No. __

In the Supreme Court of the United States

Michael Hoeft,

Petitioner,

vs.

United States of America,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Whether 18 U.S.C. § 922(g)(1) and (9), the statutes prohibiting possession of firearms by persons convicted of: (1) crimes punishable by imprisonment for a term exceeding one year; and (2) misdemeanor crimes of domestic violence, are facially unconstitutional under the Second Amendment to the United States Constitution.

Parties to the Case

The names of all parties appear in the caption of the case.

Related Cases

United States vs. Michael Hoeft
4:21-CR-40163-KES
District of South Dakota, Southern Division
Judgment entered on July 31, 2023.

United States vs. Michael Hoeft
No. 23-2835
Eighth Circuit Court of Appeals
Opinion filed June 6, 2024.

United States vs. Michael Hoeft
No. 23-2835
Eighth Circuit Court of Appeals
Order Denying Petition for En Banc Rehearing
Order entered on July 3, 2023.

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Citations of the Opinions and Orders Entered Below

The order of the Eighth Circuit Court of Appeals denying the petition for *en banc* rehearing below is reported at *United States v. Hoeft,* __ F.4th ___; 2024 U.S. App. LEXIS 16330; 2024 WL 3283260.

The panel opinion of the court of appeals is reported at *United States v. Hoeft,* 103 F. 4th 1357. The district court's opinion and order denying Petitioner's motion to dismiss is not officially reported, but is unofficially reported at *United States v. Hoeft,* 2023 U.S. Dist. LEXIS 49471, 2023 WL 2586030.

Jurisdictional Statement

The judgment of the Eighth Circuit Court of Appeals was entered in this case on June 7, 2024. A timely petition for *en banc* rehearing was denied by the court of appeals on June 12, 2024. This Petition for Certiorari is timely filed within the meaning of Rule 13 of the rules of this Court. This Court has jurisdiction to review the decision of the court of appeals pursuant to a writ of certiorari under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved in the Case

U.S. Const. Amend. II:

> 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) provides in pertinent 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; or . . .
> >
> > (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

This case arises from a federal grand jury indictment charging Petitioner, Michael Hoeft, in a two-count Indictment with possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1) and possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922(g)(1), 922(g)(9). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

Prior to trial Petitioner Hoeft filed a motion to dismiss the indictment, asserting that 18 U.S.C §§ 922 (g)(1) and (g)(9) are unconstitutional under this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The district filed an order denying the motion to dismiss setting forth its reasoning of its denial of the motion to dismiss. *United States v. Hoeft,* 2023 U.S. Dist. LEXIS 49471. In making its ruling, the district court drew on dicta from *District of Columbia v. Heller*, 554 U.S. 570 (2008) to support its conclusion. *Id.* In *Heller*, this Court noted that nothing in its "opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]" *Heller*, 554 U.S. at 626.

At trial, Petitioner Hoeft stipulated to his knowledge that he had been previously convicted of a a crime punishable by more than one year of imprisonment. He denied that he was aware that his South Dakota simple assault conviction was a misdemeanor crime of domestic violence, as that crime is defined under federal law. Following a trial in federal district court for the District of South Dakota, Southern Division, he was convicted on both counts.

Petitioner Hoeft filed a timely notice of appeal from the judgment of conviction entered by the district court. The court of appeals had jurisdiction from the district court's final judgment pursuant to 28 U.S.C. § 1291. Among other issues raised in the court of appeals, Petitioner specifically asserted that 18 U.S.C. § 922(g)(1) and (g)(9) are facially unconstitutional as in violation of the Second Amendment.

In an opinion filed on June 7, 2024, a panel of the Eighth Circuit rejected these arguments. *United States v. Hoeft,* 103 F. 4th 1357 (8th Cir 2024). The court noted it had already determined § 922(g)(1), prohibiting convicted felons from possessing firearms, was constitutional. *Id.* The court cited its decision in *United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023) (holding § 922(g)(1) constitutional "as applied to Jackson and other convicted felons" and foreclosing "felony-by-felony litigation regarding [its] constitutionality" (citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022))). Given its holding in Jackson at to the constitutionality of § 922(g)(1), the court found no need to address Petitioner's § 922(g)(9) claim.

The *Jackson* decision was premised on the rational that "legislatures traditionally employed status based restrictions to disqualify categories of persons from possessing firearms," and that "Congress acted within the historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons." *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023).

At the time Mr. Hoeft sought rehearing *en banc,* the Eighth Circuit had already denied rehearing *en banc* in *Jackson*. The order denying rehearing *en banc,* in Jackson was accompanied by a lengthy dissent by joined by four of the judges of the

court. The dissent criticized the *Jackson* opinion for shifting the burden to the Defendant to "'show . . . that his prior felony conviction is insufficient to justify the' stripping of Second Amendment Rights." *United States v. Jackson,* 85 F.4th 468 (8th Cir 2023). The dissent also argued that the *Jackson* opinion gave "'second-class' treatment to the Second Amendment," and "create[d] a group of second-class citizens: felons who, *for the rest of their lives*, cannot touch a firearm, no matter the crime they committed or how long ago it happened." Appendix, at A-40-41 (emphasis added).

