No. 99-1874

# In the Supreme Court of the United States

NAVEGAR, INC., D/B/A INTRATEC AND PENN ARMS, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether 18 U.S.C. 922(v)(1), which regulates the manufacture, transfer, and possession of semiautomatic assault weapons, exceeds Congress's power under the Commerce Clause.

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## OPINIONS BELOW

The order denying the petition for rehearing en banc (Pet. App. 86a-93a) is reported at 200 F.3d 868. The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 192 F.3d 1050. The opinion and order of the district court (Pet. App. 39a-85a) are unreported. An earlier opinion of the court of appeals in this case is reported at 103 F.3d 994. Earlier opinions of the district court are reported at 986 F. Supp. 650 and 914 F. Supp. 632.

## JURISDICTION

The judgment of the court of appeals was entered on October 8, 1999. A petition for rehearing was denied on January 25, 2000 (Pet. App. 86a-93a). On April 18, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 24, 2000, and the petition was filed on May 23, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. For over six decades, Congress has exercised its authority under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, to regulate the manufacture and sale of firearms. See generally Pet. App. 26a-28a (describing the development of the federal statutory scheme). The Federal Firearms Act of 1938, Pub. L. No. 785, 52 Stat. 1250, prohibited manufacturers and dealers from shipping firearms in interstate commerce without a license, and prohibited various transfers of firearms by licensed as well as unlicensed dealers. In 1968, Congress enacted various firearms controls in the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197. Most of those provisions were incorporated later the same year in the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. The Omnibus Crime Control and Safe Streets Act contains a congressional finding that "there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power." Pub. L. No. 90-351, § 901(a)(1), 82 Stat. 225. Congress further found that "only through adequate Federal control over interstate and foreign commerce in these weapons" would

"effective State and local regulation of this traffic be made possible." *Id.* § 901(a)(3), 82 Stat. 225.

2. The instant case involves a constitutional challenge to 18 U.S.C. 922(v)(1), which provides that "[i]t shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon." The term "semiautomatic assault weapon" is defined to include a list of specified firearms and "copies or duplicates of the firearms in any caliber." 18 U.S.C. 921(a)(30)(A). The definition also includes semiautomatic weapons that have two or more of the listed assault weapons features. 18 U.S.C. 921(a)(30)(B), (C) and (D). Section 922(v)(1) was enacted in 1994 as an amendment to the Gun Control Act. See Violent Crime Control and Law Enforcement Act of 1994, Tit. XI, § 110102(a), 108 Stat. 1996.

3. Petitioner Navegar, Inc., doing business as Intratec, is a federally licensed manufacturer of firearms. Among the weapons that it manufactures are two models of semiautomatic pistols, the TEC-DC9 and TEC-22, which are among the restricted assault weapons listed by name in 18 U.S.C. 921(a)(30)(A)(viii). See Pet. App. 5a. Petitioner Penn Arms, Inc., manufactures the Striker 12, a 12-gauge revolving cylinder shotgun. *Ibid.* Revolving cylinder shotguns are treated as "semiautomatic assault weapons" for purposes of 18 U.S.C. 922(v). See 18 U.S.C. 921(a)(30)(A)(ix).

4. In March 1995, petitioners commenced this action for declaratory relief. They contended, *inter alia*, that Congress lacked constitutional authority to enact Section 922(v)(1). Petitioners further alleged that Section 922(v)(1), in combination with the provisions of the statute specifically identifying the Intratec TEC-DC9 and TEC-22 and Striker 12 as semiautomatic assault weapons (see 18 U.S.C. 921(a)(30)(A)(viii) and (ix)), con-

stitutes an impermissible bill of attainder. Petitioners also argued that the restrictions are unconstitutionally vague. Pet. App. 6a.

5. The district court held that petitioners lacked standing to bring a pre-enforcement challenge to the statute. 914 F. Supp. 632 (D.D.C. 1996). The court of appeals affirmed in part and reversed in part. 103 F.3d 994 (D.C. Cir. 1997). The court of appeals observed that "[petitioners'] enumerated powers challenge to § 922(v)(1), and all of their Bill of Attainder claims, involve portions of the Act that single out specific weapons manufactured only by the [petitioners]." *Id.* at 999. The court found that "this threat of prosecution * * * creates the 'injury in fact' required under standing doctrine, for the threat forces appellants to forego the manufacture and transfer of the weapons specified in the Act." *Id.* at 1001. In contrast, the court determined, petitioners' vagueness claims did not involve the same imminent threat of prosecution. *Id.* at 1001-1002. Accordingly, the court of appeals affirmed the dismissal of the vagueness challenge and remanded for further proceedings with respect to the enumerated powers and bill of attainder claims. *Id.* at 1002.

