No. 22-7258

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN MARC FRASER, 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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

TYLER ANNE LEE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari, vacate the judgment, and remand for resentencing based on a proposed amendment to the Sentencing Guidelines.

2. 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.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Fraser, No. 18-cr-575 (June 17, 2021)

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

United States v. Fraser, No. 22-10619 (Jan. 10, 2023)

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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 available at 2023 WL 142085.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2023. The petition for a writ of certiorari was filed on April 10, 2023. 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 Northern District of Texas, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A2.

1. In September 2018, petitioner and an unindicted co-conspirator arranged to meet with an individual identified as B.D. at an apartment complex in Dallas, Texas. Presentence Investigation Report (PSR) ¶ 10. While B.D. was speaking with the co-conspirator, petitioner approached B.D., pointed a handgun at his head, and told him to put his hands behind his back. PSR ¶ 11.

After B.D. complied, the co-conspirator zip-tied B.D.'s hands together and took $500 in cash from his pockets. PSR ¶ 11. Petitioner began searching B.D.'s car and took several items worth approximately $260. Ibid. As petitioner was doing so, Dallas Police Department officers on patrol observed the scene, stopped, and announced themselves as police. PSR ¶ 12. Petitioner fled on foot. Ibid.

While pursuing him, the officers saw petitioner remove a handgun from his waistband and throw it into the bushes. PSR ¶ 12. The officers arrested petitioner and recovered a Sturm Ruger, Model P90, .45-caliber pistol from the bushes. Ibid. A criminal

records check revealed that petitioner had previously been convicted of a felony offense and was prohibited from possessing a firearm. Ibid.

2. A federal grand jury in the Northern District of Texas indicted petitioner for possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1. Petitioner pleaded guilty to that offense. See Pet. App. B1. In doing so, petitioner stipulated that "after having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, and knowing that he was a convicted felon, he knowingly and unlawfully possessed a firearm" and that the firearm "had previously been transported in interstate commerce." C.A. ROA 108.

In advance of sentencing, the United States Probation Office prepared a Presentence Investigation Report using the then-current 2021 version of the advisory Sentencing Guidelines. See 18 U.S.C. 3553(a)(4)(A)(ii) (generally requiring consideration of the Guidelines "in effect on the date the defendant is sentenced"). The PSR applied an enhanced base offense level under Sentencing Guidelines § 2K2.1(a)(4)(A), based on petitioner's prior convictions for aggravated robbery with a deadly weapon in violation of Tex. Penal Code Ann. § 29.03 (West 2003), and robbery in violation of Tex. Penal Code Ann. § 29.02 (West 2003), both of which the report classified as "crimes of violence." PSR ¶ 23; C.A. ROA 294-305. The Sentencing Guidelines define a "crime of

violence" as a felony that matches one of several listed crimes, including "robbery," or that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1)-(2); see id. § 2K2.1, comment. (n.1).

Based on a total offense level of 27 and criminal history category of VI, petitioner's advisory Guidelines range would have been 130 to 162 months of imprisonment, but a statutory maximum sentence of 10 years applied, resulting in an advisory range of 120 months of imprisonment. PSR ¶¶ 86-88. Petitioner argued that his prior robbery convictions did not qualify as crimes of violence under the Guidelines, but acknowledged that circuit precedent foreclosed his position. C.A. ROA 245-252; see United States v. Adair, 16 F.4th 469 (5th Cir. 2021) (explaining that a Texas robbery conviction qualifies as a crime of violence under Sentencing Guidelines § 4B1.2(a)(2)), cert. denied, 142 S. Ct. 1215 (2022).

