

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

RAYZJAUN CURRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the federal statute criminalizing the possession of a firearm by a felon unconstitutional, either on its face or as applied, because it violates the Second Amendment to the United States Constitution?

STATEMENT OF RELATED CASES

United States v. Curry, No. 22-cr-00127-RPM (D. Colo.)
Judgment entered February 14, 2023

United States v. Curry, No. 23-1047 (10th Cir.)
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PRAYER

Petitioner, Rayzjaun Curry, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on June 28, 2024.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Curry, 2024 WL 3219693 (10th Cir. June 28, 2024), is found in the Appendix at A1.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Ninety days from June 28, 2024 is September 26, 2024, so this petition is timely.

CONSTITUTIONAL PROVISION INVOLVED

This petition implicates the Second Amendment to the United States Constitution, which reads as follows:

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

Rayzjaun Curry was driving his six-year old daughter home from school one afternoon, in a car owned by his mother. Denver police pulled him over for a traffic violation. They found, in a backpack underneath Happy Meal boxes from the lunch he had just bought for himself and his daughter, a gun.

Mr. Curry had a prior felony conviction. He was charged in the United States District Court for the District of Colorado with a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1). He was convicted of the offense after a trial.

On appeal, Mr. Curry argued that he had jointly possessed the car that he was driving with his mother, and that the proof was insufficient to support his conviction under Tenth Circuit law as to what must be shown in joint-possession cases. The Tenth Circuit rejected that argument.

Mr. Curry also raised an argument that § 922(g) is unconstitutional, as violative of the Second Amendment to the Constitution, a position he had not advanced in the district court. In United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009), decided after this Court's decision in

District of Columbia v. Heller, 554 U.S. 570 (2008), the Tenth Circuit had held that § 922(g)(1) does not violate the Second Amendment.

On the same day Mr. Curry's opening brief was filed, the Tenth Circuit decided Vincent v. Garland, 80 F.4th 1197 (10th Cir. 2023). There, it held that this Court's later decision in New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), afforded no basis for it to revisit McCane, and that a challenge to the constitutionality of § 922(g)(1) remained foreclosed in the Tenth Circuit. Vincent, 80 F.4th at 1199, 1200-02. Mr. Curry raised the issue of the unconstitutionality of § 922(g)(1), which he argued was subject to plain-error review, solely to preserve it for further review.

The Tenth Circuit affirmed the judgment of the district court on June 28, 2024. On the question presented here, the Tenth Circuit considered its decisions in McCane and Vincent to be controlling. A3-4.

A week earlier, this court had issued its decision in United States v. Rahimi, 144 S.Ct. 1889 (2024). This Court explained there that "some courts have misunderstood the methodology of our recent Second Amendment cases." Id. at 1897. The Tenth Circuit in this case noted the

decision in Rahimi, but did not think Rahimi “indisputably and pellucidly abrogate[d]” Vincent and McCane, A4 n.7. The Tenth Circuit stated that this meant it was bound by that precedent to reject Mr. Curry’s claim. Id.

On July 2, four days after the Tenth Circuit issued its decision in Mr. Curry’s case, this Court granted the petition for writ of certiorari in Vincent, vacated the Tenth Circuit’s judgment in that case and remanded the case for further consideration in light of Rahimi. Vincent v. Garland, 144 S.Ct. 2708 (2024). On the same day, this Court took the same action in seven other cases.¹

¹ Cunningham v. United States, 144 S.Ct. 2714 (2024); Doss v. United States, 144 S.Ct. 2712 (2024); Jackson v. United States, 144 S.Ct. 2710 (2024); Antonyuk v. James, 144 S.Ct. 2709 (2024); United States v. Perez-Gallan, 144 S.Ct. 2707 (2024); United States v. Daniels, 144 S.Ct. 2707 (2024); Garland v. Range, 144 S.Ct. 2706 (2024).

REASONS FOR GRANTING THE WRIT

This court should GVR this case for further consideration in light of United States v. Rahimi, as it has done in another Tenth Circuit case in which supplemental briefing is in progress, or else hold this petition pending the disposition of petitions raising the constitutionality of 18 U.S.C. § 922(g)(1), which prohibits felons from possessing a firearm.

At the time Mr. Curry briefed his appeal to the Tenth Circuit, the constitutionality of § 922(g)(1) was foreclosed by circuit precedent. That court's decision in United States v. McCane, 573 F.3d 1037 (10th Cir. 2009), had rejected the claim, and was held in Vincent v. Garland, 80 F.4th 1193 (10th Cir. 2023), not to be affected by later authority from this Court. And so, Mr. Curry could not prevail on that claim. McCane, which was reaffirmed as controlling in Vincent, settled the matter in the Tenth Circuit. It bound Mr. Curry's panel to reject his plain-error claim that § 922(g)(1) is unconstitutional. A4 & n.7.

