No. 22-6853

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA SEEKINS, 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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QUESTIONS PRESENTED

1. Whether this Court's longstanding interpretation of language now codified in 18 U.S.C. 922(g)(1), which makes it unlawful for a convicted felon to possess ammunition that has traveled in interstate commerce, is correct and consistent with the Commerce Clause.

2. Whether the court of appeals correctly determined that an asserted error in the calculation of petitioner's advisory sentencing guidelines was harmless, where the district court expressly stated that the sentencing factors set forth in 18 U.S.C. 3553(a) would result in the same sentence regardless of that assertion.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Seekins, No. 19-cr-563 (May 25, 2021)

United States Court of Appeals (5th Cir.):

United States v. Seekins, No. 21-10556 (Aug. 24, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2022 WL 3644185.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2022. A petition for rehearing was denied on November 11, 2022 (Pet. App. 14a). On January 30, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 11, 2023, and the petition for a writ of

certiorari was filed on February 21, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of possessing ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. He was sentenced to 70 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-6a.

1. In June 2019, an officer arrested petitioner, a felon, for driving a U-Haul truck that had been reported stolen. C.A. ROA 353-358. A search of petitioner revealed that he was carrying a shotgun shell on his person. Id. at 366-367. When asked why he had a shotgun shell, petitioner claimed that he "found it." Id. at 367. A search of the U-Haul truck uncovered another shotgun shell inside a flare gun that had been modified to accept a shotgun shell. Id. at 369, 371. Petitioner claimed that he had found the flare gun in a dumpster. Id. at 388.

2. A federal grand jury in the Northern District of Texas indicted petitioner for possessing ammunition in and affecting interstate and foreign commerce following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). C.A. ROA 118.

Petitioner moved to dismiss the superseding indictment on the theory that Section 922(g) exceeded Congress's enumerated powers.

C.A. ROA 132-133, 183-187. Petitioner also objected to "any [jury] instruction that mere passage of a firearm across state lines at some unspecified point in the past satisfies the commerce requirement" of 18 U.S.C. 922(g). C.A. ROA 245 n.5; see id. at 545-546. But petitioner "concede[d] that the Supreme Court previously embraced this interpretation for the predecessor" to Section 922(g). Id. at 245 n.5 (citing United States v. Bass, 404 U.S. 336, 350-351 (1971); Scarborough v. United States, 431 U.S. 563, 575 (1977)).

The district court did not expressly deny petitioner's motion to dismiss, but overruled his objection to the jury instructions. C.A. ROA 546. The court instructed the jury that to find petitioner guilty, it was required to find "[t]hat the ammunition possessed traveled in interstate or foreign commerce; that is, before the defendant possessed the ammunition, it had traveled at some time from one state to another or between any part of the United States." Id. at 288, 570. The jury found petitioner guilty. Id. at 292. The court denied petitioner's motions for judgment of acquittal. Id. at 453, 456, 532, 534.

3. Applying the advisory Sentencing Guidelines, the Probation Office recommended a base offense level of 20 under Sentencing Guidelines § 2K2.1(a)(4)(B)(II)(ii)(I), which included an enhancement that treated the modified flare gun as a firearm under 26 U.S.C. 5845(a)(5). Presentence Investigation Report (PSR) ¶¶ 13, 18. Section 5845 defines a "firearm" to include any

weapon or device "capable of being concealed on the person from which a shot can be discharged through the energy of an explosive," subject to certain inapplicable exceptions. 26 U.S.C. 5845(a)(5) and (e). The Probation Office determined that petitioner's flare gun satisfied that definition because "it was modified to accept conventional shotgun cartridges and was capable of expelling a projectile by the action of an explosive." PSR ¶ 13.

