

No. \_\_\_\_\_

---

---

In the  
Supreme Court of the United States

---

**Corey Jarren Forbitto,**

*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

---

Adam Nicholson  
*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  
Adam\_Nicholson@fd.org

---

---

## QUESTION PRESENTED

- I. Whether 18 U.S.C. § 922(g)(1) comports with the Second Amendment?

Subsidiary Question: Whether this Court should hold the instant Petition pending *United States v. Rahimi*, 22-915, \_\_U.S.\_\_, 2023 WL 4278450 (June 30, 2023) (granting cert.), given the government’s concession in *Garland v. Range*, No. 23-374, that *Rahimi* presents “closely related Second Amendment issues” with respect to constitutional challenges to 18 U.S.C. § 922(g)(1), and justifies a decision to “hold the petition for a writ of certiorari” in *Range* “pending its decision *Rahimi*”, Government’s Petition for Certiorari in *Garland v. Range*, 23-374, at 7 (Filed October 5, 2023), available at [https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830\\_Range%20Pet%2010.5.pdf](https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830_Range%20Pet%2010.5.pdf), last visited October 20, 2023?

## **PARTIES TO THE PROCEEDING**

Petitioner is Corey Jarren Forbitto, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

**TABLE OF CONTENTS**

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

INDEX TO APPENDICES .....iv

TABLE OF AUTHORITIES.....v

PETITION FOR A WRIT OF CERTIORARI..... 1

OPINIONS BELOW ..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 1

STATUTORY PROVISIONS INVOLVED ..... 1

LIST OF PROCEEDINGS BELOW .....3

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THIS PETITION.....5

    I. The courts of appeals have divided as to the constitutionality of 18 U.S.C. § 922(g)(1). Further, this Court has granted certiorari and heard arguments in a case that will decide the constitutionality of a related statute. .... 5

CONCLUSION..... 10

## INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the  
Northern District of Texas

## TABLE OF AUTHORITIES

	Page(s)
<b>Federal Cases</b>	
<i>Atkinson v. Garland</i> , 70 F.4th 1018 (7th Cir. 2023).....	6, 7
<i>Henderson v. United States</i> , 568 U.S. 266 (2013) .....	7
<i>New York State Rifle &amp; Pistol Ass’n, Inc. v. Bruen</i> , 142 S.Ct. 2111 (2022) .....	4, 5
<i>Range v. Attorney General of the United States</i> , 69 F.4th 96 (3rd Cir. 2023).....	5, 6, 8, 9
<i>United States v. Bullock</i> , No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309 (S.D. Miss. 2023) .....	7
<i>United States v. Cunningham</i> , 70 F.4th 502 (8th Cir. 2023).....	5
<i>United States v. Moore</i> , 666 F.3d 313 (4th Cir. 2012).....	5
<i>United States v. Olano</i> , 507 U.S. 725 (1993) .....	7
<i>United States v. Rahimi</i> , 22-915, __U.S.__, 2023 WL 4278450 (June 30, 2023) .....	8, 9
<i>United States v. Rahimi</i> , 61 F.4th 443 (5th Cir. March 2, 2023) .....	8
<b>Federal Statutes</b>	
18 U.S.C. § 922(g) .....	6, 8
18 U.S.C. § 922(g)(1) .....	1, 2, 4, 5, 6, 7, 8, 9
18 U.S.C. § 922(g)(8) .....	8
18 U.S.C. § 924(a)(2) .....	2, 4
28 U.S.C. § 1254(1) .....	1

**Rules**

Fed. R. Crim. P. 52(b) ..... 7

**Constitutional Provisions**

U.S. Const. amend. II ..... 1, 4, 5, 7, 8, 9

**Other Authorities**

Petition for Writ of Certiorari, *Garland v. Range*,  
23-374 (Filed October 5, 2023) ..... 9

United States Sentencing Commission, *Sourcebook of Federal  
Sentencing Statistics*, Table 20, Federal Offenders Sentenced  
under Each Chapter Two Guideline, p.2 (FY 2022) ..... 6

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Corey Jarren Forbito seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Corey Jarren Forbito*, No. 22-11026, 2023 WL 8274528 (5th Cir. Nov. 30, 2023) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

### JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on November 30, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### CONSTITUTIONAL PROVISIONS INVOLVED

The Second Amendment to the U.S. Constitution 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." U.S. Const., amend. II.

### STATUTORY PROVISIONS INVOLVED

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

18 U.S.C. § 922(g)(1).

Title 18 U.S.C. § 924(a)(2) provides:

Whoever knowingly violates subsection (a)(6), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(a)(2).

## LIST OF PROCEEDINGS BELOW

1. *United States v. Corey Jarren Forbito*, 3:21-CR-130, United States District Court for the Northern District of Texas. Judgment and sentence entered on October 6, 2022. (Appendix B).
2. *United States v. Corey Jarren Forbito*, No. 22-11026, 2023 WL 8274528 (5th Cir. Nov. 30, 2023) (unpublished), Court of Appeals for the Fifth Circuit. Judgment affirmed on November 30, 2023. (Appendix A).

## STATEMENT OF THE CASE

### A. Facts and Proceedings in District Court

Petitioner Corey Jarren Forbito pleaded guilty to the lone count of a federal indictment charging him with violating 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (ROA.8, 70). Mr. Forbito did not move to dismiss the indictment, nor did he argue that the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), is unconstitutional. The district court sentenced him to a term of seventy-two months' imprisonment. (ROA.71).

### B. Appellate Proceedings

On appeal, Petitioner argued that, in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), 18 U.S.C. § 922(g)(1) violates the Second Amendment. However, explaining that it had not yet addressed the constitutionality of § 922(g)(1) in light of *Bruen*, the court of appeals relied on its prior rejection of Second Amendment challenges to § 922(g)(1) to conclude that Petitioner could not demonstrate plain error. [App. A, at 18-19].

## REASONS FOR GRANTING THIS PETITION

**I. The courts of appeals have divided as to the constitutionality of 18 U.S.C. § 922(g)(1). Further, this Court has granted certiorari and heard arguments 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 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 for many years. *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 (8<sup>th</sup> 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 (7<sup>th</sup> 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.<sup>1</sup> 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.

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. 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.4<sup>th</sup> at 131-132 (Krause, J., dissenting). Likewise, the Seventh Circuit has expressed doubt as to whether the

---

<sup>1</sup> 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 October 3, 2023.

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. *Id.*

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). 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 (5<sup>th</sup> 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.4<sup>th</sup> 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.4<sup>th</sup> 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.

Notably, the Solicitor General has affirmatively contended that *Rahimi* and *Garland v. Range* – a case involving a challenge to 18 U.S.C. 922(g)(1) – presents “closely related Second Amendment issues.” Government’s Petition for Certiorari in *Garland v. Range*, 23-374, at 7 (Filed October 5, 2023), available at [https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830\\_Range%20Pet%2010.5.pdf](https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830_Range%20Pet%2010.5.pdf) , last visited October 20, 2023. Indeed, it has contended that this Court should “hold the petition for a writ of certiorari” in *Range* “pending its decision *Rahimi*.” *Id.* It can hardly maintain now that other Petitions raising Second Amendment challenges to § 922(g)(1) should be disposed.

## 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 27th day of February, 2024.

**JASON D. HAWKINS**  
**Federal Public Defender**  
**Northern District of Texas**

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

*Attorney for Petitioner*