No. _____

In the Supreme Court of the United States

_____

Warren Ledominique Davis,
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

I. Mr. Davis pleaded guilty to violating 18 U.S.C. § 922(g)(1), which criminalizes the possession of a firearm by anyone previously convicted for a felony offense. He then attacked the statute of conviction as unconstitutional on appeal. Applying the plain-error standard of review, the Fifth Circuit declared the error alleged to be insufficiently clear. To support the point, it noted a circuit split on the question of § 922(g)(1)'s constitutionality. That split turns on whether § 922(g)(1) is sufficiently similar to Founding Era surety laws and other laws disarming groups perceived to be dangerous. Those same arguments are now before the Court in *United States v. Rahimi*, No. 22-915.

The question presented is:

Whether a ruling in Mr. Rahimi's favor would affect the Fifth Circuit's plain-error analysis concerning the constitutionality of § 922(g)(1).

LIST OF PARTIES

Warren Ledominique Davis, petitioner on review, was the Defendant-Appellant below. The United States of America, respondent on review, was Plaintiff-Appellee. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Warren Ledominique Davis*, No. 4:22-CR-241-O, U.S. District Court for the Northern District of Texas. Judgment entered on February 7, 2023.

- *United States v. Warren Ledominique Davis*, No. 23-10126, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on March 28, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Warren Ledominique Davis respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unreported opinion is available on Westlaw's electronic database at 2024 WL 1329968 and reprinted at Pet.App.a1-a2.

JURISDICTION

The Court of Appeals issued its panel opinion on March 28, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves the offense defined at 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 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.

This petition also involves the Second Amendment to the United States Constitution:

> 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.

STATEMENT OF THE CASE

Mr. Davis pleaded guilty to violating 18 U.S.C. § 922(g)(1). In a one-count indictment, a grand jury in the Northern District of Texas alleged his unlawful possession of a firearm following his conviction for "a crime punishable by a term of imprisonment exceeding one year." Indictment at 1, *United States v. Warren Ledominique Davis*, Case No. 4:22-CR-241-O (N.D. Tex. Aug. 10, 2022), ECF No. 3. He pleaded guilty to the offense alleged in the one-count indictment but did not enter into a plea agreement with the government. *See* Factual Resume at 2-3, *United States v. Warren Ledominique Davis*, Case No. 4:22-CR-241-O (N.D. Tex. Oct. 7, 2022), ECF No. 22. Mr. Davis did not raise a Second Amendment challenge to the constitutionality of § 922(g)(1) before the district court.

Mr. Davis raised a plain-error Second Amendment claim on appeal. On prong one, Mr. Davis presented a lengthy, complex argument concerning the original meaning of the Second Amendment's text and analyzing the historical context, both of which undercut § 922(g)(1). Appellant's Initial Brief at 6-49, *United States v. Warren Ledominique Davis*, Case No. 23-10126 (5th Cir. Oct. 27, 2023), ECF No. 47. His prong-two argument, by contrast, turned entirely on this Court's forthcoming opinion in *United States v. Rahimi*. *Id*. at 49-52. On this point, Mr. Davis noted a pending circuit split on § 922(g)(1)'s constitutionality. *Id*. at 49-50 (citing *United States v. Jackson*, 69 F.4th 495, 502-06 (8th Cir. 2023); *Range v. Att'y General*, 69 F.4th 96, 98 (3d Cir. 2023) (*en banc*)). The split, he noted, turned on whether "laws aimed at disarming loyalists and criminalizing the possession of

firearms by disfavored minorities" provided sufficient analogues to support § 922(g)(1)'s constitutionality. *See id*. at 49. Those same arguments, Mr. Davis pointed out, were pending before this Court in *United States v. Rahimi*. *See id*. at 50-51 (citing Brief of Public-health Researchers and Lawyers at 10, *United States v. Rahimi*, No. 22-915 (Aug. 21, 2023); Brief for the United States at 14-15, 22-24, *United States v. Rahimi*, No. 22-915 (Aug. 14, 2023)). Given the similarity of the arguments present in both cases, Mr. Davis concluded, a ruling in Mr. Rahimi's favor would likely render § 922(g)(1)'s unconstitutionality clear or obvious. *Id*. at 51.

