

No. \_\_\_\_\_

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**In the  
Supreme Court of the United States**

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Gail Manney,

Petitioner,

v.

United States of America,

Respondent.

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

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**Petition for Writ of Certiorari**

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## **Question Presented for Review**

The question presented is whether the Second Amendment covers a federal firearm regulation. This Court has not yet clarified the Second Amendment's coverage in the context of firearm regulations. Petitioner Gail Manney asserts that 18 U.S.C. § 922(a)(6) regulates the purchase of firearms, a protected Second Amendment right, thus requiring full review under *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). The Ninth Circuit held otherwise by finding the criminal firearm regulation did not fall within the Second Amendment. Certiorari is therefore necessary to establish the breadth of the Second Amendment.

## **Related Proceedings**

The prior proceedings for this case are found at: *United States v. Manney*, 114 F.4th 1048 (9th Cir. 2024), and *United States v. Manney*, No. 23-716, 2024 WL 3858826 (9th Cir. Aug. 19, 2024).

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## Petition for Writ of Certiorari

Gail Manney petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### Opinion Below

The Ninth Circuit's decision is published in the Federal Reporter at *United States v. Manney*, 114 F.4th 1048 (9th Cir. 2024), Appx. A, pp. 1a–6a.

### Jurisdiction

The Ninth Circuit entered its final order denying panel and en banc rehearing on September 25, 2024. Appx. C, p. 10a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Sup. Ct. R. 13.1.

### Constitutional and Statutory Provisions

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 USC § 922(a)(6)

(a) it shall be unlawful

\* \* \*

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter

## Statement of the Case

This case squarely presents the question of the Second Amendment’s breadth as to criminal firearm regulations under *Bruen*.

Gail Manney, legally permitted to purchase firearms under state and federal law, was profiled as a straw purchaser by a firearms dealer in northern Nevada—a dealer that had never reported a purchase to the Bureau of Alcohol, Tobacco, and Firearms (ATF) before this case. At issue is the purchase of seven firearms by Manney on April 21, 2021, from Hi-Cap Firearms (“Hi-Cap”), a federal firearms licensee in Reno, Nevada, though the government concedes Manney legally purchased a firearm from the same dealer just days earlier. Appx. A, pp. 2a–3a.

While at Hi-Cap on April 21, 2021, “Manney was on her cell phone, talking and taking photographs of various firearms [and] chose seven handguns to purchase.” Appx. A, p. 2a. A Hi-Cap employee provided her with one copy of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) Form 4473 for the seven handguns, on which she “certified that she was the actual purchaser of the firearms.” Appx. A, p. 2a.

After Manney left, a Hi-Cap employee contacted the ATF to report that Manney was a straw purchaser. “A ‘straw purchaser’ is an individual who purchases a gun on another’s behalf while falsely claiming that it is for herself.” Appx. A, pp. 2a, 5a. The ATF reviewed the Form 4473 and surveillance footage from Manney’s purchase, then “asked Hi-Cap to schedule Manney’s pickup time so [the ATF agent] could conduct an interdiction.” Appx. A, p. 2a.

Manney returned to Hi-Cap on the scheduled date, May 6, 2021, and paid for the firearms. The ATF immediately stopped her outside of the store, seized her firearms and phone, and questioned Manney both at the store and the ATF Field Office. Appx. A, p. 2a. Manney denied purchasing the firearms for someone else. The ATF searched Manney's phone and found messages about firearms, that the ATF believed to be incriminating, between Manney and her son Razaq who is a convicted felon. Appx. A, p. 2a.

The government indicted Manney for one count in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2) for making false statements on ATF Form 4473. She was convicted following a jury trial and sentenced to 18 months followed by three years of supervised release.

During pendency of Manney's case, this Court issued *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). On appeal, Manney requested dismissal because 18 U.S.C. § 922(a)(6) is unconstitutional given *Bruen*.

The Ninth Circuit affirmed the conviction in two decisions. The published opinion found the Second Amendment does not regulate the conduct underlying Manney's conviction. Appx. A, pp. 3a–4a. A separate unpublished memorandum disposition affirmed the conviction and prison sentence on other grounds, but vacated the term of supervised release and remanded for the district court to properly impose standard conditions of supervised release. Appx. B, pp. 7a–9a. The Ninth Circuit denied Manney's request for panel or en banc rehearing. Appx. C, p. 10a.



