NO. _____

In the Supreme Court of the United States

HECTOR PATRICIO GALVAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title 18, section 922(g) identifies nine categories of persons who are commanded not "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." The most commonly prosecuted category of prohibited persons is 18 U.S.C. § 922(g)(1)—anyone "(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."

1.

Does 18 U.S.C. § 922(g)(1) violate the Second Amendment on its face or as applied in this case?

2.

Does the mere movement of a firearm from one state to another mean that every subsequent act of possession is possession "in or affecting commerce?"

3.

Does 18 U.S.C. § 922(g)(1) exceed Congress's enumerated powers?

DIRECTLY RELATED PROCEEDINGS

United States v. Hector Patricio Galvan, No. 2:22-cr-48 (N.D. Tex. Dec. 14, 2022)

United States v. Hector Patricio Galvan, No. 22-11239 (5th Cir. Feb. 8, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Hector Patricio Galvan respectfully petitions for 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 opinion below was not selected for publication. It can be found at 2024 WL 485701. The decision is reprinted on pages 1a–4a of the Appendix. The district court did not issue any written opinions.

JURISDICTION

The Fifth Circuit entered its judgment on February 8, 2024. This petition is timely under S. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation and application of 18 U.S.C. § 922(g); the Commerce Clause (U.S. Const. art. I, § 8, cl. 3); and the Second Amendment. Title 18, Section 922(g) provides, in pertinent part:

> (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.

Article I of the United States Constitution, Section 8 provides, in pertinent part:

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

The Second Amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

STATEMENT

During a traffic stop for failure to wear a seatbelt, police searched Petitioner Hector Patricio Galvan's automobile and found a pistol under the front passenger seat. App., *infra*, 6a. As Petitioner would later admit, he had previously been convicted of a crime punishable by more than one year in prison. *Id.* A federal law enforcement agent studied the pistol and decided it had been "manufactured outside the state of Texas." App., *infra*, 7a. Under the prevailing interpretation of the "in or affecting commerce" element of 18 U.S.C. § 922(g), the firearm's previous movement between the point of manufacture and Texas meant he was subject to federal prosecution. Petitioner pleaded guilty. App., *infra*, 2a.

On appeal, Petitioner challenged his guilty plea and plea agreement. He argued that the pistol's previous movement did not satisfy the nexus-with-commerce element, or if it did, the statute exceeded Congress's enumerated powers. App., *infra*, 2a. He also argued that § 922(g)(1) violated the Second Amendment on its face and as applied. The Fifth Circuit rejected the nexus arguments on the merits and held that any Second Amendment error was forfeited and was not "plain." This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. WHATEVER HAPPENS IN *RAHIMI*, THE COURT SHOULD GRANT CERTIORARI TO EXPLAIN WHETHER A LAW CRIMINALIZING FELONS' POSSESSION OF FIREARMS IS CONSISTENT WITH THE SECOND AMENDMENT.

Under a straightforward application of this Court's text and historical tradition approach to the Second Amendment, the possession prong of 18 U.S.C. § 922(g)(1) is unconstitutional. Even so, this Court has suggested, in dicta, that the statute is presumptively constitutional. *District of Columbia v. Heller*, 554 U.S. 570, 626 & n.26 (2008). The lower courts are struggling to reconcile the competing pronouncements. The Court should grant certiorari to resolve the matter definitively. The Court already has several fully briefed cases to choose from.[1]

In *United States v. Rahimi*, 143 S.Ct. 2688 (2023) (No. 22-915), the Court is reviewing a Fifth Circuit decision holding that a different subsection—18 U.S.C. § 922(g)(8)—is constitutional under the Second Amendment. While *Rahimi* will shed some light on Subsection (g)(1), the prohibitions are different

[1] The Court is holding several petitions that raise the facial or as-applied constitutionality of 18 U.S.C. § 922(g)(1), including *Vincent v. Garland*, No. 23-683 (docketed Dec. 26, 2023), *Jackson v. United States*, 23-6170 (docketed Dec. 6, 2023), and *Garland v. Range*, No. 23-374 (docketed Oct. 10, 2023).

enough that the Court will probably need to grant certiorari to address Subsection (g)(1) directly.

