No. 20-6791

IN THE

Supreme Court of the United States

ALVIN CHRISTOPHER PENN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

COURT DOCUMENTS

REPLY BRIEF

The lower courts did not allow the jury to decide whether Mr. Penn's possession of his aunt's gun—brief, non-commercial, entirely confined to Grand Prairie, Texas—bore any relationship to commerce beyond the fact that the gun was manufactured elsewhere. Nor did they allow the jury to decide whether he was justified in possessing the gun by necessity or self-defense. The Fifth Circuit applied *per se* rules that deprived Mr. Penn of a fair opportunity to defend against the government's charges. The petition explained why it is critical for the Court to review both questions presented, and why this is an ideal vehicle to examine them.

In response the government offers no serious reason to deny review. Its opposition consists primarily of debatable merits arguments, with one half-hearted and implausible vehicle attack on the first question. This Court should grant the petition.

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN S*CARBOROUGH* AND *LOPEZ*

The lower courts unanimously hold that the government meets its burden of proving that a gun is possessed "in or affecting commerce" for purposes of 18 U.S.C. § 922(g) if that gun ever crossed a state boundary at any point in the past. Pet. 9 n.2; Opp. 9. The government refuses to acknowledge that this conception of the Commerce power arrogates to Congress the right to regulate every aspect of American life, no matter how trivial, local, and temporary. The government also feigns ignorance of the tension between *Scarborough* v. *United States*, 431 U.S. 563 (1977), and more recent Commerce Clause decisions from this Court.

Movement of a gun across state lines does not make every subsequent act of possession "in or affecting commerce" for the rest of time. The government asserts that "*Scarborough* forecloses" this argument. Opp. 9. That may be so, but only because this Court has never limited or corrected *Scarborough* in light of *Lopez*. Lower courts "have uniformly held" to this dubious position, *ibid.*, not because it is correct, but only because they are *lower* courts, who cannot overrule that decision. Only this Court can fix this problem.

"*Scarborough,* as the lower courts have read it, cannot be reconciled with *Lopez*." *Alderman* v. *United States*, 131 S. Ct. 700, 702 (2011) (Thomas, J., dissenting from denial of certiorari). Judges throughout the nation recognize the conflict. Pet. 8–9 & n.3 (collecting cases). This Court should grant certiorari to at least address this conflict, which did not exist when *Scarborough* was decided.

2. This is not just a constitutional problem, and the Court need not strike down the entire federal crime of felon-in-possession. The post-1986 text of § 922(g) strongly suggests that Congress intended to impose a more stringent (and constitutionally valid) nexus requirement for simple possession of a firearm than what it required for commercial actions like shipping, transportation, and receipt, which is an inherently commercial concept. Pet. 14; see *Tot* v. *United States*, 319 U.S. 463, 466 (1943) (noting that "receipt," as used in a predecessor statute, "is confined to the receipt of firearms or ammunition as a part of interstate transportation"); *United States* v. *Bass*, 404 U.S. 336, 343 n.10 (1971) (reaffirming that approach to "receipt"). But as things stand, there is no need for the "ship," "transport," and "receipt" offenses because the "possess" offense covers all that conduct and more.

Against that strong textual evidence, the Government cites Congress's "recodification" of the nexus language—"in or affecting commerce"—from the predecessor statute, Pub. L. No. 90-351 § 1202(a), 82 Stat. 236 (1968), into its present-day form, 18 U.S.C. § 922(g). Opp. 9. As an initial matter, this is a merits argument, and not a reason to deny review. But it is also wrong. Congress did *not* copy Section 1202(a)'s text verbatim into the current § 922(g). The former law used a single formulation of the nexus element for the receipt, possession, and transportation offenses. 18 U.S.C. app. § 1202(a) (repealed 1986). As amended, § 922(g) distinguishes between receipt—reaching any firearm "which has been shipped or transported in interstate or foreign commerce"—and mere "possession," which must be "in or affecting commerce." 18 U.S.C. § 922(g); see Pet. 14. By using different language to define the nexus elements of "possess" and "receive," Congress surely intended to require different kinds of proof. If a firearm "has been . . . transported in interstate or foreign commerce," its commercial *receipt* is prohibited but noncommercial local possession is not.

