

No. _____

In the
Supreme Court of the United States

Stephon James Whitney,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Question Presented

Mr. Whitney pled guilty without a plea agreement to one count of prohibited person in possession of a firearm under 18 U.S.C. § 922(g)(1). On appeal, he argued his conviction was unconstitutional under the Second Amendment. After the Ninth Circuit rejected his appeal, the court issued its published decision in *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024), vindicating an analogous Second Amendment challenge to Section 922(g)(1). The Ninth Circuit has since granted rehearing en banc in *Duarte*, see 108 F.4th 786, and those en banc proceedings remain pending.

In the meantime, other circuit courts of appeals have been resolving similar constitutional challenges to subsections of Section 922(g). See, e.g., *Range v. Attorney General*, 69 F.4th 96 (3d Cir. 2023) (en banc). Through the end of the past Term, various parties sought certiorari from this Court on these questions.

This Court recently issued its decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024), involving a Second Amendment challenge to Section 922(g)(8)(C)(i). The Court then granted seven certiorari petitions raising challenges to subsections of Section 922(g), vacated the court of appeals' decisions, and remanded for further consideration in light of *Rahimi*. See, e.g., *Garland v. Range*, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024).

The question presented is:

Should the Court grant the petition, vacate the judgment of the court of appeals, and remand for further consideration in light of *Rahimi*?

List of Parties

Stephon James Whitney is the petitioner. The United States of America is the respondent. No party is a corporate entity.

Related Proceedings

The prior proceedings in this case are:

United States v. Whitney, Case No. 22-10326 (9th Cir.) (judgment entered April 3, 2024).

United States v. Whitney, Case No. 2:21-cr-2-JAD-NJK (D. Nev.) (judgment entered December 13, 2022).

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Petition for a Writ of Certiorari

Petitioner Stephon James Whitney respectfully requests the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit issued an unpublished memorandum decision affirming Mr. Whitney's conviction and sentence. Pet. App. 3-10.

Jurisdiction

The district court had jurisdiction under 18 U.S.C. § 3231. The Ninth Circuit affirmed Mr. Whitney's conviction and sentence on April 3, 2024. Pet. App. 3-10. It denied a timely rehearing petition on May 23, 2024. Pet. App. 2. Mr. Whitney is timely filing this petition. See Sup. Ct. R. 13.1, 13.3. Mr. Whitney seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Second Amendment 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."

18 U.S.C. § 922(g)(1) provides: "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."

Introduction

This Court’s decision in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), created a sea change in Second Amendment law. Following *Bruen*, courts have been resolving Second Amendment challenges to criminal prohibitions on firearm possession.

Mr. Whitney’s appeal raised just such a claim. He challenged his conviction under 18 U.S.C. § 922(g)(1)—which bars individuals convicted of certain crimes from possessing firearms—and alleged the conviction violated his Second Amendment rights. The Ninth Circuit rejected the argument and affirmed his conviction.

The issue has continued to percolate since. Shortly after the Ninth Circuit issued its unpublished decision in Mr. Whitney’s case, the court issued a published decision in *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024). Under *Duarte*, Section 922(g)(1) is unconstitutional unless the defendant’s prior convictions are “distinctly similar’ to” offenses that “would have been punishable either with execution, with life in prison, or permanent forfeiture of the offender’s estate” during the Founding era. *Id.* at 690. The court has since vacated the panel decision and granted rehearing en banc in *Duarte*, see 108 F.4th 786. The rehearing proceedings remain pending.

Meanwhile, other circuit courts of appeals have been addressing similar issues. See, e.g., *Range v. Attorney General*, 69 F.4th 96 (3d Cir. 2023) (en banc) (agreeing with the plaintiff’s Second Amendment challenge to Section 922(g)(1)). Through the end of the past Term, various parties sought certiorari from the Court

in cases involving Second Amendment challenges to various subsections of Section 922(g). The Court then issued its decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024), which involved subsection (8)(C)(i). After the Court issued *Rahimi*, it granted seven petitions raising Section 922(g) challenges, vacated the court of appeals' decisions, and remanded for further consideration in light of *Rahimi*. See, e.g., *Garland v. Range*, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024).

