

No. _____

IN THE
Supreme Court of the United States

OTIS RAY WHITEHEAD, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY M. BYERS
FEDERAL PUBLIC DEFENDER
LAURA K. DESKIN
Counsel of Record
ASSISTANT FEDERAL PUBLIC DEFENDER
215 Dean A. McGee, Suite 109
Oklahoma City, OK 73102
(405) 609-5930
Laura_Deskin@fd.org

Counsel for Petitioner

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QUESTIONS PRESENTED

Whether a court may uphold the constitutionality of 18 U.S.C. § 922(g)(1) based solely on this Court’s statement in *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008), that “longstanding prohibitions on the possession of firearms by felons” are “presumptively lawful,” without conducting the historical analysis set forth in *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024).

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Whitehead*, No. 24-6062 (10th Cir. March 25, 2025);
- *United States v. Whitehead*, No. 23-cr-00280-J-1 (W.D. Okla. March 18, 2024).

There are no other proceedings related to this case under Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

This case presents an important question about lower court compliance with this Court’s Second Amendment jurisprudence. In *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), the Court established a historical tradition test for evaluating firearm regulations under the Second Amendment. But the Tenth Circuit has refused to apply that test to 18 U.S.C. § 922(g)(1), instead continuing to uphold the statute based solely on its prior precedent and this Court’s reference to “presumptively lawful” firearm restrictions like “possession of firearms by felons” in *District of Columbia v. Heller*, 554 U.S. 570, 626–627 & n.26 (2008).

Petitioner Otis Whitehead does not seek a broad holding that § 922(g)(1) is facially unconstitutional. Rather, he asks the Court to clarify that the Second Amendment requires more than reliance on dicta or pre-*Bruen* precedent, and that courts must apply the text-and-history methodology mandated by this Court. The Tenth Circuit’s categorical rejection of that approach creates an entrenched conflict with this Court’s post-*Bruen* framework. This case presents a clean opportunity for this Court to correct course and require the historical analysis that *Bruen* demands.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is at 2025 WL 903849 (unpublished) and reproduced at App. 1a – 19a. The district court did not issue a relevant written order or opinion in this case (as the constitutional issue was not raised in district court).

JURISDICTION

The Tenth Circuit entered its judgment on March 25, 2025. Rehearing was not sought. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. II:

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.

18 U.S.C. § 922(g)(1):

It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to 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. § 924(a)(8):

Whoever knowingly violates subsection ... (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both.

STATEMENT OF THE CASE

A. Legal Framework

In *District of Columbia v. Heller*, this Court recognized an individual right to keep and bear arms but noted that “longstanding prohibitions on the possession of firearms by felons” are “presumptively lawful.” 554 U.S. 570, 626, 627 n.26 (2008). The Court, however, did not undertake any historical analysis of such prohibitions.

Its reference to felon dispossession was dicta, as the issue was not presented in that case.

Building on *Heller*, this Court in *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), clarified that Second Amendment challenges must be resolved by reference to the Nation’s historical tradition of firearm regulation, expressly rejecting means-end scrutiny. While Bruen acknowledged the *Heller* dicta describing felon dispossession as “presumptively lawful,” it did not treat that dicta as dispositive. See *id.* at 18 n.6, 25. Nor was the constitutionality of laws prohibiting firearm possession by felons at issue in *Bruen*; rather, the Court addressed the validity of New York’s licensing regime for carrying handguns in public. *Id.* at 8–10. Instead, the Court emphasized that the government must “affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Id.* at 19.

In *United States v. Rahimi*, 602 U.S. 680 (2024), this Court addressed a Second Amendment challenge to 18 U.S.C. § 922(g)(8), which prohibits firearm possession by individuals subject to certain domestic violence restraining orders. Although the opinion briefly cited *Heller*’s reference to “presumptively lawful” firearm restrictions for felons and the mentally ill, *id.* at 682, that dicta was not at issue in the case and was neither applied nor relied upon in the Court’s reasoning. Instead, the Court conducted a full historical inquiry under *Bruen*’s framework and upheld the statute only after identifying sufficient historical analogues. The Court reaffirmed that “why and how the regulation burdens the right are central to this inquiry,” *id.* at 691, and

emphasized that constitutional validity depends on consistency with the Nation's historical tradition of firearm regulation. *Rahimi* is the only decision since *Bruen* in which this Court has applied that framework to assess the constitutionality of a federal criminal firearm restriction.

