No. 19-6220

IN THE SUPREME COURT OF THE UNITED STATES

NERSES NICK BRONSOZIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

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

QUESTION PRESENTED

Whether 26 U.S.C. 5861(d), as applied to unregistered machineguns, exceeds Congress's authority under Article I of the Constitution.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. Bronsozian, No. 16-cr-196 (May 31, 2017)

United States Court of Appeals (9th Cir.):

United States v. Bronsozian, No. 17-50197 (Apr. 15, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 19-6220

NERSES NICK BRONSOZIAN, PETITIONER

v.

UNITED STATES OF AMERICA

_____

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

BRIEF FOR THE UNITED STATES

_____

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2, at 1-4) is not published in the Federal Reporter but is reprinted at 764 Fed. Appx. 633.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2019. A petition for rehearing was denied on July 10, 2019 (Pet. App. A1). The petition for a writ of certiorari was filed on October 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d) and 5871. Pet. App. A3, at 1. He was sentenced to one year and one day of imprisonment, to be followed by three years of supervised release. Pet. App. A3, at 1. The court of appeals affirmed. Pet. App. A2, at 1-4. After the filing of the petition for a writ of certiorari, the government filed an application in the district court to dismiss the indictment. D. Ct. Doc. 143 (Dec. 5, 2019).

1. The National Firearms Act (NFA or Act), 26 U.S.C. 5801 et seq., enacted in 1934, imposes a federal tax on the manufacture, sale, and transfer of "firearm[s]." 26 U.S.C. 5811, 5821. The Act defines "firearm" to include, among other items, short-barreled shotguns, short-barreled rifles, machineguns, bombs, grenades, and silencers. 26 U.S.C. 5845(a); see 26 U.S.C. 5845(f). The NFA's definition does not include commonly used weapons such as handguns, shotguns, and rifles, or commonly used accessories such as bullets. See ibid.

The Act requires manufacturers, importers, and dealers of such firearms ("NFA firearms") to register and pay an occupational tax. 26 U.S.C. 5801, 5802. The Act also requires registration with the National Firearms Registration and Transfer Record and payment of an excise tax of $200 upon the manufacture, importation,

or transfer of an NFA firearm. 26 U.S.C. 5811, 5812, 5821, 5822, 5841. The provision of the Act that petitioner challenges, 26 U.S.C. 5861(d), prohibits any person from receiving or possessing an NFA firearm that is not registered to him. 26 U.S.C. 5861(d). The Act makes it a criminal offense, punishable by up to ten years of imprisonment, to violate the Act's requirements, including Section 5861(d). 26 U.S.C. 5871.

The Act provides that an application to transfer an NFA firearm "shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law." 26 U.S.C. 5812(a). A subsequently enacted statute, 18 U.S.C. 922(*o*), makes it illegal for private individuals "to transfer or possess a machinegun." 18 U.S.C. 922(*o*)(1). The only exceptions are for government or government-authorized actions and for "any lawful transfer or lawful possession of a machinegun that was lawfully possessed" before May 19, 1986, i.e., the date on which Section 922(*o*) took effect. 18 U.S.C. 922(*o*)(2)(B); see Firearm Owners' Protection Act, Pub. L. No. 99-308, §§ 102(9) and 110, 100 Stat. 452, 460 (1986).

Longstanding Department of Justice policy provides: "As a result of the enactment of 18 U.S.C. 922(*o*), the Secretary of the Treasury no longer will register or accept any tax payments to make or transfer a machinegun made after May 19, 1986. Accordingly, because it is impossible to comply with the registration and taxation provisions in the NFA, prosecutors

should charge the unlawful possession or transfer of a machinegun made after May 19, 1986 under § 922(*o*)." U.S. Dep't of Justice, Justice Manual § 9-63.516 (2018), https://www.justice.gov/jm/jm-9-63000-protection-public-order#9-63.516.

2. In 2011, petitioner sold an unregistered MAC-10 machinegun and a second gun to an undercover federal agent for $2200. Presentence Investigation Report (PSR) ¶¶ 7-8. A grand jury indicted petitioner for possessing an unregistered firearm (the machinegun), in violation of 26 U.S.C. 5861(d). D. Ct. Doc. 1, at 1-2 (Mar. 29, 2016).