Mr. Whitney seeks the same form of relief here. He properly raised his Second Amendment challenge in his direct appeal; the Ninth Circuit rejected the challenge; the court then issued a published decision finding a Second Amendment violation in a separate case; the court then granted rehearing en banc in that case. Mr. Whitney is seeking to position his case so he can receive the benefit of any favorable decisions from the Ninth Circuit or this Court on this issue while his direct appeal is still pending. Otherwise, Mr. Whitney's direct appeal will have concluded, and he would then need to seek relief through burdensome collateral attack litigation under 28 U.S.C. § 2255. The Court should therefore grant his petition, vacate the Ninth Circuit's decision, and remand for further consideration in light of *Rahimi*, as it has in seven similarly situated cases.

Statement of the Case

1. In August 2020, the local police pulled over a van in which Mr. Whitney was a passenger. According to the police, they asked Mr. Whitney to identify himself, and he provided an incorrect first name but his true last name and address. The police found three firearms in the van but were apparently unable to link those firearms to Mr. Whitney.

The police ran a records check on Mr. Whitney's address and discovered Mr. Whitney was on state probation. They contacted his probation officer, who arranged a home visit at the two-bedroom apartment where Mr. Whitney lived with his partner Jessica Rodosh and Ms. Rodosh's son.

The probation officer conducted a home visit and found two ammunition magazines. The police then sought and received a search warrant and conducted a search; they found a firearm, a third magazine, and cannabis.

The police arrested Mr. Whitney and interrogated him. He made statements that the government interprets as incriminating regarding his possession of the gun. The crime lab conducted a DNA analysis on the gun. It found a DNA mixture consistent with three contributors and concluded Mr. Whitney's DNA was included in the mixture.

2. A federal grand jury indicted Mr. Whitney on January 5, 2021, with one count of prohibited person in possession of a firearm under 18 U.S.C. § 922(g)(1). Mr. Whitney pled guilty to the charge without a plea agreement. The district court sentenced Mr. Whitney to a prison term of 54 months and a supervised release term of three years.

Mr. Whitney appealed his conviction and sentence. He argued in part that his conviction was unconstitutional under the Second Amendment. The Ninth Circuit issued an unpublished memorandum decision on April 3, 2024, affirming the district court and rejecting the Second Amendment argument. Pet. App. 3-10.

Mr. Whitney filed a timely petition for rehearing raising two sentencing issues. The Ninth Circuit denied rehearing on May 23, 2024. Pet. App. 2.

After Mr. Whitney filed his petition for rehearing, the Ninth Circuit issued a published decision in *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024). Under the since-vacated panel decision, Section 922(g)(1) is unconstitutional unless the defendant’s prior felony convictions are “‘distinctly similar’ to” offenses that “would have been punishable either with execution, with life in prison, or permanent forfeiture of the offender’s estate” during the Founding era. *Id.* at 690.

Once the Ninth Circuit denied rehearing in his case, Mr. Whitney filed a motion to vacate the order on rehearing. As he explained, the court had issued its published decision in *Duarte*, which sustained a Second Amendment challenge to Section 922(g)(1). At the time of Mr. Whitney’s motion, the government had filed a petition for panel or en banc rehearing in *Duarte*, but the court had yet to act on that petition. Given the Ninth Circuit’s decision in *Duarte* and the possibility of en banc rehearing on the issue, Mr. Whitney asked the court to vacate its order denying rehearing in his case. Otherwise, Mr. Whitney would need to file a petition for a writ of certiorari with this Court within 90 days of the order denying rehearing. Mr. Whitney suggested it would promote judicial economy for the Ninth Circuit to vacate its order denying rehearing and resolve Mr. Whitney’s Second Amendment argument after the proceedings in *Duarte* concluded, rather than oblige Mr. Whitney to seek certiorari from this Court.

The Ninth Circuit denied the motion. Pet. App. 1.

