

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JACQUES LISBEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1) is unconstitutional on its face and as-applied because Congress lacks the power under the Commerce Clause to criminalize the possession of a firearm by a felon simply because the firearm had travelled across state lines at one time.

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Jacques Lisbey, and Respondent, United States of America.

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Petitioner Jacques Lisbey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in case number 20-30024.

OPINIONS BELOW

The district court’s order denying petitioner Jacques Lisbey’s motion to dismiss the First Superseding Indictment is in the Appendix at App. 24.

The unpublished Memorandum Decision of the Ninth Circuit Court of Appeals affirming the district court’s order denying Lisbey’s motion to dismiss is at App. 1-3.

JURISDICTION

The Ninth Circuit affirmed the district court’s denial of Lisbey’s motion to dismiss on August 6, 2021. App. 1-3. This Court has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(a) and the Court’s rules 13.1 and 13.3.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, states:

The Congress shall have the power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, to the People.

Title 18, U.S.C. § 922(g)(1) provides:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

...

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

On January 15, 2019, the government filed an Indictment charging defendant Jacques Lisbey with one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Lisbey moved to dismiss the indictment on two grounds: (1) that § 922(g)(1) is unconstitutional on its face and as applied to him under the Commerce Clause of the United States Constitution; and (2) that the indictment failed to allege an essential element, that is, that he “knowingly” violated the statute. App. 30-36.

In response, the government filed a First Superseding Indictment that added the allegation that Lisbey acted “knowingly” in possessing a firearm after having been previously convicted of a felony. App. 28-29. Lisbey then filed a renewed motion to dismiss the First Superseding Indictment on the same grounds as in his initial motion to dismiss. App. 25-27. Without a hearing, the district court denied Lisbey’s initial motion and renewed motion to dismiss. App. 24. The court rejected his first argument that § 922(g) is unconstitutional under the Commerce Clause based on *United States v. Nguyen*, 88 F.3d 812, 820-21 (9th Cir. 2003). And the court held that any infirmity in the initial indictment

with respect to the mens rea element was mooted by the addition of the element in the First Superseding Indictment.

Lisbey then pled guilty without a plea agreement. App. 4-23. In entering his guilty plea, Lisbey agreed to the government's recitation of facts as follows:

On or about August 25, 2018, within the District of Alaska, the defendant, Jacques Lisbey, knowingly having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a Smith & Wesson revolver, serial number CFT2916, that according to an agent with the Bureau of Alcohol, Tobacco, Firearms, & Explosives, that weapon had been manufactured in another state and had to have traveled in interstate commerce to arrive in Alaska.

An Anchorage police officer, on August 25, 2018, saw the defendant fail to stop at a stop sign, so the officer initiated a traffic stop. During the traffic stop, the defendant told the police officer that he had a gun in his pants. Anchorage police officers assisted the defendant in exiting the car.

Subsequently, at the defendant's direction, an officer retrieved the gun in the defendant's pants that had slipped under the waistband.

The defendant was previously convicted on September 6, 2013, of murder II in Alaska state court under Case No. 4FA-11-02702 CR. The defendant knew that he had been convicted of a felony, which was punishable by imprisonment for a term exceeding one year.

App. 18-19.

On January 6, 2020, the district court sentenced Lisbey to 34 months imprisonment and two years supervised release.

On appeal, the Ninth Circuit affirmed the district court's order denying Lisbey's motion to dismiss. App. 1-3.

REASONS FOR GRANTING THE PETITION

18 U.S.C. § 922(g)(1) is unconstitutional on its face and as-applied because Congress lacks the authority under the Commerce Clause to criminalize firearm possession simply because the firearm had travelled across state lines at one time.

It is a fundamental principle of our Constitution that the federal government is one of limited, enumerated powers. U.S. Const. art. I, § 8. “The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). The Tenth Amendment expresses this core principle by providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.” U.S. Const. amend. X; *see Bond v. United States*, 564 U.S. 211, 225 (2011) (“The principles of limited national powers and

state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it.”).

