No. 18-6771

IN THE SUPREME COURT OF THE UNITED STATES

JOHNY GARDNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(1), which makes it unlawful for a convicted felon to possess a firearm that has traveled in interstate commerce, exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 734 Fed. Appx. 311.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2018. The petition for a writ of certiorari was filed on November 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. A1; C.A. ROA 65. The district court sentenced petitioner to 100 months of imprisonment, to be followed by three years of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. A1-A2.

1. In 2011, petitioner was convicted of felony possession of cocaine under Texas law. Presentence Investigation Report (PSR) ¶ 45. In August 2012, after repeatedly violating the terms of his probation, petitioner received a sentence of nine months of imprisonment. Ibid. During his term of probation, petitioner also committed felony evidence tampering under Texas law by swallowing a piece of cocaine before a traffic stop. PSR ¶ 46. Petitioner was sentenced to two years of imprisonment for that separate evidence-tampering offense. Ibid.

In September 2015, following petitioner's release from prison, law enforcement agents in Austin, Texas, began to investigate petitioner's involvement in narcotics and firearm trafficking. PSR ¶ 7. In July 2016, petitioner sold one ounce of marijuana and a loaded nine-millimeter pistol to an undercover law enforcement agent. PSR ¶ 9.

A federal grand jury in the Western District of Texas charged petitioner with possession of a firearm by a felon, in violation

of 18 U.S.C. 922(g)(1). Pet. App. B1-B2. Petitioner pleaded guilty pursuant to a written plea agreement. Id. at A1; Plea Agreement 1-10. In the agreement, petitioner admitted that he had previously been convicted of a crime punishable by more than one year in prison and that he knowingly possessed and sold a firearm that had been transported in interstate commerce. Plea Agreement 3. Petitioner also waived the right to appeal his "conviction or sentence on any ground" other than to claim that the district court imposed a sentence greater than the statutory maximum. Id. at 5. At his plea hearing, petitioner confirmed that the factual recitation in his plea agreement was accurate and that he was "giving up [his] right to an appeal." Plea Tr. 11; see id. at 37-38. The district court sentenced petitioner to 100 months of imprisonment, to be followed by three years of supervised release. Judgment 1-3.

2. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. A1-A2. The court rejected petitioner's argument, raised for the first time on appeal, that the statutory provision under which he was convicted, 18 U.S.C. 922(g)(1), unconstitutionally exceeds Congress's power under the Commerce Clause. Pet. App. A2. The court observed that it had "repeatedly emphasized that the constitutionality of § 922(g)(1) is not open to question," including after this Court's decision in United States v. Lopez, 514 U.S. 549 (1995). Pet. App. A2 (quoting United

States v. De Leon, 170 F.3d 494, 499 (5th Cir.), cert. denied, 528 U.S. 863 (1999)).

ARGUMENT

Petitioner contends (Pet. 3-8) that 18 U.S.C. 922(g)(1), which prohibits convicted felons from possessing firearms and ammunition that have previously traveled in interstate commerce, exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Petitioner both forfeited that contention by failing to raise it in the district court and knowingly and voluntarily waived his right to raise it on appeal in his plea agreement. In any event, the court of appeals' decision rejecting that contention does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

In Scarborough v. United States, 431 U.S. 563 (1977), this Court interpreted the phrase "possesses * * * in commerce or affecting commerce" in a predecessor statute to Section 922(g)(1) to require "only that the firearm possessed by [a] convicted felon traveled at some time in interstate commerce." Id. at 567-568 (citation omitted); see id. at 572 ("[B]y prohibiting both possessions in commerce and those affecting commerce, Congress must have meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities."). Following this Court's decision in United States v. Lopez, 514 U.S. 549 (1995), on which petitioner relies (Pet. 3-8), the courts of appeals

uniformly have held that Section 922(g)'s prohibition against possessing a firearm that has previously moved in interstate commerce falls within Congress's Commerce Clause authority.[1] This Court has recently and repeatedly denied petitions for writs of certiorari challenging the constitutionality of Section 922(g)(1) under the Commerce Clause.[2] The same result is warranted here.