Reasons for Granting the Petition

The Court should grant this petition, vacate the decision below, and remand for further consideration in light of *Rahimi*. At the end of this past Term, the Court took this approach in seven similarly situated cases. It should take the same approach in this case. This procedure will allow Mr. Whitney to continue seeking relief in his direct appeal and will avoid the potential for wasteful and unnecessary collateral attack litigation under 28 U.S.C. § 2255.

I. The Court has granted petitions, vacated, and remanded for further consideration in light of *Rahimi* in seven similar cases.

After the Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), litigants began raising Second Amendment challenges to various subsections of Section 922(g). The Court resolved one such case in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). It then disposed of related petitions for writs of certiorari by granting them, vacating the lower court decisions, and remanding for further consideration in light of *Rahimi*. Mr. Whitney seeks the same outcome here.

In *Bruen*, the Court developed a new test for assessing the constitutionality of firearm regulations. Under *Bruen*, courts must first analyze whether “the Second Amendment’s plain text covers an individual’s conduct.” 597 U.S. at 24. If so, “the Constitution presumptively protects that conduct.” *Ibid.* “The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Ibid.* When the regulation in question “addresses a general societal problem that has persisted since the 18th century, the

lack of a distinctly similar historical regulation addressing that problem is relevant evidence” of unconstitutionality. *Id.* at 26.

Following *Bruen*, litigants began raising Second Amendment challenges to Section 922(g)(1), which prohibits certain individuals (those convicted of a crime punishable by a term of imprisonment exceeding one year) from possessing firearms. The argument, briefly stated, is that the plain text of the Second Amendment covers the regulated conduct, i.e., possessing firearms; and there are no adequate historical analogues to Section 922(g)(1), e.g., no Founding-era statutes prohibiting individuals with qualifying prior convictions from possessing firearms. Thus, the argument concludes, the statute is unconstitutional under *Bruen*.

The Third Circuit credited this argument in *Range v. Attorney General*, 69 F.4th 96 (3d Cir. 2023) (en banc). It agreed the plain text of the Second Amendment covers the conduct regulated by Section 922(g)(1). *Id.* at 101-03. And it agreed there’s no adequate historical tradition of prohibiting individuals with qualifying prior convictions from owning firearms. *Id.* at 103-06.

After the Third Circuit issued its decision in *Range*, the government sought certiorari from this Court.

Separately, the Fifth Circuit credited a related argument in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023). That case involved a challenge to 18 U.S.C. § 922(g)(8)(C)(i), which prohibits an individual from possessing a firearm if the individual is subject to an intimate partner violence restraining order, and if the order specifically includes a finding that the individual presents a credible threat to the physical safety of the intimate partner (or the individual’s child or the partner’s

child). The Fifth Circuit agreed Section 922(g)(8)(C)(i) was unconstitutional. The government sought certiorari from this Court in *Rahimi*. The Court granted certiorari, see 143 S. Ct. 2688 (2023).

In the meantime, other circuit courts of appeals were resolving similar constitutional challenges to various subsections of Section 922(g). Litigants sought certiorari from this Court in some of those cases. Those courts of appeals decisions included: *United States v. Perez-Gallan*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023) (crediting a challenge to Section 922(g)(8)(C)(ii)); *United States v. Doss*, No. 22-3662, 2023 WL 8299064 (8th Cir. Dec. 1, 2023) (rejecting a challenge to Section 922(g)(1)); *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023) (rejecting a challenge to Section 922(g)(1)); *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023) (rejecting a challenge to Section 922(g)(1)); *United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023) (rejecting a challenge to Section 922(g)(1)); and *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023) (crediting a challenge to Section 922(g)(3)).

The Court then issued its decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). It concluded Section 922(g)(8)(C)(i) is constitutional under the Second Amendment. It identified as historical analogues various surety laws and going armed laws. “Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.” *Id.* at 1901. The statute’s “prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going

armed laws represent.” *Ibid.* The Court noted that the statute’s prohibition applies only when a court has made an individualized finding “that the defendant ‘represents a credible threat to the physical safety’ of another.” *Id.* at 1901-02. The Court also referenced the “limited duration” of the restriction—the statute doesn’t impose a permanent prohibition but instead applies only “so long as the defendant ‘is’ subject to a restraining order.” *Id.* at 1902.