The Probation Office's calculations of a total offense level of 20 and a criminal history category of VI resulted in a recommended guidelines range of 70 to 87 months of imprisonment. PSR ¶¶ 26, 44, 67. Petitioner objected to the base offense level on the theory that the flare gun could not be classified as a firearm unless it had a metal insert or sleeve that would prevent it from self-destructing during firing. C.A. ROA 938. The district court overruled petitioner's objection and adopted the recommended guidelines range of 70 to 87 months. Id. at 617-618.

After considering the factors listed in 18 U.S.C. 3553(a), the district court imposed a sentence of 70 months. C.A. ROA 624. The court found that petitioner had committed a "serious offense"; that the "circumstances surrounding" the offense included driving a stolen vehicle; that petitioner had the modified flare gun "for inappropriate purposes"; and that despite petitioner's "long criminal history" with "several offenses in his past," he "just has not learned his lesson." Id. at 623. The court told petitioner that "the wake-up call has been ringing and you just have refused

to answer it" and that "[w]hen you get out, you're going to have to do something to turn your life around or it's just going to get worse and worse for you every time." Id. at 623-624.

The district court determined that petitioner's sentence would promote respect for the law, impose a just punishment on petitioner, deter petitioner from committing additional crimes and thereby protect the public, and deter others from similar conduct. C.A. ROA 623-624. The court further stated:

> For the record, this is the sentence that the Court would have imposed under any and all circumstances. So to the extent that any of the objections are deemed appropriate by the Court of Appeals, the Court concludes that under all the circumstances of this case, this is an appropriate, fair and reasonable sentence, taking into account all the factors under 18 United States Code Section 3553(a).

Pet. App. 40a.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-6a. The court observed that petitioner's claim that Section 922(g) exceeds Congress's power under the Commerce Clause was foreclosed by circuit precedent. Id. at 3a-5a. And it rejected petitioner's renewed contention of error in classifying his flare gun as a firearm for purposes of the advisory Sentencing Guidelines, finding that any such error was harmless in the circumstances of this case. Id. at 5a-6a.

The court of appeals explained that although petitioner had directly put the non-enhanced range of 37-46 months of imprisonment at issue, the district court had "[n]onetheless * * * determined that a 70-month sentence was fair and reasonable even absent the

§ 2K2.1(a)(4)(B)(II)(ii)(I) enhancement." Pet. App. 6a. The court declined to "demand magic words or robotic incantations" from the district judge. Ibid. (citation and internal quotation marks omitted). And the court found that the "district court's statements at sentencing, taken in their totality, are sufficient to support application of the harmless error doctrine." Ibid.

5. The court of appeals denied rehearing en banc. Pet. App. 14a-22a. Judge Ho, joined by Judges Smith and Engelhardt, issued an opinion dissenting from the denial of rehearing en banc, in which he stated that he would have reconsidered binding circuit precedent upholding the constitutionality of Section 922(g) under the Commerce Clause. Id. at 16a-22a.

ARGUMENT

Petitioner contends (Pet. 11-18) that this Court's longstanding interpretation of language in 18 U.S.C. 922(g)(1), which prohibits convicted felons from possessing ammunition "in or affecting commerce," exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. 1, § 8, Cl.3. The court of appeals correctly rejected that contention, and its unpublished per curiam decision does not conflict with any decision of this Court or another court of appeals. This Court has recently and

repeatedly denied certiorari on this issue,[1] and the same result is warranted here.[2]

Petitioner also contends (Pet. 18-29) that the court of appeals erred in affirming his sentence on harmless-error grounds based on its determination that the asserted error in the calculation of petitioner's advisory guidelines range did not affect the sentence imposed. That contention likewise lacks merit; the court's decision does not conflict with any decision of this Court or another court of appeals; and this case would in any event be a poor vehicle for addressing the question presented, because the district court did not err in calculating petitioner's advisory sentencing range. This Court has repeatedly and recently denied petitions for certiorari on that issue as well, and should follow the same course here.[3]