The petitioner in *Jackson* also went on to seek a writ of certiorari in this Court. While that his was pending, this Court issued its decision in *Rahimi v. United States*, 144 S. Ct. 1889 (2024), considering the Fifth Circuit case of *United States v. Rahimi*, 61 F.4th 443, 455 (5th Cir.), cert. granted, 143 S. Ct. 2688 (2023), 144 S. Ct. 1889 (2024).

On June 21, 2023, this Court's issued its decision in *Rahimi*. *Rahimi v. United States,* 144 S. Ct. 1889 (2024). *Rahimi* held that 18 U.S.C. § 922(g)(8) (the federal prohibition on possession of a firearm while subject to a domestic violence restraining order), is constitutional. In turn, on August 5, 2024, this Court granted Jackson's petition for writ of certiorari, vacating the judgment of the Eighth Circuit Court of Appeals, remanding that case back to the Eighth Circuit for further consideration in light of this Court's decision in *Rahimi.* Three days later, the Eighth Circuit affirmed its original decision (*United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023)), concluding, "*Rahimi* does not change our conclusion in this appeal . .

." *United States v. Jackson*, ___ F.4th ___ (8th Cir. 2024), 2024 U.S. App. LEXIS 19868, 2024 WL 3768055.

Reasons for Granting the Petition

Petitioner seeks this Court's review of the decision of the United States Court of Appeals for the Eighth Circuit's, rejecting *Bruen's* required analogical inquiry: "whether modern and historical regulations impose a comparable *burden* on the right of armed self-defense." Despite its obligation to make this inquiry as to each regulation imposing a burden upon an individual's right to bear arms, the Eighth Circuit persists in the rational that criminality alone, with no regard for dangerousness, is a sufficient basis for lifetime disarmament.

A. *Bruen's* Directive

"We start . . . with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). The text of the amendment itself plainly protects the right of the people to possess and to carry firearms. U.S. Const. Amend. II ("the right of the people to keep and bear Arms, shall not be infringed"). And "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," whose parameters already were understood at the time of its adoption. *Heller*, 554 U.S. at 592.

For those reasons, in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), this Court held that a regulation infringing an individual's Second Amendment rights will not be deemed constitutional unless the Government

successfully carries a significant burden of proof. The Government "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, at 2127. *Bruen* disavowed the means-end balancing tests adopted by the courts of appeals:

> when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, at 2126.

The *Bruen* Court also observed:

> [w]hen confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar."

Id. at 2132.

The Court further set forth two "*central"* considerations when engaging in an analogical inquiry: "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Bruen*, 142 S. Ct. at 2133. Notwithstanding *Bruen's* assessment that "reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate,

and more administrable," than a balancing test (*Id.* at 2130), a lack of consensus on the application of *Bruen's* required analysis developed in the lower courts.

B. *Rahimi's* Guidance

In *Rahimi*, finding that some lower courts misunderstood *Bruen's* methodology, this Court set out to clarify the inquiry required under *Bruen*. *Rahimi* reiterated the primary principle of *Bruen:* "The appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi v. United States,* 144 S. Ct. 1889 (2024) citing, *Bruen*, 597 U. S., at 26-31.

The Court went on to reverse the Fifth Circuit's holding that 18 U.S.C. § 922(g)(8), prohibiting the possession of firearms by citizens subject to domestic violence restraining orders, is unconstitutional under *Bruen*. In *Rahimi* the Fifth Circuit applied the historical analysis mandated under *Bruen* to conclude that individuals merely suspected of criminal conduct, only subject to civil censure, fell in the group protected by the Second Amendment.

In reversing the Fifth Circuit, this Court held instead that "our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." *United States v. Rahimi*, 144 S. Ct. 1889 (2024).

C. *Rahimi* does not Resolve Application of *Bruen* as to § 922(g)(1) and (g)(8)'s lifetime prohibition of the right to possess firearms.

While *Rahimi* resolves application of § 922(g)(8) to the Second Amendment, it did not address the laws prosecuted in this case. Sections 922(g)(1) and (g)(9), both

impose the most severe burden upon the Second Amendment rights of those convicted: a lifetime ban on the possession of all firearms and all ammunition by any person convicted of a crime punishable by a term of more than a year in prison or a misdemeanor crime of domestic violence.

The statute at issue in *Rahimi*, imposes only a temporary burden on Second Amendment rights. Thus, *Rahimi's,* holding was limited to a Texas statute imposing a prohibition extending two years from the petitioner's release from prison, a "lesser restriction of temporary disarmament," permissible under the constitution. *Rahimi*, 144 S. Ct. at 1902. Because *Rahimi* provided no occasion to consider whether a lifetime ban on the exercise of Second Amendment rights, is a burden comparable to the historical tradition of firearms regulations, it leaves unresolved the question of whether § 922(g)(1) and (9), with their lifetime consequences, are constitutional firearms regulations.

Rahimi leaves unanswered the question as to how lower courts should analyze dangerousness. As this Court stated in *Rahimi, "*Our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." *Id.* In explicitly limiting its holding, this Court concluded: "Rather, we conclude only this: 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." *Id.* at 1903.

Nothing in *Rahimi* supports the Eighth Circuit's categorical approach to banning a citizen from ever possessing a firearm without any consideration of

actual dangerousness. Such an approach impermissibly bootstraps the ends-means scrutiny rejected by *Bruen*.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted this 22nd day of August, 2024.

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