The “general power of governing,” commonly known as the “police power,” belongs to the States—not the federal government. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012). “The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.” *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting). It is undisputed that “States possess primary authority for defining and enforcing the criminal law.” *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995); *see also United States v. Morrison*, 529 U.S. 598, 617 (2000) (noting there is “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims”). As a result, “[a] criminal act committed wholly within a state ‘cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.’” *Bond v. United States*, 572 U.S. 844,

854 (2014) (*Bond II*) (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

Under our constitutional scheme, therefore, Congress has no powers except those specified in the Constitution: “Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.” *Morrison*, 529 U.S. at 607. Those powers are carefully spelled out in Article I, Section 8, and do not include a general police power to create and punish criminal offenses. *United States v. Kebodeaux*, 570 U.S. 387, 401-02 (2013) (Roberts, J., concurring); *Morrison*, 529 U.S. at 618-19 (“[W]e have always rejected readings of . . . the scope of police power that would permit Congress to exercise a police power.”).

In the district court, Lisbey argued that 18 U.S.C. § 922(g)(1) is unconstitutional, facially and as applied, because the statute exceeds Congress’s authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. This Court has identified three general areas that Congress may regulate under its Commerce Clause powers: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, or the persons or things in interstate commerce; and (3)

“those activities having substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” *Lopez*, 514 U.S. at 558-59 (1995); *Raich*, 545 U.S. at 16. The first two categories don’t apply here.

Nor does § 922(g) regulate “activities having substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” Section 922(g) does not establish that the non-economic activity of possession “substantially affects” interstate commerce in general, and does not “ensure, through case-by-case inquiry, that the firearm in question substantially affects interstate commerce.” *Lopez*, 514 U.S. at 561-62. Thus, section 922(g) is facially unconstitutional.

Further, § 922(g) is unconstitutional as applied to Lisbey’s intrastate possession of a firearm in this case. When an Anchorage police officer detained Lisbey and recovered the firearm charged in this case during a routine traffic stop in Anchorage. Lisbey was not engaging in any commercial or interstate activity. There is no evidence that the firearm had recently moved through interstate commerce or that Lisbey knew the firearm had traveled across state lines. Because

the facts do not show a substantial connection between the firearm and Lisbey's activities and interstate commerce, the statute is unconstitutional as applied to him.

On appeal, the Ninth Circuit rejected Lisbey's arguments that Congress lacked the power to enact § 922(g)(1) under its Commerce Clause powers, citing its decisions in *United States v. Hanna*, 55 F.3d 1456, 1462 (9th Cir. 1995), *United States v. Nguyen*, 88 F.3d 812, 820-21 (9th Cir. 1996), and *United States v. Latu*, 479 F.3d 1153, 1156-57 (9th Cir. 2007). App. 2. The appellate court also held that the statute is not unconstitutional as applied to Lisbey because during his plea colloquy, he “agreed to the government’s recitation of facts, which included the fact the firearm he possessed ‘had been manufactured in another state and had to have traveled in interstate commerce to arrive in Alaska.’” App. 2.

The Ninth Circuit’s precedents are based on a 1977 decision by this Court that rejected a challenge to a prior version of the statute. In *Scarborough v. United States*, 431 U.S. 563 (1977), the Court held that 18 U.S.C. § 1202(a), the predecessor to § 922(g)(1), required only ‘the minimal nexus that the firearm have been, at some time, in interstate

commerce.” 431 U.S. at 575. But in *Scarborough* “no party alleged that the statute exceeded Congress’ authority, and the Court did not hold that the statute was constitutional.” *Alderman v. United States*, 562 U.S. 1163, 1165 (2011) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari). Nonetheless, circuit courts have long relied on *Scarborough* in rejecting Commerce Clause challenges to § 922(g) (and similar statutes). *See, e.g., United States v. Chesney*, 86 F.3d 564, 568 (6th Cir. 1996) (“all ten courts of appeals that have considered the constitutionality of § 922(g)(1) since *Lopez* have upheld the statute”); *Hanna*, 55 F.3d at 1461-62.