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[1] See, e.g., Penn v. United States, 141 S. Ct. 2526 (2021) (No. 20-6791); Perryman v. United States, 141 S. Ct. 2524 (2021) (No. 20-6640); Johnson v. United States, 141 S. Ct. 137 (2020) (No. 19-7382); Bonet v. United States, 139 S. Ct. 1376 (2019) (No. 18-7152); Gardner v. United States, 139 S. Ct. 1323 (2019) (No. 18-6771); Garcia v. United States, 139 S. Ct. 791 (2019) (No. 18-5762); Robinson v. United States, 139 S. Ct. 638 (2018) (No. 17-9169); Dixon v. United States, 139 S. Ct. 473 (2018) (No. 18-6282); Vela v. United States, 139 S. Ct. 349 (2018) (No. 18-5882); Terry v. United States, 139 S. Ct. 119 (2018) (No. 17-9136); Brice v. United States, 137 S. Ct. 812 (2017) (No. 16-5984); Gibson v. United States, 579 U.S. 919 (2016) (No. 15-7475).

[2] The pending petitions for writs of certiorari in Stevens v. United States, No. 22-7157 (filed Mar. 23, 2023), Frase v. United States, No. 22-7258 (filed Apr. 10, 2023), Baker v. United States, No. 22-7276 (filed Apr. 10, 2023), Gonzales v. United States, No. 22-7320 (filed Apr. 17, 2023), and Mack v. United States, No. 22-7524 (filed May 9, 2023), raise similar issues.

[3] See, e.g., Brooks v. United States, 143 S. Ct. 585 (2023) (No. 22-5788); Irons v. United States, 143 S. Ct. 566 (2023) (No.

1. Petitioner principally argues (Pet. 11-18) that Section 922(g)(1) exceeds Congress's power under the Commerce Clause. In particular, he argues that the fact that ammunition has previously traveled across state lines does not establish a constitutionally sufficient basis for prohibiting a felon from possessing it. That argument lacks merit.

a. In its current form, Section 922(g) identifies nine categories of persons -- including those who have previously been convicted of a felony, 18 U.S.C. 922(g)(1) -- to whom ammunition restrictions attach. Section 922(g) makes it unlawful for such persons "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." 18 U.S.C. 922(g).

In United States v. Bass, 404 U.S. 336 (1971), this Court considered a predecessor criminal provision that applied to any person within specified categories (including convicted felons)

22-242); Brown v. United States, 141 S. Ct. 2571 (2021) (No. 20-6374); Rangel v. United States, 141 S. Ct. 1743 (2021) (No. 20-6409); Snell v. United States, 141 S. Ct. 1694 (2021) (No. 20-6336); Thomas v. United States, 141 S. Ct. 1080 (2021) (No. 20-5090); Torres v. United States, 140 S. Ct. 1133 (2020) (No. 19-6086); Elijah v. United States, 139 S. Ct. 785 (2019) (No. 18-16); Monroy v. United States, 138 S. Ct. 1986 (2018) (No. 17-7024); Shrader v. United States, 568 U.S. 1049 (2012) (No. 12-5614); Savillon-Matute v. United States, 565 U.S. 964 (2011) (No. 11-5393); Effron v. United States, 565 U.S. 835 (2011) (No. 10-10397); Rea-Herrera v. United States, 557 U.S. 938 (2009) (No. 08-9181); Mendez-Garcia v. United States, 556 U.S. 1131 (2009) (No. 08-7726); Bonilla v. United States, 555 U.S. 1105 (2009) (No. 08-6668).

who "receives, possesses, or transports in commerce or affecting commerce . . . any firearm." Id. at 337 (quoting 18 U.S.C. App. 1202(a) (1968)). The Court held that the statute's "in commerce or affecting commerce" requirement applied to the receipt and possession offenses as well as to the transportation offense, and that each requires the government must prove a case-specific connection to interstate commerce. Id. at 347-350. In particular, the Court held that the statute required proof that the firearm that a defendant had been charged with receiving had itself "previously traveled in interstate commerce." Id. at 350. The Court explained that such an element would ensure that the statute remained "consistent with * * * the sensitive relation between federal and state criminal jurisdiction." Id. at 351.

