No. _____

In the Supreme Court of the United States

JACOB LYON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the
United Sates Court of Appeals for the Fifth Circuit

SHANE O'NEAL
O'NEAL LAW
101 E. Avenue B
Alpine, Texas 79830
(713) 516-3505
shane@shaneoneallaw.com

Attorney for Defendant-Appellant

QUESTION PRESENTED FOR REVIEW

1. Whether an objection to a sentencing enhancement, urged with a specific argument supporting the non-application of that enhancement, waives all other grounds for the enhancement.

2. Whether 18 U.S.C. § 922(g) is constitutional under the Second Amendment? And, whether this Court should hold the instant petition pending *United States v. Rahimi*, cert. granted, 143 S. Ct. 2688 (No. 22-915) (oral argument heard Nov. 7, 2023), give the government's concession in its Petition for Certiorari 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 urges this Court to "hold the petition for a writ of certiorari" in *Range* "pending its decision in *Rahimi*[?]"[1]

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[1] *See* Petition for Certiorari, *Garland v. Range*, (No. 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.

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PETITION FOR WRIT OF CERTIORARI

Jacob Lyon asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on December 20, 2023.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on December 20, 2023. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION 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.

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "no person shall be … deprived of … liberty … without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

Petitioner Jacob Lyon was found guilty, after a trial, of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

Lyon's presentence investigation report increased his recommended sentence because his offense involved a large capacity magazine. Lyon objected to that enhancement because "the instant offense does not meet the first prong of U.S.S.G. § 2K2.1(a)(3)," the prong requiring the offense to involve a firearm capable of accepting a large capacity magazine. In support of his objection, Lyon argued that "there is nothing in the PSR that indicates that the magazine was attached to either firearm or that it was in close proximity to either firearm."

At sentencing, Lyon urged that "the issue is going to be whether the firearm or one of the firearms that was involved in this case is considered a semi-automatic firearm capable of accepting a large-capacity magazine." The determinative issue, Lyon urged, was "whether or not there was a large capacity magazine in

close proximity to this firearm." Lyon argued that despite being nearby, the magazine was not in close proximity because it was in a safe and therefore not easily accessible.

On appeal, Lyon raised an array of issues. The two relevant to this petition are (1) whether the large capacity magazine was compatible with the firearm and (2) whether 18 U.S.C. § 922(g)(1) was constitutional under the Commerce Clause and the Second Amendment.

The Fifth Circuit reviewed the sentencing objection for plain error because Lyon's objections in the district court "concerned only the proximity of the rifle to the magazine, and not whether the rifle and the magazine were compatible." *Appendix*, at 5 n.1.

Lyon also raised on appeal that 18 U.S.C. § 922(g)(1) is an unconstitutional infringement of the Second Amendment. The Fifth Circuit rejected that argument on plain error review because "there is as yet no binding precedent explicitly holding that § 922(g)(1) is unconstitutional" and "it is not clear that *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), dictates such a result." *Appendix*, at 9.

REASONS FOR GRANTING CERT

I. The Circuits are split over whether a defendant preserves a claim for de novo review when he makes an objection, though employing different arguments in the district court than he ultimately urges on appeal.

The Fifth Circuit found that Lyon did not preserve all arguments supporting that his offense did not involve a firearm capable of accepting a large capacity magazine by objecting to that enhancement when he urged, in support, an argument that the large capacity magazine found was not easily accessible because it was in a safe.

"A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b).

The Fifth Circuit's ruling deepens a circuit split over whether a defendant's argument against a sentencing enhancement can shift on appeal. Some Courts of Appeals have held, pursuant to *Yee v. City of Escondido*, 503 U.S. 519 (1992), that a defendant who presents a claim in district court may advance different arguments on appeal than those presented to the district court in support of that

claim. *See, e.g., United States v. Billups*, 536 F.3d 574, 577-78 (7th Cir. 2008). The Fifth Circuit's holding in this case is consistent with a longstanding split over the degree to which a defendant's argument against a sentencing enhancement must be consistent in the district court and on appeal.

A. The Fifth Circuit's ruling deepens an already existing split over whether parties are locked into the theory of their objection made in the district court.

In *Yee,* this Court stated "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." 503 U.S. at 534. This Court adhered to its "traditional rule" that parties are not limited to the precise argument they made below but can make any argument in support of a claim that was properly presented in *Lebron v. National Railroad Passenger Corporation*, 513 U.S, 374, 379 (1995). And, in *Citizens United*, this Court reaffirmed its "practice" that "[o]nce a claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331 (2010).

There is a well-defined circuit split over the proper standard of review when a party makes a claim and supports that claim on appeal with an argument different than that presented to the district court, as applied to objections to the application of the Sentencing Guidelines. *Compare United States v. Castillo*, 36 F.4th 431, 435, n.1 (2d Cir. 2022); *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022); *United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008); *United States v. Walton*, 881 F.3d 768, 771 (9th Cir. 2018); *with United States v. Rios-Hernandez*, 645 F.3d 456, 462 (1st Cir. 2011); *United States v. Joseph*, 730 F.3d 336, 341 (3d Cir. 2013); *Narez-Garcia*, 819 F.3d at 150; *United States v. Anderson*, 62 F.4th 1260, 1267 (10th Cir. 2017); *United States v. Ramirez-Flores*, 743 F.3d 816, 821 (11th Cir. 2014).

