

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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**Leroy Hoyle,**

*Petitioner,*

v.

**United States of America,**

*Respondent.*

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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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PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### I.

Whether 18 U.S.C. §922(g)(1) is unconstitutional under the Second Amendment framework of *New York State Rifle & Pistol Association v. Bruen*.

### II.

Whether 18 U.S.C. §922(g) should be construed to require a more substantial connection to interstate commerce than the mere passage of a firearm across state lines in an unspecified way, and if not, whether it exceeds Congress's power to enact?

## **PARTIES TO THE PROCEEDING**

Petitioner is Leroy Hoyle, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

## **RELATED PROCEEDINGS**

- *United States v. Hoyle*, No. 3:21-CR-641-M, U.S. District Court for the Northern District of Texas. Judgment entered on June 15, 2023.
- *United States v. Hoyle*, No. 23-10649, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on January 12, 2024.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Leroy Hoyle seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### OPINIONS BELOW

The Fifth Circuit's unpublished opinion is available at *United States v. Hoyle*, No. 23-10649, 2024 U.S. App. LEXIS 902 (5th Cir. Jan. 12, 2024). It is reprinted in Appendix A to this Petition. The district court's judgment is attached as Appendix B.

### JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on January 12, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides that:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes

U.S. Const. art. I, § 8, cl. 3.

Section 922(g)(1) of Title 18 provides:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year—

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.



## STATEMENT OF THE CASE

### I. Facts and Proceedings in District Court

Petitioner Leroy Hoyle was charged with a single count of violating 18 U.S.C. §922(g)(1), by possessing a firearm after a felony conviction. *See* (ROA.8-10). He filed a Motion to Dismiss the Indictment, arguing the statute’s requirement that possession of the firearm be “in or affecting commerce” requires a more robust connection to interstate commerce than merely crossing state lines at some point in the past. *See* (ROA.33-37). The Motion to Dismiss Indictment recognized that this interpretation of “in or affecting commerce” has been accepted by the Fifth Circuit Court of Appeals and others but sought to preserve the argument for further review. *See* (ROA.33). The Government filed a Response to Motion to Dismiss which argued Mr. Hoyle’s position was foreclosed by Fifth Circuit precedent. *See* (ROA.39-40). The trial court denied Mr. Hoyle’s Motion to Dismiss Indictment. *See* (ROA.42-43). Subsequently, Mr. Hoyle pleaded guilty without a plea agreement to the single count indictment. (ROA.44-47). The trial court accepted Mr. Hoyle’s guilty plea and imposed a sentence of 52 months imprisonment, plus supervised release. *See* (ROA.52,68-69).

### II. Appellate Proceedings

Hoyle appealed, challenging his sentence as unconstitutional under the Second Amendment framework of *New York State Rifle & Pistol Association v. Bruen*, and as exceeding Congress’s commerce power. The Fifth Circuit affirmed in an unpublished opinion. *United States v. Hoyle*, No. 23-10649, 2024 U.S. Appl. LEXIS 902 (5<sup>th</sup> Cir. Jan. 12, 2024) (reprinted in Appendix A).

## REASONS FOR GRANTING THIS PETITION

### I. Lower courts require guidance on how to apply *Bruen*.

#### A. A circuit split has emerged over the constitutionality of 18 U.S.C. § 922(g)(1).

The Second Amendment guarantees “the right of the people to keep and bear arms.” U.S. Const. amend. II. Yet 18 U.S.C. § 922(g)(1) denies that right, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. Despite the conflict between the statutory and constitutional text, the courts of appeals historically and uniformly rejected Second Amendment challenges. *See United States v. Moore*, 666 F.3d 313, 316–17 (4th Cir. 2012) (collecting authorities).

However, this Court’s decision in *Bruen*, presented a new framework for analyzing Second Amendment questions. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022). “When the Second Amendment’s plain text covers an individual’s conduct,” *Bruen* held that the government must “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 24. No longer may the government defend a regulation by showing that it is narrowly tailored to achieve an important or even compelling state interest. *Id.* at 17–24.