Then, in Scarborough v. United States, 431 U.S. 563 (1977), this Court specifically focused on the jurisdictional element in the context of a felon-in-possession offense and held that it is satisfied by proof that the relevant firearm previously traveled in interstate commerce. Id. at 568, 575, 578. The Court rejected the defendant's argument that "the possessor must be engaging in commerce" "at the time of the [possession] offense," explaining that Congress's use of the phrase "affecting commerce" demonstrated its intent to assert "'its full Commerce Clause power.'" Id. at 568-569, 571 (citation omitted).

Scarborough thus forecloses petitioner's contention that the Commerce Clause requires the government to prove more than the

prior movement of ammunition in interstate commerce in order to satisfy Section 922(g)(1)'s jurisdictional element. And consistent with Bass and Scarborough, the courts of appeals have uniformly recognized that Section 922(g)'s prohibition against possessing a firearm that has previously moved in interstate commerce falls within Congress's Commerce Clause authority. See, e.g., United States v. Torres-Colón, 790 F.3d 26, 34 (1st Cir.), cert. denied, 577 U.S. 882 (2015); United States v. Bogle, 522 Fed. Appx. 15, 22 (2d Cir. 2013); United States v. Brown, 765 F.3d 278, 284 n.1 (3d Cir. 2014); United States v. Lockamy, 613 Fed. Appx. 227, 228 (4th Cir. 2015) (per curiam), cert. denied, 577 U.S. 1085 (2016); United States v. Rendon, 720 Fed. Appx. 712, 713 (5th Cir.) (per curiam), cert. denied, 139 S. Ct. 259 (2018); United States v. Conrad, 745 Fed. Appx. 60, 60 (9th Cir. 2018); United States v. Griffith, 928 F.3d 855, 865 (10th Cir. 2019); United States v. Vereen, 920 F.3d 1300, 1317 (11th Cir. 2019), cert. denied, 140 S. Ct. 1273 (2020).

b. Petitioner contends (Pet. 15-17) that the court of appeals decisions that uphold the constitutionality of Section 922(g) under the Commerce Clause -- as well as Scarborough itself -- are invalid under United States v. Lopez, 514 U.S. 549 (1995). That contention lacks merit.

In Lopez, the Court held unconstitutional a federal prohibition against possessing a firearm in a school zone in 18 U.S.C. 922(q) (1988 & Supp. IV 1992), which "by its terms ha[d]

nothing to do with 'commerce' * * * , however broadly one might define th[at] term[]." 514 U.S. at 561. The Court explained that Section 922(q), among other things, "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Ibid.

Lopez did not cast doubt on Scarborough's continuing force or the constitutionality of Section 922(g)(1) as applied to ammunition that has previously moved in interstate commerce. Section 922(g), unlike the provision at issue in Lopez, requires proof of a connection to interstate commerce in each case. In fact, the Court in Lopez specifically distinguished the felon-in-possession statute from the school-zone provision, noting that the felon-in-possession statute contains an "express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562.

This Court recognized in Lopez that Congress has authority under the Commerce Clause to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." 514 U.S. at 558. In exercising that authority, Congress may address harmful consequences associated with particular classes of goods and transactions. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964); United States v. Darby, 312 U.S. 100, 112-115 (1941).

Section 922(g)(1) regulates goods in interstate commerce -- firearms and ammunition -- by addressing a particular, harmful segment of the interstate market in those goods: the acquisition by felons of firearms and ammunition that have been the subject of interstate commerce.