On the first day of trial, petitioner moved to dismiss the indictment. Pet. App. A4, at 1-20; D. Ct. Doc. 96, at 85-87 (Jan. 12, 2017). As relevant here, petitioner argued that Section 5861(d) is unconstitutional as applied to unregistered machineguns possessed after May 19, 1986, on the theory that Section 5861(d) "now imposes a penalty, rather than a tax" on such machineguns and thus "cannot be justified under Congress' enumerated power under Article I, § 8, cl. 1 to lay and collect taxes." Pet. App. A4, at 20. The trial proceeded while petitioner's motion remained pending, and the jury found petitioner guilty. D. Ct. Doc. 93, at 116-118 (Jan. 11, 2017). After trial, the district court denied petitioner's motion to dismiss the indictment. D. Ct. Doc. 82, at 1-6 (Nov. 30, 2016). The court explained that the arguments in petitioner's motion were foreclosed by Hunter v. United States, 73 F.3d 260 (9th Cir. 1996), in which the court of appeals determined

that Section 5861(d) "was within Congress's power to tax." D. Ct. Doc. 82, at 4.

The court of appeals affirmed in an unpublished memorandum decision. Pet. App. A2, at 1-4. As relevant here, the court determined that its decision in Hunter foreclosed petitioner's constitutional challenge to Section 5681(d). Id. at 2. The court rejected petitioner's contention that this Court's decision in National Federation of Independent Business v. Sebelius (NFIB), 567 U.S. 519 (2012), "fatally undermined" Hunter. Pet. App. A2, at 2. The court explained that Hunter addressed "whether § 5861(d), which was enacted in aid of a firearms tax provision, remained constitutional in light of the federal agency's decision to deny the licensing and registration applications that would have triggered the taxable event." Id. at 3. And the court observed that "NFIB did not address that issue in any way, even indirectly." Ibid.

3. After petitioner filed this petition for a writ of certiorari, the government filed an application in the district court to vacate the judgment and to dismiss the indictment with prejudice pursuant to Federal Rule of Criminal Procedure 48(a). D. Ct. Doc. 143, at 1-2. Rule 48(a) provides that "[t]he government may, with leave of court, dismiss an indictment." Fed. R. Crim. P. 48(a). Rule 48(a) allows the government to seek dismissal of an indictment even after the government prevails at trial and the district court enters judgment. See Thompson v.

United States, 444 U.S. 248, 250 (1980) (per curiam); Rinaldi v. United States, 434 U.S. 22, 28-32 (1977) (per curiam).

The government explained in a declaration supporting the application that, "[a]fter consultation with the Solicitor General's Office, the United States Attorney's Office now has determined that dismissal of this criminal case in the interest of justice." D. Ct. Doc. 143, at 5. The government observed to the court that "a Department of Justice policy direct[s] prosecutors to charge the unlawful possession or transfer of a machinegun made after May 19, 1986 under 18 U.S.C. § 922(*o*), rather than, as in this case, under 26 U.S.C. § 5681(d)." Ibid. The government emphasized that the policy "creates no enforceable rights for a particular defendant" and that the case was "lawfully charged and prosecuted." Id. at 5-6. But the government explained that it had concluded that because of "the possibility that a similarly situated defendant in another district would not have been so charged and convicted," "the strong interest in national uniformity in the application of justice provides good cause for the dismissal of the indictment and vacatur of the judgment." Ibid.

Petitioner did not object to the government's application. See D. Ct. Doc. 143, at 6. The application remains pending in the district court.

ARGUMENT

Petitioner contends (Pet. 5-13) that 26 U.S.C. 5861(d), as applied to unregistered machineguns, exceeds Congress's taxing power under Article I of the Constitution. In view of the government's pending application to dismiss the indictment, this Court should grant the petition, vacate the judgment below, and remand the case.

1. The Department of Justice's internal policies do not create rights that are enforceable at law by private parties. See, e.g., United States v. Lorenzo, 995 F.2d 1448, 1453 (9th Cir. 1993). This Court, however, has explained that, when the Office of the Solicitor General represents that a "Department policy was violated" in a criminal case, the Court may properly grant the petition, vacate the judgment, and remand the case. Thompson v. United States, 444 U.S. 248, 249 (1980) (per curiam). That practice rests on the federal statute that empowers the Court to "affirm, modify, vacate, set aside or reverse any judgment * * * lawfully brought before it for review, and [to] * * * require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106. The Court has explained that, when "a prosecution is initiated and a conviction obtained in violation of [a] policy" and "the Solicitor General has discovered such a violation in a case pending before this Court," the "power to afford relief which is 'just under the circumstances'" allows the Court to remand the case "to allow the Government to dismiss

the indictment." Rinaldi v. United States, 434 U.S. 22, 25 n.8 (1977) (per curiam) (citation omitted).