In *Bruen*’s wake, courts of appeals have split as to whether 18 U.S.C. §922(g)(1) infringes on rights protected by the Second Amendment. The Third Circuit sustained the Second Amendment challenge of a man previously convicted of making a false statement to obtain food stamps, notwithstanding that the crime was punishable by

imprisonment for a term exceeding one year. See *Range v. Att’y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023). By contrast, the Eighth Circuit has rejected Second Amendment challenges to the constitutionality of § 922(g)(1). See *United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023) (citing *United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023)). The Seventh Circuit considered a more robust development of the historical record necessary at the trial court and remanded the issue accordingly. See *Atkinson v. Garland*, 70 F.4th 1018, 1022–24 (7th Cir. 2023). The Tenth Circuit concluded that *Bruen* did not “indisputably and pellucidly abrogate” precedent upholding § 922(g)(1). *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023) (relying up on a head count of votes from *Bruen*’s concurring and dissenting opinions reaffirming language in *Heller*, and its footnote concerning “shall-issue” regimes.) Similarly, the Eleventh Circuit found that, absent clearer instruction from the Court, *Bruen* did not disrupt its precedent regarding § 922(g)(1)’s constitutionality. *United States v. Dubois*, 2024 U.S. App. LEXIS 5337 at \*13, 94 F.4th 1284 (11th Cir. 2024) (noting *District of Columbia v. Heller*, 554 U.S. 570 (2008) did not cast doubt on felon-in-possession laws, and the *Bruen* made clear it was “[i]n keeping with *Heller*.”).

**B. This issue is of exceptional importance.**

*Bruen*’s application to § 922(g)(1) will continue to plague lower courts until this Court provides guidance. The Court’s much anticipated decision in *United States v. Rahimi*, No. 22-915, which will decide the constitutionality of 18 U.S.C. § 922(g)(8), may provide some guidance as to the constitutionality of § 922(g)(1). But the Solicitor General appears to agree that more is needed. The government has requested this

Court’s review in *Garland v. Range*, No. 23-374, which squarely presents the question of § 922(g)(1)’s constitutionality under the Second Amendment; and in *United States v. Daniels*, Case No. 23-376, which presents the related question of § 922(g)(3)’s constitutionality under the Second Amendment.

Moreover, the issue before the Court implicates the prosecution and incarceration of thousands. As of April 9, 2024, the Bureau of Prisons reported that it imprisons 156,007 people.<sup>1</sup> And as of April 6, 2024, 21.9% of inmates (31,559) were incarcerated for “Weapons, Explosives, [and] Arson” offenses, the second largest category of offenses within the federal prison population.<sup>2</sup>

These figures only capture the tail end of the criminal process at the district court. The scope of prosecutions looms larger. “The Department of Justice filed firearms-related charges in upwards of 13,000 criminal cases during the 2021 fiscal year.” *United States v. Kelly*, No. 3:22-CR-00037, 2022 WL 17336578, at \*3 (M.D. Tenn. Nov. 16, 2022) (citing Executive Office for United States Attorneys, U.S. Dept. of Justice, Annual Statistical Report Fiscal Year 2021 at 15 (Table 3C), available at <https://www.justice.gov/usao/page/file/1476856/download>). The scale of the question presented warrants this Court’s attention.

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<sup>1</sup> *Statistics*, Federal Bureau of Prisons, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) (last visited Apr. 9, 2024).

<sup>2</sup> *Statistics – Inmate Offenses*, Federal Bureau of Prisons, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last visited Apr. 9, 2024).

**II. This Court should delineate the boundaries of federal authority under the Commerce Clause in the firearm context.**

The Omnibus Crime Control and Safe Streets Act of 1968, a predecessor to 18 U.S.C. §922(g), made it a crime for a convicted felon to possess “in commerce or affecting commerce... any firearm.” Pub. L. No. 90-351, § 1202, 82 Stat. 197. *Scarborough v. United States* addressed whether under that statute “proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the *statutorily* required nexus between the possession of a firearm by a convicted felon and commerce.” *Scarborough v. United States*, 431 U.S. 563, 564 (1977) (emphasis added). Focusing on the statutory construction and Congress’s intent in enacting the statute, *Scarborough* answered this question in the affirmative, but did not address the constitutional implications of its statutory construction. *See id.* at 577; *see also United States v. Johnson*, 42 F.4th 743, 750 (7th Cir. 2022) (noting that the decision in *Scarborough* “was one of statutory interpretation”); *United States v. Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc). (“[T]he Court’s holding in *Scarborough* was statutory, not constitutional.”).

Nearly two decades later, this Court examined the related *constitutional* question presented by 18 U.S.C. § 922(q) in *United States v. Lopez*, 514 U.S. 549 (1995). That statute “made it a federal offense ‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.’” *Id.* at 551 (quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)). This Court affirmed that the statute lay “beyond the power of Congress under the Commerce Clause.” *Id.* at 552.

