

No. _____

In the
Supreme Court of the United States

Dontrell Lavell Thomas,

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

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 922(g)(1) comports with the Second Amendment?
2. Subsidiary Question: 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), given 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 *Rahimi*?”¹

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.

PARTIES TO THE PROCEEDING

Petitioner is Dontrell Lavell Thomas, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dontrell Lavell Thomas seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is attached as Appendix A to this Petition. It does not appear to be reported electronically. 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 January 29, 2024. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY 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.

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).

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

On January 14, 2023, SWAT officers surrounded an apartment occupied by Petitioner Dontrell Lavell Thomas, following up on claims of physical abuse by his spouse. *See* (ROA.10-11). They arrested him and searched a bag seen in his possession. *See* (ROA.10-11). That bag contained a firearm. *See* (ROA.10-11).

Petitioner signed a plea agreement, agreeing to plead guilty to one count of possessing a firearm despite a felony conviction, a violation of 18 U.S.C. §922(g)(1). *See* (ROA.179-185). The government agreed to forego further charges. *See* (ROA.182). Petitioner also waived his right to appeal, subject to certain express exceptions not at issue here. *See* (ROA.183-184). Before the plea agreement, he filed a motion to dismiss the indictment on the grounds that 18 U.S.C. §922(g)(1) exceeds Congressional power under Article I, Section Eight of the Constitution, but did not raise a Second Amendment challenge. *See* (ROA.51-56).

The court accepted the plea and imposed 60 months imprisonment, together with a term of supervision. *See* (ROA.158, 171-172).

B. Appellate Proceedings

Counsel filed a brief under *Anders v. California*, 368 U.S. 738 (1967), but the court of appeals ordered briefing on the constitutionality of §922(g)(1) under the Second Amendment. Counsel then filed a merits brief, urging the Court to reverse the conviction. The court of appeals, however, held that it could not reverse on plain error review. *See* [Appendix B].

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are 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, on pain of 15 years imprisonment, 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*, 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.² 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. Although Petitioner has a previous conviction for assaultive conduct, this Court may well find that the Second Amendment supports a broad or facial challenge to Section 922(g)(1).

² *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 on February 8, 2024.

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.4th at 131-132 (Krause, J., dissenting). Likewise, the Seventh Circuit has expressed doubt as to whether the 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. Jun. 28, 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 Petitioner could establish 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). 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, to say the least.

Finally, while the defendant signed a waiver of appeal, the court below did not address its applicability to a facial constitutional challenge to the statute of conviction. There is good reason to think that the challenge would survive the waiver. It is well-settled in the Fifth Circuit that a defendant cannot waive the right not to be convicted or imprisoned for conduct that does not constitute the charged offense, and that such a challenge is impliedly reserved by an appeal waiver. *See United States v. Trejo*, 610 F.3d 308, 312-313 (5th Cir. 2010); *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008); *United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002); *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002); *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001). Because the power of Congress to enact laws flows from its authority under the Constitution, an unconstitutional statute is no law at all. As such, the indictment and factual resume neither allege nor admit an offense, and the situation is not meaningfully different than one in which the factual resume admits facts that fail to satisfy a statute of undisputed constitutionality. In neither case has the defendant committed or admitted conduct for which the law authorizes punishment.

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.

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). 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), *available at* https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830_Range%20Pet%2010.5.pdf. 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 Section 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 19th day of April, 2024.

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