No. 20-1017

In the Supreme Court of the United States

LAWRENCE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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1. Petitioner contends (Pet. 19-20) that the court of appeals erred in rejecting his claim that *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), entitled him to vacatur of his conviction under 18 U.S.C. 922(g)(1) and 924(a)(2) on plain-error review following trial and sentencing. On January 8, 2021, this Court granted the petition for a writ of certiorari in *Greer* v. *United States*, No. 19-8709 (oral argument scheduled for Apr. 20, 2021), to consider the application of plain-error review in such circumstances. Because the Court's decision in *Greer* may affect the proper disposition of the petition for a writ of certiorari, the petition in this case should be held pending the decision in *Greer* and then disposed of as appropriate in light of that decision.

2. Petitioner separately renews his contention (Pet. 7-19) that the district court erred in declining to instruct the jury on his proposed "innocent transitory possession" defense to the charge of unlawful possession of a

firearm by a felon, in violation of 18 U.S.C. 922(g)(1). For the reasons explained at pages 6 to 14 of the government's brief in opposition in *Faircloth* v. *United States*, No. 19-6249 (Jan. 27, 2020) (Gov't *Faircloth* Br.), that contention lacks merit.[1] This Court has also recently and repeatedly declined to review petitions for writs of certiorari asserting similar claims. See *Becerra* v. *United States*, No. 20-5341 (Jan. 11, 2021); *Vereen* v. *United States*, 140 S. Ct. 1273 (2020) (No. 19-6405); *Faircloth* v. *United States*, 140 S. Ct. 1273 (2020) (No. 19-6249); see also Gov't *Faircloth* Br. at 6 (listing earlier denials).

The same course is warranted here, particularly because the court of appeals declined "to rule definitively on the existence of an innocent possession defense to [Section] 922(g)." Pet. App. 6a. The court instead stated only that "the defense is not available 'where the [defendant's] possession was not momentary or only for as long as necessary to deal with a justifying necessity of some kind.'" *Ibid.* (quoting *United States* v. *Miles*, 748 F.3d 485, 490 (2d Cir.) (per curiam), cert. denied, 574 U.S. 936 (2014)). The court then applied that standard and found "no evidentiary basis in this case for an innocent possession defense," *id.* at 7a, where petitioner purportedly "carr[ied] a gun down the street for purposes of taking it to a police precinct, particularly when [petitioner] was in possession of a working cell phone and could have contacted police," *id.* at 6a. The court accordingly found that petitioner was not entitled to an instruction on the defense, even assuming that another defendant in other circumstances might be. *Id.* at 7a.

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[1] We have served petitioner with a copy of the government's brief in opposition in *Faircloth*, which is also available from this Court's online docket.

The court of appeals' explanation accords with the one circuit that has recognized an innocent-possession defense to 18 U.S.C. 922(g)(1). In *United States* v. *Mason*, 233 F.3d 619 (2001), the D.C. Circuit accepted such a defense, but required a defendant asserting it to show that he obtained the firearm innocently and with no illicit purpose; that his possession was "transitory"; and that he "took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible." *Id.* at 624. Because the court of appeals here employed a similar standard when reviewing petitioner's invocation of such a defense, its fact-bound determination that the circumstances of petitioner's case would not qualify for it, in a non-precedential summary order, does not squarely implicate any disagreement with *Mason*.[2] See Pet. App. 6a-7a; see also *id.* at 14a (determination by district court that petitioner would not have been entitled to an instruction "even under the *Mason*

[2] Petitioner incorrectly states (Pet. 8-9) that the First Circuit recognized an innocent-possession defense to a Section 922(g)(1) charge in *United States* v. *Teemer*, 394 F.3d 59, cert. denied, 544 U.S. 1009 (2005). The First Circuit in *Teemer* actually rejected an innocent-possession instruction similar to the one petitioner sought here. See *id.* at 63 ("The district court was correct not to give this proposed instruction."); *id.* at 64 ("The statute bans possession outright without regard to how great a danger exists of misuse in the particular case."). The First Circuit also confirmed in a subsequent published decision that it had "declined to adopt th[e] innocent possession defense in *Teemer*." *United States* v. *Mercado*, 412 F.3d 243, 252 (2005). And while that court later recognized the defense in another context, see *United States* v. *Baird*, 712 F.3d 623, 629-631 (1st Cir. 2013), it has never done so in a Section 922(g) proceeding.

version of the innocent possession defense"). Further review of this issue is accordingly unwarranted.[3]

Respectfully submitted.

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[3] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.