Many Courts of Appeals have held that *de novo* review is appropriate even when arguments about the proper application of the Sentencing Guidelines vary from those presented in the district court, so long as they support the same claim. In *Billups*, the Seventh Circuit rejected the government's argument that it should review a challenge that a false imprisonment conviction is not a crime of violence only for plain error. 536 F.3d at 577-78. The defendant had urged a different ground in the Court of Appeals for

why his previous conviction was not a crime of violence. *Id*. Relying on *Yee,* the Seventh Circuit held that his objection was sufficient to trigger *de novo* review of whether the prior conviction was a crime of violence. *Id*.

Other Circuits have followed that analysis, holding that the advancement of a claim—such as an objection to the application of a Guideline enhancement—preserves unasserted arguments in support of that claim. *See United States v. Collazo*, 2022 WL 1553168, at *3 (9th Cir. May 12, 2022); *Hope*, 28 F.4th at 494-95 ("We have clarified that for purposes of *de novo* appellate review, it is sufficient for counsel to articulate an objection based on multiple theories … . Though Hope now adds more weight to his argument on appeal, the district court had an opportunity to evaluate his specific objection that his state convictions were not predicate offenses for the ACCA enhancement.").

On the other side of the split, there are two groups. One requires that the same theory underlying the claim be urged to the district court. *See Anderson*, 62 F.4th at 1267 ("He also argues that, based on *Yee*, … he is permitted to raise this argument on appeal because it was encompassed by his general argument that there was no reasonable suspicion to stop him. As the government

points out, however, we have rejected this construction of *Yee*."); *Joseph*, 730 F.3d at 341 ("raising an issue [or claim] in the district court is insufficient to preserve for appeal all arguments bearing on that issue."). Another requires that the theories presented to the district court and the court of appeals be substantially similar. *United States v. Posey*, 2022 WL 17056662, at *5-7 (11th Cir. Nov. 17, 2022) (citing *Ramirez-Flores*, 743 F.3d at 821 and *United States v. Weeks*, 711 F.3d 1255 (11th Cir. 2013)).

The opinion here is consistent with the Fifth Circuit's previous published holdings on this issue, that plain error review applies when the argument shifts from the district court to appeal. *Narez-Garcia*, 819 F.3d at 150 (applying plain error review to an argument against a crime-of-violence categorization because a different argument was urged below)

The Fifth Circuit's decision to review only for plain error was ultimately critical to its decision because "an AR-15 rifle taking .223/5.56 ammunition and an AR-15 magazine taking .223/5.56 ammunition are compatible under plain-error review." *Appendix*, at 8 n.6. As Judge Elrod noted in dissent, the majority "spot[ted] the government evidence that it did not produce." *Appendix*, at 12.

This Court should review the Fifth Circuit's holding to resolve this well-defined circuit split.

II. The Circuits are divided over whether 18 U.S.C. § 922(g)(1) is constitutional under the Second Amendment, and 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, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. Despite 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*, 597 U.S. 1, 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 (3d Cir. 2023). By contrast, the Eighth Circuit has held that Section 922(g)(1) is constitutional in all instances, at least against Second Amendment attack. *See United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023). And the Seventh Circuit determined 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 (7th 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. 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 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 Section 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 Section 922(g)(1) in a substantial number of cases.

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 Petitioner could establish a clear or obvious violation of his Second Amendment rights if this Court evaluates the constitutionality of Section 922(g)(1), which it should quickly do. 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 Petitioner has been sentenced to prison for exercising a basic constitutional right would affect the outcome and cast doubt on the fairness of the proceedings.

Alternatively, this Court should hold the instant Petition pending the outcome of *United States v. Rahimi*, cert. granted, 143 S. Ct. 2688 (No. 22-915) (oral argument heard Nov. 7, 2023) 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 Section 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 (5th Cir. 2023) (considering this argument), *cert. granted*, 143 S. Ct. 2688 (2023). It will also require the Court to consider and reject historical analogues to Section 922(g)(8), including some that have been offered in support of Section 922(g)(1). *Compare Rahimi*, 61 F.4th 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.4th 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) – present "closely related Second Amendment issues." Petition for Certiorari, *Garland v. Range*, (No.23-374), at 7 (Filed October 5, 2023). Indeed, it has contended that this Court should "hold the petition for a writ of certiorari" in *Range* "pending its decision in *Rahimi*." *Id*. It can hardly maintain now that other petitions raising Second Amendment challenges to Section 922(g)(1) should be disposed.

CONCLUSION

For these reasons, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

s/ Shane O'Neal
Counsel of Record for Petitioner
Dated: March 19, 2024