

No. 23-374

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

BRYAN DAVID RANGE

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

ELIZABETH B. PRELOGAR
*Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

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In the decision below, the en banc Third Circuit held that 18 U.S.C. 922(g)(1), the federal statute disarming persons who have been convicted of crimes punishable by more than one year of imprisonment, violates the Second Amendment as applied to individuals like respondent Bryan Range. See Pet. App. 19a. Range agrees with the government (Br. in Opp. 5-12) that the Third Circuit’s decision conflicts with the decisions of other courts of appeals. He also agrees (*id.* at 12-13) that the decision has significant practical consequences.

Parting ways with the government, Range argues (Br. in Opp. 13-30) that the Third Circuit’s decision was correct. But Range’s arguments suffer from many of the same flaws as the arguments advanced by respondent Zackey Rahimi in *United States v. Rahimi*, cert. granted, 143 S. Ct. 2688 (No. 22-915) (oral argument

scheduled for Nov. 7, 2023), the pending case concerning the constitutionality of the statute disarming persons subject to domestic-violence protective orders, 18 U.S.C. 922(g)(8). Like *Rahimi*, Range discounts this Court’s many statements that the Second Amendment protects only law-abiding, responsible citizens; ignores the longstanding tradition of disarming persons based on categorical judgments; and erroneously reduces the inquiry into the Second Amendment’s original meaning to a search for a specific historical analogue.

Range also urges this Court (Br. in Opp. 30-33) to grant certiorari now instead of holding the petition pending the decision in *Rahimi*. But that approach would needlessly require re-briefing and re-argument of many of the same issues that have already been briefed, and that will have already been argued, in *Rahimi*. The Court should thus adhere to its usual practice by holding the petition—and other petitions involving challenges to provisions of Section 922(g), including the government’s petition in *United States v. Daniels*, No. 23-376 (filed Oct. 5, 2023)—pending its decision in *Rahimi*. At that point, the Court can decide whether to grant plenary review in one or more cases involving Section 922(g)(1) or to remand to allow the lower courts to reconsider their decisions with the benefit of this Court’s guidance in *Rahimi*.

A. Section 922(g)(1) Is Constitutional As Applied To Range

Range argues (Br. in Opp. 13-30) that Section 922(g)(1) violates the Second Amendment, at least as applied to him. In doing so, he reprises many of the same arguments that have already been raised by the respondent (and rebutted by the government) in *Rahimi*.

1. Range’s challenge to Section 922(g)(1) contradicts this Court’s repeated statements that the right to keep and bear arms belongs only to “law-abiding, responsible citizens.” *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Range, like Rahimi, dismisses those statements as dicta and argues that they have been superseded by this Court’s decision in *NYSRPA v. Bruen*, 142 S. Ct. 2111 (2022). See Br. in Opp. 14-15; Resp. Br. at 34-35, *Rahimi*, *supra* (No. 22-915) (*Rahimi* Resp. Br.). But as the government has explained in *Rahimi*, the “law-abiding, responsible citizens” principle has been a central feature of this Court’s Second Amendment jurisprudence. See Gov’t Br. at 11-13, *Rahimi*, *supra* (No. 22-915) (*Rahimi* Gov’t Br.); Reply Br. at 2-3, *Rahimi*, *supra* (No. 22-915) (*Rahimi* Reply Br.). The *Bruen* Court, for example, used the term “law-abiding, responsible citizen” and its variants more than a dozen times, see *Rahimi* Gov’t Br. at 12 n.1; explained that a court must judge a modern regulation’s consistency with historical precursors by asking “how and why the regulations burden a *law-abiding citizen’s* right to armed self-defense,” *Bruen*, 142 S. Ct. at 2133 (emphasis added); and approved background checks on the ground that they ensure “that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens,’” *id.* at 2138 n.9 (citation omitted). See *Rahimi* Reply Br. at 2, 6.

Range’s Second Amendment challenge also conflicts with the *Heller* Court’s assurances that nothing in its opinion “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.” 554 U.S. at 626. Range emphasizes a footnote in which the *Heller* Court described the laws it approved as “presumptively lawful regulatory measures.” *Id.* at 627

n.26. He interprets (Br. in Opp. 14) that footnote to mean that such regulatory measures may “turn out to be lawful to some extent,” but that they remain subject to as-applied challenges. “That is an unlikely reading, for it would serve to cast doubt on the constitutionality of these regulations in a range of cases despite the Court’s simultaneous statement that ‘nothing in [its] opinion should be taken to cast doubt’ on the regulations.” *United States v. Jackson*, 69 F.4th 495, 505 n.3 (8th Cir. 2023) (citation omitted). The *Heller* Court also described “laws forbidding the carrying of firearms in sensitive places such as schools” as “presumptively lawful regulatory measures,” 554 U.S. at 626, 627 n.26, but Range presumably would not argue (Br. in Opp. 14) that bans on firearms in schools are lawful only “to some extent” or are subject to as-applied Second Amendment challenges.

