No. 25-5343

IN THE SUPREME COURT OF THE UNITED STATES

KENDRICK JARRELL BEAIRD, 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 18 U.S.C. 922(g)(1), the federal statute that prohibits a person from possessing a firearm if he has been convicted of "a crime punishable by imprisonment for a term exceeding one year," complies with the Second Amendment.

2. Whether the district court correctly determined that a 17-round magazine qualified as a "large capacity magazine" for purposes of an enhancement to petitioner's base offense level under the advisory Sentencing Guidelines § 2K2.1(a)(3) (2021).

3. 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.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is available at 2025 WL 1410410.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2025. The petition for a writ of certiorari was filed on August 11, 2025. 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). Pet. App. B1. The district court sentenced him to 72 months of imprisonment, to be followed by three years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A3.

1. In October 2022, an officer from the Dallas Police Department, while covertly conducting a routine crime-prevention investigation, observed petitioner pull a firearm from his waistband and point it at another person at an abandoned fast-food restaurant. Presentence Investigation Report (PSR) ¶ 10. When additional officers arrived, they recovered from petitioner's waistband a Glock firearm with an inserted magazine that was capable of holding 17 rounds of ammunition. PSR ¶¶ 10, 18. Petitioner told officers that he had received the firearm earlier that day and had been attempting to sell it. PSR ¶ 11.

At the time, petitioner had four prior felony convictions: two for burglary of a habitation, one for possession of a prohibited item in a correctional facility, and one for aggravated assault against a public servant. PSR ¶¶ 31, 33, 35, 37. A federal grand jury in the Northern District of Texas indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1.

2. Petitioner moved to dismiss the indictment, arguing that Section 922(g)(1) violates the Second Amendment and the Commerce Clause. See D. Ct. Doc. 22, at 2-20 (Oct. 3, 2023). The district

court denied the motion, D. Ct. Doc. 24 (Nov. 1, 2023), and petitioner pleaded guilty, Pet. App. B1.

The Probation Office calculated petitioner's advisory Guidelines range as 63-78 months of imprisonment. PSR ¶¶ 18-27, 93. That calculation was based in part on the application of Sentencing Guidelines § 2K2.1(a)(3) (2021),[1] which enhances the base offense level for an unlawful-possession offense that "involved," inter alia, a "semiautomatic firearm that is capable of accepting a large capacity magazine." Ibid.; see PSR ¶ 18. The Sentencing Commission's official commentary for that Guideline defines the quoted term to include a semiautomatic firearm that "had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition." Sentencing Guidelines § 2K2.1, comment. (n.2).

Petitioner objected to the enhanced base offense level on the ground that the court owed no deference to the commentary's elaboration of the Guideline's text. PSR Addendum 2. The district court overruled the objection. Sent. Tr. 10-11. The court then sentenced petitioner to 72 months of imprisonment, to be followed by three years of supervised release. Pet. App. B2-B3.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A3.

The court of appeals reasoned that petitioner "c[ould]not show on plain error review" that Section 922(g)(1) is unconstitu-

[1] Unless otherwise noted, all citations to the Sentencing Guidelines in this brief refer to the 2021 edition used at petitioner's sentencing.

tional under the Second Amendment "as applied to him" because he had previously been "convicted of a felony." Pet. App. A2. The court also observed that petitioner's "facial [Second Amendment] challenge" to Section 922(g)(1), as well as his argument that Section 922(g)(1) exceeds Congress's power under the Commerce Clause, were foreclosed by circuit precedent. Ibid. (citing, inter alia, United States v. Diaz, 116 F.4th 458, 471-472 (5th Cir. 2024), cert. denied, 145 S. Ct. 2822 (2025), and United States v. Perryman, 965 F.3d 424, 426 (5th Cir. 2020), cert. denied, 141 S. Ct. 2524 (2021)).

