**No. _____**

**In the Supreme Court of the United States**

FELIX OLIVAS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for Writ of Certiorari**
**to the**
**United Sates Court of Appeals for the Fifth Circuit**

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## QUESTION PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 922(g)(1), which criminalizes possession of a firearm by a convicted felon, exceeds Congress's power under the Commerce Clause.

2. Whether 18 U.S.C. § 922(g)(1) violates the Second Amendment.

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## PETITION FOR WRIT OF CERTIORARI

Felix Olivas asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 5, 2024.

## PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

## OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on March 4, 2024. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

Article I of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States[.]" U.S. Const. art. I, § 8, cl. 3.

The Second Amendment to the United States Constitution provides that "A well regulated Militia, being necessary to the security of a free State, the right to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

## STATEMENT OF THE CASE

Petitioner Felix Olivas was charged by indictment with being a previous convicted felon knowingly in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The indictment alleged that the firearm "had been shipped and transported in interstate and foreign commerce."

Olivas pleaded guilty to that charge, admitting to possessing the firearm solely within Texas, with the interstate commerce element satisfied by the firearm's manufacture outside of Texas. After he entered his guilty plea, the district court sentenced Olivas to 108 months' imprisonment.

## REASONS FOR GRANTING CERT

### I. Because mere possession of a firearm is not commercial activity, § 922(g)(1) cannot be justified by the commerce clause.

Title 18 U.S.C. § 922(g) prohibits specified categories of persons—including felons—from possessing firearms "in or affecting commerce." In cases involving previous iterations of a federal felon-firearm prohibition statute, the Court has ruled that the proof of the statutory element "in and affecting commerce" can be satisfied by proof that, at some point in the past, the firearm traveled in interstate commerce. *See Scarborough v. United States*, 431 U.S. 563, 566–67 & n.5 (1977). *Scarborough* did not, however, consider whether a statute that reaches conduct with such a minimal, temporally distant link to interstate commerce is a constitutional exercise of the federal commerce power.

The Court should consider that issue now. In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act, 18 U.S.C. § 922(q), holding that Congress lacked the power to criminalize the mere possession of a firearm on school premises. 514 U.S. 549 (1995). *Lopez* and later decisions indicate that noncommercial activity is not a proper subject for commerce-clause regulation. Thus, the congressionally created "commerce" element in § 922(g) cannot make the statute constitutional. Congress cannot, through statutory design, confer upon itself a power the constitution does not grant it.

The U.S. Constitution created a federal government of enumerated powers. See U.S. CONST. art. I, § 8; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (Roberts. C.J.) (plurality op.). "The Constitution's express conferral of some powers makes clear that it does not grant others." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534 (Roberts. C.J.) (plurality op.). One power not granted to the federal government is a general police power. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000). Because it lacks a general police power, Congress cannot criminalize acts simply because it thinks that doing so would advance the societal good. Instead, any crime created by Congress, as with every other exercise of Congressional power, must be justified by reference to a particular grant of enumerated authority. See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534 (Roberts, C.J.).

Section 922(g)(1)'s prohibition of firearm possession by felons is said to rest on Congress's exercise of the commerce clause. See, e.g., *United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013). The commerce clause grants Congress the authority "[t]o regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. *Lopez* identified three categories of activities that Congress may regulate under its commerce power and, because § 922(q) clearly did not fall into the first two, it had to fall "under the third category as a regulation of activity that substantially affects in-

terstate commerce." *Lopez*, 514 U.S. at 559. § 922(q) failed the "substantial effect" test because mere possession of a gun was not commercial activity and because regulation of such possession was not a part of a greater scheme of commercial regulation. *Lopez*, 514 U.S. at 561-63.

§ 922(g)(1) similarly regulates mere gun possession that does not substantially affect interstate commerce. A substantial effect on commerce cannot be shown merely through arguments that gun possession or violent crime may cause harms that require the spending of money to remedy or that gun possession may harm economic productivity. *Lopez*, 514 U.S. at 563-67. Accepting such social-costs arguments would make it "difficult to perceive any limitation on federal power[.]" *Id*. at 564.

Given § 922(g)(1)'s minimal impacts on commerce, it can only survive constitutional scrutiny if it is part of "a general regulatory statute [that] bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558. That kind of regulation is permitted if the statute regulates non-commercial activity that is "an essential part of a larger regulation of economic activity, in which the activity would be undercut unless the intrastate activity were regulated. *Lopez*, 514 U.S. at 560-61. § 922(g)(1) does not meet this criterion.

Gun possession is not commercial activity. The sale of guns may be regulated as commercial activity. A law prohibiting sales to felons might be a viable, commerce-based way to keep guns from felons. But criminalizing simple,

local possession of a gun is not commercial activity. Nor is it necessary to achieve the goals of reducing gun sales to felons.

Section 922(g)(1)'s interstate-commerce element cannot save the statute. This Court has interpreted § 922(g)(1) as only requiring proof that that the firearm traveled in interstate commerce prior to a felon's possession of it. *Scarborough*, 431 U.S. at 564, 566-70. That question is distinct from the constitutional issue of whether a statute regulating mere possession falls without the commerce power and was not addressed.

*Lopez* acknowledged that the presence of a statutory nexus should be considered in determining whether a statute violates the commerce clause. 514 U.S. at 561. Some courts have inferred that the mere presence of a jurisdictional element like § 922(g)(1)'s will always save a statute from a commerce clause challenge. *See, e.g., United States v. Santiago*, 238 F.3d 213, 216 (2d Cir. 2001); *cf. United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996) (upholding § 922(g)(1) in part on presence of jurisdictional element). But, that inference treats too lightly our constitutional structure of limited central government with enumerated powers. The Court cast significant doubt on the viability of that inference in *Jones v. United States*, which construed the jurisdictional element of 18 U.S.C. § 844(i) narrowly as "currently used in commerce or in an activity affecting commerce" in order to avoid a possibly-unconstitutional construction. 529 U.S. 848, 858-59 (2000).