In addition, Section 922(g)(1)'s ammunition-possession prohibition is a component of a larger statutory scheme regulating the interstate market in firearms and ammunition, preventing felons from participating in that market. Section 922(g) not only bars felons from possessing firearms and ammunition that have traveled in interstate commerce, but also prohibits such individuals from "ship[ping] or transport[ing]" those items "in interstate or foreign commerce," and from "receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g). As the Court reaffirmed in Gonzales v. Raich, 545 U.S. 1 (2005), "Congress can regulate purely intrastate activity that is not itself 'commercial' * * * if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." Id. at 18; see id. at 36 (Scalia, J., concurring in the judgment) ("Though the conduct in Lopez was not economic, the Court nevertheless recognized that it could be regulated as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'") (quoting Lopez, 514 U.S. at 561).

If the federal prohibition were limited to direct participation by felons in interstate transactions, it would often be difficult to establish the precise circumstances under which a particular felon acquired his firearm or ammunition. That difficulty would be especially acute for transactions outside traditional retail channels, such as street-level and other informal transactions, or transactions using nominal or straw purchasers. Cf. Scarborough, 431 U.S. at 576 ("Those who do acquire guns after their conviction obviously do so surreptitiously."). Given those enforcement problems, Congress could have reasonably determined that a ban on possession by felons of any firearm or ammunition that has previously moved in interstate commerce is a necessary and proper means of achieving its objectives. See Raich, 545 U.S. at 22. Indeed, "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." Id. at 26.

c. Petitioner's contention (Pet. 11-14) that further review is warranted, based on the assertion the courts of appeals "have been unable to reconcile" Scarborough with Lopez, is unsound. This Court "reviews judgments, not statements in opinions." California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam) (quoting Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956)). And every court of appeals to have considered the question has upheld Section 922(g)(1) following Lopez.

Furthermore, petitioner's assertion (Pet. 12-14) of a methodological conflict is mistaken. He recognizes (Pet. 13) that nine courts of appeals have relied on Scarborough to uphold the constitutionality of Section 922(g)(1). He nevertheless attempts to manufacture a circuit conflict by citing two circuits that have upheld the constitutionality of Section 922(g)(1) "independent of Scarborough." Ibid. But while the Fourth Circuit in United States v. Gallimore, 247 F.3d 134 (2001), did not cite Scarborough, it expressly relied on decisions that did. Id. at 138 (citing United States v. Santiago, 238 F.3d 213, 216-217 (2d Cir.) (per curiam), cert. denied, 532 U.S. 1046 (2001); United States v. Dorris, 236 F.3d 582, 585-586 (10th Cir. 2000), cert. denied, 532 U.S. 986 (2001); United States v. Napier, 233 F.3d 394, 401-402 (6th Cir. 2000)). And the Sixth Circuit in United States v. Chesney, 86 F.3d 564 (1996), cert. denied, 520 U.S. 1282 (1997), interpreted Scarborough to hold that the predecessor to Section 922(g)(1), and thus Section 922(g)(1), "clearly was within Congress's power." Id. at 571.

2. Petitioner also contends (Pet. 18-29) that the court of appeals erred in applying the principles of harmless-error review to the district court's calculation of his advisory guidelines range. The court of appeals' decision is correct and no further review is warranted.

a. In Gall v. United States, 552 U.S. 38 (2007), this Court stated that under the advisory Sentencing Guidelines, an appellate

court reviewing a sentence, within or outside the guidelines range, must ensure that the sentencing court made no significant procedural error, such as by failing to calculate or incorrectly calculating the guidelines range, treating the Guidelines as mandatory, failing to consider the sentencing factors set forth in 18 U.S.C. 3553(a), making clearly erroneous factual findings, or failing to explain the sentence. 552 U.S. at 51. The courts of appeals have consistently recognized that errors of the sort described in Gall do not automatically require a remand for resentencing, and that ordinary appellate principles of harmless-error review apply. As the Seventh Circuit has explained:

> [a] finding of harmless error is only appropriate when the government has proved that the district court's sentencing error did not affect the defendant's substantial rights (here -- liberty). To prove harmless error, the government must be able to show that the Guidelines error "did not affect the district court's selection of the sentence imposed." [United States v. Anderson, 517 F.3d 953, 965 (7th Cir. 2008)] (quoting Williams v. United States, 503 U.S. 193, 203 (1992) (applying harmless error pre-Gall)).