Finally, the court of appeals observed that petitioner had "rightly concede[d] that his argument that the district court erred in relying on the Guidelines commentary" in deciding that his firearm had a "'large capacity magazine'" is "foreclosed." Pet. App. A2 (citing United States v. Martin, 119 F.4th 410, 414-415 (5th Cir. 2024), cert. denied, 145 S. Ct. 1454 (2025)).

ARGUMENT

Petitioner contends that Section 922(g)(1) violates the Second Amendment, see Pet. 8-15; that the district court erred by deferring to the Guidelines commentary in determining that his offense involved a firearm capable of accepting a large-capacity magazine for purposes of Sentencing Guidelines § 2K2.1(a)(3), see Pet. 15-21; and that Section 922(g)(1) exceeds Congress's authority under the Commerce Clause, see Pet. 21-28. The court of

appeals correctly rejected those contentions. Petitioner presents no issue warranting review by this Court.

1. a. Petitioner appears (Pet. 8-15) to renew his as-applied Second Amendment challenge to Section 922(g)(1). He describes what he contends are different approaches to as-applied challenges to that provision taken by the courts of appeals. Pet. 11-15. But petitioner fails to develop any argument that Section 922(g)(1) is actually unconstitutional as applied to him. See Pet. 8-15. He therefore presents no basis for granting certiorari on the first question presented.

Moreover, petitioner failed to preserve his as-applied challenge in the district court. See Pet. App. A2 (analyzing petitioner's as-applied challenge for plain error). Throughout the period in which United States v. Rahimi , 602 U.S. 680 (2024), was pending and after Rahimi was decided, this Court consistently denied petitions raising Second Amendment challenges to Section 922(g)(1) when the petitioners failed to preserve their claims in the lower courts. See, e.g., Trammell v. United States, 145 S. Ct. 561 (2024) (No. 24-5723); Chavez v. United States, 145 S. Ct. 459 (2024) (No. 24-5639); Dorsey v. United States, 145 S. Ct. 457 (2024) (No. 24-5623). The same course is warranted here.

Furthermore, for the reasons set out in the government's brief in opposition in Vincent v. Bondi, No. 24-1155 (cert. pending), the contention that Section 922(g)(1) violates the Second Amendment as applied to petitioner does not warrant this Court's review.

Although there is some disagreement among the courts of appeals regarding whether Section 922(g)(1) is susceptible to individualized as-applied challenges, that disagreement is shallow. See Br. in Opp. at 11-14, Vincent, supra (Aug. 11, 2025). This Court has previously denied certiorari when faced with similarly narrow disagreements among the circuits about the availability of as-applied challenges to Section 922(g)(1). See id. at 13-14. And any disagreement among the circuits may either evaporate or carry no prospective importance in light of the Department of Justice's recent re-establishment of the administrative process under 18 U.S.C. 925(c) for granting relief from federal firearms disabilities. See Br. in Opp. at 8-11, Vincent, supra.

Section 922(g)(1) also poses no constitutional concerns as applied to petitioner. When petitioner violated Section 922(g)(1) in October 2022, PSR ¶¶ 1, 10, he was on probation for felony aggravated assault against a public servant and his conditions of probation forbid him from "possessing a firearm." PSR ¶ 37. Every court of appeals to have considered the question has accepted Section 922(g)(1)'s validity as applied to a convicted felon who is still on parole or another form of supervision. See United States v. Quailes, 126 F.4th 215, 221-224 (3d Cir. 2025), cert. denied, No. 24-7033 (Oct. 6, 2025); United States v. Moore, 111 F.4th 266, 272 (3d Cir. 2024), cert. denied, 145 S. Ct. 2849 (2025) (No. 24-968); United States v. Giglio, 126 F.4th 1039, 1043-1046 (5th Cir. 2025); United States v. Goins, 118 F.4th 794, 804-805

(6th Cir. 2024); United States v. Gay, 98 F.4th 843, 847 (7th Cir. 2024); cf. Range v. Attorney Gen., 124 F.4th 218, 232 (3d Cir. 2024) (en banc) (upholding Second Amendment challenge but emphasizing that the challenger had "completed his sentence").

