

IN THE SUPREME COURT OF THE UNITED STATES

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SYLVESTER CUNNINGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(1), the federal statute that prohibits a person from possessing a firearm if he has been convicted of "a crime punishable by imprisonment for a term exceeding one year," ibid., complies with the Second Amendment.

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No. 23-6602

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 83-89) is reported at 70 F.4th 502. The order of the district court (Pet. App. 50-82) is not published in the Federal Supplement but is available at 2021 WL 2593766. The report and recommendation of the magistrate judge (Pet. App. 1-49) is not published in the Federal Supplement but is available at 2021 WL 3017999.

JURISDICTION

The judgment of the court of appeals (Pet. App. 90) was entered on June 13, 2023. A petition for rehearing was denied on August 30, 2023 (Pet. App. 91). On November 2023, Justice

Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including December 26, 2023. On December 18, 2023, Justice Kavanaugh further extended the time to and including January 27, 2024. The petition was filed on January 25, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); possessing cocaine and cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm during and in relation to drug trafficking, in violation of 18 U.S.C. 924(c)(1). Judgment 1. He was sentenced to 87 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 83-89.

1. In August 2020, petitioner went shopping at a Walmart in Cedar Rapids, Iowa. See Pet. App. 84. He entered the store in a wheelchair, but used one of the store's motorized carts while shopping. See ibid. He soon realized that he had misplaced his cell phone, and he returned to his car in his motorized cart to look for it. See ibid.

In the meantime, an employee suspected that petitioner's phone could have slid under the seat cushion in his wheelchair,

which remained at the front of the store. Pet. App. 85. When the employee lifted the cushion to search for the phone, she found a .357-caliber revolver. See id. at 4, 85. The employee notified the police. See id. at 85.

Upon questioning by the police, petitioner admitted that he lacked a permit to carry a firearm and that he was on supervised release for a previous offense. See Pet. App. 85. The police then arrested petitioner. See ibid. During a search incident to arrest, the police found 13 bags of cocaine and cocaine base in his undergarments. See ibid. At the time of his arrest, petitioner had previous felony convictions for a third offense of driving under the influence, in violation of 625 Ill. Comp. Stat. 5/11-501(d)(1)(A) (2005), and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). See Pet. App. 4.

2. A federal grand jury indicted petitioner for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); possessing cocaine and cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm during and in relation to drug trafficking, in violation of 18 U.S.C. 924(c)(1). See Pet. App. 3. The district court denied petitioner's motion to dismiss the felon-in-possession charge, rejecting his contention that Section 922(g)(1) violates the Second Amendment. See id. at 71-81. The court determined that, because petitioner "is a felon" whose "past felonies \* \* \* are undoubtedly dangerous offenses," he falls within "the category

of persons historically barred from Second Amendment protections.”  
Id. at 81.

After a trial, a jury found petitioner guilty on all counts. See Pet. App. 86. The district court sentenced him to 87 months of imprisonment, to be followed by five years of supervised release. See Judgment 2-3.

3. The Eighth Circuit affirmed. Pet. App. 83-89. As relevant here, the court rejected petitioner’s contention that “the Second Amendment guaranteed his right to possess a firearm, despite his status as a twice-convicted felon, because neither of his prior offenses qualified as a ‘violent’ offense based on the elements of the crime.” Id. at 87. The court explained that petitioner’s contention was foreclosed by its decision in United States v. Jackson, 69 F.4th 495 (8th Cir. 2023), petition for cert. pending, No. 23-6170 (filed Nov. 28, 2023), in which it had rejected “felony-by-felony litigation regarding the constitutionality of § 922(g)(1).” Id. at 502; see Pet. App. 87. Judge Stras dissented. See id. at 89.

The court of appeals denied petitioner’s petition for rehearing. See Pet. App. 91. Four judges stated that they would have granted rehearing en banc. See ibid.

#### ARGUMENT

Petitioner contends (Pet. 5-10) that 18 U.S.C. 922(g)(1) violates the Second Amendment as applied to him. The government has filed a petition for a writ of certiorari in Garland v. Range,

No. 23-374 (filed Oct. 5, 2023), presenting the question whether Section 922(g)(1) complies with the Second Amendment. The government has argued in Range that Section 922(g)(1) is constitutional, that the courts of appeals are divided over Section 922(g)(1)'s constitutionality, and that the question would ordinarily warrant this Court's review. See Pet. at 7-25, Range, supra (No. 23-374). But the government has argued that this Court should hold the petition in Range until it resolves United States v. Rahimi, No. 22-915 (argued Nov. 7, 2023), the pending case concerning the constitutionality of 18 U.S.C. 922(g)(8), the statute disarming individuals subject to domestic-violence protective orders. See Pet. at 25-28, Range, supra (No. 23-374).

For the reasons given in Range, this Court should likewise hold the petition for a writ of certiorari in this case until it resolves Rahimi and then dispose of the petition as appropriate. Holding the petition would allow the Court to choose among granting plenary review, remanding for further consideration, and denying the petition after it issues its decision in Rahimi. And even if the Court ultimately opts for plenary review, deferring review until after a decision in Rahimi would likely give the Court a broader choice of vehicles for resolving Section 922(g)(1)'s constitutionality and would allow the parties to litigate that question with the benefit of the guidance the Court provides in Rahimi. See Cert. Reply Br. at 10, Range, supra (No. 23-374).

## CONCLUSION

This Court should hold the petition for a writ of certiorari pending the disposition of United States v. Rahimi, No. 22-915 (argued Nov. 7, 2023), and then dispose of the petition as appropriate.

Respectfully submitted.

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