2. Range likewise fails to show that convicted felons are among “the people” protected by the Second Amendment. He asserts (Br. in Opp. 18) that the term “the people” must mean exactly the same thing in all of the provisions of the Constitution protecting individual rights, but that premise is wrong. For example, some noncitizens are among “the people” protected by the Fourth Amendment, see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 271-273 (1990), but Range appears to acknowledge (Br. in Opp. 17) that they are outside “the people” protected by the Second Amendment. Similarly, the Constitution provides for the election of the House of Representatives and Senate by “the People.” See U.S. Const. Art. I, § 2, Cl. 1; Amend. XVII, Cl. 1. Those provisions secure an individual “right to vote for representatives in Congress.” *United States v. Classic*, 313 U.S. 299, 314 (1941). Yet this Court has

recognized that the States' power to set qualifications for voters in congressional elections authorizes them to disqualify convicted felons—as many States have long done. See *Richardson v. Ramirez*, 418 U.S. 24, 41-56 (1974). And just as legislatures may provide that a felony conviction excludes a person from “the people” entitled to vote, Congress may direct that one consequence of a felony conviction is exclusion from “the people” entitled to keep and bear arms.

3. Range also analyzes the history and tradition of firearms regulation in the same flawed way as Rahimi. Like Rahimi, Range seeks to reduce the interpretation of the Second Amendment to a rote archival search for Founding-era laws that match the challenged statute. Br. in Opp. 24; see *Rahimi* Resp. Br. at 34-35. And like Rahimi, he isolates each of the precursors cited by the government and focuses on differences between that specific precursor and the challenged law. See Br. in Opp. 22-23; *Rahimi* Resp. Br. at 17-31. As the government has explained in *Rahimi*, that analytical approach misunderstands *Bruen*, conflicts with the Court's usual methods of constitutional interpretation, and would lead to untenable results. See *Rahimi* Gov't Br. at 41-42; *Rahimi* Reply Br. at 2-6.

Range argues (Br. in Opp. 20-21) that the historical practice of executing felons does not support the modern practice of disarming them. But “it is difficult to conclude that the public, in 1791, would have understood someone facing death * * * to be within the scope of those entitled to possess arms.” *Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir.), cert. denied, 140 S. Ct. 645 (2019). The Founding generation, moreover, did not punish felons with death alone. It also punished them with the total extinction of their legal rights—

including the right to own property, the right to vote, the right to serve on juries, and (most relevant here) the right “to bear arms.” *Avery v. Everett*, 18 N.E. 148, 156 (N.Y. 1888) (Earl, J., dissenting). Historical practice thus confirms that the commission of a felony can result in the loss of fundamental rights, including the right to keep and bear arms.

Echoing *Rahimi*, Range also urges this Court to disregard a Second Amendment precursor, proposed by Anti-Federalists in Pennsylvania, that recognized Congress’s power to disarm persons “for crimes committed, or real danger of public injury from individuals.” 2 *The Documentary History of the Ratification of the Constitution* 598 (Merrill Jensen ed., 1976); see Br. in Opp. 23-24; *Rahimi* Resp. Br. at 36-38. But the Second Amendment was “widely understood to codify a pre-existing right, rather than to fashion a new one,” and this Court has found it unlikely that “different people of the founding period had vastly different conceptions” of that right. *Heller*, 554 U.S. at 603-605. Indeed, the Court has described the Pennsylvania Anti-Federalists’ proposal as “highly influential” and has relied on it in interpreting the Second Amendment. *Id.* at 604. It is particularly improbable that the Anti-Federalists, who strongly opposed federal power, would have had a *narrower* understanding of the right to keep and bear arms than the people in general. See *Rahimi* Reply Br. at 8.

Finally, Range offers little meaningful response to the government’s argument (Pet. 16-18) that the Second Amendment allows Congress to disarm categories of persons who would endanger themselves or others if armed. Range instead asserts (Br. in Opp. 26) that “[t]he government’s arguments on this point have been thoroughly answered by the briefs in *Rahimi*.” But

that response just underscores the substantial overlap between this case and *Rahimi*. See pp. 8-9, *infra*.

4. Range fails to provide a judicially administrable standard for his proposed regime of as-applied challenges to Section 922(g)(1). He argues that courts should focus on whether a crime justifies disarming a felon in the first place, see Br. in Opp. 29, but then “reserves the right” to argue that the Second Amendment also requires “a process for restoring the rights of those whose rights were validly forfeited,” *ibid.* He states at one point that disarmament requires a “case-by-case finding of dangerousness,” *id.* at 26, but at another point that courts may “use careful rules of thumb to classify some felonies as dangerous,” *id.* at 30 (citation omitted). He argues that “violent felons” categorically differ from “nonviolent” ones, *id.* at 2, 3, 15-16, yet suggests that Congress may disarm “drug deal[ers],” *id.* at 30 (citation omitted). And he disavows (*ibid.*) the “categorical approach of the Armed Career Criminal Act,” but fails to propose any alternative approach for determining which crimes permit disarmament. Cf. *Haaland v. Brackeen*, 599 U.S. 255, 279 (2023) (faulting parties for remaining “silent about the potential consequences of their position”).

