

IN THE SUPREME COURT OF THE UNITED STATES

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DEVONTAE NYKEL RACLIFF, 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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## QUESTIONS PRESENTED

1. Whether petitioner is entitled to plain-error relief on his claim that 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, violates the Second Amendment.

2. Whether petitioner is entitled to plain-error relief on his claim that 18 U.S.C. 922(g)(1) violates the Commerce Clause.

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

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Racliff, No. 20-cr-417 (Apr. 15, 2022)

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

United States v. Racliff, No. 22-10409 (Sept. 14, 2023)

IN THE SUPREME COURT OF THE UNITED STATES

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No. 23-6278

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UNITED STATES OF AMERICA

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is available at 2023 WL 5972049.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2023. The petition for a writ of certiorari was filed on December 13, 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 on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 4a. He was sentenced to 51 months of imprisonment, to be followed by three years of supervised release. Id. at 5a-6a. The court of appeals affirmed. Id. at 1a-3a.

1. On May 23, 2020, law enforcement received a call regarding the burglary of a car. Presentence Investigation Report (PSR) ¶ 10. Four days earlier, the victim had visited a friend's apartment in Irving, Texas, and had left the car unlocked. Ibid. The victim later noticed that a Taurus firearm, which the victim kept in a shoebox in the trunk, was missing. Ibid.

On July 16, 2020, police officers in Dallas, Texas responded to a robbery report. PSR ¶ 11. Two men had approached an adult female victim as she left her apartment. Ibid. As the victim placed her belongings into her Ford Fusion, the men approached her, pointed a weapon at her head, and demanded her car keys. Ibid. The victim handed over her keys and the men fled. Ibid.

That afternoon, undercover officers spotted the stolen Ford Fusion in a mall parking garage. PSR ¶ 12. As the car left the garage, a marked patrol vehicle followed it. Ibid. The car then accelerated and drove through a stop sign. Ibid. Officers activated their emergency lights and sirens, but the car

continued to accelerate and drove through two intersections with red traffic lights. Ibid. It later collided with another vehicle. Ibid.

When officers arrived at the scene of the collision, they saw petitioner retrieve a red cloth item from the passenger side of the Ford Fusion. PSR ¶ 13. Petitioner disregarded commands to “stop” and fled on foot. Ibid. Two other men also fled from the car. Ibid. Officers later apprehended petitioner, who was no longer in possession of the red cloth item. PSR ¶ 14. A bystander in the area then submitted photos of all three suspects to law enforcement. PSR ¶ 15. The photos showed petitioner running down the street holding the red cloth item. Ibid. Officers retraced petitioner’s route and found a red shirt and a Taurus firearm behind an air conditioning unit. Ibid.

Following his arrest, petitioner identified himself in one of the surveillance photos that displayed him running and in possession of the red cloth item. PSR ¶ 16. Petitioner identified the item as a shirt that contained marijuana, but he denied having a gun inside it. Ibid. Law enforcement subsequently determined that the recovered Taurus firearm was the one that had been reported stolen on May 23, 2020, and that it had been manufactured outside the State of Texas. PSR ¶¶ 17-18.

2. A grand jury in the Northern District of Texas charged petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and

924(a)(2). D. Ct. Doc. 1. Petitioner pleaded guilty. D. Ct. Doc. 31.

The Probation Office's presentence report applied Sentencing Guidelines § 2K2.1(a)(4), which authorizes a base offense level of 20 if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of \* \* \* a crime of violence," because petitioner had committed his federal firearms offense after a conviction for robbery in Texas. PSR ¶ 24. After considering other adjustments, the Probation Office calculated a total offense level of 19, a criminal history category of V, and an advisory Sentencing Guidelines range of 57 to 71 months. PSR ¶ 89.

Petitioner objected to the presentence report, claiming that his prior Texas robbery offense was not a "crime of violence" under the definition in Sentencing Guidelines § 4B1.2(a). D. Ct. Doc. 36, at 1. He acknowledged, however, that circuit case law -- namely, United States v. Adair, 16 F.4th 469 (5th Cir. 2021), cert. denied, 142 S. Ct. 1215 (2022) -- foreclosed his objection. D. Ct. Doc. 36, at 1-2. The district court accordingly overruled the objection and adopted the Probation Office's guidelines calculations. Sent. Tr. 8, 11. The court then varied downward and imposed a 51-month sentence. Id. at 15. In doing so, the court reviewed the sentencing factors under 18 U.S.C. 3553(a) and announced that "even if [the court] got the guidelines wrong, [it] th[ought] 51 [months] is the right number." Sent. Tr. 20.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-3a.