Furthermore, petitioner possessed a firearm in this case after sustaining felony convictions for burglary and aggravated assault against a public servant. PSR ¶¶ 31, 35, 37. Given his criminal history, petitioner cannot show that he would prevail on an as-applied challenge in any circuit. See, e.g., United States v. White, No. 23-3013, 2025 WL 384112, at *2 (3d Cir. Feb. 4, 2025) (unpublished) (rejecting as-applied challenge by a felon with previous convictions for, inter alia, aggravated assault), cert. denied, 145 S. Ct. 2805 (2025); United States v. Williams, 113 F.4th 637, 663 (6th Cir. 2024) (recognizing Section 922(g)(1)'s constitutionality as applied to those convicted of "assault" or "burglary"); Pitsilides v. Barr, 128 F.4th 203, 213 (3d Cir. 2025) (district courts may consider "the context and circumstances" of a previous offense in deciding an as-applied challenge to Section 922(g)(1)).

b. It is unclear whether petitioner attempts to renew his facial Second Amendment challenge to Section 922(g)(1). See Pet. 8-15 (focusing on as-applied contentions). But to the extent that he has properly presented the question of Section 922(g)(1)'s facial constitutionality, that question does not warrant this Court's review for the reasons set out in the government's brief

in opposition in French v. United States, 145 S. Ct. 2709 (2025) (denying certiorari). As the government explained in French, that contention plainly lacks merit, and every court of appeals to have considered the issue since Rahimi has determined that the statute has at least some valid applications. See Br. in Opp. at 3-6, French, supra (No. 24-6623).

2. Petitioner separately contends (Pet. 15-21) that the district court erred in relying on Sentencing Guidelines § 2K2.1(a)(3) -- which enhances the base offense level for Section 922(g)(1) offenses involving a "semiautomatic firearm that is capable of accepting a large capacity magazine," Sentencing Guidelines § 2K2.1(a)(3) -- in calculating his guidelines range. Application Note 2 to Section 2K2.1 defines the quoted term to include "a semiautomatic firearm that has the ability to fire many rounds without reloading because * * * the firearm had attached to it a magazine * * * that could accept more than 15 rounds of ammunition." Sentencing Guidelines § 2K2.1, comment. (n.2). Petitioner argues (Pet. 19; see Pet. 18-21) that his firearm, with an inserted 17-round-capacity magazine would "not likely qualify" as a weapon with a "'large capacity magazine'" under Section 2K1.1(a)(3)'s text if the associated commentary were not afforded deference under Stinson v. United States, 508 U.S. 36 (1993), and further contends (Pet. 16) that Kisor v. Wilkie, 588 U.S. 558 (2019), now "cast[s] doubt on Stinson." That contention is incorrect and warrants no further review.

This Court in Stinson drew an "analogy" to the principles of deference applicable to an executive agency's interpretation of its own regulations and concluded that, although the "analogy is not precise," the same "measure" of deference given to such agency interpretations under Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), should be afforded to the Sentencing Commission's interpretation of the Sentencing Guidelines in its official commentary. Stinson, 508 U.S. at 44-45. In Kisor, the Court clarified that Seminole Rock deference (also called Auer deference) applies, among other things, only where a federal regulation is "genuinely ambiguous." Kisor, 588 U.S. at 573-575; see id. at 563. The government has accordingly taken the position, including in this Court, that Kisor sets the standard for determining whether particular Guidelines commentary is entitled to deference. See, e.g., Br. in Opp. at 17, Poore v. United States, No. 25-227 (Nov. 19, 2025); Br. in Opp. at 15, Tabb v. United States, 141 S. Ct. 2793 (2021) (No. 20-579).