Range blames (Br. in Opp. 16, 28) Congress for those practical problems, arguing that Congress should not have categorically prohibited felons from possessing firearms. But Congress adopted its current categorical approach only after decades of experience proved the unworkability of a regime of individualized exceptions. Pet. 2-3, 21. Congress’s considered choice to abandon that approach in favor of a categorical rule accords with practice dating to before the Founding: Legislatures have “traditionally employed status-based restrictions

to disqualify categories of persons from possessing firearms.” *Jackson*, 69 F.4th at 505. And Range appears to concede that Section 922(g)(1)’s categorical restriction is at least “presumptively” constitutional. Br. in Opp. 13 (citation omitted). Range’s inability to craft a workable test for resolving as-applied challenges to that longstanding and presumptively constitutional restriction is a strong reason not to allow such challenges in the first place.

B. This Court Should Hold The Petition Pending The Resolution Of *Rahimi*

Range argues (Br. in Opp. 30-33) that this Court should grant the government’s petition for a writ of certiorari now rather than hold it (and other petitions involving challenges to various provisions of Section 922(g)) pending the resolution of *Rahimi*. Range asserts (*id.* at 31) the Court’s decision in *Rahimi* is unlikely to “resolve issues central to this case.” And he notes (*id.* at 33) that the Court sometimes hears multiple cases “involving a single constitutional right” in a given Term. But Range’s examples involve cases raising entirely distinct First and Fourth Amendment questions. Here, in contrast, *Rahimi* raises many of the same Second Amendment issues as this case:

- Whether and in what circumstances Congress may disarm persons even if they are among “the people” protected by the Second Amendment. See Br. in Opp. 20-30; *Rahimi* Gov’t Br. at 36-38.
- Whether Congress may disarm persons on the ground that they are not law-abiding, responsible citizens. See Br. in Opp. 14; *Rahimi* Gov’t Br. at 10-27.

- Whether Congress may disarm persons on the ground that they pose a danger to themselves or others. See Br. in Opp. 26; *Rahimi* Gov't Br. at 27-29.
- Whether Congress may make categorical rather than case-by-case judgments about dangerousness. See Br. in Opp. 26; *Rahimi* Reply Br. at 17.
- Whether courts applying the Second Amendment may consider historical evidence apart from specific historical analogues. See Br. in Opp. 24-25; *Rahimi* Reply Br. at 3-4.
- Whether and how courts should consider English history in interpreting the Second Amendment. See Br. in Opp. 22; *Rahimi* Reply Br. at 7.
- Whether Second Amendment precursors illuminate the Amendment's original meaning. See Br. in Opp. 23-24; *Rahimi* Reply Br. at 7-8.

Thus, although this Court's decision in *Rahimi* may not definitively resolve the question presented here, it is likely to shed substantial light on the proper analysis of that question. Under the Court's usual practice, such overlap justifies holding the petition for a writ of certiorari pending the resolution of *Rahimi*.

Range's contrary proposal to hear this case this Term would create significant practical problems for this Court and for the parties. Range suggests (Br. in Opp. 30) that this case should be heard "alongside *Rahimi*." But that is not possible: By the time the Court considers the petition for a writ of certiorari in this case, it will have already heard argument in *Rahimi*—and presumably will have already considered some or all of the Second Amendment issues discussed above. Range's proposal would thus require the parties to submit, and the Court to review, another set of briefs

relitigating many of the same issues without the benefit of this Court's guidance in *Rahimi*.

In addition, this case may not be the optimal vehicle for resolving Section 922(g)(1)'s constitutionality. A judge on the en banc Third Circuit concluded that Range lacked standing, see Pet. App. 88a-98a (Roth, J., dissenting); this Court may prefer a vehicle in which it need not consider that threshold issue. Range emphasizes (Br. in Opp. 20) that Pennsylvania labels his crime a misdemeanor; the Court may prefer to resolve Section 922(g)(1)'s constitutionality in the more common context of a crime that is labeled a felony. And the Court may prefer to grant review in multiple Section 922(g)(1) cases, so that it can consider the statute's constitutionality across a range of different crimes and circumstances.

In sum, Range provides no sound reason to depart from this Court's usual practice by granting certiorari now rather than holding this case for *Rahimi*. A hold would allow the Court to choose between granting plenary review and remanding for further consideration after the Court issues its decision in *Rahimi*. And even if the Court ultimately opts for plenary review rather than a remand, deferring review until after a decision in *Rahimi* would likely give the Court a broader choice of vehicles for resolving Section 922(g)(1)'s constitutionality and would allow the parties to litigate that question with the benefit of the guidance the Court provides in *Rahimi*.

* * * * *

This Court should hold the petition for a writ of certiorari pending the disposition of *United States v. Rahimi, supra*, and then dispose of the petition as appropriate.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NOVEMBER 2023