

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LESLIE FULWILER,

Petitioner,

versus

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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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1) violates the Second Amendment under *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022)?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction and sentence can be found at *United States v. Fulwiler*, No. 23-30152, 2023 WL 7118748 (5th Cir. Oct. 27, 2023) (unpublished), and is set forth at App. 001.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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.

Section 922(g)(1) of Title 18 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.

STATEMENT OF THE CASE

On October 31, 2022, Leslie Fulwiler pled guilty to possession of firearms by a conviction felon in violation of 18 U.S.C. § 922(g)(1). ROA.35. As a part of his plea, Fulwiler admitted that on January 28, 2021, he pawned two firearms at a local federal firearms licensee (“FFL”) and attempted to retrieve both firearms the next day but could not do so because he was a felon. ROA.111-12. At sentencing, the court

imposed a sentence of 60 months. ROA.39. A written judgment was entered on March 3, 2023. ROA.39. Fulwiler timely filed a notice of appeal. ROA.56.

Fulwiler appealed and challenged the constitutionality of 18 U.S.C. § 922(g)(1) under this Court’s decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). On October 27, 2023, the United States Court of Appeals for the Fifth Circuit affirmed and declined to reach the constitutionality of § 922(g)(1) because Fulwiler had not raised the claim below, this issue was unsettled in the Circuit, and thus Fulwiler could not establish plain error. App. 2-3.

REASONS FOR GRANTING THE WRIT

I. Lower courts require guidance on how to apply *Bruen*

A. A circuit split has emerged over the constitutionality of 18 U.S.C. § 922(g)(1)

The Second Amendment guarantees “the right of the people to keep and bear arms.” U.S. Const. amend. II. 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. Despite the conflict between the statutory and constitutional text, the courts of appeals historically and uniformly rejected Second Amendment challenges. *See United States v. Moore*, 666 F.3d 313, 316–17 (4th Cir. 2012) (collecting authorities).

“Enter *Bruen*.” *United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023) (citing *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022)). “When the Second Amendment’s plain text covers an individual’s conduct,” *Bruen* held that the government must “justify its regulation by

demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 24. No longer may the government defend a regulation by showing that it is narrowly tailored to achieve an important or even compelling state interest. *Id.* at 17-24.

In *Bruen*’s wake, courts of appeals have split as to whether 18 U.S.C. §922(g)(1) infringes on rights protected by the Second Amendment. The Third Circuit sustained the Second Amendment challenge of a man previously convicted of making a false statement to obtain food stamps, notwithstanding that the crime was punishable by imprisonment for a term exceeding one year. *See Range v. Att’y Gen. United States of Am.*, 69 F.4th 96 (3d 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, 506 (8th Cir. 2023) (citing *United States v. Jackson*, 69 F.4th 495, 501-02 (8th Cir. 2023)). The Seventh Circuit considered a more robust development of the historical record necessary at the trial court and remanded the issue accordingly. *See Atkinson v. Garland*, 70 F.4th 1018, 1022–24 (7th Cir. 2023). The Tenth Circuit stands alone in declining to even venture into the historical justifications for § 922(g)(1) — it decided that *Bruen* did not abrogate precedent upholding § 922(g)(1) based on a head count of votes from *Bruen*’s concurring and dissenting opinions and its footnote concerning “shall-issue” regimes. *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023).

B. This issue is of exceptional importance

Bruen's application to § 922(g)(1) will continue to plague lower courts until this Court provides guidance. The Court's much anticipated decision in *United States v. Rahimi*, No. 22-915, which will decide the constitutionality of 18 U.S.C. § 922(g)(8), may provide some. But the Solicitor General appears to agree that more is needed. The government has requested this Court's review in *Garland v. Range*, No. 23-374, which squarely presents the question of § 922(g)(1)'s constitutionality under the Second Amendment; and in *United States v. Daniels*, Case No. 23-376, which presents the related question of § 922(g)(3)'s constitutionality under the Second Amendment.

Moreover, the issue before the Court implicates the prosecution and incarceration of thousands. As of December 7, 2023, the Bureau of Prisons reported that it imprisons 157,740 people.¹ And as of December 2, 2023, 21.9% of inmates (32,163) were incarcerated for “Weapons, Explosives, [and] Arson” offenses, the second largest category of offenses within the federal prison population.² “For more than 25 years” in fact, firearm crimes have been one of the “four crime types” that “have comprised the majority of federal felonies and Class A misdemeanors[.]”³ In

¹ *Statistics*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Dec. 11, 2023).

² *Statistics – Inmate Offenses*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Dec. 11, 2023).

³ *Fiscal Year 2021 Overview of Federal Criminal Cases* at 4, U.S. SENTENCING COMM'N (April 2022), available at <https://www.ussc.gov/sites/default/files/pdf/research-andpublications/research->

fiscal year 2021, “[c]rimes involving firearms were the third most common federal crimes[.]”⁴ Of the 57,287 individuals sentenced, 8,151 were firearm cases—a 14.2% share.⁵ This represents an 8.1% increase from the year before, despite the number of cases reported to the U.S. Sentencing Commission declining by 11.3% and hitting an all-time low since fiscal year 1999.⁶

These figures only capture the tail end of the criminal process at the district court. The scope of prosecutions looms larger. “The Department of Justice filed firearms-related charges in upwards of 13,000 criminal cases during the 2021 fiscal year.” *United States v. Kelly*, No. 3:22-CR-00037, 2022 WL 17336578, at *3 (M.D. Tenn. Nov. 16, 2022) (citing Executive Office for United States Attorneys, U.S. Dept. of Justice, Annual Statistical Report Fiscal Year 2021 at 15 (Table 3C), available at <https://www.justice.gov/usao/page/file/1476856/download>). The scale of the question presented warrants this Court’s attention.

II. Should this Court grant certiorari to address the constitutionality of 18 U.S.C. § 922(g)(1) in another case, the Court should hold the instant petition pending the outcome

Leslie Fulwiler did not challenge the constitutionality of the statute at the district court. This likely presents an insurmountable vehicle problem for a plenary grant in the present case. Nonetheless, the questions presented are worthy of certiorari, and the Court has other opportunities to review them.

publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf.

⁴ *Id.* at 19.

⁵ *Id.* at 1, 5.

⁶ *Id.* at 2.

If the Court grants certiorari to decide the constitutionality of § 922(g)(1) in *Garland v. Range*, for instance, it may recognize the unconstitutionality of § 922(g)(1) in a substantial number of cases. Indeed, this Court may well find that the Second Amendment even supports a facial challenge to § 922(g)(1). In dissent, Judge Krause 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 131-32 (Krause, J., dissenting). The Seventh Circuit likewise questioned any dividing line based on “dangerousness.” *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. *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *2-3 (S.D. Miss. June 28, 2023). But even if the Court declines to grant certiorari in *Range*, this Court at minimum should hold the instant petition pending its decision in *Rahimi*. A victory for *Rahimi* likely will involve a rejection of the government’s contention that the Second Amendment is limited to those Congress terms “law abiding.” *See Rahimi*, 61 F.4th at 451-53. It will also require the Court to consider and reject historical analogues to § 922(g)(8), including some also offered in support of § 922(g)(1). *Compare Rahimi*, 61 F.4th at 456-57, *with Range*, 69 F.4th at 104-05.

In short, the Court may ultimately grant certiorari to address the question presented. If so, Fulwiler requests that it hold the instant petition pending the outcome. Should this Court disapprove of § 922(g)’s constitutionality or limit the statute’s application, Fulwiler requests that the Court grant certiorari in the instant

case, vacate the judgment below, and remand for reconsideration. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this January 25, 2024,

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