A. Under *Bruen*'s standard, § 922(g)(1) is unconstitutional.

In *Heller*, the Court held "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. at 595. Without performing any "historical analysis," the Court mused that the decision should not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626. After *Heller*, lower courts consistently deferred to legislative judgment and upheld ahistorical firearm laws. *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

Bruen overruled most of these decisions and clarified the "standard for applying the Second Amendment":

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.

597 U.S. at 24.

A straightforward application of this method would doom the possession prong of § 922(g)(1). The individual right protected by the Second Amendment "belongs to all Americans." *Heller*, 554 U.S. at 581.

Subsection (g)(1) criminalizes and severely punishes the very same conduct protected by the Amendment's text—the keeping of arms. *See id.* at 582–83 (interpreting the phrase "keep arms"). Under the *Heller-Bruen* methodology, § 922(g)(1) should be presumptively *unconstitutional*.

And there is nothing like § 922(g)(1) in the American historical tradition of firearm regulation. The Government has yet to identify "a well-established and representative historical *analogue*" to § 922(g)(1). *Bruen*, 597 U.S. at 30. On the contrary—thorough historical research has failed to find *any* American laws banning felons from possessing weapons before the modern era: "[O]ne can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009); *see also* Carlton F.W. Larson*, Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 Hastings L.J. 1371, 1374 (2009) (finding "no colonial or state law" in 18th Century America restricting "the ability of felons to own firearms"). As the unqualified text of the Second Amendment suggests, "American law recognized a zone of immunity surrounding the privately owned guns of citizens." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139, 142 (2007) (reviewing the first fourteen states' codes from 1607 to 1815).

The first nationwide possession ban applying to every type of firearm appeared in 1968—nearly two centuries after ratification. The ban was "last-minute" amendment to a sprawling bill that was "hastily passed, with little discussion, no hearings and no report." *United States v. Bass*, 404 U.S. 336, 344 (1971). As James Madison recognized, Congress's "midnight precedents … ought to have little weight" in constitutional analysis. James Madison to Judge Roane, May 6, 1821, in 9 *The Writings of James Madison* 61 (Gaillard Hunt, ed. 1910).

B. Statements in *Heller*, *McDonald*, and *Bruen* suggest the opposite outcome.

Without performing the "exhaustive historical analysis" necessary to resolve the question definitively, *Heller* tentatively assumed that some categories of firearm laws would survive constitutional scrutiny. One such category was "longstanding prohibitions on the possession of firearms by felons and the mentally ill." 554 U.S. at 626. In his opinion for the plurality in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), Justice Alito "repeated" *Heller*'s assumption but described it as an "*assurance*[ ]." *Id.* at 786 (emphasis added). In *Bruen*, Justice Kavanaugh (joined by the Chief Justice) again repeated *Heller*'s dictum about felons. 597 U.S. at 81 (Kavanaugh, J., concurring).

Together, these statements suggest that many members of the Court are comfortable with (at least some) laws separating (at least some) felons from

firearms, notwithstanding the novelty of the law within American historical tradition.

C. The unreasonably broad scope of § 922(g)(1) creates disagreement about as-applied Second Amendment challenges.

Despite a general sense that states may restrict the firearm rights of many or even most felons, many respected jurists have expressed discomfort with the current scope of § 922(g)(1). The federal ban lasts for life, regardless of any state laws restoring firearm rights, and regardless of the *nature* of the prior conviction. For many years, Congress allowed the Executive Branch to make *ad hoc* exceptions to eh ban, *see* 79 Stat. 788 (1965) and 18 U.S.C. § 925(c), but Congress has refused to fund the process since 1992. *See United States v. Bean*, 537 U.S. 71, 75 & n.3 (2002).

