No. 22-7276

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO DEMOND BAKER, 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 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 Commerce Clause.

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

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Baker, No. 21-cr-270 (Apr. 22, 2022)

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

United States v. Baker, No. 22-10435 (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 142086.

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 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 96 months of imprisonment, to be followed by three years of supervised release. Judgment 2. The court of appeals affirmed. Pet. App. A1-A2.

1. Following an increase in violent crime and drug trafficking at a building in an apartment complex in Fort Worth, Texas, law enforcement officers began investigating gang and drug activity there. Presentence Investigation Report (PSR) ¶ 7. On September 7, 2021, officers observed several people, including petitioner, standing in the breezeway. PSR ¶ 7. Two people approached petitioner and handed him money, which petitioner counted before putting it into his pocket. Ibid. Petitioner then walked to a grey car in the parking lot, placed a firearm in the back of his pants, covered the firearm with his shirt, and entered the driver's side of the car. Ibid. Once inside the car, petitioner opened a bag that contained "clear plastic baggies consistent with drug trafficking." PSR ¶ 8. Petitioner then exited the car. Ibid.

A "short time later," petitioner returned to the car, entered the driver's seat, and removed the firearm from his pants. PSR ¶ 8. Petitioner then drove through the apartment complex, exited

onto the roadway without signaling, and cut through the parking lot of a convenience store to get to a second roadway. PSR ¶ 8. Officers attempted to conduct a traffic stop, but petitioner turned back toward the apartment complex and began driving "at a high rate of speed." Ibid. He turned into the apartment complex, "jumped a curb onto the grassy area between buildings," and sped through a common area and over pedestrian walkways. Ibid. Petitioner then parked his car and began running through the apartment complex on foot. Ibid. After "[a] short foot chase," petitioner stopped running and was arrested. Ibid.

During a search of petitioner's car, officers found a firearm between the driver's seat and the center console, as well as multiple controlled substances -- including methamphetamine, heroin, and cocaine -- wrapped in individual plastic baggies. PSR ¶ 9. Officers also conducted a criminal record search and discovered that petitioner had previously been convicted of felony aggravated assault with a deadly weapon. PSR ¶ 11.

2. A grand jury returned an indictment charging petitioner with unlawfully possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)2), and possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Indictment 1-2. Pursuant to a plea agreement, petitioner pleaded guilty to the firearm-possession count, and the government agreed to dismiss the drug-possession count. D. Ct. Doc. 23 (Dec. 21, 2021).

As part of his guilty plea, petitioner admitted to knowing he had been convicted of a felony offense at the time he possessed the firearm. D. Ct. Doc. 22, at 2 (Dec. 21, 2022). Petitioner also admitted that the firearm was stolen and had traveled in interstate commerce. Ibid. Petitioner waived his right to appeal the conviction or sentence, except in limited circumstances. D. Ct. Doc. 23, at 6. The district court accepted petitioner's guilty plea and sentenced him to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 2.

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. 4-8. Petitioner acknowledged that his argument was foreclosed by circuit precedent, that the argument was not preserved for appellate review, and that he could not establish that any error was plain under Federal Rule of Criminal Procedure 52(b). Id. at 4, 7-8. The court of appeals agreed that petitioner's arguments "challenging the constitutionality of [Section] 922(g)(1) are foreclosed" and granted the government's motion for summary affirmance. Pet. App. A1-A2.

ARGUMENT

Petitioner contends (Pet. 3-9) 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. 1, § 8, Cl. 3. 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 certiorari on this issue,[1] and the same result is warranted here.[2]

For the first time, petitioner also contends (Pet. 9-10) that Section 922(g)(1) violates the Second Amendment. That contention lacks merit, and in all events, this case would be a poor vehicle for addressing that issue. The petition for writ of certiorari should be denied.

1. Petitioner principally argues (Pet. 3-9) 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

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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), and Fraser v. United States, No. 22-7258 (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.

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 to satisfy Section 922(g)(1)'s jurisdictional element. And consistent with Bass and Scarborough, the courts of appeals have uniformly held 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. 4-5) that Scarborough and the court of appeals decisions that follow it conflict with this Court's subsequent decisions in United States v. Lopez, 514 U.S. 549 (1995), National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (NFIB), and Bond v. United States, 572 U.S. 844 (2014). Those cases are inapposite.