B. Proceedings Below

Petitioner was convicted in the United States District Court for the Western District of Oklahoma of possessing a firearm after a prior felony conviction in violation of 18 U.S.C. § 922(g)(1). He did not raise a Second Amendment challenge in the district court.

On direct appeal, Petitioner argued that § 922(g)(1) violates the Second Amendment as interpreted in *Bruen*. He acknowledged that the claim was foreclosed by binding Tenth Circuit precedent and raised the issue for preservation purposes. The government responded that *Bruen* did not abrogate *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), which had upheld the constitutionality of § 922(g)(1) by relying exclusively on *Heller*'s statement that felon-in-possession laws are "presumptively lawful."

The Tenth Circuit affirmed Mr. Whitehead's conviction under plain error review, relying on its decision in *Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025), which issued after briefing concluded in this case. In *Vincent*, the Tenth Circuit had previously upheld the constitutionality of § 922(g)(1) based on its longstanding precedent in *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), reasoning that *Bruen* did not disturb this Court's dicta in *Heller* that felon dispossession laws are

“presumptively lawful.” This Court subsequently granted certiorari in *Vincent*, vacated the judgment, and remanded for further consideration in light of *Rahimi*. See *Vincent v. Garland*, 144 S. Ct. 2708 (2024). On remand, the Tenth Circuit concluded that *Rahimi* did not undermine its prior reasoning and therefore readopted its earlier opinion without conducting any new historical analysis. *Bondi*, 127 F.4th at 1264–1266. Relying on that reaffirmed decision, the Tenth Circuit here held that § 922(g)(1) remains constitutional and rejected Petitioner’s Second Amendment challenge. App. 19a.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit Upheld § 922(g)(1) Without Applying the Historical Methodology Mandated by *Bruen* and Reaffirmed in *Rahimi*.

In *Bruen*, this Court held that all Second Amendment challenges must be resolved through a historical analysis. The government must “affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Bruen*, 597 U.S. at 19. *Bruen* expressly rejected means-end scrutiny and reaffirmed that courts may not bypass history in favor of policy judgments, even when addressing longstanding regulations. See *id.* at 21–22.

In *United States v. Rahimi*, 602 U.S. 680 (2024), this Court applied that same methodology to uphold 18 U.S.C. § 922(g)(8). The Court made clear that “why and how the regulation burdens the right are central to this inquiry,” *id.* at 691, and reaffirmed that “our tradition of firearm regulation” is the proper constitutional touchstone. *Id.* at 702.

Here, the Tenth Circuit did not apply that required framework. Rather than assess whether 18 U.S.C. § 922(g)(1) is consistent with the Nation’s historical tradition of firearm regulation, the court relied entirely on precedent rooted in *Heller*’s dicta. Specifically, the court held that *Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025), foreclosed Mr. Whitehead’s challenge.

That reliance is particularly significant because this Court had recently granted, vacated, and remanded *Vincent* for reconsideration in light of *Rahimi*. See *Vincent v. Garland*, 144 S. Ct. 2708 (2024). On remand, however, the Tenth Circuit simply reaffirmed its earlier opinion—originally based on *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)—without conducting the historical analysis *Bruen* and *Rahimi* require. See *Vincent*, 127 F.4th at 1264–66.

This Court has never held that § 922(g)(1) is constitutional without such analysis. Yet courts of appeals, including the Tenth Circuit here, continue to treat *Heller*’s reference to the “presumptive lawfulness” of felon-in-possession statutes as dispositive. That reference was dicta, not a holding, and *Bruen* and *Rahimi* confirm that historical consistency—not judicial assurances—governs the constitutional inquiry.

II. Other Courts of Appeals Have Adopted the Same Flawed Approach.

The Tenth Circuit’s approach is not an outlier. Several courts of appeals have upheld § 922(g)(1) without conducting the historical analysis this Court mandated in *Bruen* and reaffirmed in *Rahimi*. Instead, they have relied on *Heller*’s dicta stating

that “longstanding prohibitions on the possession of firearms by felons” are “presumptively lawful.” 554 U.S. at 626–27 & n.26.

The Eighth Circuit concluded that *Bruen* did not disturb its prior precedent upholding § 922(g)(1), stating that *Heller* “expressly stated” such laws are lawful. *United States v. Cunningham*, 70 F.4th 502, 504–05 (8th Cir. 2023).