Manney now seeks certiorari because the Ninth Circuit’s published opinion conflicts with this Court’s precedent in *Bruen* by limiting the Second Amendment’s scope.

### **Reasons for Granting the Petition**

#### **I. The Ninth Circuit’s published opinion conflicts with *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022) by exempting a firearm regulation from the Second Amendment.**

The Ninth Circuit’s published opinion conflicts with this Court’s decision in *N.Y. State Rifle and Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022), and review by this Court is necessary to secure and maintain uniformity with the Court’s decisions. In *Bruen*, this Court issued a new two-part test for assessing the constitutionality of firearm regulations, 597 U.S. at 24–25, which the Ninth Circuit failed to correctly apply to 18 U.S.C. § 922(a)(6). Appx. A, pp. 3a–4a. The *Bruen* test requires determining whether: (1) “the Second Amendment’s plain text covers an individual’s conduct;” and if so, (2) the government must show a challenged law “is consistent with the Nation’s historical tradition of firearm regulation” from 1791. *Bruen*, 597 U.S. at 24–25. This test is demanding: a firearm regulation aligns with American tradition only if similar regulations were widespread and commonly accepted when the Second Amendment was adopted in 1791. *Id.* at 34–38.

The question for review is whether 18 U.S.C. § 922(a)(6) regulates conduct covered by the Second Amendment. Manney asserts that § 922(a)(6) as applied here regulates the purchase of firearms, a protected Second Amendment right, thus meeting the first *Bruen* step. Section § 922(a)(6) typically entails a material misrepresentation on ATF Form 4473 (Firearms Transaction Record), a form

required to lawfully transfer a firearm from a federally licensed dealer at the time of purchase. Section § 922(a)(6) violates Manney’s Second Amendment rights, which grants “the people” the right “to keep and bear Arms.” U.S. Const. amend. II.<sup>1</sup>

The Ninth Circuit erroneously found that § 922(a)(6) regulates conduct outside the scope of the Second Amendment because “we find that § 922(a)(6) prohibits false statements” which is “unrelated to the possession of a firearm.” Appx. A, p. 4a. The Ninth Circuit joins the Seventh Circuit on this issue, *United States v. Scheidt*, 103 F.4th 1281, 1284 (7th Cir. 2024), which applied similar erroneous reasoning to find that § 922(a)(6) regulates conduct outside the scope of the Second Amendment. But as discussed herein, recent concurrences and dissents support Manney’s argument that firearm regulations fall within the text of the Second Amendment at *Bruen*’s first step. *See, e.g., Md. Shall Issue, Inc. v. Moore*, 116 F.4th 211, 229–52 (4th Cir. 2024) (en banc) (Rushing, J., concurring; Niemeyer, J., concurring in part; and Richardson, J., dissenting); *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 128–43 (10th Cir. 2024) (McHugh, J., concurring).

The Ninth Circuit found Manney’s argument “too broad” for *Bruen*’s first step, finding her statutory interpretation to be an impermissible “high level of generality.” Appx. A, p. 4a. Yet the Ninth Circuit acknowledged that the reach of the Second Amendment’s coverage has not been set by this Court: “the Supreme

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<sup>1</sup> The Ninth Circuit agreed with Manney and correctly found “[she] is a member of ‘the people’ the Second Amendment protects.” Appx. A, p. 4a. The Ninth Circuit also agreed that “handguns qualify as ‘arms’ under the Second Amendment. Appx. A, p. 4a.

Court has yet to expound on all conduct the Second Amendment’s plain text covers. . .” Appx. A, p. 4a. By granting certiorari, this Court can now clarify the Second Amendment’s breadth.

Section 922(a)(6), as applied here, regulates the purchase of a firearm, meeting *Bruen*’s first prong of protected Second Amendment conduct. Section § 922(a)(6), which falls under Chapter 44 titled “firearms,” specifically regulates the acquisition of firearms:

It shall be unlawful \*\*\* for any person *in connection with the acquisition or attempted acquisition of any firearm or ammunition* from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. § 922(a)(6) (emphasis added).

The purchase of a firearm falls within the Second Amendment’s plain text. In prior opinions, the Ninth Circuit followed this Court’s precedent to hold that the Second Amendment protects “the ability to acquire arms,” which is “[an] ancillary right[] necessary to the realization of the core right to possess a firearm for self-defense.” *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017); *see also District of Columbia v. Heller*, 554 U.S. 570, 581, 586, 622 (2008) (clarifying Second Amendment right extends to individual rights to keep and bear arms).