More importantly, this argument ignores the effect of *Lopez* and other decisions reviving the original understanding of Congress's Commerce power. *Scarborough* arose when there were no discernible limits on Congress's Commerce power. See *United States* v. *Morrison*, 529 U.S. 598, 608 (2000) (noting the great "latitude" afforded Congress after 1937). Intervening decisions draw sharper boundaries on the scope of that power. See *United States* v. *Lopez*, 514 U.S. 549, 567–68 (1995); *Morrison*, 529 U.S. at 617–19; *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 548–58 (2012). Congress would not want the possession crime to exceed constitutional boundaries.

At best, the government's "recodification" argument shows that is debatable whether Congress intended § 922(g)'s possession crime to stretch as far as the lower courts have uniformly construed it—to reach every act of possessing any firearm that ever crossed a state line. Even if the modern-day § 922(g) incorporates *Scarborough*'s interpretation wholesale, that would just render the entire statute unconstitutional. That is no reason to deny certiorari.

3. Nor is the government's collection of denials of certiorari compelling. Opp. 6–7. None of those cases involved a defendant who took brief possession of someone else's gun entirely within the confines of a single city in the interior of a state.[1] In several of the cited cases, the petitioner directly participated in the market when he sold a firearm to an undercover detective or admitted purchasing the gun himself.[2] In others, there was strong evidence that the defendant purchased or otherwise acquired title to the firearm—it was in the defendant's house, or carried regularly.[3]

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[1] Mr. Penn possessed the firearm within Grand Prairie, Texas; he thew it into a field about two miles away from where he took possession. Trial Tr. Vol. II at 13–14, *United States* v. *Penn*, No. 3:17-cr-00506-L-1 (N.D. Tex. Nov. 20, 2018), ECF No. 139.

[2] *Bonet* v. *United States*, 139 S. Ct. 1376 (2019) (No. 18-7152); *Gardner* v. *United States*, 139 S. Ct. 1323 (2019) (No. 18-6771). *Cf. Robinson* v. *United States*, 139 S. Ct. 638 (2018) (No. 17-9169) (involving a petitioner who told police he purchased the firearm, directly implicating the three commerce elements of § 922(g)).

[3] *Garcia* v. *United States*, 139 S. Ct. 791 (2019) (No. 18-5762) (weapon found in petitioner's home during a probationary search); *Vela* v. *United States*, 139 S. Ct. 349 (2018) (No. 18-5882) (weapon found in a vehicle with no indicia of fleeting possession); *Terry* v. *United States*, 139 S. Ct. 119 (2018) (No. 17-9136) (involving a telephone call in which the petitioner acknowledged illicit ownership of a firearm).

That, too, suggests participation in the firearms market. In many cases, the issue was not even raised below.[4] None of these petitions resembles Mr. Penn's case, where the possession was temporary, local, and noncommercial.

4. The government also argues that the predominant interpretation of "in or affecting commerce"—reaching all firearms that ever crossed a state line—would be constitutional if Congress decided that it must prohibit all acts of local possession in order to effectively regulate the interstate market, as it has concluded for illegal drugs. Opp. 12–13. The government reasons that it might be hard for Congress to regulate the buying and selling of guns without regulating possession because felons may use "street-level and other informal transactions, or transactions using nominal or straw purchasers," to acquire firearms. *Ibid.* This complaint only goes to the merits of the case. It also assumes that Congress explicitly prohibited possession of *all* firearms that had *ever* moved across state lines. But that is not the scheme that Congress chose—instead, Congress chose to prohibit only certain acts of gun possession—those acts "in" commerce and those acts "affecting" commerce. 18 U.S.C. § 922(g). The firearm's travel history is irrelevant to those statutory terms, especially when the possession itself is local, temporary, and far removed in time and space from the last commercial transaction.