To the extent that petitioner argues that Kisor now governs the degree of deference owed to an agency's interpretation of its regulations, the government agrees. But for reasons set forth in the government's brief in opposition in Ratzloff v. United States, 144 S. Ct. 554 (2024), that question does not warrant this Court's review. Like the petitioner in Ratzloff, petitioner overstates the degree of any circuit disagreement about whether and how Kisor applies in the distinct context of the Sentencing Commission's

commentary to the Guidelines. See Br. in Opp. at 15-17, Ratzloff, supra (No. 23-310). And petitioner's own assertion of circuit disagreement aligns the decision below with other decisions that have all resulted in denials of certiorari. See Pet. 17 (citing United States v. White, 97 F.4th 532 (7th Cir.), cert. denied, 145 S. Ct. 293 (2024) (No. 24-5031); United States v. Vargas, 74 F.4th 673 (5th Cir. 2023) (en banc), cert. denied, 144 S. Ct. 828 (2024) (No. 23-5875); United States v. Maloid, 71 F.4th 795 (10th Cir. 2023), cert. denied, 144 S. Ct. 1035 (2024) (No. 23-6150); United States v. Moses, 23 F.4th 347 (4th Cir. 2022), cert. denied, 143 S. Ct. 640 (2023) (No. 22-163)).

Those denials of certiorari are part of a long series of denials. This Court has recently and repeatedly denied petitions for writs of certiorari seeking review of questions concerning the applicability of Kisor to the Guidelines. See, e.g., Munoz v. United States, No. 25-5114 (Oct. 6, 2025); Elwell v. United States, No. 25-5110 (Oct. 6, 2025); Cook v. United States, 145 S. Ct. 2830 (2025) (No. 24-7265); Zheng v. United States, 145 S. Ct. 1899 (2025) (No. 24-604); see also, e.g., Br. in Opp. at 10 n.2, Zheng, supra (citing 17 additional denials of certiorari petitions seeking review of similar Kisor-based challenges to the Guidelines commentary). The Court has even denied certiorari petitions challenging the application of the commentary's interpretation of "large capacity magazine" in Application Note 2 to Section 2K2.1, including in the very case that the court of appeals followed here.

See Trumbull v. United States, 145 S. Ct. 1952 (2025) (No. 24-6848); Pet. App. A2 (following United States v. Martin, 119 F.4th 410, 414-415 (5th Cir. 2024), cert. denied, 145 S. Ct. 1454 (2025) (No. 24-6582)). The Court should follow the same course in this case.[2]

Review is particularly unwarranted because the Sentencing Commission is fully capable of resolving disputes concerning the application of particular commentary by amending the text of the Guidelines. In fact, the Commission has undertaken a "multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary, and possible consideration of amendments that might be appropriate." 88 Fed. Reg. 60,536, 60,537 (Sept. 1, 2023). And it has, in fact, begun to amend the Guidelines accordingly. See, e.g., Sentencing Guidelines Amendment 822, at 57-58 (effective Nov. 1, 2023) (explaining "changes to address a circuit conflict regarding the authoritative weight afforded to certain commentary to §4B1.2" in light of Kisor that "mov[ed], without change," definitions of terms from commentary "to the text of the guideline"); cf. Braxton v. United States, 500 U.S. 344, 348 (1991) (explaining that this Court should be "restrained and circumspect in using [its] certiorari power" to resolve Guidelines issues in light of the Commission's "statutory

[2] Other petitions raising a similar issue are currently pending in this Court. See Poore, supra (No. 25-227); Oladokun v. United States, No. 25-5964 (filed May 12, 2025); Nock v. United States, 25-6158 (filed Nov. 3, 2025); James v. United States, No. 25-6267 (filed July 30, 2025).

duty 'periodically to review and revise' the Guidelines") (brackets and citation omitted).