Before *Bruen*, the Third Circuit Court of Appeals (and individual judges in other circuits) concluded that § 922(g)(1) would be unconstitutional if applied exactly as written. *Binderup v. Attorney Gen.*, 836 F.3d 336, 351 (3d Cir. 2016) ("[U]pon close examination of the Challengers' apparently disqualifying convictions, we conclude that their offenses were not serious enough to strip them of their Second Amendment rights."); *accord Kanter v. Barr*, 919 F.3d 437, 451–69 (7th Cir. 2019) (Barrett, J., dissenting).

After *Bruen*, the en banc Third Circuit sustained an as-applied challenge to the statute: "Because the Government has not shown that our Republic has a

longstanding history and tradition of depriving people like Range of their firearms, § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights." *Range v. Attorney Gen.*, 69 F.4th 96, 106 (3d Cir. 2023). The Eighth and Tenth Circuits have adhered to pre-*Bruen* precedent rejecting facial and as-applied challenges to § 922(g)(1). *See Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023) ("*Bruen* did not indisputably and pellucidly abrogate" prior circuit precedent); *see also United States v. Jackson*, 69 F.4th 495, 505–06 (8th Cir. 2023), *reh'g denied*, 85 F.4th 468 (8th Cir. 2023). The Seventh Circuit revived a Second Amendment challenge and remanded the case to the district court for additional historical analysis. *Atkinson v. Garland*, 70 F.4th 1018, 1024 (7th Cir. 2023) ("Both sides should cast a wider net and provide more detail about whatever history they rely on.").

D. This Court should grant certiorari and explain whether § 922(g)(1) is to be evaluated on its face or only as-applied, and how that analysis should proceed.

Heller promised to "expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." 554 U.S. at 635. Now is the time. The Court should grant certiorari in this case or in one of the other fully briefed petitions and explain where § 922(g)(1) complies with the Second Amendment on its face and as applied to someone who has never been convicted of a violent felony.

Lower courts that uphold § 922(g)(1) rely on pre-*Bruen* precedent and Supreme Court dicta. The Court should undertake the "historical analysis" necessary to evaluate the statute's constitutionality.

II. THIS COURT SHOULD GRANT THE PETITION AND ADDRESS WHETHER A FIREARM'S PRIOR MOVEMENT ACROSS STATE LINES MEETS THE MINIMUM STATUTORY AND CONSTITUTIONAL REQUIREMENTS FOR PROVING A NEXUS WITH COMMERCE.

When the Founders decided to from a stronger national government, they had to overcome objections that Congress would eventually utilize its power to disarm disfavored citizens. Federalists believed that the enumeration of limited and specific powers would keep Congress from disarming anyone. *Heller*, 554 U.S. at 599. Antifederalists worried that those limits might not hold, and the Government would later disarm citizens in favor of a standing army or organized militia. The Second Amendment was designed to allay those fears. *Id.* at 598–600. After ratification of the Bill of Rights, Americans understood that their right to keep arms had twofold protection: "No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. … But if in any blind pursuit of inordinate power," Congress *did* attempt it, "this amendment may be appealed to as a restraint." William Rawle, *A View of the Constitution of the United States* 125–26 (2d ed. 1829). A nationwide Congressional ban on keeping arms would have

scandalized the founding generation. Nothing like it existed during the first 180 years of our nation's existence.

One of Congress's "few and defined," powers is the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8. In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that the commerce power does not authorize regulation of a purely local, non-economic activity like "possession of a gun in a school zone." *Id.* at 560. The original version of the Gun-Free School Zones Act ("GFSZA") exceeded Congress's commerce power. *Id.* at 561.