6. On remand, the district court granted the government's motion for summary judgment. Pet. App. 39a-85a. The court held that the enactment of Section 922(v)(1) was a permissible exercise of Congress's power under the Commerce Clause. *Id.* at 47a-74a. It explained that "[b]ecause local manufacture, transfer, and possession of semiautomatic assault weapons is so closely related to the interstate market for these weapons, such transfer, manufacture, and possession has a substantial [e]ffect on interstate commerce when viewed in the aggregate and cannot truly be considered purely local." *Id.* at 74a. The court also

concluded that "because the challenged statute does not fall within the historical meaning of legislative punishment, furthers nonpunitive legislative purposes, and fails to evince any congressional intent to punish, * * * § 921(a)(30)(A)(viii) and (ix) is not a bill of attainder with respect to [petitioners]." *Id.* at 85a; see *id.* at 75a-85a.

7. The court of appeals affirmed. Pet. App. 1a-38a. The court upheld Section 922(v)(1) against petitioners' Commerce Clause challenge. *Id.* at 9a-32a. The court of appeals applied the constitutional standards set forth in *United States* v. *Lopez*, 514 U.S. 549 (1995), and found Section 922(v)(1) to be a permissible "regulation of activities having a substantial [e]ffect on interstate commerce." Pet. App. 10a. It relied in part on "extensive legislative history indicating a firm congressional intent to control the flow through interstate commerce of semiautomatic assault weapons bought or manufactured in one state and subsequently transported into other states." *Id.* at 16a. The court explained that

> [t]he restriction on the manufacture and transfer of [semiautomatic assault] weapons is an attempt to restrict the supply of such weapons in interstate commerce. Manufacture, transfer and possession are activities that not only substantially affect interstate commerce in "semiautomatic assault weapons," but are also the necessary predicates to such commerce. The ban on possession of "semiautomatic assault weapons" in this context is necessary to allow law enforcement to effectively regulate the manufacture and transfers where the product comes to rest, in the possession of the receiver.

*Id*. at 18a (citation omitted). The court of appeals found Section 922(v)(1) to be further "supported by the history of prior firearms legislation such as the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968, which contain congressional findings that there is a large interstate market in firearms and firearms legislation is aimed at controlling that market." *Id*. at 11a. The court also noted that "eight other circuit courts of appeals have upheld a similar prohibition of the 'transfer or possession of machine guns' against post-*Lopez* commerce clause challenges." *Ibid*.[1]

**ARGUMENT**

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. The 1994 amendments to the Gun Control Act restrict the manufacture, transfer, and possession of specified weapons. 18 U.S.C. 922(v). Congress sought to prevent interstate commerce in the prohibited firearms by "impos[ing] criminal liability for those activities which fuel the supply and demand for such weapons." Pet. App. 17a. Petitioners are federally licensed manufacturers of firearms whose standing to sue is premised on Section 922(v)(1)'s likely effect on their commercial activities. See 103 F.3d at 1001 (court

[1] The court of appeals also rejected petitioners' claim under the Bill of Attainder Clause. Pet. App. 32a-38a. The court explained that "since the prohibition effectuated by the Act neither falls within the historical meaning of punishment, nor exhibits a purely punitive purpose, nor manifests a congressional intent to punish [petitioners], it does not constitute an unconstitutional Bill of Attainder." *Id*. at 37a-38a. Petitioners do not press the Bill of Attainder Clause challenge in this Court.

of appeals concluded on prior appeal that petitioners had demonstrated standing because the statutory restrictions would require them "to forego the manufacture and transfer of the weapons specified in the Act"). And as the legislative history of the Gun Control Act and the 1994 amendments demonstrates, federal regulation of firearms and assault weapons is based in large part on evidence that the nationwide market for firearms renders purely local prohibitions ineffective. See Pet. App. 19a-21a. There is consequently no basis for petitioners' contention that Section 922(v)(1) is an invalid regulation of non-economic activity.

Petitioners contend that "for an activity to be 'economic,' it must not simply 'substantially affect' a larger market for the product in interstate commerce, but must do so in a manner that has economic effects, i.e., affects the volume and thus prices of the product." Pet. 8. The significance of that assertion is unclear. Section 922(v)(1) imposes an absolute prohibition on the sale of specified firearms, and that prohibition directly affects volume and price. The fact that the statute serves non-economic ends (protection of the public health and safety) as well does not render it an invalid exercise of Congress's Commerce Clause powers. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257 (1964) (Congress may use its Commerce Clause authority to "legislat[e] against moral wrongs" as long as the regulated activity also has the requisite nexus to interstate commerce); *Mulford* v. *Smith*, 307 U.S. 38, 48 (1939) ("[t]he motive of Congress in exerting the [commerce] power is irrelevant to the validity of the legislation").

b. Petitioners' reliance (Pet. 5-9) on *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), is misplaced. The Court in

*Morrison* concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 1751. The Gun-Free School Zones Act (GFSZA) at issue in *Lopez* was held to have "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Nor did the restrictions in *Morrison* or *Lopez* form "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Ibid.* The GFSZA simply outlawed the possession of a firearm in the vicinity of a school building, and did not form part of a broader regulatory scheme. The restriction imposed a geographic limit on the possession of guns that might otherwise be freely manufactured, sold, and possessed in interstate commerce.