The purchase of a firearm is the regulated conduct at issue here—not the alleged false statement, which is how the protected right is burdened under *Bruen*’s

second prong. Because the purchase, receipt, and possession of a firearm comes within the Second Amendment’s plain text, Manney’s conduct is presumptively protected. *Bruen*, 597 U.S. at 24; *Heller*, 554 U.S. at 586, 622. The statute falls within the Second Amendment’s plain text by involving protected activity, meeting *Bruen*’s first step. *Bruen*, 597 U.S. at 23–24.<sup>2</sup>

Recent concurring and dissenting opinions support Manney’s argument by asserting that firearm regulations fall within the text of the Second Amendment at *Bruen*’s first step. In *Md. Shall Issue, Inc. v. Moore*, 116 F.4th 211 (4th Cir. 2024) (en banc), the majority opinion found that Maryland’s “shall-issue” licensing law did not fall within the text of the Second Amendment, and therefore failed *Bruen*’s step one, because the law does not “infringe” on the Second Amendment right to keep and bear arms. *Id.* at 220–222, 226–229. Six judges disagreed on this point, issuing or joining concurring and dissenting opinions. *Id.* at 229–252 (Rushing, J., concurring, joined by Gregory, J., and Quattlebaum, J.; Niemeyer, J., concurring in part; and Richardson, J., dissenting, joined by Agee, J.). Each concurring and dissenting judge would have found the licensing law fell within the text of the

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<sup>2</sup> Because the Second Amendment presumptively protects the conduct that § 922(a)(6) proscribes as applied here, the *Bruen* analysis proceeds to the second step. 597 U.S. at 24–25. At the second step, the government must show a robust tradition of “distinctly similar historical regulation[s]” as of 1791, when the Second Amendment was ratified. *Bruen*, 597 U.S. at 26. The Ninth Circuit did not address the second prong of *Bruen*, because it erroneously stopped its analysis at the first prong. Appx. A, p. 4a. The government presented no historical analogue in its briefing below, thus failing to meet its demanding burden of proof and waiving the argument. *United States v. Orozco*, 858 F.3d 1204, 1210 (9th Cir. 2017) (an argument not addressed in an answering brief is waived).

Second Amendment at *Bruen*'s step one. *Id.* at 230 (Rushing, J., concurring) (“Maryland’s law regulates acquiring a handgun, and the Second Amendment’s text encompasses that conduct.”); *Id.* at 238 (Niemeyer, J., concurring in part) (“Rather than requiring the plaintiff to prove infringement at step one, as the majority does, *Bruen* requires the plaintiff to show only that his or her *conduct* is covered by the Amendment’s plain text.”) (emphasis in original); *Id.* at 240–246 (Richardson, J., dissenting) (“Maryland’s law cuts off all avenues of [acquiring a handgun] unless she complies with its terms. Thus, the law necessarily regulates conduct protected by the Second Amendment’s plain text.”).

And the Fourth Circuit is not the only divided court as to the scope of the Second Amendment in *Bruen*'s step one. In *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024), the Tenth Circuit held a Colorado law raising the minimum age to purchase firearms from 18 to 21 fell outside the text of the Second Amendment, because all “laws imposing conditions and qualifications on the sale and purchase of arms do not implicate the plain text of the Second Amendment.” *Id.* at 120–121. One judge joined in the ultimate holding that the statute was constitutional, but only because of analysis at *Bruen*'s second step. This concurring judge would have found the regulation fell within the Second Amendment at *Bruen*'s first step, noting “Because Mr. Pineda wants to purchase a firearm but is prevented from doing so by the law, the proposed conduct is purchasing firearms. . . . Whether the government can regulate purchasing firearms based on age is a question for step two, where the court evaluates possible historical analogues.” *Id.*

at 137 (McHugh, J., concurring). And “purchasing firearms is a necessary concomitant of the right to ‘keep and bear Arms.’ . . . After all, acquisition is a prerequisite to possession.” *Id.* at 140 (McHugh, J., concurring) (citations omitted). The concurrence further explains that *Bruen*’s step one and two should not be conflated: “instead of analyzing ‘how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right,’ courts must begin by determining whether ‘the Second Amendment’s plain text covers an individual’s conduct.’” *Id.* at 131.

