

IN THE SUPREME COURT OF THE UNITED STATES

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LARRY CARL MACK, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

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 a firearm 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. Mack, 21-cr-385 (Aug. 1, 2022)

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

United States v. Mack, 22-10719 (Feb. 9, 2023)

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No. 22-7524

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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 1872367.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2023. The petition for a writ of certiorari was filed on May 9, 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 unlawfully possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. The district court sentenced him to 33 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 January 2021, officers stopped petitioner's SUV after observing several traffic infractions. Presentence Investigation Report (PSR) ¶¶ 9-10. Petitioner was alone in the SUV, and as they approached, the officers smelled marijuana and saw a tobacco cigarette that had been rolled with a leafy green substance in the ashtray. PSR ¶¶ 10-11. Petitioner admitted to the presence of marijuana. PSR ¶ 12.

The officers searched the SUV and found a digital scale, along with a bag containing \$75 and two individually wrapped bags of marijuana, in the center console. PSR ¶¶ 12, 17. Behind the center console, the officers found another bag containing seven baggies of marijuana. PSR ¶¶ 14, 17. In the center console and in the driver's seat, the officers found a total of ten yellow baggies filled with multicolored pills containing methamphetamine. PSR ¶¶ 13, 17. And concealed inside the driver's door, the officers found a .380 caliber Ruger pistol. PSR ¶ 15. Petitioner admitted possessing the pistol. PSR ¶ 16.

2. A federal grand jury in the Northern District of Texas indicted petitioner for possessing a firearm 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). Indictment 1.

Petitioner pleaded guilty unconditionally and without a plea agreement. Judgment 1; C.A. ROA 38, 41, 68, 70. As part of his guilty plea, petitioner admitted "[t]hat the possession of the firearm was in or affected interstate commerce; that is, that before the [petitioner] possessed the firearm, it had traveled from one state to another." Pet. App. C1.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A2.

On appeal, petitioner argued for the first time that the firearm-possession statute, 18 U.S.C. 922(g)(1), exceeded Congress's power under the Commerce Clause. Pet. C.A. Br. 3-6. Alternatively, he argued that Section 922(g)(1) should be construed to require "either recent movement across state lines, or movement in response to the defendant's conduct," and that the factual basis for his plea had not contained the necessary elements. Id. at 6. Petitioner acknowledged, however, that both this Court's precedent and circuit precedent foreclosed his arguments, and that he could not establish that any error was plain under Federal Rule of Criminal Procedure 52(b). Id. at 3-7. The court of appeals agreed that petitioner's arguments "challenging

the constitutionality of § 922(g)(1) are foreclosed” and granted the government’s motion for summary affirmance. Pet. App. A2.

#### ARGUMENT

Petitioner renews his contention (Pet. 4-10) that this Court’s longstanding interpretation of language in 18 U.S.C. 922(g)(1), which prohibits convicted felons from possessing firearms “in or affecting commerce,” exceeds Congress’s authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Petitioner also renews his alternative contention (Pet. 8-10) that Section 922(g)(1)’s text does not in fact cover possession of a firearm that has traveled across state lines. For the reasons explained in the government’s briefs in opposition to the petitions for writs of certiorari in Stevens v. United States, No. 22-7157 (filed Mar. 23, 2023), and Baker v. United States, No. 22-7276 (filed Apr. 10, 2023), copies of which are being served on petitioner, those contentions do not warrant this Court’s review. They lack merit; the court of appeals’ unpublished per curiam decision does not conflict with any decision of this Court or another court of appeals; and this Court has recently and repeatedly denied petitions for writs of certiorari on both the

constitutional<sup>1</sup> and the statutory<sup>2</sup> issues. It should follow the same course here.<sup>3</sup>

Indeed, this case would be a particularly unsuitable vehicle for reviewing either issue. As a threshold matter, petitioner's statutory claim is foreclosed by his unconditional guilty plea, in which he admitted that the firearm he possessed had "traveled from one state to another" and therefore "was in or affected interstate commerce." Pet. App. C1, C3. Although an unconditional guilty plea does not relinquish a constitutional challenge to the offense of conviction, Class v. United States, 138 S. Ct. 798, 804-805 (2018), petitioner's admission that the evidence sufficiently established all the elements of the offense charged in the indictment necessarily relinquished his statutory claim, which is

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<sup>1</sup> See, e.g., Seekins v. United States, 2023 WL 4163279 (2023) (No. 22-6853); 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).

<sup>2</sup> See Gray v. United States, 140 S. Ct. 557 (2019) (No. 19-5699); Robinson, *supra*, (No. 17-9169).

<sup>3</sup> The pending petitions for writs of certiorari in Stevens v. United States, No. 22-7157 (filed Mar. 23, 2023), Fraser 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 Reyna v. United States, No. 22-7644 (filed May 23, 2023), raise similar issues.



inconsistent with the premise that his conduct satisfies those elements. See United States v. Broce, 488 U.S. 563, 570-571 (1989).

This case would also be an unsuitable vehicle for addressing the constitutional issue because Section 922(g)(1) is plainly constitutional as applied to petitioner. Petitioner possessed the firearm in a vehicle with a scale, cash, and individually packaged methamphetamine and marijuana, and the district court found that petitioner possessed the firearm in connection with drug distribution. PSR ¶¶ 13, 17, 26; C.A. ROA 84-85; see U.S.S.G. § 2K2.1(b)(6)(B). This Court has repeatedly recognized that Congress may regulate even “the purely intrastate production, possession, and sale” of controlled substances under the Commerce Clause. Taylor v. United States, 136 S. Ct. 2074, 2077 (2016); see Gonzales v. Raich, 545 U.S. 1, 22 (2005). Regulation of firearm possession in the course of such commercial activity is likewise within Congress’s authority.

Lastly, as petitioner acknowledges (Pet. 10-11), he did not raise either of his challenges in the district court. Petitioner’s challenges would therefore be subject to review for plain error. See Fed. R. Crim. P. 52(b). Petitioner accordingly recognizes (Pet. 10) that his failure to raise those challenges in district court “probably presents an insurmountable vehicle problem.”

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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