All that changed on July 2, 2024. On that day, this Court granted certiorari in Vincent, vacated the judgment and remanded for further consideration in light of United States v. Rahimi, 144 S.Ct. 1889 (2024), in which this Court observed that "some courts have misunderstood the methodology of our recent Second Amendment cases," id. at 1897. So,

Vincent is no longer binding precedent that requires the rejection of the claim (whether on plain-error review or otherwise) that § 922(g)(1) violates the Second Amendment, and that Mr. Curry therefore committed no crime.

The Tenth Circuit is actively complying with this court's GVR order. The Tenth Circuit directed the parties to file supplemental briefs on the impact of Rahimi on Mr. Vincent's claim of the unconstitutionality of § 922(g)(1). Mr. Vincent filed his supplemental brief on September 16, the government's supplemental brief is due on October 24, and the reply brief is due on November 7.

Vincent will issue the controlling decision in the Tenth Circuit on the constitutionality of § 922(g)(1) after Rahimi. Indeed, the Tenth Circuit has abated many cases that challenge the constitutionality of § 922(g)(1) pending its decision in Vincent. E.g., United States v. Lee, No. 24-1115, slip op. (10th Cir. Aug. 22, 2024) (order); United States v. Garcia, No. 24-1051, slip op. (10th Cir. Aug. 21, 2024) (order); United States v. Reese, Nos. 24-2069 & 24-2070, slip op. (10th Cir, Aug. 15, 2024) (order); United States v. Lowmaster, No. 23-3219, slip op. (10th Cir. Aug. 13, 2024) (order); United States v. Vickers, No. 24-8012, slip op. (10th Cir. July 22, 2024). If this Court

does GVR this case, Mr. Curry will also ask the Tenth Circuit to abate his case pending the decision in Vincent.

If the Tenth Circuit grants such abatement, and if it rules in Vincent that § 922(g)(1) is unconstitutional after Rahimi, the requirement of plainness will be satisfied in Mr. Curry's case. The favorable decision in Vincent will make the error plain in the Tenth Circuit, no matter what any other circuit has decided. United States v. Wolfname, 835 F.3d 1214, 1221-22 (10th Cir. 2016). And plainness at the time of the appeal is all that is necessary to meet this requirement of Federal Rule of Appellate Procedure 52(b). Johnson v. United States, 520 U.S. 461, 467-68 (1997).

It is especially appropriate for this Court to issue a GVR order in Mr. Curry's case. This is so because, in the event of a favorable ruling in the Tenth Circuit, Mr. Curry will (under that law) be actually innocent. He will have been held to account -- and will continue to be held to account, as he is now in a halfway house, and still has his three-year term of

supervised release to serve -- for something the Second Amendment does not allow to be made a crime.²

If this Court does not GVR Mr. Curry's case, it should hold this case pending its determination of other petitions raising the issue of the constitutionality of § 922(g)(1). Because Mr. Curry's claim is one for plain-error relief (and because of the other procedural question noted in the Tenth Circuit, as set out in the footnote on this page), this case is not the

² The Tenth Circuit noted that Mr. Curry had not raised a challenge to the constitutionality of § 922(g)(1) in the district court, and that this would result in a waiver under Federal Rule of Criminal Procedure 12(c), absent a showing of good cause. A4 n.6. The existence of binding circuit precedent that foreclosed the claim can be good cause. United States v. Duarte, 101 F.4th 657, 663 (9th Cir.), reh'g en banc granted, opinion vacated, 108 F.4th 786 (9th Cir. 2024).

United States v. McCane, 573 F.3d 1037 (10th Cir. 2009), may well be such binding circuit precedent. In Vincent v. Garland, the Tenth Circuit easily held that New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), did not "indisputably and pellucidly abrogate[]" McCane, Vincent v. Garland, 80 F.4th 1097, 1200 (10th Cir. 2023); see also id. at 1202, and that it thus had to follow the holding of McCane, id. at 1202.

It would be for the Tenth Circuit, in the first instance, to decide whether the existence of the 2009 decision in McCane was good cause for not challenging § 922(g)(1) in the district court. Likewise, it would be for the Tenth Circuit to decide whether it could for some other reason consider Mr. Curry's plain-error argument. None of this is a basis for this Court not to grant Mr. Curry the relief requested.

best vehicle for the determination of the question presented. Other cases will allow this Court to be sure that it can cleanly decide the question.