In light of *Lopez* and *Jones*, the constitutionality of § 922(g)(1) as interpreted by *Scarborough* dubiously rests on the lax requirement of showing only a tangential connection to commerce. *See United States v. Bell*, 70 F.3d 495, 498 (7th Cir. 1995) (noting doubt raised by *Lopez*). The Court should grant certiorari to address the doubts raised about the constitutionality of § 922(g)(1). The statute has faced and continues to face repeated challenges to its constitutionality. *See United States v. Scott*, 263 F.3d 1270, 1274 (11th Cir. 2001) (collecting cases to that point). These ongoing challenges and the thousands of § 922(g) prosecutions brought each year mean that the issue presented will recur until the Court provides a definitive statement regarding the application of *Lopez*'s principles to the statute.

**II. § 922(g)(1) does not comport with the Second Amendment.**

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 this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges for many years. *See United States v. Moore*, 666 F.3d 313, 316-17 (4th Cir. 2012) (collecting cases). This changed, however, following *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111

(2022). *Bruen* held that where the text of the Second Amendment plainly covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation's historical tradition of gun regulation. *See id,*, at 2129-2130. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id*. at 2127-2128.

After *Bruen*, the courts of appeals have split as to whether 18 U.S.C. § 922(g)(1) trenches on rights protected by the Second Amendment. The Third Circuit has sustained the Second Amendment challenge of a man previously convicted of making a false statement to obtain food stamps, notwithstanding the felony status of that offense. *See Range v. Attorney General of the United States*, 69 F.4th 96 (3d Cir. 2023). By contrast, the Eighth Circuit has held that Section 922(g)(1) is constitutional in all instances, at least against Second Amendment attack. *See United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023). And the Seventh Circuit determined that the issue could be decided only after robust development of the historical record, remanding to consider such historical materials as the parties could muster. *See Atkinson v. Garland*, 70 F.4th 1018, 1023-1024 (7th Cir. 2023).

This circuit split plainly merits certiorari. It involves a direct conflict between the federal courts of appeals as to the constitutionality of a criminal

statute. The statute in question is a staple of federal prosecution. A felon living in a neighborhood beset by crime deserves to know whether he may defend himself against violence by possessing a handgun, or whether such self-defense is undertaken only on pain of 15 years imprisonment.

If the Court grants certiorari to decide the constitutionality of § 922(g)(1) in another case, it should hold the instant case pending the outcome, then grant certiorari, vacate the judgment below, and remand if the outcome recognizes the unconstitutionality of § 922(g)(1) in a substantial number of cases.

It is true that the Second Amendment challenge was not preserved in district court, and that any review will therefore eventually have to occur on the plain error standard. *See* Fed. R. Crim. P. 52(b). This means that to obtain relief Petitioner must show error, that is clear or obvious, that affects substantial rights, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). But as shown above, there is at least a reasonable probability that Petitioner could establish a clear or obvious violation of his Second Amendment rights if this Court evaluates the constitutionality of Section 922(g)(1), which it should quickly do. And the obviousness of error may be shown any time before the expiration of direct appeal. *Henderson v. United States*, 568 U.S. 266 (2013). Finally, a finding that the Petitioner has been sentenced to prison for exercising a basic constitutional right would affect the outcome and

cast doubt on the fairness of the proceedings.

Alternatively, this Court should hold the instant Petition pending the outcome of *United States v. Rahimi*, cert. granted, 143 S. Ct. 2688 (No. 22-915) (oral argument heard Nov. 7, 2023) which will decide the constitutionality of 18 U.S.C. § 922(g) (8). That statute forbids firearm possession by those subject to a domestic violence restraining order.

Of course, if Rahimi prevails in that case, it will tend to support constitutional attacks on other sections of Section 922(g). Likely, a victory for Rahimi will involve a rejection of the government's contention that the Second Amendment is limited to those Congress terms "law abiding." *See United States v. Rahimi*, 61 F.4th 443, 451- 453 (5th Cir. 2023) (considering this argument), *cert. granted*, 143 S. Ct. 2688 (2023). It will also require the Court to consider and reject historical analogues to Section 922(g)(8), including some that have been offered in support of Section 922(g)(1). *Compare Rahimi*, 61 F.4th at 456-457 (considering government's argument that Congress could disarm those subject to restraining orders because some states disarmed enslaved people and Native Americans at founding), *with Range*, 69 F.4th at 105-106 (considering government's argument that Congress could disarm felons because some states disarmed enslaved people and Native Americans at founding).

But even if Rahimi does not prevail, the opinion may be of significant use

to Petitioner. If, for example, this Court were to decide that Rahimi may be stripped of his Second Amendment rights because he is objectively dangerous, Petitioner may argue that his convictions do not mark him as such. In short, the Court has granted certiorari in a closely related issue and should hold the instant Petition.

Notably, the Solicitor General's office has affirmatively contended that *Rahimi* and *Garland v. Range* – a case involving a challenge to 18 U.S.C. 922(g)(1) – present "closely related Second Amendment issues." Petition for Certiorari, *Garland v. Range*, (No.23-374), at 7 (Filed October 5, 2023). Indeed, it has contended that this Court should "hold the petition for a writ of certiorari" in *Range* "pending its decision in *Rahimi*." *Id*. It can hardly maintain now that other petitions raising Second Amendment challenges to Section 922(g)(1) should be disposed.

## CONCLUSION

For these reasons, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

s/ Shane O'Neal
*Counsel of Record for Petitioner*
Dated: June 3, 2024