United States v. Abbas, 560 F.3d 660, 667 (2009); see Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

A sentencing court may confront a dispute over the application of the Sentencing Guidelines. When the court resolves that issue and imposes a sentence inside or outside the resulting advisory guidelines range, it may also explain that, had it resolved the disputed issue differently and arrived at a different advisory

guidelines range, it would nonetheless have imposed the same sentence in light of the factors enumerated in Section 3553(a). Under proper circumstances, that permits the reviewing court to affirm the sentence under harmless-error principles even if it disagrees with (or, as here, does not independently consider) the sentencing court's resolution of the disputed guidelines issue.

This Court in Molina-Martinez v. United States, 578 U.S. 189 (2016), analogously recognized that when the "record" in a case shows that "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range," the reviewing court may determine that "a reasonable probability of prejudice does not exist" for purposes of plain-error review, "despite application of an erroneous Guidelines range." Id. at 200; see id. at 204 (indicating that a "full remand" for resentencing may be unnecessary when a reviewing court is able to determine that the sentencing court would have imposed the same sentence "absent the error"). Although Molina-Martinez concerned the requirements of plain-error review under Federal Rule of Criminal Procedure 52(b), the principle it recognized applies with equal force in the context of harmless-error review under Rule 52(a).

b. Applying ordinary principles of harmless-error review to the circumstances of this case, the court of appeals correctly determined that any error in the district court's calculation of petitioner's advisory guidelines range was harmless because it did

not affect the district court's determination of the appropriate sentence. Pet. App. 5a-6a.

In the particular circumstances of this case, the court of appeals correctly recognized that "[t]he district court's statements at sentencing, taken in their totality, are sufficient to support application of the harmless error doctrine." Pet. App. 6a. As the court of appeals observed, the district court expressly stated that it would have imposed the same sentence even without the enhanced base offense level -- even though petitioner had twice requested the alternative guidelines range of 37 to 46 months that would have applied had the court sustained petitioner's objection, thereby putting it front and center in the sentencing proceedings. Ibid.; see C.A. ROA 618, 620, 625. And the court explained at length why a 70-month sentence was "sufficient, but not greater than necessary, to satisfy the purposes" of 18 U.S.C. 3553(a) irrespective of the legal merits of petitioner's "objections." C.A. ROA 622; see id. at 622-625.

The district court found petitioner's offense to be a serious one in part because it found that he possessed the flare launcher "for inappropriate purposes." C.A. ROA 623. It considered the circumstances surrounding petitioner's crime, including that he was driving a stolen vehicle. Ibid. It noted that petitioner had committed "several offenses in his past" -- which undisputedly included four counts of drug distribution that did not receive criminal history points, as well as possession of stolen firearms

-- and "just has not learned his lesson." Ibid.; see PSR ¶¶ 31, 34, 36, 44. And the court emphasized that its sentence would promote respect for the law, justly punish petitioner, protect the public from his future crimes, and deter others from similar conduct. C.A. ROA 623-624.

c. Petitioner contends (Pet. 25-27) that permitting harmless-error review of guidelines-calculation errors diminishes "the 'anchoring' effect of the Guidelines" and jeopardizes appellate review of guidelines questions. But harmless-error review does not alter the principle that "the Guidelines should be the starting point" for a district court's determination of the appropriate sentence. Gall, 552 U.S. at 49. Such review simply identifies cases, like this one, where the sentencing court found that factor to be outweighed by others. See, e.g., C.A. ROA 622 (district court noting that "the Court is not to sentence based exclusively on the guideline range, although I am to consider it, and I am doing so").