Since the Fifth Circuit rejected Mr. Davis's argument before this Court issued a ruling in *Rahimi*, he could not show clear or obvious error. The panel therefore resolved the case on plain error's second prong. The Fifth Circuit, the panel explained, had already issued a published opinion declaring § 922(g)(1)'s constitutionality unsettled. Pet.App.a.2 (citing *United States v. Jones*, 88 F.4th 571, 573-74 (5th Cir. 2023)). That made it impossible for Mr. Davis to show clear or obvious error. *Id*. In the published opinion precluding relief, the Fifth Circuit noted the existence of the same circuit split conceded by Mr. Davis in his merits brief. *Jones*, 88 F.4th at 574 (citing *United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023); *Range*, 69 F.4th at 98-99).

REASONS FOR GRANTING THIS PETITION

I. The Court should hold this petition pending its decision in *United States v. Rahimi*.

This Court will soon address the circuit split that precluded plain-error relief below. In *United States v. Rahimi*, the Fifth Circuit Court of Appeals rejected Founding Era laws aimed at disarming dangerous and disloyal individuals as sufficiently analogous to save § 922(g)(8) against a Second Amendment challenge. 61 F.4th 443, 457, 459-60 (5th Cir. 2023). Those arguments are now pending before the Court, and the circuit split on § 922(g)(1) turns on the same basic analysis. An opinion in Mr. Rahimi's favor would therefore affect the claim advanced below and require a second look by the Fifth Circuit as to the clarity of the error alleged. This Court should hold Mr. Davis's petition pending *Rahimi*. If it rules in Mr. Rahimi's favor, this Court should then grant this petition, vacate the Fifth Circuit's judgment, and remand for a reconsideration of the error alleged.

a. An opinion in Mr. Rahimi's favor would affect the clarity of the error alleged by Mr. Davis.

The pending circuit split addressed by Mr. Davis and the Fifth Circuit depends on the same historical analogues before this Court in *Rahimi*. To defend § 922(g)(8), the government initially referred this Court to English and American laws aimed at disarming individuals thought to be "dangerous." Brief for the United States at 14-15, 22-24, *United States v. Rahimi*, No. 22-915 (Aug. 14, 2023). It then depicted historical surety laws as within the same tradition of firearm regulation. *Id*. at 24. "Those laws," the government argued, "confirm that

irresponsible individuals were subject to special restrictions that did not (indeed, could not) apply to ordinary, law-abiding citizens." *Id.* The pending circuit split precluding second-prong relief in this case turns on the analogical value of the same laws. In *Range*, a majority of the *en banc* Third Circuit rejected laws aimed at disarming loyalists and criminalizing the possession of firearms by disfavored minorities as sufficient historical analogues to § 922(g)(1) because those laws "do[] nothing to prove that" Mr. Range was "part of a similar group today." 69 F.4th at 105. A dissenting judge would have rejected the petitioner's as-applied challenge based on those same laws. *Id.* at 115 (Shwartz, J., dissenting). Section 922(g)(1), he reasoned, simply used the petitioner's prior felony conviction "as a proxy for disloyalty and disrespect for the sovereign and its laws" in the same way the historical laws cited by the government had relied on loyalism, race, and religion to do the same *Id.* A panel of Eighth Circuit judges recently upheld § 922(g)(1) on similar reasoning and based on the same historical analogues. *United States v. Jackson*, 69 F.4th 495, 502-06 (8th Cir. 2023).