Properly construed, the possession crime could still reach every felon who possessed a firearm "in or affecting commerce." To the extent that there would occasionally be failure of proof—as in this case—of any real connection to commerce, Congress could rest

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[4] *Dixon* v. *United States*, 139 S. Ct. 473 (2018) (No. 18-6282).

easy knowing that every state has its own laws limiting felons' access to weapons.

For the first time, the government argues that it could also secure conviction without *Scarborough*'s *per se* rule "because the evidence indicates that [Mr. Penn] possessed a firearm on a highway." Opp. 13. And, the argument goes, Congress has the power to regulate highways "so far as is necessary to keep interstate traffic upon fair and equal terms." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 271 (1964) (Black, J., concurring). So maybe his brief foray onto a "highway" while fleeing the men trying to kill him brought this otherwise local activity within Congress's authority over channels of commerce.

This is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Fifth Circuit never had a chance to address any alternative theory for satisfying the nexus element because, in its view, the gun's "past connection" to commerce was enough. Pet. App. 13a. Nor did the jury have any chance to evaluate even the basics of Mr. Penn's so-called "highway" travel—its distance, duration, local (or intrastate) character—nor any other fact relevant to this new theory. Perhaps the government failed to mention this theory before because the local road the Fifth Circuit described as a "highway," Pet. App. 3a, is Carrier Parkway.[5] While it is a "highway" in the broad sense—"a road, street, [or] parkway," 23 U.S.C. § 101(a)(11)(A)—Carrier Parkway isn't an *interstate* highway and there is no evidence that it is a "channel" of interstate commerce. It won't take you any-

[5] *See, e.g.*, Trial Tr. Vol. V at 66, *United States* v. *Penn*, No. 3:17-cr-00506-L-1 (N.D. Tex. Oct. 26, 2018), ECF No. 136. There was separate testimony about momentary travel on the "service road" next to Texas State Highway 161. Trial Tr. Vol. II at 208.

where that isn't in Grand Prairie or the adjacent city of Arlington, Texas. This should not satisfy the nexus element, either, but that is an argument for another day.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT ABOUT FLIGHT FROM LAW ENFORCEMENT

The government resists review of the second question by arguing that the Fifth Circuit's decision is "fact-bound." Opp. 16. But that argument misses the forest for the trees. The Fifth Circuit applied a *per se* rule to preclude the affirmative defense: Mr. Penn fled from law enforcement without surrendering the gun, so the defense was unavailable. Pet. App. 7a–8a. The circuits are divided over that *per se* rule. The Third, Fifth, and Sixth Circuits apply it; the Fourth and Ninth Circuits do not.

1. The lower courts are divided about the preliminary burden an armed but prohibited person must satisfy before presenting a justification defense to the jury. The Fifth Circuit, following decisions from the Third and Sixth Circuits, applied a *per se* rule: "A defendant can't assert a justification defense if he 'fails to'" surrender a firearm as soon as "a police officer happens to find" him in possession of a gun. Pet. App. 7a–8a (quoting *United States* v. *Moore*, 733 F.3d 171, 174 (6th Cir. 2013)); see also *United States* v. *Paolello*, 951 F.2d 537, 542 (3d Cir. 1991) (A pursuing policeman would, if recognized, provide the defendant "an opportunity to dispose of the gun and stop running earlier than he did.").

The Fourth and Ninth Circuits do not apply this *per se* rule. In those circuits, a defendant's flight from law enforcement does not preclude him from presenting

the defense to the jury as a matter of law. In *United States* v. *Ricks*, 573 F.3d 198, 204 (4th Cir. 2009), the Fourth Circuit recognized that surrendering the firearm to authorities was only one of several "options for reasonable dispossession of a firearm," and "ultimately, *the reasonableness of the defendant's course of conduct is a question for a jury*." (emphasis added). Likewise, in *United States* v. *Gomez*, 92 F.3d 770 (9th Cir. 1996), the court held that a jury could have believed that a defendant's justification did not evaporate the moment he fled from law enforcement agents; in fact, the jury could have believed that he remained justified even after he discarded the weapon until his arrest the following day. *Id.* at 773–74.

