney

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