Unlike the original GFSZA, § 922(g)'s possession prong requires proof of a nexus element—that the defendant possessed "in or affecting commerce" a firearm. *Lopez* assumed that this nexus element "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* If that were true, then the element would often present "a complicated legal question" that would delight "students of constitutional law." *Rehaif v. United States*, 139 S. Ct. 2191, 2207 (2019) (Alito, J., dissenting).

But this Court construed the nexus element in a predecessor statute to reach *any* possession of a firearm if the firearm itself previously moved in interstate or foreign commerce. *Scarborough v. United States*, 431 U.S. 563 (1977). The constitutional logic of *Lopez* cannot be reconciled with the statutory holding of *Scarborough*. *Alderman v. United States*, 562 U.S. 1163 (2011) (Thomas, J., dissenting from denial of certiorari); *United States v. Seekins*, 52 F.4th 988, 989

(5th Cir. 2022) (Ho, J., dissenting from denial of reh'g). If Congress had the affirmative power to regulate who could possess a musket if that musket (or any of its components) had ever crossed a state line, then it had the power to disarm the militia.

For most of the 20th Century—even as Congress asserted a more robust role in regulating firearms through its commerce power—this Court and the Government seemed to understand that Congress would not, did not, and could not directly ban *any* Americans from possessing firearms. But in *Scarborough v. United States*, 431 U.S. 563 (1977), this Court considered the first, hastily passed possession ban and found "no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575.

This Court has never considered whether that same interpretation governs the post-1986 version of § 922(g)(1). The defendant in *Scarborough* argued that possession required proof of a *present* connection to commerce, whereas a past connection would satisfy the nexus element for *receipt*. 431 U.S. at 569. The Court rejected that argument because, at the time, possession was prohibited only in a last-minute addendum, without much care for verb tense, in an entirely separate title. *Id.* at 569–70. But in 1986 Congress combined the prohibitions into a single statute, with three different nexus elements depending on the prohibited activity:

> It shall be unlawful for any [prohibited] person:

> 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) (emphases added). In current form, there are two textual distinctions between the nexus elements for "possess" and "receive." First, for possession, the Government must prove a nexus *for the possession itself*; for receipt, the nexus element modifies "firearm" or "ammunition." *Id.* Second, because the phrase "in or affecting commerce" modifies the present-tense verb "possess," the text requires a *present* connection with commerce (even if that connection is unspecified). For receipt, "the proscribed act, 'to receive any firearm,' is in the present tense, the interstate commerce reference is in the present perfect tense, denoting an act that has been completed." *Barrett v. United States*, 423 U.S. 212, 216 (1976).

Whether *Scarborough* correctly or incorrectly interpreted the 1968 possession ban, the principles of statutory interpretation do not allow the Court to disregard these distinctions in the modern form of the crime.

And even if that interpretation of *statutory language* or presumed congressional intent were correct, the statute would exceed Congress's power under the Constitution. The movement of a durable

item like a firearm from one state to another may be "commerce," but the item does not remain "in commerce" forever. There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000).

The current version of the possession ban makes up more than 10% of federal prosecutions. *See* Emily Tiry et al., *Prosecution of Federal Firearms Offenses 2000-16* at 4–5, Tables 1 & 2 (Urban Institute Oct. 2021).[2] Despite repeated calls for additional guidance, this Court has never explained how the prevailing interpretation of 18 U.S.C. § 922(g)'s possession-nexus element is consistent with the original understanding of the Constitution.

Under the prevailing interpretation of 18 U.S.C. § 922(g), the statute entirely bans *millions* of Americans from keeping firearms in their homes and automobiles on pain of ten or fifteen years in prison. *See* Federal Bureau of Investigation, *Active Records in the NICS Indices* (updated April 30, 2024) (reporting more than 31 million entries of prohibited persons in the national background-check database, including 5 million prohibited under § 922(g)(1)).

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[2] Available at https://www.ojp.gov/pdffiles1/bjs/grants/254520.pdf (accessed May 7, 2024).

CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

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