For example, "[t]he Department of Justice has a firmly established policy, known as the 'Petite' policy, under which United States Attorneys are [ordinarily] forbidden to prosecute any person for allegedly criminal behavior if the alleged criminality was an ingredient of previous state prosecution against them." Thompson, 444 U.S. at 248. "Ever since the Justice Department established the 'Petite' policy in 1959, the Court has consistently responded to requests by the Government in cases [where the policy was violated] by granting certiorari and vacating the judgments." Id. at 249; see Hammons v. United States, 439 U.S. 810 (1978); Frakes v. United States, 435 U.S. 911 (1978); Rinaldi, 434 U.S. at 32; Croucher v. United States, 429 U.S. 1034 (1977); Watts v. United States, 422 U.S. 1032 (1975); Ackerson v. United States, 419 U.S. 1099 (1975); Hayles v. United States, 419 U.S. 892 (1974); Thompson v. United States, 400 U.S. 17 (1970) (per curiam); Marakar v. United States, 370 U.S. 723 (1962) (per curiam); Petite v. United States, 361 U.S. 529 (1960) (per curiam).

This Court's practice "is not unique to violations of the 'Petite' policy." Thompson, 444 U.S. at 250. "The Court also has consistently vacated the judgments in other cases which the Solicitor General has represented were in violation of other Justice Department policies." Ibid.; see Blucher v. United States, 439 U.S. 1061 (1979) (obscenity prosecution); Nunley v. United

States, 434 U.S. 962 (1977) (prosecution for willfully making false statements); Margraf v. United States, 414 U.S. 1106 (1973) (prosecution for carrying a concealed weapon while boarding an aircraft); Robison v. United States, 390 U.S. 198 (1968) (per curiam) (addition of counts upon retrial); Redmond v. United States, 384 U.S. 264 (1966) (per curiam) (obscenity prosecution).

As noted above, a longstanding policy of the Department of Justice states: "As a result of the enactment of 18 U.S.C. 922(*o*), the Secretary of the Treasury no longer will register or accept any tax payments to make or transfer a machinegun made after May 19, 1986. Accordingly, because it is impossible to comply with the registration and taxation provisions in the [National Firearms Act], prosecutors should charge the unlawful possession or transfer of a machinegun made after May 19, 1986 under § 922(*o*)." Justice Manual § 9-63.516. In this case, the government charged petitioner under 26 U.S.C. 5681(d) rather than 18 U.S.C. 922(*o*). The government has now determined, in light of the Department of Justice's policy, that the interests of justice justify the dismissal of the indictment and vacatur of the judgment, and it has filed an application in the district court reflecting that determination. See pp. 5-6, supra. Under the "long line of decisions" discussed above, Thompson, 444 U.S. at 250, it would be appropriate for this Court to grant the petition, vacate the judgment below, and remand the case to the court of appeals.

2. Although this Court's past practice suggests that course, the Court could also achieve the same practical result by simply denying the petition. The decision below is unpublished and nonprecedential. This Court has repeatedly denied petitions for writs of certiorari inviting the Court to hold that the National Firearms Act's taxation and registration provisions exceed Congress's enumerated powers. See Kettler v. United States, 139 S. Ct. 2691 (2019) (No. 18-936); Thompson v. United States, 543 U.S. 859 (2004) (No. 03-10935); Gresham v. United States, 522 U.S. 1052 (1998) (No. 97-5420); Milojevich v. United States, 522 U.S. 969 (1997) (No. 97-5207). And this case comes to the Court in an interlocutory posture, because the government's application to dismiss the indictment remains pending in the district court.

That interlocutory posture "alone furnishe[s] sufficient ground for the denial of the application." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Virginia Military Institute v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari); Brotherhood of Locomotive Firemen & Enginemen, v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam). If the application were granted, petitioner's challenge to his conviction would become moot. If the application were denied, petitioner will have an opportunity to raise the claims pressed here, in addition to any claims that may arise from the district court's consideration of the application, in a single petition for

a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals"); cf. Rinaldi, 434 U.S. at 24-25 (reviewing the refusal of district court to grant the government's application under Rule 48(a) in a case where the government sought dismissal in light of an internal policy).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

MARCH 2020