

No. 23-683

In the Supreme Court of the United States

MELYNDA VINCENT, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(1), the federal statute that prohibits a person from possessing a firearm if he has been convicted of “a crime punishable by imprisonment for a term exceeding one year,” *ibid.*, complies with the Second Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 80 F.4th 1197. The opinion of the district court (Pet. App. 15a-21a) is not published in the Federal Supplement but is available at 2021 WL 4553249.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2023. On December 5, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including December 21, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2008, petitioner Melynda Vincent pleaded guilty to bank fraud, a felony violation of 18 U.S.C. 1344. See Pet. App. 2a, 16a. As part of her plea agreement,

(1)

petitioner admitted that she had knowingly cashed a fraudulent check for \$498.12. See C.A. App. 65. Petitioner also acknowledged that the government would offer, for purposes of sentencing, evidence that she had cashed, passed, or deposited ten additional stolen or fraudulent checks, totaling approximately \$25,000, between January and March 2007. See *id.* at 65, 72.

Bank fraud is punishable by up to 30 years of imprisonment. See 18 U.S.C. 1344. Petitioner was sentenced to five years of supervised release and was ordered to pay restitution. See C.A. App. 76, 78. Under 18 U.S.C. 922(g)(1), the longstanding federal statute that disarms felons, petitioner's 2008 conviction disqualifies her from possessing firearms. See Pet. App. 2a.

2. In 2020, petitioner filed this suit in the United States District Court for the District of Utah, naming the Attorney General as a defendant. See Pet. App. 15a. She sought a declaration that Section 922(g)(1) violates the Second Amendment as applied to her and an injunction prohibiting its enforcement against her. See C.A. App. 32.*

The district court granted the government's motion to dismiss. See Pet. App. 15a-21a. The court explained that it was bound by the Tenth Circuit's decision in *United States v. McCane*, 573 F.3d 1037, 1047 (2009), cert. denied, 559 U.S. 970 (2010), which held that Section 922(g)(1)'s disarmament of felons complies with the Second Amendment. See Pet. App. 18a-19a.

* Petitioner also sued the Utah Attorney General to seek relief from a state felon-disarmament law. See Pet. App. 2a n.1. But the court of appeals later dismissed that claim, noting that, as a result of an amendment enacted during this litigation, petitioner is no longer subject to that state law. See *ibid.*

3. The Tenth Circuit affirmed, rejecting petitioner’s contention that Section 922(g)(1) violates the Second Amendment as applied to her. See Pet. App. 1a-14a. The court explained that it was bound by its decision in *McCane*, in which it had upheld Section 922(g)(1) based on this Court’s assurances in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that “nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.” *McCane*, 573 F.3d at 1047 (quoting *Heller*, 554 U.S. at 626); see Pet. App. 3a. The court of appeals rejected petitioner’s contention that *McCane* had been superseded by this Court’s decision in *NYSRPA v. Bruen*, 597 U.S. 1 (2022). See Pet. App. 3a-8a. The court of appeals also determined that, under its precedent, it had “no basis to draw constitutional distinctions based on the type of felony involved.” *Id.* at 8a.

Judge Bacharach, the author of the court of appeals’ opinion, issued a concurring opinion. See Pet. App. 10a-14a. He reasoned that, because the constitutionality of felon-disarmament laws under the historical test set forth in *Bruen* is “debatable,” *Bruen* should not be understood to have abrogated circuit precedent upholding such laws. *Id.* at 10a.

DISCUSSION

Petitioner contends (Pet. 7-12) that 18 U.S.C. 922(g)(1) violates the Second Amendment as applied to her. The government has filed a petition for a writ of certiorari in *Garland v. Range*, No. 23-374 (filed Oct. 5, 2023), presenting the question whether Section 922(g)(1) complies with the Second Amendment. The government has argued in *Range* that Section 922(g)(1) is constitutional, that the courts of appeals are divided over Section 922(g)(1)’s constitutionality, and that the

question would ordinarily warrant this Court's review. See Pet. at 7-25, *Range, supra* (No. 23-374). But the government has argued that this Court should hold the petition in *Range* until it resolves *United States v. Rahimi*, No. 22-915 (argued Nov. 7, 2023), the pending case concerning the constitutionality of 18 U.S.C. 922(g)(8), the statute disarming individuals subject to domestic-violence protective orders. See Pet. at 25-28, *Range, supra* (No. 23-374).

For the reasons given in *Range*, this Court should likewise hold the petition for a writ of certiorari in this case until it resolves *Rahimi* and then dispose of the petition as appropriate. Holding the petition would allow the Court to choose among granting plenary review, remanding for further consideration, and denying the petition after it issues its decision in *Rahimi*. And even if the Court ultimately opts for plenary review, 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*. See Cert. Reply Br. at 10, *Range, supra* (No. 23-374).

CONCLUSION

This Court should hold the petition for a writ of certiorari pending the disposition of *United States v. Rahimi*, No. 22-915 (argued Nov. 7, 2023), and then dispose of the petition as appropriate.

Respectfully submitted.

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FEBRUARY 2024