No. 22-7757

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL LEE MORRISON, 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

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

WILLIAM A. GLASER
Attorney

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

QUESTION PRESENTED

Whether petitioner is entitled to plain-error relief on his claim that 18 U.S.C. 922(n), the federal statute that prohibits receiving a firearm while under a felony indictment, violates the Second Amendment.

IN THE SUPREME COURT OF THE UNITED STATES

No. 22-7757

SAMUEL LEE MORRISON, 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

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2023 WL 2366984.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2023. The petition for a writ of certiorari was filed on June 2, 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 receiving a firearm while under felony indictment, in violation of 18 U.S.C. 922(n). Pet. App. 3a. He was sentenced to 60 months of imprisonment, to be followed by one year of supervised release. Id. at 4a-5a. The court of appeals affirmed. Id. at 1a-2a.

1. In 2018, a Texas grand jury indicted petitioner for felony assault on a family or household member. C.A. ROA 136. In 2019, he entered into a deferred-adjudication agreement under which he received two years of probation. Ibid. Then, in May 2020, police officers arrested petitioner for violating the terms of his supervision. Ibid. During a search of petitioner's residence, the officers found a pistol. Ibid. Petitioner admitted buying the pistol in January 2020, while he was still under indictment because of the deferred-adjudication agreement. Ibid.

2. A federal grand jury indicted petitioner for receiving a firearm while under felony indictment, in violation of 18 U.S.C. 922(n). C.A. ROA 13. Petitioner pleaded guilty without a plea agreement. Id. at 101, 103. The district court sentenced him to 60 months of imprisonment, to be followed by one year of supervised release. Pet. App. 4a-5a.

3. The Fifth Circuit affirmed. Pet. App. 1a-2a. On appeal, petitioner argued for the first time that Section 922(n) violated the Second Amendment. Ibid. Noting that petitioner had not raised

that argument in district court, the court of appeals reviewed it for plain error. Id. at 2a. The court determined that petitioner could not establish plain error because it had previously "rejected the notion that § 922(n) is clearly or obviously unconstitutional." Ibid. (citing United States v. Avila, No. 22-50088, 2022 WL 17832287, at *2 (5th Cir. Dec. 21, 2022) (per curiam)).

ARGUMENT

Petitioner argues (Pet. 3-14) that Section 922(n) violates the Second Amendment. Because petitioner did not raise that argument in the district court, it is subject to review only for plain error. The court of appeals correctly determined that petitioner had failed to establish plain error, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. As the court of appeals observed, petitioner "did not present [his Second Amendment claim] to the district court." Pet. App. 2a. That claim is therefore reviewable only for plain error. See Fed. R. Crim. P. 52(b). To prevail under that standard, petitioner must establish (1) "an error" (2) that was "clear or obvious, rather than subject to reasonable dispute," (3) that affected his "substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Puckett v. United States, 556 U.S. 129, 135 (2009) (brackets, citation, and internal quotation marks

omitted). Petitioner cannot establish that the district court erred, much less clearly or obviously erred, in failing to hold Section 922(n) unconstitutional.

As relevant here, Section 922(n) makes it unlawful for "any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to * * * receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(n). While felony charges are pending, Section 922(n) stops indicted defendants from acquiring new firearms, but does not prevent them from retaining old ones. That modest restriction serves two important purposes. First, it protects the integrity of the criminal-justice system by reducing the risk that indicted defendants will acquire firearms to facilitate their flight. Second, it protects the community at large by reducing the risk that indicted defendants will acquire and use firearms to commit other crimes while awaiting trial.

That restriction is consistent with history and tradition. Our society has traditionally recognized that the government is entitled to "secure the due attendance of the party accused" at a criminal trial. Ex parte Milburn, 34 U.S. (9 Pet.) 704, 710 (1835) (Story, J.). It has also traditionally recognized that the government is entitled to preserve "the safety of the people" from offenders who are awaiting trial. A. Highmore, A Digest of the Doctrine of Bail in Civil and Criminal Cases vii (1783). The government has accordingly long subjected criminal defendants to

temporary restrictions on their liberty -- including restrictions affecting their ability to keep and bear arms -- in order to ensure their attendance at trial and to prevent crime in the meantime. Three of those traditional restrictions are pertinent here.

First, in the Founding era, criminal defendants who were indicted on serious charges were ordinarily subject to detention without bail. "[D]eath was 'the standard penalty for all serious crimes' at the time of the founding." Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019) (citation omitted). And criminal defendants who were indicted on capital charges were traditionally denied bail. See, e.g., State v. Hill, 1 Tread. 242, 246 (S.C. 1812) (opinion of Smith, J.) ("The general rule is, not to admit to bail after bill found, in capital cases."); The Territory v. Benoit, 1 Mart.(o.s.) 142, 142-143 (Orleans Super. Ct. 1810) ("[T]he finding of the Grand Jury [is] too great a presumption of the defendant's guilt to bail him. We recollect no case in which it was done."); 1 David Robertson, Reports of the Trials of Colonel Aaron Burr 311 (1808) (recording Chief Justice Marshall's statement that he "doubted extremely" whether he had the power to grant bail in a capital case "after an indictment"). Pretrial detention without bail necessarily entailed the temporary loss of the right to keep and bear arms.

Second, even a defendant who was released on bail remained subject to significant restrictions while awaiting trial. A defendant seeking release on bail had to find "sureties" -- that

is, friends, neighbors, or other third parties who were willing to guarantee his attendance at trial and his good behavior in the meantime. 3 William Blackstone, Commentaries on the Laws of England 290 (1765). Courts "look[ed] to [the sureties'] vigilance to secure the attendance and prevent the absconding" of the defendant. United States v. Simmons, 47 F. 575, 577 (C.C.S.D.N.Y. 1891). Sureties were also often required to ensure that the defendant "ke[pt] the peace" until trial. 4 Blackstone 250. To enable sureties to fulfill their functions, the common law granted them legal "custody" of and "dominion" over the defendant. Taylor v. Taintor, 16 Wall. 366, 371 (1873). As the defendant's legal custodians, the sureties enjoyed "unrestricted authority over [his] person." Charles Petersdorff, A Practical Treatise on the Law of Bail in Civil and Criminal Proceedings 514 (1824).