On appeal, petitioner argued for the first time that 18 U.S.C. 922(g)(1) exceeded Congress's power under the Commerce Clause and violated the Second Amendment. Pet. App. 2a. The court of appeals accordingly reviewed those claims for plain error, which required petitioner to "show a forfeited error that is clear or obvious and that affect[ed] his substantial rights." Ibid. (citing Puckett v. United States, 556 U.S. 129, 135 (2009)). If petitioner made that showing, the court of appeals then "ha[d] the discretion to correct the error but only if it seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." Ibid.

The court of appeals observed that circuit precedent foreclosed petitioner's Commerce Clause challenge. Pet. App. 2a (citing United States v. De Leon, 170 F.3d 494, 499 (5th Cir.), cert. denied, 528 U.S. 863 (1999)). And as to petitioner's Second Amendment claim, the court found petitioner to be "unable to demonstrate an error that is clear or obvious" because "no binding precedent explicitly hold[s] that § 922(g)(1) is unconstitutional." Ibid.

The court of appeals also rejected petitioner's claim that "his Texas robbery conviction did not constitute a 'crime of violence'" under the Sentencing Guidelines. Pet. App. 3a. The court observed that its decision in Adair had "reaffirmed that Texas robbery is the equivalent of the enumerated offense of



robbery under § 4B1.2 and that it is therefore a crime of violence for purposes of § 2K2.1(a)(4)(A).” Ibid.

4. On November 1, 2023, and several months after the court of appeals affirmed petitioner’s conviction and sentence, an amendment to Sentencing Guidelines § 4B1.2(a) went into effect. The amendment defined the enumerated offense of “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.

Sentencing Guidelines App. C Supp., Amend. 822. The amendment further provides that “‘actual or threatened force’ refers to force that is sufficient to overcome a victim’s resistance.” Ibid.

#### ARGUMENT

Petitioner contends (Pet. 4-13) that 18 U.S.C. 922(g)(1), which prohibits convicted felons from possessing firearms “in or affecting commerce,” violates the Second Amendment and exceeds Congress’s authority under the Commerce Clause, U.S. Const. Art. 1, § 8, Cl. 3. The court of appeals correctly rejected those claims on plain-error review, and its nonprecedential decision does not conflict with any decision of this Court or another court of appeals. This Court has recently and repeatedly denied petitions for certiorari raising such claims in a similar posture, and should follow the same course here.

Petitioner further contends (Pet. 14-16) that under the Sentencing Commission's recent amendment to Section 4B1.2(a) of the Sentencing Guidelines, his prior Texas robbery conviction might not qualify as a crime of violence, and therefore this Court should grant certiorari, vacate the judgment, and remand (GVR) for consideration of the amendment. But doing so would be unwarranted. The 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 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.

1. Petitioner does not ask this Court to grant plenary review of the Second Amendment question (Pet. 4-5) in this case. He instead argues (Pet. 13-14) that the Court should hold the petition for a writ of certiorari pending its decision in United States v. Rahimi, No. 22-915 (argued Nov. 7, 2023), or its disposition of the petition for a writ of certiorari in Garland v. Range, No. 23-374 (filed Oct. 5, 2023). Because resolution of the questions presented in Rahimi or Range would not help petitioner establish plain error, the petition should instead be denied.

Petitioner acknowledges (Pet. 13) that he failed to raise his Second Amendment claim in the district court. His claim is thus 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) (citation and internal quotation marks omitted). As explained in the government's petition for a writ of certiorari in Range, supra (No. 23-374), a copy of which is being served on petitioner, Section 922(g)(1) is consistent with the Second Amendment. Accordingly, petitioner cannot establish that the district court erred, much less clearly or obviously erred, in failing to hold Section 922(g)(1) unconstitutional.

Contrary to petitioner's contention (Pet. 14), this Court's decision in Rahimi is unlikely to establish that his conviction under 18 U.S.C. 922(g)(1) is clearly and obviously erroneous. 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). Even if the Court holds that Section 922(g)(8) is invalid, its decision would not establish that Section 922(g)(1) -- a different provision with different elements and different historical justifications -- is clearly or obviously unconstitutional. Instead, the government would have the opportunity to demonstrate that, notwithstanding any similarities with Section 922(g)(8), Section 922(g)(1) nonetheless

comports with “this Nation’s historical tradition of firearm regulation.” New York State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2126 (2022). Thus, regardless of how this Court resolves Rahimi, petitioner could not establish plain error here.

Petitioner’s request (Pet. 13-14) to hold his petition pending this Court’s disposition of the government’s petition for a writ of certiorari in Range (No. 23-374), similarly lacks merit. In Range, the government seeks further review of the Third Circuit’s decision concluding that Section 922(g)(1) is unconstitutional as applied to the respondent in that case. See Pet. at I, Range, supra (No. 23-374); see also Range v. Attorney General, 69 F.4th 96, 106 (3d Cir. 2023) (en banc). Even if the Court grants review and affirms the Third Circuit’s decision, such a decision would not establish that Section 922(g)(1) is clearly or obviously unconstitutional as applied to petitioner, given his crimes and individualized circumstances. Compare Range, 69 F.4th at 98 (noting Range’s prior conviction for making a false statement to obtain food stamps), with PSR ¶¶ 39, 43 (noting petitioner’s prior convictions for robbery and assault/family violence). Thus, regardless of how this Court disposes of the petition in Range, petitioner could not establish plain error here.