This Court's resolution of the broad historical claims advanced by the government in *Rahimi* will necessarily affect the Fifth Circuit's assessment of the error alleged by Mr. Davis. If the government is right, Congress and state legislatures are free to identify groups as dangerous in the abstract and to punish any individual within that group for possessing a firearm. Neither § 922(g)(8) nor § 922(g)(1) offend the Second Amendment if legislative judgment as to abstract risks of danger is the dividing line between constitutional and unconstitutional firearm

restrictions. If, however, this Court rejects that level of generality and rules in favor of Mr. Rahimi, the plain-error challenge presented below to § 922(g)(1) deserves a second look. After all, the error alleged was insufficiently obvious only because one circuit court of appeals has adopted an approach to the Second Amendment this Court may well reject in *Rahimi*.

b. On plain-error review, the clarity of the error alleged is judged at the time of appellate disposition.

A decision in Mr. Rahimi's favor would affect the Fifth Circuit's plain-error analysis in this case. Whether an error is plain depends on the state of the law "at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468 (1997). The judgment entered in this case is not yet final. *Gonzalez v. Thaler*, 565 U.S. 134, 149 (2012) (quoting *Clay v. United States*, 537 U.S. 522, 527 (2003)). An opinion in Mr. Rahimi's favor would render the Fifth Circuit's second-prong analysis obsolete and require a reassessment of the claim advanced below.

This has happened before. In *Johnson v. United States*, this Court declared the Armed Career Criminal Act's residual clause unconstitutionally vague. 576 U.S. 591, 597 (2015). A district court in the Southern District of Texas had previously imposed an ACCA-enhanced sentence against a defendant named Antonio Maldonado based in part on the residual clause. *United States v. Maldonado*, 638 F. App'x 360, 362 (5th Cir. 2016). The Fifth Circuit initially affirmed the sentence. *United States v. Maldonado*, 608 F. App'x 244, 244 (5th Cir. 2015). This Court then issued its opinion in *Johnson*, granted Mr. Maldonado's

petition for certiorari, and vacated the Fifth Circuit's judgment. *Maldonado v. United States*, 136 S. Ct. 510, 511 (2015). Mr. Maldonado had not challenged the district court's application of the residual clause at his sentencing hearing, so the plain-error standard applied. *Maldonado*, 638 F. App'x at 362. The Fifth Circuit nevertheless recognized on remand its duty to reassess Mr. Maldonado's sentence in light of *Johnson*: "The judgment against Maldonado was not final when *Johnson* was decided, and the *Johnson* decision announced law that applies in Maldonado's case." *Id.* The Fifth Circuit declared the district court's error sufficiently clear and reversed on plain-error review. *Id.* at 363.

A ruling in Mr. Rahimi's favor would likewise affect the Fifth Circuit's plain-error analysis in this case. As it stands, the strength of the historical analogues offered by the government to defend both § 922(g)(8) and § 922(g)(1) remains unsettled. This Court's opinion in *Rahimi* will resolve that dispute. The arguments advanced by the government to defend both statutes are effectively identical, and a ruling from this Court as to one will affect the other. Since the judgment entered below is not yet final, Mr. Davis could take advantage of a ruling in Mr. Rahimi's favor, and the Fifth Circuit would be obliged to consider that ruling upon remand. *Maldonado*, 638 F. App'x at 362.

c. If the Court rejects the historical analogues proffered by the government in *Rahimi*, it should grant this petition and remand to allow the Fifth Circuit a second look.

The Court should hold this petition pending its decision in *United States v. Rahimi*. An opinion in Mr. Rahimi's favor would affect the clarity of the error

alleged by Mr. Davis. At that point, the Fifth Circuit's plain-error analysis would "conflict[] with [a] relevant decision[] of this Court," and certiorari would be appropriate. Rule 10, RULES OF THE SUPREME COURT OF THE UNITED STATES. The outcome of this petition thus depends on the outcome of *Rahimi*. If the Court rules in Mr. Rahimi's favor, it should grant this petition, vacate the Fifth Circuit's judgment, and remand for a reconsideration of the error alleged below.

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 May 6, 2024.

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