After the Court issued its decision, the government filed a supplemental certiorari-stage brief on June 24, 2024, in five cases where a litigant had filed a petition for a writ of certiorari regarding the constitutionality of Section 922(g)(1): *Range* (No. 23-374), *Vincent* (No. 23-683), *Jackson* (No. 23-6170), *Cunningham* (No. 23-6602), and *Doss* (No. 23-6842). The government asked the Court to grant the petitions in *Doss*, *Jackson*, and either *Range* or *Vincent*. Supplemental Brief at 2. It suggested it would be appropriate for the Court to grant, vacate, and remand in *Daniels* (involving subsection (g)(3)) and *Perez-Gallan* (involving subsection (g)(8)(C)(ii)). *Id.* at 10 n. 5.

The Court granted, vacated, and remanded in all seven cases: *United States v. Perez-Gallan*, No. 23-455, 2024 WL 3259665 (U.S. July 2, 2024); *Doss v. United States*, No. 23-6842, 2024 WL 3259684 (U.S. July 2, 2024); *Vincent v. Garland*, No. 23-683, 2024 WL 3259668 (U.S. July 2, 2024); *Jackson v. United States*, No. 23-6170, 2024 WL 3259675 (U.S. July 2, 2024); *Garland v. Range*, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024); *Cunningham v. United States*, No. 23-6602, 2024 WL 3259687 (U.S. July 2, 2024); and *United States v. Daniels*, No. 23-376, 2024 WL 3259662 (U.S. July 2, 2024).

II. The Court should take the same approach here.

The Court should take the same approach in this case as it took in the seven cases listed above: it should grant Mr. Whitney's petition, vacate the judgment below, and remand for further consideration in light of *Rahimi*. The Court's approach in those seven cases was sensible, and it would be equally sensible here.

This approach would promote judicial economy. The Ninth Circuit issued a published decision in *United States v. Duarte* crediting a Second Amendment challenge to Section 922(g)(1). The Ninth Circuit has since granted en banc rehearing in *Duarte*, and those en banc proceedings remain pending, with oral argument scheduled for December 9, 2024. If the Court were to grant, vacate, and remand in this case, the Ninth Circuit could hold Mr. Whitney's appeal in abeyance pending the en banc decision in *Duarte* and, if necessary, any certiorari- or merits-stage proceedings in this Court in *Duarte* (or a related case). That way, the Ninth Circuit can wait to resolve the constitutional issue in Mr. Whitney's case until the issue is settled within the Ninth Circuit by the Ninth Circuit or this Court.

A contrary approach would undermine judicial economy. If the Court were to deny certiorari in this case, Mr. Whitney's direct appeal will have concluded. At that point, if the Second Amendment issue is then settled in his favor, Mr. Whitney would need to pursue a collateral attack under 28 U.S.C. § 2255. Section 2255 motions are procedurally complex and require substantial briefing in the district court along with potential appeals to the circuit court of appeals or certiorari proceedings in this Court. By contrast, if Mr. Whitney's direct appeal remains pending, and if the issue is then settled in his favor, Mr. Whitney would have no

need to pursue time-consuming and wasteful proceedings under Section 2255 to continue litigating this constitutional issue. The most practical approach is therefore to postpone the conclusion of Mr. Whitney's direct appeal until the Second Amendment issue is definitively resolved by the Ninth Circuit or this Court, thus sparing Mr. Whitney the need to pursue (and the federal courts the need to address) collateral litigation on this front. The Court should thus follow the same course it did in the seven cases listed above and grant, vacate, and remand in this case.

Conclusion

The Court should grant this petition, vacate the decision below, and remand for further consideration in light of *Rahimi*.

Dated August 21, 2024.

Respectfully submitted,

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