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 noted that among other things, Section 922(q) "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Ibid. Section 922(g), in contrast, requires proof of a connection to interstate commerce in each case, and the Court in Lopez specifically distinguished Section 922(g)'s statutory predecessor from Section 922(q), on the ground that the former included 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. Lopez accordingly did not cast doubt on Scarborough's continuing force or the constitutionality of Section 922(g)(1) as applied to a firearm that has previously moved in interstate commerce.

Nor do this Court's decisions in NFIB and Bond support petitioner's position. 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 "preserv[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.

c. In any event, this case would be an unsuitable vehicle for this Court's review. As petitioner acknowledges (Pet. 9), he

did not raise his Commerce Clause challenge in the district court. Petitioner's challenge would therefore be subject to plain-error review, see Fed. R. Crim. P. 52(b), and petitioner cannot satisfy that standard.

Even if it were not already constitutional based on the firearm's past movement in interstate commerce, Section 922(g)(1)'s requirement that a firearm be possessed "in or affecting commerce" would be constitutional as applied to petitioner's use of the firearm to facilitate drug possession and sale. The evidence shows, and petitioner has never disputed, that he possessed a firearm while selling individually wrapped baggies of methamphetamine, heroin, and cocaine. PSR ¶ 9. 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.

2. Petitioner's cursory claim (Pet. 9-10), made for the first time in this Court, that Section 922(g)(1) violates the Second Amendment likewise lacks merit.

a. In District of Columbia v. Heller, 554 U.S. 570, 595 (2008), this Court held that the Second Amendment protects "the right of law-abiding, responsible citizens" to possess handguns for self-defense. Id. at 635. Consistent with that understanding,

the Court stated that "nothing in [its] opinion should be taken to cast doubt" on certain "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons and the mentally ill." Id. at 626-627 & n.26. The Court described those "permissible" measures as falling within "exceptions" to the protected right to keep and bear arms. Id. at 635. And the Court incorporated those exceptions into its holding, stating that the plaintiff in Heller was entitled to keep a handgun in his home "[a]ssuming that [he] is not disqualified from the exercise of Second Amendment rights," ibid. -- that is, assuming "he is not a felon and is not insane.," id. at 631. Two years later, a plurality of the Court "repeat[ed]" Heller's "assurances" that its holding "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (quoting Heller, 554 U.S. at 626).

The historical record supports this Court's repeated statements that convicted felons fall outside the scope of the Second Amendment. "Heller identified as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting 554 U.S. at 604), cert. denied, 562 U.S. 1303 (2011). That report expressly recognized the permissibility of disarming citizens "for crimes

committed." Ibid. Other sources reinforce the permissibility of preventing felons from possessing firearms. See Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 480 (1995) ("[F]elons, children, and the insane were excluded from the right to arms."); Robert Dowlut, The Right to Arms: Does the Constitution or the Predilection of Judges Reign?, 36 Okla. L. Rev. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from the right to keep and bear arms]."); Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 28-29 (1868) (explaining that the term "the people" has traditionally been interpreted in certain contexts to exclude "the idiot, the lunatic, and the felon").

Petitioner acknowledges (Pet. 10) Heller's recognition of the presumptive lawfulness felony disarmament laws. He nevertheless contends that this Court's decision in New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), "has dramatically changed the calculus for Second Amendment challenges" and "cast[] doubt on Heller's dicta about felony disarmament." Pet. 10. That is incorrect. Bruen held that the Second Amendment protects the right of "ordinary, law-abiding citizens" to "carry a handgun for self-defense outside the home." 142 S. Ct. at 2122. But nothing in Bruen calls into doubt Heller's statements that "longstanding prohibitions on the possession of firearms by felons" are

"presumptively lawful." 554 U.S. at 626-627 & n.26. Indeed, two concurring opinions expressly rejected any claim to the contrary. See 142 S. Ct. at 2157 (Alito, J., concurring) (noting that the decision does not "disturb[] anything that [the Court] said in Heller or McDonald * * * about restrictions that may be imposed on the carrying of guns"); see also id. at 2162 (Kavanaugh, J., concurring) (emphasizing that "the Second Amendment allows a 'variety' of gun regulations," and Bruen did not "cast doubt on longstanding prohibitions on the possession of firearms by felons") (citation omitted).

b. At all events, this case would be an unsuitable vehicle for addressing the question presented given that petitioner did not raise it in either lower court. Cf. Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (noting that this Court is "a court of review, not of first view"). As with the first question, petitioner acknowledges (Pet. 10) that his challenge would be subject to plain-error review. At a bare minimum, his position is neither "clear" nor "obvious," as required for relief under that standard. See Puckett v. United States, 556 U.S. 129, 135 (2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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