In *Lopez*, the Court laid out the three categories of activity subject to Congress’s commerce power: (1) “the use of the channels of interstate commerce”; (2) activities, even if intrastate, that threaten “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” *Id.* at 558–59 (internal citations omitted). Because the Court readily concluded § 922(q) could not be justified under the first two categories, its inquiry focused on whether §922(q) regulated an activity that substantially affected interstate commerce. *Id.* at 559.

The Court noted that “States possess primary authority for defining and enforcing the criminal law” and that laws like § 922(q), which federally criminalize “conduct already denounced as criminal by the States ... effects a change in the sensitive relation between federal and state criminal jurisdiction.” *Id.* at 561 & n.3. The Court also worried the government’s arguments for how possession of a firearm in a local school zone substantially affected commerce lent themselves to no limiting principle, opening the door to a “a general federal police power.” *Id.* at 563–66. Ultimately, the Court concluded that “possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.* at 567.

**A. The Court of Appeals differ on the relationship between *Scarborough* and *Lopez*.**

In the decades since *Lopez* was decided, federal courts have “cried out for guidance from this Court” on the discord between *Scarborough* and *Lopez*. *Alderman v.*

*United States*, 131 S. Ct. 700, 702 (2011) (Thomas, J., dissenting from denial of certiorari). Simply put, “*Scarborough* is in fundamental and irreconcilable conflict with the rationale of the United States Supreme Court in [*Lopez*].” *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting). Absent further guidance from this Court, the Fifth Circuit “continue[s] to enforce § 922(g)(1)” because it is “not at liberty to question the Supreme Court’s approval of the predecessor statute to [§ 922(g)(1)].” *United States v. Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (per curiam). See also *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (per curiam) (Garwood, J., concurring) (“one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce,” but concluding that *Scarborough*’s “implication of constitutionality” “bind[s] us, as an inferior court,...whether or not the Supreme Court will ultimately regard it as a controlling holding in that particular respect.”).

The Fifth Circuit is not alone. See, e.g., *United States v. Patterson*, 853 F.3d 298, 301–02 (6th Cir. 2017) (“If the *Lopez* framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent,” i.e., *Scarborough*, “that does not squarely address the constitutional issue.” (quoting *Alderman v. United States*, 131 S. Ct. at 703 (Thomas, J., dissenting from denial of certiorari))); *United States v. Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir. 2002) (although “[t]he vitality of *Scarborough* engenders significant debate,” committing to “follow

*Scarborough* unwaveringly” “[u]ntil the Supreme Court tells us otherwise”); *United States v. Bishop*, 66 F.3d 569, 587–88, 588 n.28 (3d Cir. 1995) (noting that, until the Supreme Court is more explicit on the relationship between *Lopez* and *Scarborough*, a lower court is “not at liberty to overrule existing Supreme Court precedent”); *United States v. Patton*, 451 F.3d 615, 634–35 (10th Cir. 2006) (collecting cases).

Nine courts of appeals have upheld § 922(g)(1) based solely on the *Scarborough* minimal nexus test. See *United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216–17 (2d Cir. 2001) (per curiam); *United States v. Gateward*, 84 F.3d 670, 671–72 (3d Cir. 1996); *Rawls*, 85 F.3d at 242–43; *United States v. Lemons*, 302 F.3d 769, 771–73 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam); *United States v. Hanna*, 55 F.3d 1456, 1461–62, 1462 n.2 (9th Cir. 1995); *United States v. Dorris*, 236 F.3d 582, 584–86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). Only two courts of appeals have engaged in *Lopez*’s substantial-effects test and reasoned that § 922(g)(1) is constitutional under it. See *United States v. Crump*, 120 F.3d 462, 466 & n.2 (4th Cir. 1997) (citing *United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995) (en banc), *abrogated on other grounds by Rehaif v. United States*, 139 S. Ct. 2191 (2019)); *United States v. Chesney*, 86 F.3d 564, 568–70 (6th Cir. 1996). Because courts often fail to apply the *Lopez* test to these firearm possession cases at all, defendants across the country lack the constitutional protection from congressional overreach provided by *Lopez*. To avoid unconstitutionality, *Lopez* demands that § 922(g)(1)’s “possess in or affecting commerce” element require either: 1) proof that



the defendant’s offense caused the firearm to move in interstate commerce; or, at least, 2) proof that the firearm moved in interstate commerce at a time reasonably near the offense. But *Scarborough* continues to control the outcome in a large majority of circuits, leaving the “empty, formalistic” requirement of a jurisdictional provision as the only check on Congress’ power to criminalize this particular kind of intrastate activity. *Chesney*, 86 F.3d at 580 (Batchelder, J., concurring).