At the sentencing hearing, the district court overruled petitioner's objection to the Section 4B1.2 enhancement, C.A. ROA 159, and sentenced petitioner to 120 months of imprisonment, Pet. App. B1; C.A. ROA 170. The court determined that the sentence was "sufficient but not greater than necessary" to comply with the purposes set forth Section 3553(a), and stated that it "would have imposed the same sentence for the same reasons * * * regardless of the applicable guideline range." C.A. ROA 171-172.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A2. The court observed that petitioner's challenge to the classification of his prior Texas robbery convictions as crimes of violence was "foreclosed" by circuit precedent. Id. at A2 (citing Adair, 16 F. 4th at 470-471). And it rejected petitioner's contention -- raised for the first time on appeal -- that 18 U.S.C. 922(g)(1) "is an unconstitutional exercise of power under the Commerce Clause," which petitioner "concede[d]" was likewise foreclosed. Pet. App. A2 (citing United States v. Perryman, 965 F.3d 424, 426 (5th Cir. 2020), cert. denied, 141 S. Ct. 2524 (2021), and United States v. Alcantar, 733 F.3d 143, 145-146 (5th Cir. 2013), cert. denied, 572 U.S. 1028 (2014)).

4. Several months after the court of appeals affirmed petitioner's conviction and sentence, the United States Sentencing Commission issued a proposed amendment to Section 4B1.2(a) that would define "robbery" as

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

88 Fed. Reg. 28,254, 28,274-28,275 (May 3, 2023). The proposed amendment further provides that "'actual or threatened force' refers to force that is sufficient to overcome a victim's

resistance." Id. at 28,275. Absent disapproval by Congress, the amendment will go into effect on November 1, 2023. See id. at 28,254.

ARGUMENT

Petitioner contends (Pet. 5-15) that under the Sentencing Commission's proposed amendment to Section 4B1.2(a) of the Sentencing Guidelines, his prior Texas robbery convictions would not qualify as crimes of violence, and therefore this Court should grant certiorari, vacate the judgment, and remand (GVR) for consideration of the proposed amendment. But doing so would be unwarranted. The proposed amendment does not alter the 2021 Guidelines applicable to petitioner, provide a reason to question the court of appeals' interpretation of those Guidelines, or even exclude petitioner's aggravated robbery conviction from its redefinition of "crime of violence." Moreover, the district court made clear that it would impose the same sentence regardless of the advisory Guidelines range.

Petitioner also 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. That contention lacks merit, and the court of appeals' 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 petitions for writs of certiorari on this issue,[1] and the same result is warranted here.[2]

1. Petitioner's suggestion (Pet. 5-15) that the Court should GVR in light of the Sentencing Commission's proposed amendment to Sentencing Guidelines § 4B1.2(a) is unsound. "Amendments to the Guidelines must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them," Stinson v. United States, 508 U.S. 36, 41 (1993), and even in the absence of congressional action, the proposed amendment on which petitioner relies will not go into effect until November 1, 2023. See 28 U.S.C. 994(p). And as a statutory matter, the district court was required to apply "the guidelines * * * in effect on the date the defendant is sentenced," 18 U.S.C. 3553(a)(4)(A)(ii), not the ones that might go into effect on a future date.

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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 Seekins v. United States, No. 22-6853 (filed Feb. 21, 2023), Stevens v. United States, No. 22-7157 (filed Mar. 23, 2023), Baker v. United States, No. 22-7276 (filed Apr. 10, 2023), Mack v. United States, No. 22-7524 (filed May 9, 2023), and Reyna v. United States, No. 22-7644 (filed May 23, 2023), raise similar issues.

To the extent that petitioner asserts (Pet. 9) that a GVR order is nonetheless warranted because the proposed amendment is a "clarifying" amendment that sheds light on the "current" version of the Guidelines, that assertion lacks merit. Even assuming the proposed amendment were merely "clarifying," only if a sentencing court is applying an "earlier edition of the Guidelines Manual," in light of ex post facto concerns with the then-current one, is the sentencing court required to "consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes." Sentencing Guidelines § 1B1.11(b)(2) (emphasis added).

Moreover, the proposed amendment would affect only the definition of "robbery" for purposes of a state crime's automatic inclusion as a "crime of violence"; it would not change the alternative definition of "crime of violence" to include offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) and (2); see 88 Fed. Reg. at 28,275. And as petitioner recognizes (Pet. 10), the court of appeals has determined that a conviction for Texas robbery-by-threat like petitioner's own aggravated robbery conviction has such an element. United States v. Garrett, 24 F.4th 485, 491 (5th Cir. 2022) (interpreting identical language in 18 U.S.C. 924(e)(2)(B)(i)); C.A. ROA 323-324.