There is no doubt that the question presented here is one of exceptional importance that should be settled by this Court. Sup. Ct. R. 10(c). The Solicitor General, in the wake of Rahimi, urged this Court to take up the question immediately in five cases then pending before it.

In a supplemental brief filed in each of those cases, the Solicitor General urged that taking up the issue at that time, rather than GVR'g those cases, was the right course of action because “the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower courts.” Supplemental Brief for the Federal Parties in Garland v. Range, Vincent v. Garland, Jackson v. United States, Cunningham v. United States, and Doss v. United States, Nos. 23-374, 23-683, 23-6170, 23-6602 and 23-6842 (U.S. June 26, 2024), at 2 (quoting Lawrence v. Chater, 516 U.S. 163, 167-68 (1996) (per curiam)). The Solicitor General noted that the question had split the circuits, id. at 3, and “deeply divided district courts,” id. at 4. And she stressed the “disruptive effects” on the use of a statute that “account[s] for nearly 12% of all federal criminal

cases.” Id. at 5. Given all of this, the Solicitor General urged this Court to grant plenary review in three of the then-pending petitions in which the supplemental brief was filed, id. at 7, “to ensure that it can decide the questions presented next Term,” id. at 6.

Of course, that is not the path this Court chose. Instead, it issued a GVR order in each of the five cases in which the supplemental brief was filed. Compare *supra* at 10 (identifying the five cases) with *supra* at 5 n.1.

That should not dissuade this Court from now taking up the question presented. The desire for percolation that is the usual reason for delaying review on a question of such importance is rapidly taking place. It has been just three months since this Court decided Rahimi. Already, at least four circuits have issued precedential decisions on the question. United States v. Diaz, No. 23-50542, __ F.4th __, 2024 WL 4223684 (5th Cir. Sept. 18, 2024); United States v. Cunningham, 114 F.4th 671 (8th Cir. 2024); United States v. Williams, 113 F.4th 637 (6th Cir. 2024); United States v. Jackson, 110 F.4th 1120 (8th Cir. 2024); United States v. Langston, 110 F.4th 808 (1st Cir. 2024). More circuits will likely weigh in over the coming weeks. There is not much to be gained by waiting to grant review on the

question, but (as the Solicitor General has noted) there is much to be lost by doing so.³

Admittedly, the request to hold a petition pending the disposition of another petition (or petitions) ordinarily comes with the identification of that other petition (or petitions). This request is different. There does not appear to have yet been filed a petition that challenges, in light of Rahimi, the constitutionality of § 922(g).

But those petitions are coming, and coming fast. In two of the four cases in which circuits have issued precedential decisions on the question presented here -- Langston from the First Circuit and Williams from the Sixth Circuit -- the dockets show that no petition for rehearing or motion for extension of time in which to seek rehearing was filed. As Langston was decided on August 2, the petition for writ of certiorari in that case is

³ In the time since the Solicitor General filed her supplemental brief, the Ninth Circuit, which was one of two circuits that had held § 922(g)(1) to be unconstitutional (at least in some situations), granted *en banc* review in that case and vacated the panel opinion. See United States v. Duarte, 101 F.4th 657 (9th Cir.), reh'g en banc granted, 108 F.4th 786 (9th Cir. 2024). The other case on Mr. Curry's side of the circuit split is being reconsidered in light of this Court's GVR order. See Range v. Attorney General United States of America, 69 F.4th 96 (3d Cir. 2023) (en banc), vacated and remanded by Garland v. Range, 144 S.Ct. 2706 (2024).

due on October 31. Because the only conference dates before October 31 are October 11 and 18, any petition in Langston will likely be filed before this Court considers Mr. Curry's petition. The petition in Williams is due on November 21.

So, there will very likely be a petition filed that raises the question presented here before this Court conferences Mr. Curry's petition. This Court should hold this petition pending its disposition of any such other petitions, and then dispose of this petition accordingly. Mr. Curry will advise the Court of the filing of such other petitions while his petition is pending.

CONCLUSION

This Court should grant Mr. Curry a writ of certiorari, vacate the judgment of the Tenth Circuit and remand for further consideration in light of Rahimi. In the alternative, this Court should hold this petition pending the disposition of forthcoming petitions raising the question of whether 18 U.S.C. § 922(g)(1) violates the Second Amendment, and dispose of the petition here as appropriate in light of its disposition of those other petitions.

Respectfully submitted,

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