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[1] See, e.g., United States v. Weems, 322 F.3d 18, 25-26 (1st Cir.), cert. denied, 540 U.S. 892 (2003); United States v. Santiago, 238 F.3d 213, 215-217 (2d Cir.) (per curiam), cert. denied, 532 U.S. 1046 (2001); United States v. Singletary, 268 F.3d 196, 198-205 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); United States v. Gallimore, 247 F.3d 134, 137-138 (4th Cir. 2001); United States v. Daugherty, 264 F.3d 513, 518 (5th Cir. 2001), cert. denied, 534 U.S. 1150 (2002); United States v. Henry, 429 F.3d 603, 619-620 (6th Cir. 2005); United States v. Williams, 410 F.3d 397, 400 (7th Cir. 2005); United States v. Stuckey, 255 F.3d 528, 529-530 (8th Cir.), cert. denied, 534 U.S. 1011 (2001); United States v. Davis, 242 F.3d 1162, 1162-1163 (9th Cir.) (per curiam), cert. denied, 534 U.S. 878 (2001); United States v. Dorris, 236 F.3d 582, 584-586 (10th Cir. 2000), cert. denied, 532 U.S. 986 (2001); United States v. Scott, 263 F.3d 1270, 1271-1274 (11th Cir. 2001) (per curiam), cert. denied, 534 U.S. 1166 (2002).

[2] See, e.g., Garcia v. United States, No. 18-5762 (Jan. 7, 2019); Dixon v. United States, 139 S. Ct. 473 (2018) (No. 18-6282); Price v. United States, 139 S. Ct. 437 (2018) (No. 18-6073); Dixon v. United States, 139 S. Ct. 374 (2018) (No. 17-8853); Vela v. United States, 139 S. Ct. 349 (2018) (No. 18-5882); Ibarra v. United States, 139 S. Ct. 297 (2018) (No. 18-5795); Mitchell v. United States, 139 S. Ct. 282 (2018) (No. 18-5593); Buchanan v. United States, 139 S. Ct. 270 (2018) (No. 18-5444); Terry v. United States, 139 S. Ct. 119 (2018) (No. 17-9136); Martin v. United States, 139 S. Ct. 114 (2018) (No. 17-9098); Pina v. United States, 138 S. Ct. 2695 (2018) (No. 17-9070); Boatwright v. United States, 138 S. Ct. 2650 (2018) (No. 17-7645); Kitchen v. United States, 138 S. Ct. 1989 (2018) (No. 17-7521); Massey v. United States, 138 S. Ct. 500 (2017) (No. 16-9376); Moorefield v. United States, 138 S. Ct. 154 (2017) (No. 16-9549); Brice v. United States, 137 S. Ct. 812 (2017) (No. 16-5984); Isom v. United States, 137 S. Ct. 45 (2016) (No. 15-9109); Crouch v. United States,

Further review is particularly unwarranted given that (1) petitioner's claim was not raised in the district court and therefore would be subject to at most plain-error review in this Court, see Fed. R. Crim. P. 52(b); Pet. C.A. Br. 8 (acknowledging that plain-error standard would apply to review of petitioner's claim), and (2) petitioner in fact affirmatively waived the right to appeal his conviction "on any ground," subject only to a limited exception not relevant here, Plea Agreement 5. This Court has held that "a guilty plea by itself does not bar" an appeal in which the defendant argues that the statute of conviction is unconstitutional. Class v. United States, 138 S. Ct. 798, 801-802 (2018) (emphasis added). But that principle does not call into question a defendant's ability to expressly waive his right to appeal claims, including constitutional claims, where, as here, the waiver is knowingly and voluntarily made. See United States v. Mezzanatto, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.").

The government did not assert petitioner's appeal waiver in the court of appeals, but the waiver remains an alternative basis for affirming the judgment, because the government did not

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137 S. Ct. 43 (2016) (No. 15-8974); James v. United States, 136 S. Ct. 2509 (2016) (No. 15-8227); Moore v. United States, 136 S. Ct. 2488 (2016) (No. 15-8601); Fisk v. United States, 136 S. Ct. 2485 (2016) (No. 15-7855); Delgado v. United States, 136 S. Ct. 2485 (2016) (No. 15-7850); Gibson v. United States, 136 S. Ct. 2484 (2016) (No. 15-7475).

"strategically withhold" the defense or "choose to relinquish it". Wood v. Milyard, 566 U.S. 463, 472-473 (2012) (quoting Day v. McDonough, 547 U.S. 198, 211 (2006) (brackets omitted)).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] In the government's unopposed motion for summary affirmance before the court of appeals, the government stipulated that the petitioner's "brief [to that court] preserve[d] the [Commerce Clause] issue for Supreme Court review." C.A. Mot. for Summ. Affirmance 3. That stipulation made clear that, by agreeing to the motion for summary affirmance based on binding circuit precedent, petitioner was not forfeiting any issue he otherwise properly raised before the court of appeals. It was not intended to waive any argument about the plain-error standard of review or the government's ability to rely on petitioner's appeal waiver.