**B. An unchecked Commerce power would significantly expand Congress’s reach into state affairs.**

The federal government’s enumerated powers are “few and defined,” while the powers which remain in the state governments are “numerous and indefinite.” *Lopez*, 514 U.S. at 552 (citing *The Federalist* No. 45, pp. 292–293 (C. Rossiter ed. 1961)). One such enumerated power is “[t]o regulate Commerce . . . among the several States[.]” U.S. Const. art. I, § 8, cl. 3. “Constitutional limits on governmental power do not enforce themselves”; instead, “[t]hey require vigilant—and diligent—enforcement.” *Seekins*, 52 F.4th at 989 (Ho, J., dissenting from denial of rehearing en banc). “Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” *United States v. Morrison*, 529 U.S. 598, 614 (2000) (quoting *Lopez*, 514 U.S. at 557 n.2).

Merely including the phrase “which has been shipped or transported in interstate or foreign commerce” in a statute does not act as magic words to fulfill the constitutional requirement. *See Alderman*, 131 S. Ct. at 702 (Thomas, J., dissenting from the denial of certiorari) (“*Scarborough*, as the lower courts have read it, cannot be

reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook.”). The Commerce Clause power would be reduced to a rubber stamp, opening the door to a federal police power in direct contravention of the federal government the Constitution enshrines. *See Morrison*, 529 U.S. at 618 (“the Founders denied the National Government” “the police power,” “reposed in the States”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (the Commerce Clause “must be read carefully to avoid creating a general federal authority akin to the police power”).

**III. This Court should grant certiorari to address the constitutional issues in another case and hold the instant petition pending the outcome.**

Hoyle did not challenge the constitutionality of the statute under *Bruen* at the district court. This probably presents an insurmountable vehicle problem for a plenary grant in the present case. Nonetheless, the questions presented are worthy of certiorari, and the Court has other opportunities to review them.

If the Court grants certiorari to decide the constitutionality of § 922(g)(1) in *Garland v. Range*, for instance, it may recognize the unconstitutionality of § 922(g)(1) in a substantial number of cases. Indeed, this Court may well find that the Second Amendment even supports a facial challenge to § 922(g)(1). In dissent, Judge Krause in *Range* expressed serious doubts as to whether the logic of that decision could be contained to those convicted of relatively innocuous felonies. *See, e.g., Range*, 69 F.4th at 131-32 (Krause, J., dissenting). The Seventh Circuit likewise questioned any dividing line based on “dangerousness.” *See Atkinson*, 70 F.4th at 1023. And the South-

ern District of Mississippi has sustained a Second Amendment challenge to a defendant previously convicted of aggravated assault and manslaughter. *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at \*2–3 (S.D. Miss. June 28, 2023). But even if the Court declines to grant certiorari in *Range*, this Court at minimum should hold the instant petition pending its decision in *Rahimi*. A victory for *Rahimi* likely will involve a rejection of the government’s contention that the Second Amendment is limited to those Congress terms “law abiding.” *See Rahimi*, 61 F.4th at 451–53. It will also require the Court to consider and reject historical analogues to § 922(g)(8), including some also offered in support of § 922(g)(1). *Compare Rahimi*, 61 F.4th at 456–57 with *Range*, 69 F.4th at 104–05. Notably, the Solicitor General has contended that this Court should “hold the petition for a writ of certiorari” in *Range* “pending its decision *Rahimi*.” Government’s Petition for Certiorari in *Garland v. Range*, 23-374, at 7 (Filed October 5, 2023), available at [https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830\\_Range%20Pet%2010.5.pdf](https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830_Range%20Pet%2010.5.pdf), last visited April 9, 2024. It can hardly maintain now that other Petitions raising Second Amendment challenges to §922(g)(1) should be disposed.

In short, the Court may ultimately grant certiorari to address either question presented. If so, Hoyle requests that it hold the instant petition pending the outcome. Should this Court disapprove of § 922(g)’s constitutionality or limit the statute’s application, Hoyle requests that the Court grant certiorari in the instant case, vacate

the judgment below, and remand for reconsideration. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166–67 (1996).

### CONCLUSION

Petitioner Leroy Hoyle respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 10th day of April 2024.

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