

No. 23-455

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**In the Supreme Court of the United States**

UNITED STATES OF AMERICA,

*Petitioner,*

v.

LITSSON PEREZ-GALLAN,

*Respondent.*

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

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RESPONSE

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## **QUESTION PRESENTED FOR REVIEW**

Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence protective orders, violates the Second Amendment on its face or as-applied to Perez-Gallan.

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## BRIEF

The government urges the Court to hold the petition for a writ of certiorari pending disposition of *United States v. Rahimi*, 143 S. Ct. 2688 (No. 22-915) (argued Nov. 7, 2023). While Perez-Gallan agrees with the government that the holding in *Rahimi* will likely impact his case, Perez-Gallan writes in response to urge the distinctions between his case and *Rahimi*'s. In sum: if the Court affirms *Rahimi* and finds that 18 U.S.C. § 922(g)(8) is unconstitutional, the Court should deny the petition for a writ of certiorari. If, however, the Court reverses the Fifth Circuit's decision in *United States v. Rahimi*,<sup>1</sup> finding that 18 U.S.C. § 922(g)(8) is not facially unconstitutional, the Court should remand Perez-Gallan's case for consideration of his as-applied challenge.

Perez-Gallan initially challenged the unconstitutionality of 18 U.S.C. § 922(g)(8) in the district court. He argued that a proper application of the Court's historical analogue test from *Bruen*<sup>2</sup> dictated that 18 U.S.C. § 922(g)(8) was facially unconstitutional. He

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<sup>1</sup> 61 F.4th 443 (5th Cir. 2023).

<sup>22</sup> *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

argued, in the alternative, that 18 U.S.C. § 922(g)(8) was unconstitutional as applied to him. In the as-applied challenge, Perez-Gallan urged three arguments: (a) that the government's allegations showed that whatever danger Perez-Gallan posed to others was limited people in his home, a type of danger sanctioned by the nation's historical tradition; (b) that the government's allegations showed that he possessed a firearm while traveling far away from his home, removed from the area where he had shown dangerousness; and (c) that the nation's historical tradition did not permit disarming Perez-Gallan while transporting valuable cargo through rural, high-crime areas.

Perez-Gallan's case thus differs from *Rahimi* in two important respects. First, the defendant in *Rahimi* used a firearm to threaten his girlfriend and later used firearms in public. Second, the defendant in *Rahimi* continued to possess the firearm near his home, not while traveling through dangerous areas. Specifically, Rahimi used a firearm in a physical assault of his girlfriend, resulting in the issuance of a domestic violence protective order.

*United States v. Rahimi*, 2022 WL 2070392, at \*1 (5th Cir. June 8, 2022) *withdrawn* 61 F.4th 443 (5th Cir. 61 F.4th 443). Subsequently, he was involved in five different shootings in public. *Rahimi*, 61 F.4th at 448-49.

In contrast, Perez-Gallan was alleged to have been violent solely within his own home, directed his violence solely at his domestic partner, and did not use a firearm as part of that violence.

Also different from *Rahimi*, Perez-Gallan was alleged to have possessed a firearm in a different state from his domestic partner and possessed it to protect himself in a dangerous area; he was not alleged to have used it in any way.

### CONCLUSION

For those reasons, if the Court's decision in *Rahimi* dictates remand to the Fifth Circuit, Perez-Gallan requests that the Court remand with instructions to consider his as-applied challenge. These facts and their relation to the Second Amendment's historical context present a significant question about whether 18 U.S.C. § 922(g)(8) can be applied constitutionally to Perez-Gallan. The Fifth Circuit did not consider that question.

s/ Shane O'Neal  
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Dated: November 30, 2023