Finally, the common law has long allowed an arresting officer to seize, among other things, a suspect's "weapons," lest the suspect use them to "effect an escape from custody." Agnello v. United States, 269 U.S. 20, 30 (1925). That power was "always recognized under English and American law" and was "uniformly maintained in many cases." Weeks v. United States, 232 U.S. 383, 392 (1914). In keeping with the common law, this Court's Fourth Amendment cases establish that, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape." Chimel v.

California, 395 U.S. 752, 762-763 (1969). And a 19th-century court stated that "[p]ersons accused of crime, upon their arrest, have constantly been divested of their arms, without the legality of the act having ever been questioned." State v. Buzzard, 4 Ark. 18, 21 (1842).

Under the test set forth in NYSRPA v. Bruen, 142 S. Ct. 2111 (2022), those historical practices strongly support Section 922(n)'s constitutionality. Section 922(n) and those practices are all "comparably justified," id. at 2133; they all serve the government's interests in "bringing the accused to trial" and in "preventing crime by arrestees," United States v. Salerno, 481 U.S. 739, 745, 749 (1987). The "burden[s]" imposed by Section 922(n) are also "comparable" in important ways to the burdens imposed by those historical practices. Bruen, 142 S. Ct. at 2133. Like those practices, Section 922(n) applies only to those who have been accused of crimes and only during the pendency of criminal proceedings; it does not apply to the public at large, and it ceases to operate once the case ends.

In other respects, Section 922(n) is significantly less burdensome than the restraints on criminal defendants' liberty accepted at the founding. Detention without bail involves the total denial of liberty, including the total denial of any ability to keep and bear arms; Section 922(n), in contrast, neither subjects defendants to a total denial of liberty nor deprives them of the arms that already belong to them. In addition, traditional

rules governing sureties and arrests extended to all crimes (felonies as well as misdemeanors), while Section 922(n) applies only to "crime[s] punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(n).

In a variety of other contexts, it is accepted that the government may burden a criminal defendant's constitutional rights in order to ensure that he attends trial or to prevent him from committing other crimes while awaiting trial. For instance, the First Amendment protects the freedom of speech, yet released defendants may be required to "avoid all contact" with victims and potential witnesses. 18 U.S.C. 3142(c)(1)(B)(v). The First Amendment also guarantees the freedom of association, yet defendants may be required to "abide by specified restrictions on personal associations." 18 U.S.C. 3142(c)(1)(B)(iv). And the Constitution protects a right to travel, see United States v. Guest, 383 U.S. 745, 756-759 (1966), yet a defendant may be required to "abide by specified restrictions on * * * travel," 18 U.S.C. 3142(c)(1)(B)(iv). Upholding Section 922(n) thus would not treat the Second Amendment as a "second-class right"; rather, it would subject the Second Amendment to the same "body of rules" as "the other Bill of Rights guarantees." Bruen, 142 S. Ct. at 2156 (citation omitted).

2. Contrary to petitioner's suggestion (Pet. 3-9), the decision below does not warrant this Court's review. Since Bruen, no court of appeals has squarely addressed Section 922(n)'s

constitutionality -- although the Fifth Circuit has repeatedly rejected challenges to the provision under the plain-error standard, see, e.g., Pet. App. 1a-2a; United States v. Rodriguez, No. 22-10896, 2023 WL 4044409 (June 16, 2023) (per curiam); United States v. Williams, No. 22-10129, 2023 WL 2342341 (Mar. 3, 2023) (per curiam). Petitioner states (Pet. 7-8) that some district courts have disagreed about Section 922(n)'s constitutionality, but a conflict among district courts ordinarily does not justify this Court's intervention. See Sup. Ct. R. 10(a). And in any event, this case's plain-error posture makes it an unsuitable vehicle for deciding whether Section 922(n) complies with the Second Amendment, see Pet. 7-14, or for providing further guidance about the proper application of Bruen, see Pet. 3-7.

3. Petitioner has not asked this Court to hold the petition for a writ of certiorari pending United States v. Rahimi, cert. granted, 143 S. Ct. 2688 (2023) (No. 22-915) (oral argument scheduled for Nov. 7, 2023), and that course would in any event be unwarranted. Rahimi presents the question whether 18 U.S.C. 922(g)(8), the federal statute that disarms persons subject to domestic-violence protective orders, violates the Second Amendment on its face. See Pet. at I, Rahimi, supra (No. 22-915). Regardless of how this Court resolves the question presented in Rahimi, petitioner would be unable to establish plain error in this case. This Court has denied, rather than held, another recent petition raising an unpreserved challenge to Section 922(n), see Williams

v. United States, No. 22-7707, 2023 WL 6378254 (Oct. 2, 2023), as well as several recent petitions raising unpreserved challenges to Section 922(g)(1), the statute disarming convicted felons, see McCoy v. United States, No. 23-5360, 2023 WL 6558570 (Oct. 10, 2023); Wilson v. United States, No. 23-5263, 2023 WL 6378925 (Oct. 2, 2023); Roy v. United States, No. 23-5188, 2023 WL 6378839 (Oct. 2, 2023); Hickcox v. United States, No. 23-5130, 2023 WL 6378730 (Oct. 2, 2023).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

WILLIAM A. GLASER
Attorney

OCTOBER 2023