

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAE MICHAEL BERNARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED

Whether a permanent lifetime prohibition for a misdemeanor conviction, which was adopted by Congress in 1994 and codified in 18 U.S.C. §922(g)(9) and which does not require a corresponding finding of an ongoing credible threat, is consistent with the history and tradition of firearm regulations under the Second Amendment.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

RELATED CASES

- *United States v. Bernard*, No. 1:22-cr-00003, U.S. District Court for the Northern District of Iowa. Judgment entered July 26, 2023.
- *United States v. Bernard*, No. 23-2808, U.S. Court of Appeals for the Eighth Circuit. Judgment entered May 9, 2025.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
LIST OF PARTIES.....	ii
RELATED CASES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION.....	5
1. THE PROVISIONS OF 18 U.S.C. §922(g)(9) AND THE LIFETIME PROHIBITION THEREIN WITHOUT A DETERMINATION OF AN ONGOING CREDIBLE THREAT ARE NOT CONSISTENT WITH THE HISTORY AND TRADITION OF FIREARM REGULATION.....	5
CONCLUSION.....	11

INDEX TO APPENDICES

APPENDIX A- OPINION FROM EIGHTH CIRCUIT COURT OF APPEALS
DATED MAY 9, 2025.

APPENDIX B- JUDGMENT FROM U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA DATED JULY 26, 2023.

APPENDIX C- REPORT AND RECOMMENDATION CONCERNING PLEA
OF GUILTY DATED DECEMBER 28, 2022.

TABLE OF AUTHORITIES

Cases

<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	6, 11
<i>McDonald v. Chicago</i> , 561 U.S. 742 (2010).....	6, 11
<i>New York State Rifle and Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)...	3-6, 9, 11
<i>United States v. Gailes</i> , 118 F. 4 th 822 (6 th Cir. 2024).....	9
<i>United States v. Rahimi</i> , 144 S. Ct. 1889 (2024).....	4-7, 9-11

Federal Statutes

18 U.S.C. § 921.....	8
18 U.S.C. § 921 (33)(B).....	9
18 U.S.C. § 921(33)(C).....	8-9
18 U.S.C. § 922(g)(8).....	6-7, 10
18 U.S.C. § 922(g)(9).....	i, 2-3, 5, 7-11
18 U.S.C. § 925.....	9
18 U.S.C. § 1254.....	2
28 U.S.C. § 1254(1).....	1

Other Authorities

Mass. Rev. Stat., ch. 134 §§ 1, 16.....	7
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jae Michael Bernard, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the Petition and is unpublished.

The judgment of the United States District Court for the Northern District of Iowa appears at Appendix B to the Petition.

JURISDICTION

The Eighth Circuit entered judgment on May 9, 2025. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1254 – Court of Appeals; Certiorari; Certified Questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

18 U.S.C. 922(g)(9)

(g) It shall be unlawful for any person –

(9) who has been convicted in any court of a misdemeanor crime of domestic violence

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

Mr. Jae Bernard was charged in count one of a three count Indictment with a violation of 18 U.S.C. § 922(g)(9) on or about January 6, 2022. The offense subjected Mr. Bernard to a maximum of ten years in prison, if convicted.

The indictment alleged that on or about September 29, 2021, Mr. Bernard possessed multiple firearms knowing he had been convicted of a crime of domestic violence. The Indictment alleged Mr. Bernard had been convicted of the misdemeanor offense of domestic abuse assault on or about April 12, 2002. Mr. Bernard was alleged to have possessed multiple firearms, none of which were alleged to have been unlawful to possess but for Bernard's status as a prohibited persons pursuant to 18 U.S.C. §922(g)(9).

Mr. Bernard entered a plea on or about June 9, 2022. On June 22, 2022, the United States Supreme Court issued the opinion in *New York State Rifle and Pistol Ass'n. v. Bruen*. Mr. Bernard subsequently moved to withdraw his plea and dismiss the Indictment in reliance upon *Bruen*. Mr. Bernard asserted that under *Bruen* there was no historical precedent for a permanent lifetime prohibition consistent with 18 U.S.C. §922(g)(9) and the punitive provisions contained therein were thus unconstitutional.

No hearing was held on Bernard's Motion to Dismiss and the Government presented no evidence. The Government filed a resistance to the motion to dismiss and a brief in support thereof. The court concluded that

the provision of 18 U.S.C. §922(g)(9) were constitutional and denied the Motion to Dismiss.

A Conditional Plea Agreement was subsequently entered which allowed Defendant to appeal the denial of the Motion to Dismiss. The plea was accepted, and on July 26, 2023, Bernard was sentenced to 37 months.

Bernard appealed to the United States Court of Appeals for the Eighth Circuit. Initially, the matter was set for submission without argument. During the pendency of the appeal, the Supreme Court of the United States decided *Rahimi*, after which additional briefing was ordered and oral argument was set. Bernard argued that consistent with *Rahimi*, the provisions of 922(g)(9) were unconstitutional as there was no statutory provisions relating to a finding of dangerousness corresponding with a prohibition time frame. The United States Court of Appeals for the Eighth Circuit ultimately affirmed the District Court's ruling concluding that discretionary vehicles for reinstatement of rights, such as pardons and expungements, ultimately render the permanent prohibition constitutional. Bernard now appeals that decision.