Consistent with that view, this Court has recently denied, rather than held, other recent petitions raising unpreserved challenges to Section 922(g)(1). See, e.g., Smith v. United States, 2024 WL 218838 (Jan. 22, 2024) (No. 23-6218); Porter v.

United States, 144 S. Ct. 511 (2023) (No. 23-5876); Easton v. United States, 144 S. Ct. 402 (2023) (No. 23-5742); McCoy v. United States, 144 S. Ct. 296 (2023) (No. 23-5360); Wilson v. United States, 144 S. Ct. 255 (2023) (No. 23-5263); Roy v. United States, 144 S. Ct. 234 (2023) (No. 23-5188); Hickcox v. United States, 144 S. Ct. 237 (2023) (No. 23-5130). The same approach is warranted here.

2. Petitioner separately renews his contention (Pet. 7-13) that 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. For the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Baker v. United States, No. 22-7276 (filed June 14, 2023), a copy of which is being served on petitioner, that contention likewise does not warrant this Court's review. It lacks 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 raising the same issue.\* It should do the same here.

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\* See, e.g., Smith v. United States, 2024 WL 218838 (Jan. 22, 2024) (No. 23-6218); Dix v. United States, 144 S. Ct. 610 (2024) (No. 23-6100); Reyna v. United States, 144 S. Ct. 138 (2023) (No. 22-7644); Mack v. United States, 144 S. Ct. 126 (2023) (No. 22-7524); Baker v. United States, 144 S. Ct. 113 (2023) (No. 22-7276); Seekins v. United States, 143 S. Ct. 2688 (2023) (No. 22-6853); Penn v. United States, 141 S. Ct. 2526 (2021) (No. 20-

Indeed, this case would be a particularly unsuitable vehicle for addressing the Commerce Clause issue. As a threshold matter, petitioner's failure to raise the issue in the district court means that it would be reviewed only for plain error, which even petitioner acknowledges (Pet. 13) "probably presents an insurmountable vehicle problem." In addition, he would not be able to show that the particular application of Section 922(g)(1) to him was plainly unconstitutional. Petitioner possessed the firearm alongside a red cloth item that, by his own admission, contained marijuana. See PSR ¶¶ 13-16. 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, 579 U.S. 301, 303 (2016); see Gonzales v. Raich, 545 U.S. 1, 22 (2005). Regulation of firearm possession in the course of such activity is likewise within Congress's authority.

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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, 580 U.S. 1093 (2017) (No. 16-5984); Gibson v. United States, 579 U.S. 919 (2016) (No. 15-7475).

3. Petitioner's suggestion (Pet. 14-16) that the Court should GVR in light of the Sentencing Commission's recent amendment to Sentencing Guidelines § 4B1.2(a) is unsound.

The district court sentenced petitioner on April 13, 2022. See 20-cr-417 Docket entry No. 44. The amendment on which petitioner relies went into effect on November 1, 2023. See Sentencing Guidelines App. C Supp., Amend. 822. 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.

To the extent that petitioner asserts (Pet. 15-16) that a GVR order is nonetheless warranted because this amendment might be deemed a "clarifying" amendment that sheds light on the 2021 version of the Guidelines under which petitioner was sentenced, that assertion lacks merit. Even assuming this amendment is 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).

In any event, petitioner fails to explain how the amendment implicates the classification of his Texas robbery offense as a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(2). The

court of appeals previously construed the definition of generic "robbery" for purposes of a state crime's inclusion as a "crime of violence" under Guidelines § 4B1.2(a)(2) as requiring the "misappropriation of property under circumstances involving immediate danger to the person"; and the court confirmed that "the elements of the Texas statute substantially correspond to th[ose] basic elements." United States v. Santiesteban-Hernandez, 469 F.3d 376, 380-381 (5th Cir. 2006) (quoting 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3(d)(2) (2d ed. 2003)) (brackets omitted), overruled on other grounds by United States v. Rodriguez, 711 F.3d 541, 554-555 (5th Cir.) (en banc), cert. denied, 571 U.S. 989 (2013); see also United States v. Adair, 16 F.4th 469, 470 (5th Cir. 2021), cert. denied, 142 S. Ct. 1215 (2022). The recent amendment -- which defines "robbery" to include "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of \* \* \* fear of injury, immediate or future, to his person or property," Sentencing Guidelines App. C Supp., Amend. 822 -- aligns with the court of appeals' preexisting definition.

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 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. Sent. Tr. 20; 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").

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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