The Eleventh Circuit similarly affirmed a conviction under § 922(g)(1) without engaging in historical analysis, relying on the continued validity of its prior decisions relying upon *Heller*’s statements that a felon-in-possession ban was presumptively lawful. *United States v. Dubois*, 94 F.4th 1284, 1292-93 (11th Cir. 2024).

The latest court to join this camp is the Ninth Circuit, which also held that *Bruen* did not alter *Heller*’s assurances as to felon-in-possession laws. *United States v. Duarte*, 137 F. 4th 743, 750–752 (9th Cir. 2025).

By contrast, the Third Circuit has departed from this approach. Sitting en banc, it applied *Bruen*’s historical-analogical method to conclude that § 922(g)(1) was unconstitutional as applied to a nonviolent offender. *Range v. Att’y Gen.*, 124 F.4th 218, 222 (3d Cir. 2024) (en banc).

The Sixth Circuit also engaged in a history-and-text analysis and concluded that § 922(g)(1) is constitutional on its face and as applied to dangerous people, but suggests its application to those whose prior felonies could be considered non-dangerous might not pass be unconstitutional. *United States v. Williams*, 113 F.4th 647, 662–663 (6th Cir. 2024).

The Seventh Circuit has held that *Bruen* requires courts to engage in the text- and history inquiry it expounded upon; not sidestep it with reference to *Heller*, and remanded for further proceedings accordingly. *Atkinson v. Garland*, 70 F.4th 1019, 1022 (7th Cir. 2023).

This division reflects deep and growing uncertainty in the lower courts about how to reconcile *Heller*'s dicta with this Court's directive in *Bruen*. Unless this Court grants review, the split will not be resolved, and lower courts will continue to rely on assurances from *Heller* to uphold modern firearm restrictions without engaging in the historical inquiry the Constitution requires.

III. This Case Presents an Ideal Vehicle for Review.

This case is a clean vehicle for addressing whether § 922(g)(1) can survive under *Bruen*. The facts are straightforward and undisputed. The question presented is purely legal. The Tenth Circuit's decision turned exclusively on its view that it remained bound by precedent resting on *Heller*'s dicta—even after *Rahimi*.

Moreover, the petitioner preserved his Second Amendment challenge on appeal, and it was fully briefed and decided by the Tenth Circuit. This Court has already demonstrated interest in this precise issue by vacating and remanding *Vincent* after *Rahimi*. The Tenth Circuit's decision on remand to reaffirm its prior opinion without conducting the required analysis heightens the need for this Court to intervene.

IV. The Plain Error Posture Does Not Diminish the Suitability of this Case

Although the court of appeals reviewed the Second Amendment claim under the plain error standard, it rejected the challenge not on procedural grounds, but because it concluded there was no error at all. The constitutional question was preserved on appeal, fully briefed, and resolved on the merits. Where, as here, a court of appeals applied a legal framework that conflicts with this Court's decisions in *Bruen* and *Rahimi*, the plain error posture does not diminish the case's suitability for review.

This Court has repeatedly granted certiorari in criminal cases where important constitutional questions were decided on appeal, even if not raised in the district court. This case is no different. It presents a clean record, a recurring issue of national importance, and a clear conflict between the reasoning below and this Court's recent Second Amendment jurisprudence.

The question presented arises frequently and remains unresolved by this Court. This case offers a straightforward opportunity to provide needed guidance on the methodology courts must apply in evaluating Second Amendment challenges.

CONCLUSION

The decision below reflects a recurring and consequential error: treating dicta from *Heller* as controlling, rather than applying the historical methodology this Court mandated in *Bruen* and reaffirmed in *Rahimi*. Despite the opportunity to correct course after this Court's GVR in *Vincent*, the Tenth Circuit reaffirmed its prior

reasoning without conducting the analysis required by this Court's recent Second Amendment jurisprudence.

This case presents a clean vehicle for resolving an increasingly frequent and unresolved constitutional question that directly affects numerous prosecutions nationwide. The Court's guidance is needed to ensure that lower courts apply the constitutional framework this Court has prescribed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY M. BYERS
FEDERAL PUBLIC DEFENDER



Counsel of Record for Petitioner

LAURA K. DESKIN
ASSISTANT FEDERAL PUBLIC DEFENDER
215 Dean A. McGee, Suite 109
Oklahoma City, OK 73102
(405) 609-5930
Laura_Deskin@fd.org