REASONS FOR GRANTING THE PETITION

1. **The provisions of 18 U.S.C. 922(g)(9) and the lifetime prohibition therein without a determination of an ongoing credible threat are not consistent with the history and tradition of firearm regulation.**

This Court should grant review of the Eighth Circuit’s conclusion that 18 U.S.C. §922(g)(9) is constitutional in this case and require an ongoing, credible threat be established by the government to justify a lifetime prohibition to establish and buttress the preexisting rights enshrined in the Second Amendment to the United States Constitution and determine 18 U.S.C. §922(g)(9) in the absence of such provisions fails to pass constitutional muster. The provisions of 18 U.S.C. 922(g)(9) were added to the code in 1994, and are not consistent with the history and tradition of firearm regulation.

In *United States v. Rahimi*, this Supreme Court concluded an individual ‘found by a court to pose a credible threat to the physical safety of another’ may be ‘temporarily’ disarmed consistent with the Second Amendment.

United States v. Rahimi, 144 S.Ct. 1889, 1903 (June 21, 2024). In doing so, the Court reaffirmed that for legislative limitations to be placed upon constitutionally protected rights under the Second Amendment, the government must be compelled to establish a historical analogue that imposes similar restrictions consistent with limitations understood at the time of the passage of the Second Amendment.

In *Bruen*, we directed courts to examine our “historical tradition of firearm regulation” to help delineate the contours of the

right. *Id.*, at 17, 142 S.Ct. 2111. We explained that if a challenged regulation fits within that tradition, it is lawful under the Second Amendment. We also clarified that when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to “justify its regulation.” *Id.*, at 24, 142 S.Ct. 2111.

United States v. Rahimi, 144 S.Ct. 1889, 1897 (June 21, 2024)(citing *Bruen*, 597 U.S. at 22, 142 S.Ct. 2111).

The Court reiterated that the right to keep and bear arms is among the “fundamental rights necessary to our system of ordered liberty.” *Rahimi*, 144 S.Ct. at 1897 (citing *McDonald v. Chicago*, 561 U.S. 742, 778, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)). However, like most rights,” “the right secured by the Second Amendment is not unlimited.” *Rahimi*, 144 S.Ct. at 1897 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)). Tasked with considering the restrictions in 18 U.S.C. § 922(g)(8) this Court provided additional guidance to the outer limits of such restrictions upon Second Amendment Rights. *See Rahimi*.

In *Rahimi*, this Court, in analyzing historical analogues, confirmed the Government did not identify a founding era or Reconstruction era law that specifically disarmed domestic abusers. *Rahimi*, at 1904 (Sotomayor/Kagan Concurrence). However, in surety laws and ‘affray’ laws, the Court found a historical analogue which was determined to be sufficiently similar to the prohibitions outlined in 18 U.S.C. §922(g)(8). *Rahimi*, 144 S.Ct. at 1899-1903. The Court identified two aspects of these laws that are critical in

determining if a restriction is proper: a prior finding of a credible threat, and the temporary nature of the prohibition. *Rahimi*, 144 S.Ct. at 1901-02.

Identically, in response to Defendant's Motion to Dismiss the Indictment in this matter, the government cited 'surety laws' as a historical analogue. The analysis of *Rahimi* is equally applicable to Section 922(g)(9). The surety and going armed or 'affray' laws confirm what common sense suggests: when an individual poses a *clear threat of physical violence to another*, the threatening individual may be disarmed. *Rahimi*, 144 S.Ct. at 1901 (emphasis added). Surety laws offered the accused significant procedural protections. *Rahimi*, 144 S.Ct. at 1900. Before the accused could be compelled to post a bond for "go[ing] armed," a complaint had to be made to a judge or justice of the peace by "any person having reasonable cause to fear" that the accused would do him harm or breach the peace. Mass. Rev. Stat., ch. 134, §§ 1, 16. *Id.* The magistrate would take evidence, and—if he determined that cause existed for the charge—summon the accused, who could respond to the allegations. §§ 3–4. *Id.* But most notably, bonds could not be required for more than six months at a time, and an individual could obtain an exception if he needed his arms for self-defense or some other legitimate reason. § 16. *Id.* Thus, the Court concluded the specific finding of a 'credible' threat, and the limited duration of the prohibition, were the determining factors that allowed §922(g)(8) to pass constitutional muster. *Rahimi*.