Harmless-error review in cases like this one "merely removes the pointless step of returning to the district court when [the court of appeals is] convinced that the sentence the judge imposes will be identical" regardless of the correct range. Abbas, 560 F.3d at 667. And far from undermining appellate review, "[a]n explicit statement that the district court would have imposed the same sentence under two different ranges can help to improve the clarity of the record, promote efficient sentencing, and obviate

questionable appeals." United States v. Zabielski, 711 F.3d 381, 389 (3d Cir. 2013).

d. The court of appeals' decision does not conflict with any decision of another court of appeals. To the extent that some formal differences exist in the articulated requirements for harmless-error review when a district court has offered an alternative sentencing determination, those differences do not reflect any meaningful substantive disagreement about when an alternative sentence can render a guidelines-determination error harmless. And petitioner has failed to identify any court that would have reached a different result in the circumstances of this case.

Petitioner errs in asserting (Pet. 18-19) that the decision below conflicts with the Second Circuit's analysis in United States v. Seabrook, 968 F.3d 224 (2020). In Seabrook, the court of appeals was unconvinced -- based on the record before it -- that the district court's choice of sentence was independent of the asserted errors in calculating the guidelines range. See id. at 233-234 (observing that, "[t]ellingly," the district court "'returned multiple times'" to the Guidelines in "framing its choice of the appropriate sentence," and had also declined the government's suggestion to take a guidelines factor into account under Section 3553(a)) (citation omitted). The Second Circuit has been clear that it will credit the kind of "unequivocal[]" statements at issue in this case under appropriate circumstances.

United States v. Jass, 569 F.3d 47, 68 (2009), cert. denied, 558 U.S. 1159, and 559 U.S. 1087 (2010).

Petitioner's reliance on Third Circuit decisions (Pet. 19-20) is likewise misplaced. In United States v. Smalley, 517 F.3d 208 (3d Cir. 2008), the court of appeals declined to find a guidelines-calculation error harmless where the district court "did not explicitly set forth an alternative Guidelines range," id. at 214, and where its "alternative sentence" was accompanied by only a "bare statement" that was "at best an afterthought, rather than an amplification of the Court's sentencing rationale," id. at 215; see United States v. Wright, 642 F.3d 148, 154 n.6 (3d Cir. 2011) (concluding that Smalley required a remand for resentencing). Here, the court of appeals correctly noted that petitioner twice requested the alternative guidelines range of 37 to 46 months and the district court nonetheless determined that a 70-month sentence was the right one for him. Pet. App. 6a. And the court thoroughly explained the sentence it imposed as a function of the seriousness of petitioner's offense, his criminal history, and the need to protect the public, promote respect for the law, impose a just punishment, and deter others. C.A. ROA 622-624.

Petitioner similarly errs in contending (Pet. 20-21) that the court of appeals' resolution of his appeal conflicts with the Seventh Circuit's decision in United States v. Asbury, 27 F.4th 576 (2022). In Asbury, the Seventh Circuit merely rejected the

proposition that a district court could "nullify the guidelines by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence"; the district court's disclaimers in that case had not specified which potential guidelines errors it had in mind, and the district court had failed to connect its alternative sentence to specific Section 3553(a) factors. Id. at 581; see id. at 579-583. Here, in contrast, the district court specifically tied its statement that it would have imposed the same sentence to the objections that petitioner had raised, C.A. ROA 625, where it had just considered the only objection that would have affected the guidelines range, id. at 617-618.