Attempting to cast doubt on the split, the government cites *United States* v. *Beasley*, 346 F.3d 930 (9th Cir. 2003) Opp. 20–21. But *Beasley* confirms the circuit split, and it is consistent with *Ricks* and *Gomez*. Unlike Mr. Penn, the defendant in *Beasley* had an opportunity to present evidence of his affirmative defense to the jury and to explain "why he did not immediately turn over the gun to the police." *Id.* at 936. Beasley's jury was not persuaded. *Ibid.* Mr. Penn's jury never had a chance to consider his justification defense, because the Fifth Circuit is on the wrong side of a five-circuit split. Mr. Penn asks the Court only to resolve that purely legal question—does flight from law enforcement automatically preclude presentation of a justification defense to § 922(g)? The question has divided the lower courts and it was outcome determinative below.

2. This is not a case involving "misapplication of a properly stated rule of law." Opp. 16 (quoting Sup. Ct. R. 10). The circuit split is not merely about diverging outcomes given different factual scenarios. The circuit split concerns the threshold showing a defendant

must make before presenting his affirmative defense to the jury. The lower courts precluded Mr. Penn from presenting an affirmative defense because of an incorrect *per se* rule. A defendant is entitled to present an affirmative defense if "there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). The reasonableness of Mr. Penn's continued possession of the gun during a five-minute police chase is a question properly reserved for the jury.

3. A reasonable jury could have concluded, in light of all the surrounding circumstances (and in particular Devante Scott's history of terrorizing his family), that Mr. Penn was justified when he took possession of his aunt's pistol. The jury could likewise reasonably conclude that he remained justified during and despite the brief, five-minute pursuit by police. This is exactly the sort task our system entrusts to jurors—"not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *United States* v. *Gaudin*, 515 U.S. 506, 514 (1995).

To be sure, there are facts the support both sides. The trial judge believed Mr. Penn should have "pull[ed] over or attempt[ed] to flag the officer for assistance." Pet. App. 25a. The Fifth Circuit decided that his fear of a "beating" by police if he had surrendered the gun during the pursuit did not excuse his failure to do so. Pet. App. 8a. The government points to other facts that, in its view, made any justification evaporate during the chase. Opp. 15.

But in our constitutional system, a judge's assessment of the facts does not control. Even when a court is "entirely satisfied" with its own view of the evidence, it must instruct the jury on any theory arguably supported. *Stevenson* v. *United States*, 162 U.S.

313, 323 (1896). "[I]t is the province of the jury to determine from all the evidence what the [defendant's] condition of mind was." *Id.*

All of those facts could have, and should have, been submitted to the jury to consider along with Mr. Penn's excluded justification evidence. Pet. App. 38a–52a. There is reason to believe that the jury would have acquitted him. Even without knowledge of Scott's violent history and death threats against Mr. Penn, the jurors sent a note to the judge during deliberations asking for instructions on the law of justification. Pet. App. 29a–33a. This note "demonstrates" that they "were uncertain" about whether to convict him, even without hearing his full defense. *Weeks* v. *Angelone*, 528 U.S. 225, 241 (2000) (Stevens, J., dissenting). If the court had allowed them to consider justification and all the evidence, they probably would have acquitted Mr. Penn. Instead, following the erroneous *per se* rule, the district court forbade the jury from "consider[ing] justification during the course of your deliberations." Pet. App. 33a. That would not happen in the Fourth or Ninth Circuits.

4. The availability of the justification defense should not turn on an accident of geography. Unless and until this Court intervenes, defendants in the Fourth and the Ninth Circuits will be allowed to present a justification defense even if they fled from law enforcement before releasing the firearm. Defendants in the Third, Fifth, and Sixth Circuits will not.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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