Similarly, the provisions of 18 U.S.C. §922(g)(9) require a conviction before one can be dispossessed of their preexisting Second Amendment rights. However, unlike surety laws, the statutory provisions of 18 U.S.C. 922(g)(9) establish no end date for prohibition. Any person convicted in any court of a misdemeanor crime of domestic violence is subject to a *lifetime* prohibition from firearm possession. 18 U.S.C. §922(g)(9) (2024)¹. The statutory provisions of §922(g)(9) provide for extinction of Second Amendment rights, even in the absence of a finding of a ‘clear threat’ of future violence, and in the absence of even a ‘credible’ threat of future violence. *See Id.* Even assuming *arguendo* that the fact of a conviction establishes a clear or credible threat for at least a limited duration, no provisions exist in Section 922(g)(9) to limit that prohibition to a time period when such a threat may be germane,

The structure of §922(g)(9) provides for no opportunity for reinstatement of rights except upon governmental discretion, no end date for such prohibition, and no requirement for the Government to establish an ongoing credible threat. *See* 18 U.S.C. §922(g)(9), 921 (2024). In denying Mr.

¹ The definitions in 18 U.S.C. 921 provide an exception for those in a ‘dating’ relationship, limiting prohibition in such circumstances to five years. 18 U.S.C. §921(33)(C) (2024). Benard contends the inclusion of a specific term related to one type of ‘domestic’ relationship as opposed to another type of ‘domestic’ relationship elucidates the necessity for establishment of an ongoing risk by the government for the provisions to be consistent with the protections of the Second Amendment.

Bernard’s appeal, the Eighth Circuit in this matter relies upon language which allows those who have had their conviction expunged or civil rights restored as a basis to conclude that avenues exist for reinstatement of rights thus rendering the prohibition not permanent and the statute not unconstitutional. 18 U.S.C. §921(33)(B),(C) (2024). Citing *United States v. Gailles*, the Eighth Circuit concluded that “the purported permanent ban in § 922(g)(9) may not always be so, given that domestic-violence misdemeanants ‘can (1) petition to set aside their conviction; (2) seek a pardon; (3) have their conviction expunged; or (4) have their civil rights fully restored.’” 118 F.4th 822, 829 (6th Cir. 2024). However, the provisions for any ‘restoration’ are discretionary, and switch the burden to the prohibited person to establish they should be entitled to the preexisting right. *See* 18 U.S.C. §925 generally. As recognized by *Bruen* and *Rahimi*, the burden is and should be upon the Government to establish an ongoing credible threat, and any façade of due process in a discretionary function requiring a prohibited person to establish a negative is a red herring.

The permanent nature of the prohibition outlined in §922(g)(9) renders the prohibition in violation of the Second Amendment facially unconstitutional. While surety laws which provided a limited time frame restriction may be somewhat analogous to the prohibitions of Section 922(g)(9), the unlimited term of prohibition is a significant departure from historical traditions under the Second Amendment. Initially, restrictions

imposed by surety laws were limited, not more than six months at a time. *Rahimi*, 144 S.Ct. at 1900. Further, as stated by the Court, like surety bonds of limited duration, Section 922(g)(8)'s restrictions are temporary, and only prohibits firearm possession so long as the defendant "is" subject to a restraining order. *Rahimi*, 144 S.Ct. at 1902. Section 922(g)(9) directs that a misdemeanor conviction forfeits one's Second Amendment Rights to the grave, absent Governmental discretion and a burden of proof on the prohibited, and regardless of the passage of time, acquisition of wisdom, rehabilitation, remorse, or general propensity against violence, and does so in the absence of any requirement that the government establish a clear, credible, ongoing threat to another. The statutory machinations of §922(g)(9) allow for an open-ended prohibition detached from firm procedural protections and require the prohibited person to establish the *lack* of an ongoing, credible threat, contrary to the conclusion in *Rahimi*, which requires the government to establish an ongoing credible threat. *See Rahimi*. No historical analogues exist for a such a permanent abolition of a constitutional right, or requirement that a citizen establish the preexisting right, specifically Second Amendment Rights, even and especially in the surety laws.

The constitutionality of a permanent ban pursuant to §922(g)(9) must be anchored to historical analogues which establish a tradition of firearm dispossession. Nothing cited nor relied upon by the district court, the Eighth

Circuit Court of Appeals, or presented by the government in this matter reaches that threshold. There exists no historical analogue which allows for the permanent extinction of a constitutional right for a misdemeanor conviction. And certainly no analogue for an extinction of the right in the absence of a finding of a clear, credible, ongoing threat to another. As such, the provisions of 18 U.S.C. §922(g)(9) should be determined to be unconstitutional and the denial of Bernard's Motion to Dismiss should be reversed.

A conclusion that the burden of proof, as outlined in *Bruen* and *Rahimi*, requires the Government to prove an ongoing credible threat of a prohibited person to support a lifetime prohibition would establish consistency with a historical tradition of firearm regulation, would allow for protection of preexisting Second Amendment rights, and would be consistent with the conclusions of *Heller*, *McDonald*, *Bruen*, and *Rahimi*.

CONCLUSION

This case presents an opportunity for the Court to reaffirm the preexisting rights of citizens to possess firearms unless and until the government can establish an ongoing credible threat consistent with the Second Amendment, *Heller*, *McDonald*, *Bruen*, and *Rahimi*. Therefore, Mr. Bernard asks this court to grant certiorari.

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August 5, 2025.