Petitioner also fails to adequately support his suggestion (Pet. 21-22) that the Ninth or Tenth Circuits would have found reversible error in the particular circumstances here. In United States v. Acosta-Chavez, 727 F.3d 903 (2013), the Ninth Circuit declined to find application of a 16-level enhancement harmless where the district court's sentence was a substantial upward variance from the correct guidelines range and the court failed to support such a variance with a sufficient explanation. Id. at 909-910. Likewise, in United States v. Munoz-Camarena, 631 F.3d 1028 (2011), cert. denied, 565 U.S. 1253 (2012), the Ninth Circuit declined to find a guidelines-calculation error harmless where "the district court's explanation" of its sentence was "insufficient to explain the extent of the variance from the

correct Guidelines range." Id. at 1031. Similarly, in United States v. Peña-Hermosillo, 522 F.3d 1108 (2008), the Tenth Circuit did not address "when, if ever, an alternative holding based on the exercise of Booker discretion could render a procedurally unreasonable sentence calculation harmless." Id. at 1117-1118. Instead, it resolved the case on a different ground -- that the district court's "alternative" sentence itself did "not satisfy the requirement of procedural reasonableness" because the court "offer[ed] no more than a perfunctory explanation" for it. Id. at 1118. And in United States v. Porter, 928 F.3d 947 (2019), the Tenth Circuit found that a district court's explanation could not justify what would have been a downward variance had it properly calculated the guidelines. Id. at 968.

In this case, in contrast, the court of appeals found the district court's well-reasoned explanation for its sentence to be a sufficient determination that it would have imposed the same sentence even if petitioner's objection to the advisory range had been valid. Pet. App. 6a. Petitioner fails to show that either the Ninth or Tenth Circuit would concur in his fact-bound disagreement with the court of appeals' assessment, and any dispute about the adequacy of the specific explanation in this case would not warrant this court's review. In addition to deviation from this Court's usual practice, see Sup. Ct. R. 10, it would be difficult if not impossible to provide guidance that would

preordain the result that a court of appeals should reach in every possible factual scenario.

e. At all events, this case would be an unsuitable vehicle for resolving the question presented because the district court did not err in calculating petitioner's advisory guidelines range. The question presented would therefore not be outcome-determinative here.

On appeal, petitioner argued that the district court erred in finding that his flare gun qualified as a "firearm" under 26 U.S.C. 5845(a). Pet. App. 5a. Sentencing Guidelines § 2K2.1(a)(4)(B)(i)(II) provides for a six-level increase in the base offense level if the defendant is a prohibited person and the offense involved a firearm that is described in 26 U.S.C. 5845(a). Section 5845(a)'s definition of "firearm" includes items that qualify as "any other weapon" as defined in Section 5845(e), which encompasses "any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive" (with certain inapplicable exclusions). 26 U.S.C. 5845(e). And courts have accordingly recognized that a flare gun loaded with a shotgun shell can qualify as a firearm under 26 U.S.C. 5845. United States v. Coston, 469 F.2d 1153, 1153 (4th Cir. 1972) (per curiam); United States v. Griffin, No. 07-cr-186, 2007 WL 4287509, at *4 (D. Neb. Dec. 4, 2007) (holding that government could prove that a flare gun qualified even where it had not been test-fired because of safety concerns).

Petitioner argued that his flare gun could not qualify as a firearm on the theory that it would have exploded if he had fired it. C.A. ROA 938. The district court correctly rejected that argument. Petitioner cited no authority stating that the definition of firearm excludes those devices that may be used only once or that a flare gun that lacks a metal insert cannot qualify as a firearm. At a minimum, the district court did not clearly err in declining to accept petitioner's speculation that, upon firing, the flare gun would have sufficient explosive force to self-destruct but insufficient explosive force to propel a projectile. Indeed, petitioner's own declarant testified at trial that the flare gun, if fired, would still expel a projectile to some degree, id. at 526, and the Probation Office stated that "[t]he flare gun's functionality was tested, and the examination concluded the flare gun could expel a projectile (i.e. 12 gauge shotgun round) by the action of an explosive," PSR ¶ 12; see C.A. ROA 969 (noting that, for safety and to maintain the gun's integrity, the examiner removed the shot column and propellant before test-firing the flare gun).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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