By contrast, legislative measures designed to suppress the national market in a particular article of commerce are legitimate exercises of Commerce Clause authority, even as applied to conduct (*e.g.*, possession of the item by the ultimate recipient) that may be undertaken for non-economic motives. Thus, the courts of appeals have uniformly rejected Commerce Clause challenges asserted by individuals convicted of illegal possession of a machinegun. See *United States* v. *Franklyn*, 157 F.3d 90, 93-96 (2d Cir.), cert. denied, 525 U.S. 1027 (1998) and 525 U.S. 1112 (1999); *United States* v. *Wright*, 117 F.3d 1265, 1269-1271 (11th Cir.), cert. denied, 522 U.S. 1007 (1997), vacated in part on other grounds, 133 F.3d 1412 (11th Cir.), cert. denied, 525 U.S. 894 (1998); *United States* v. *Knutson*, 113 F.3d 27 (5th Cir. 1997); *United States* v. *Rybar*, 103 F.3d 273, 283 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997); *United States* v. *Kenney*, 91 F.3d 884 (7th Cir. 1996);

*United States* v. *Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States* v. *Rambo*, 74 F.3d 948 (9th Cir.), cert. denied, 519 U.S. 819 (1996); *United States* v. *Wilks*, 58 F.3d 1518 (10th Cir. 1995).[2] The constitutionality of Section 922(v)(1) is particularly clear as applied to petitioners, who seek to manufacture and transfer the proscribed firearms as part and parcel of an ongoing commercial enterprise.

2. Petitioners contend (Pet. 9-19) that the court of appeals' analysis of the legislative history of the Gun Control Act and its amendments is inconsistent with this Court's treatment of congressional findings in *Lopez* and *Morrison*. That claim lacks merit. As *Lopez* and *Morrison* make clear, "Congress normally is not required to make formal findings" regarding an activity's likely effects on interstate commerce. *Morrison*, 120 S. Ct. at 1751 (quoting *Lopez*, 514 U.S. at 562). The Court in *Lopez* did observe that where the nexus between regulated conduct and interstate commerce is

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[2] As the Seventh Circuit has explained, such restrictions on possession constitute "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Kenney*, 91 F.3d at 890 (quoting *Lopez*, 514 U.S. at 561). See also *Franklyn*, 157 F.3d at 94 (restriction on machinegun possession "is integral to a larger federal scheme for the regulation of trafficking in firearms—an economic activity with strong interstate effects"); *Rybar*, 103 F.3d at 283 (statute validly "targets the possession of machine guns as a demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce in machine guns"); *Wright*, 117 F.3d at 1270-1271 (same). As the court in *Wright* observed, "[t]he same cannot be said for the prohibition at issue in *Lopez*," because, "[b]y prohibiting only the possession of guns within 1,000 feet of a school, Congress could not rationally have expected to substantially affect the manufacture, importation, and interstate transfer of firearms." *Id.* at 1270 n.8.

not readily apparent, "congressional findings would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce." 514 U.S. at 563. But in the present case, where commercial gun manufacturers challenge regulation of their firearms production, the nexus to interstate commerce is "visible to the naked eye" (*ibid.*) in a way that was not true in *Lopez*. There is consequently no need for legislative findings or extensive history to support the congressional judgment at issue here.

In any event, the legislative record fully supports Congress's view that the manufacture and transfer of firearms have substantial interstate commercial effects. In the Omnibus Crime Control Act of 1968, Congress found that "widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce" rendered the States unable to "control this traffic within their own borders through the exercise of their police power." Pub. L. No. 90-351, § 901(a)(1), 82 Stat. 225. See also *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974) (Congress enacted federal firearms legislation because "it was concerned with the widespread traffic in firearms"). The legislative hearings that led to the 1994 amendments produced a substantial body of evidence on the same point, including "extensive testimony from police officers about the significant flow of weapons across state lines and the inability of a state to control it." Pet. App. 19a. That evidence supports Congress's common-sense judgment that a categorical ban on the manufacture, transfer, and possession of specified firearms will significantly reduce interstate commerce in those weapons.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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