In any event, petitioner cannot demonstrate that any disagreement about the level of deference owed would change the outcome of his Guidelines calculation. In particular, petitioner identifies the Third and Ninth Circuits as disagreeing with the court below on the question whether Kisor applies to Guidelines commentary. Pet. 16-17 (citing United States v. Nasir, 17 F.4th 459, 471 (3d Cir. 2021), and United States v. Castillo, 69 F.4th 648, 656 (9th Cir. 2023)). But both of those courts have held that the phrase "large capacity magazine" in Section 2K1.1 is genuinely ambiguous and that the commentary's interpretation of that phrase warrants deference under Kisor. See United States v. McIntosh, 124 F.4th 199, 206-211 (3d Cir. 2024) (applying the "analysis * * * articulated in Nasir"); United States v. Trumbull, 114 F.4th 1114, 1117-1121 (9th Cir. 2024) (applying Kisor because of Castillo), cert. denied, 145 S. Ct. 1952 (2025). Petitioner's Guidelines calculation would thus be the same in every court of appeals to have considered the relevant interpretive question.

3. Finally, petitioner contends (Pet. 21-28) that if Section 922(g)(1) is construed to apply where the relevant firearm "travel[ed] across state lines at any time" before it was possessed by the defendant, Pet. 21, it would exceed Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. That question also merits no further review.

This Court has held that "proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the [jurisdictional element]" of a similarly worded predecessor felon-in-possession statute. Scarborough v. United States, 431 U.S. 563, 564 (1977); see United States v. Bass, 404 U.S. 336, 350 (1971) ("[T]he Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce."). The courts of appeals have uniformly read Section 922(g) the same way and have consistently upheld that reading against constitutional challenges. See, e.g., United States v. Singletary, 268 F.3d 196, 205 (3d Cir. 2001) (collecting cases), cert. denied, 535 U.S. 976 (2002).

This Court has also recently and repeatedly denied certiorari on this question. See, e.g., Martinez v. United States, No. 24-7104 (Oct. 6, 2025); Mason v. United States, No. 24-7286 (Oct. 6, 2025); York v. United States, No. 24-7244 (Oct. 6, 2025); Freeman v. United States, No. 24-7101 (Oct. 6, 2025); Riddick v. United States, 145 S. Ct. 2859 (2025) (No. 24-7182); Dean v. United States, 145 S. Ct. 2859 (2025) (No. 24-7217); Dominguez v. United States, 145 S. Ct. 2857 (2025) (No. 24-6772); Hemphill v. United States, 145 S. Ct. 2855 (2025) (No. 24-6731); Collette v. United States, 145 S. Ct. 2853 (2025) (No. 24-6497); see also Br. in Opp. at 5 n.1, Hemphill, supra (citing 44 additional denials of certiorari petitions seeking review of the same Commerce Clause issue in 2024 and 2025). The same result is warranted here.

In any event, petitioner did more than just possess a firearm that crossed state lines at some point in the past. When he was arrested, petitioner told the arresting officers that he received the firearm earlier that day and was attempting to sell it. PSR ¶ 11. Petitioner's conduct therefore falls within Congress's power to regulate "persons or things in interstate commerce" or activities that "substantially affect interstate commerce." United States v. Lopez, 514 U.S. 549, 558-559 (1995); see Taylor v. United States, 579 U.S. 301, 307 (2016) (holding that a defendant "who affects or attempts to affect even the intrastate sale" of a product that is produced "within the State" will, under Gonzales v. Raich, 545 U.S. 1 (2005), "affect[] or attempt[] to affect commerce over which the United States has jurisdiction").[3]

[3] Copies of the government's briefs in opposition in French, supra (No. 24-6623); Hemphill, supra (No. 24-6731); Poore, supra (No. 25-227); Ratzloff, supra (No. 23-310); Tabb, supra (No. 20-579); Vincent, supra (No. 24-1155), and Zheng, supra (No. 24-604), are publicly available at the Court's online docket, https://www.supremecourt.gov/docket/docket.aspx.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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