Lisbey asked the Ninth Circuit to overrule its prior rulings in light of this Court’s decisions in *Sebelius* and *Bond II*. App. 2. In *Sebelius*, the Supreme Court noted that “[a]s expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power of reaching ‘activity.’” 567 U.S. at 551 (noting that the individual mandate “does not regulate existing commercial activity”). Under *Sebelius*, Congress can only regulate a person’s activity under the Commerce Clause if that person is *currently* engaged in *activity* affecting the relevant market.

Likewise, in *Bond II*, the Court held that the Chemical Weapons Convention Implementation Act did not reach the defendant's conduct as it was a purely local crime of assault. 572 U.S. at 866. In doing so, this Court emphasized that a contrary reading of the statute "would 'alter sensitive federal-state relationships,' convert an astonishing amount of 'traditionally local criminal conduct' into 'a matter for federal enforcement,' and 'involve a substantial extension of federal police resources.'" *Bond II*, 572 U.S. at 863 (quoting *United States v. Bass*, 404 U.S. 336, 349-50 (1971)).

Here, § 922(g) is unconstitutional because intrastate possession of a firearm is not an "activity" nor does it substantially affect interstate commerce. It is a local crime that has long been regulated by the state. Congress lacks the power to criminalize possession of a firearm by a felon simply because the firearm had travelled across state lines in the past.

The Ninth Circuit rejected Lisbey's constitutional challenge, holding that it is bound by *Hanna* and other circuit precedent. App. 2 ("We have repeatedly held that § 922(g)(1) is a constitutional exercise of Congress's Commerce Clause authority."). As two justices noted ten

years ago with respect to *Lopez* and *Morrison*, circuit courts “have determined that ‘[a]ny doctrinal inconsistency between *Scarborough* and the Supreme Court’s more recent decisions is not for [appellate courts] to remedy,’ *ibid.*, and have stated their intent to follow *Scarborough* ‘until the Supreme Court tells us otherwise.’” *Alderman*, 562 U.S. at 1166 (2011) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari). The same holds true today. *See, e.g.*, App. 2 (“We decline Lisbey’s invitation to overrule this line of [Ninth Circuit] precedent in light of *Sebelius* and *Bond*.); *United States v. Penn*, 969 F.3d 450, 460 (5th Cir. 2020) (rejecting constitutional challenge because “*Bond* did not address § 922(g) or abrogate our precedent”), *cert. denied*, 209 L.Ed.2d 554 (Apr. 19, 2021); *United States v. Bron*, 709 Fed. Appx. 551, 554 (11th Cir. 2017) (explaining that because “*Sebelius* did not address the constitutionality of § 922(g), nor did it express an intention to overrule the precedents on which our cases relied in finding § 922(g) constitutional as applied to conduct like Bron’s, . . . *Sebelius* is not ‘clearly on point’ for purposes of the prior-precedent rule”), *cert. denied*, 200 L.Ed.2d 211 (2018); *United States v. Roszkowski*, 700 F.3d 50, 58 (1st Cir. 2012) (“even if *Sebelius* changed the Supreme Court’s

Commerce Clause jurisprudence,” it did not undermine the validity of § 922(g)(1)).

Lisbey squarely raised the constitutional issue here in a motion to dismiss in the district court. Despite changes to Commerce Clause jurisprudence in *Sebelius* and *Bond II*, circuit courts have made clear they will not reevaluate the constitutionality of § 922(g) without further direction from this Court. The Court thus should grant certiorari to decide whether Congress had the power to enact § 922(g) under its Commerce Clause powers in light of the Court’s post-*Scarborough* pronouncements on the Commerce Clause and the Tenth Amendment, most notably *Sebelius* and *Bond II*. See, e.g. *Alderman*, 562 U.S. at 1163-68 (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (explaining that congressional regulation of intrastate possession of body armor because it had crossed state lines sometime in the past exceeded Congress’s authority under the Commerce Clause and infringed upon traditional state powers).

CONCLUSION

For these reasons, the Court should grant Lisbey's petition for writ of certiorari.

Dated: October 18, 2021

Respectfully submitted,



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