The Ninth Circuit thus improperly excluded a firearm regulation at *Bruen*’s step one of analysis. The Ninth Circuit limits *Bruen*’s application by finding not “every requirement making it slightly more difficult to possess a firearm demands a full historical inquiry into its origin.” Appx. A, p. 4a. Claiming that *Bruen* dealt with “prohibitions, or near prohibitions, on the ability to possess firearms,” *id.*, the Ninth Circuit found that § 922(a)(6) is merely a “statute regulat[ing] statements made by the individual purchasing a firearm to ensure that a purchaser is not lying to a firearm’s dealer about who is purchasing the firearm.” Appx. A, p. 4a. But the regulation imposes requirements on firearm possession and is subject to the Second Amendment. The Ninth Circuit ignored that *Bruen* itself dealt with a regulation imposing requirements on possession—not an outright prohibition of firearms.

In *Bruen*, a state regulation required a purchaser of a firearm for “public carry” to first prove that “proper caused exist[ed]” to issue the license. 597 U.S. at 11–12. The petitioners in *Bruen* had been denied “public carry” licenses under this

regulation. This Court found the regulation “operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose” and plainly regulated the right to keep and bear arms. *See id.* at 60, 70. *Bruen* analyzed the licensing regulation under its *second* prong in discussing historical analogues—the licensing regime easily met the first prong because it burdened the Second Amendment’s protected conduct of possessing a firearm. 597 U.S. at 31–32. And *Bruen* recognized that “because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes.” *Bruen*, 597 U.S. at 38 n.9. Following *Bruen*, federal courts continue to find firearm licensing laws unconstitutional under *Bruen*. *See, e.g., Srour v. N.Y. City*, 699 F. Supp. 3d 258 (S.D.N.Y. 2023) (holding licensing regulations unconstitutional under *Bruen*).

Certiorari is necessary because the Ninth Circuit failed to correctly apply *Bruen* by exempting a firearm regulation from the scope of the Second Amendment.

## **II. This case is the appropriate vehicle to decide an issue of exceptional importance.**

This case squarely presents the question of the Second Amendment’s breadth as to criminal firearm regulations under *Bruen*. The question presented is of exceptional importance to federal courts and defendants not only because of the felony status under 18 U.S.C. § 922(a)(6) and ten-year maximum sentence under 18 U.S.C. § 924(a)(2), but also because of the lifetime ban from possessing firearms for those who have no other criminal history.

Firearm offenses are the third most common federal offense.<sup>3</sup> U.S. Sent. Comm’n, *Sourcebook of Federal Sentencing Statistics Fiscal Year 2023, Figure 2—Sentenced Individuals by Type of Crime* (2024).<sup>4</sup> In Fiscal Year 2023, over 1,600 individuals convicted of a firearm offense had a Criminal History Category of I—like Manney—and were sentenced to a median 13-month incarceration term. *Id.* at *Table 27—Sentence Length in Each Criminal History Category by Type of Crime*.<sup>5</sup> Petitioner Manney, who has no prior criminal history, is one of thousands of defendants who served a prison sentence for a firearm conviction and will bear the felony conviction and its collateral consequences—including a lifetime ban of possessing firearms.

While this Court has previously interpreted the Second Amendment, it has not yet addressed whether federal criminal firearm regulations, such as 18 U.S.C. § 922(a)(6), fall within the Second Amendment’s coverage requiring *Bruen* analysis. The proper interpretation of both *Bruen* and the Second Amendment requires this Court’s review and intervention.

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<sup>3</sup> The Sentencing Commission does not track convictions specifically under 18 U.S.C. § 922(a)(6), but rather tracks application of U.S.S.G. § 2K2.1—the guideline that includes § 922(a)(6) offenses. Nearly 95% of all firearms offenses are sentenced under § 2K2.1. U.S. Sent. Comm’n, *Sourcebook of Federal Sentencing Statistics Fiscal Year 2023, Figure F-1—Distribution of Firearms Cases by Guideline* (2024), available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/FigureF1.pdf>.

<sup>4</sup> Available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Figure02.pdf>.

<sup>5</sup> Available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table27.pdf>.



## Conclusion

Because the panel decision conflicts with this Court's precedent in an area of exceptional importance—the breadth of the Second Amendment—this Court should grant a petition for writ of certiorari.

Dated this 20th day of December 2024.

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