Petitioner suggests that circuit precedent on that point has been invalidated by this Court's decision in Taylor v. United States, 142 S. Ct. 2015 (2022), which held that attempted Hobbs Act robbery is not a "crime of violence" under 18 U.S.C. 924(c)(3)(B). But Taylor simply rejected the argument that a defendant's conduct can be threatening even if no one was placed in fear and the "threat" would have been evident only to an omniscient objective observer. See 142 S. Ct. at 2022-2023. Texas robbery-by-threat, in contrast, requires that the defendant make "actual or threatened overtures of violence to the person of another, such that the threatened or injured party was put in fear." Williams v. State, 827 S.W.2d 614, 616 (Tex. App. 1992).[3]

Finally, at all events, this Court has explained that it will not grant, vacate, and remand in light of an intervening development unless, as relevant here, "a reasonable probability" exists that the court of appeals will reach a different conclusion on remand. Greene v. Fisher, 565 U.S. 34, 41 (2011) (quoting

[3] Petitioner errs in contending (Pet. 11-13) that Texas robbery-by-threat does not require an actual threat. Petitioner relies (Pet. 12-13) on state-law cases where defendants were convicted of Texas robbery-by-threat without speaking to the individuals who were placed in fear. In the two examples cited by petitioner, the victim witnessed the defendant's conduct and was placed in fear by "implicit threats" communicated through that conduct. Howard v. State, 333 S.W.3d 137, 137–138 (Tex. Crim. App. 2011); see Burgess v. State, 448 S.W.3d 589, 601-602 (Tex. App. 2014). Those examples are consistent with Taylor, which expressly recognized that threats can be communicated verbally or nonverbally, 142 S. Ct. at 2022, and does not impose any requirement that the defendant directly interact with the threatened victim.

Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam)). Accordingly, no remand is warranted here, where the district court expressly stated that it would have imposed the same sentence regardless of petitioner's advisory Guidelines range. C.A. ROA 172; cf. Lawrence, 516 U.S. at 173-174 (recognizing that the Court's power to grant, vacate, and remand in light of "intervening developments," "should be exercised sparingly," out of "[r]espect for lower courts" and for the "public interest in finality of judgments").

2. Petitioner separately argues (Pet. 15-22) that Section 922(g)(1) exceeds Congress's power under the Commerce Clause. In particular, he argues that the fact that a firearm 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 firearm 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) who "receives, possesses, or transports in commerce or affecting commerce . . . any firearm." Id. at 337 (quoting 18 U.S.C. App. 1202(a) (1970)). 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 the government must prove a case-specific connection to interstate commerce for all three. 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 forecloses petitioner's contention that the Commerce Clause requires the government to prove more than the prior movement of a firearm 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).

Petitioner contends (Pet. 15-22) that Scarborough and the court of appeals decisions that follow it conflict with this Court's subsequent decisions in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (NFIB), and Bond v. United States, 572 U.S. 844 (2014). Unlike the provision considered in NFIB, Section 922(g)(1) does not "compel[]

individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." 567 U.S. at 552 (opinion of Roberts, C.J.) (emphasis omitted); see id. at 656-660 (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.). And Bond's interpretation of the Chemical Weapons Convention Implementation Act of 1998, see 572 U.S. at 852, 859-860 (interpreting 22 U.S.C. 6701), does not call the scope of Section 922(g)(1) into question. Bond's statutory holding obviated any need to address the Commerce Clause, see id. at 865-866, and the decision in fact cited Bass approvingly as an example of statutory construction that "preserve[ed] as an element of all the offenses a requirement suited to federal criminal jurisdiction alone." Id. at 859 (quoting Bass, 404 U.S. at 351). The Court thus saw no inconsistency in its interpretation of the Implementation Act and its construction of the language at issue in Bass and Scarborough.

b. Regardless, this case would be an unsuitable vehicle for this Court's review, because, as petitioner acknowledges (Pet. 22), he did not raise his Commerce Clause challenge in the district court. Petitioner's challenge would therefore be subject to review for plain error. See Fed. R. Crim. P. 52(b). Petitioner accordingly recognizes (Pet. 22) that his failure to raise this challenge in district court "probably presents an insurmountable vehicle problem."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

TYLER ANNE LEE
Attorney

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