No. _____________

In the

Supreme Court of the United States

Jonathan Jamal Bangash,

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

Whether 18 U.S.C. §922(n) comports with the Second Amendment?

Whether 18 U.S.C. §922(n) permits conviction for the receipt of any firearm that has ever crossed state lines at any time in the indefinite past, and, if so, if it is facially unconstitutional?

PARTIES TO THE PROCEEDING

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jonathan Jamal Bangash seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Bangash*, No.23-10228, 2024 WL 1070276 (5th Cir. March 12, 2024)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

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

RELEVANT STATUTE AND CONSTITUIONAL PROVISION

Section 922(n) of Title 18 reads in relevant part:

> It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Article I, Section 8 of the United States Constitution provides in relevant 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 OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Jonathan Jamal Bangash pleaded guilty to willfully receiving a firearm that had been shipped or transported in interstate or foreign commerce, and that Bangash was and knew he was under felony indictment at the time of the receipt, in violation of 18 U.S.C. § 922(n). Record in the Court of Appeals.8, 100. Before doing so, however, moved to dismiss the indictment on the grounds that the statute was not within the constitutional power of Congress to enact under the Commerce Clause of Article I, Section 8. Record in the Court of Appeals.29-33. He also argued that the statute should be construed to require a closer connection to commerce than mere past movement across state lines in the indefinite past, and under circumstances unrelated to the defendant's offense. Record in the Court of Appeals.32. The district court denied the motion. Record in the Court of Appeals.38.

At rearraignment, the presiding magistrate advised Bangash during the hearing that conviction under 18 U.S.C. § 922(n) required proof of these elements:

> First: Mr. Bangash was under indictment and knew that he was under indictment for the felony offense of aggravated assault in State of Texas v. Jonathan Jamal Bangash, Cause Number 366-81703-2014 out of Collin County, Texas; and
>
> Two: While under indictment, Mr. Bangash will-fully received a firearm that had been shipped or transmitted in interstate or foreign commerce. That is, at some time before Mr. Bangash received the firearm, it had traveled from one State or Country to another. The term

> "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion.

Record in the Court of Appeals.96. The presiding judge made no comment on Congress's ability to criminalize this conduct. The magistrate also relied on a written stipulation that Bangash executed before the hearing to find that a factual basis existed to support Bangash's guilty plea. Record in the Court of Appeals.42, 100-02. In that stipulation, Bangash admitted that he was under felony indictment, knew that he was under felony indictment, and willfully received a firearm that "had previously been shipped and transported in interstate and foreign commerce[.]" Record in the Court of Appeals.42. The magistrate judge recommended accepting Bangash's guilty plea, and the district court later did so without objection. Record in the Court of Appeals.5, 45, 48.

At sentencing, the district court heard argument on Bangash's objections, overruled them, and adopted probation's findings from the PSR. Record in the Court of Appeals.108-22, 133. The district court downwardly varied from the recommended sentence of 60 months and imposed a sentence of 55 months and three years of supervised release Record in the Court of Appeals.133-34.

B. Appellate Proceedings

Petitioner appealed, arguing that 18 U.S.C. §922(n) renewing his arguments related to interstate commerce. He also argued that it conflicted with the Second Amendment.

The court of appeals affirmed. *See* [Appx. A]; *United States v. Bangash*, No. 23-10228,2024 WL 1070276, at *1 (5th Cir. Mar. 12, 2024)(unpublished). It agreed that

the defendant preserved his arguments related to the interstate commerce clause, but found them to be foreclosed. *See Bangash*, 2024 WL 1070276, at *1. It rejected his Second Amendment argument on plain error review, finding that any error was not clear or obvious given the unsettled nature of the law in this area. *See id.*

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari, vacate the judgment below, and remand in light of the forthcoming Fifth Circuit opinion in *United States v. Quiroz*, No. 22-50834 should that opinion create a reasonable probability of a different result.

Subsection (n) of 18 U.S.C. §922 makes it a crime for any person under felony indictment to receive a firearm that has moved in interstate commerce. Finding that persons under indictment are among "the people" referenced by the Second Amendment, and further finding no valid historical analogue to §922(n), three district judges have found the statute unconstitutional. *See United States v. Stambaugh*, 641 F.Supp.3d 1185, 1189-1193 (W.D. Okla. Nov. 14, 2022), *reconsideration denied* 650 F.Supp.3d 1227 (W.D. Okla. Jan. 12, 2023); *United States v. Quiroz*, 629 F.Supp.3d 511, 516-524 (W.D. Tex. Sept. 19, 2022); *United States v. Hicks*, 649 F.Supp.3d 357, 359-365 (W.D. Tex. 2023).

Others, however, have found the statute constitutional, reasoning that it is analogous to pretrial detention, *see Alexander v. United States*, 686 F. Supp. 3d 608, 621-622 (W.D. Mich. 2023); *United States v. Alston*, No. 5:23-CR-00021-FL-RN-1, 2023 WL 4758734, at **9-11 (E.D.N.C. 2023); *United States v. Posada*, 670 F.Supp.3d 402, 407-411 (W.D. Tex. 2023), surety laws, *see Alexander v*, 686 F. Supp. 3d at 621-622; *United States v. Kays*, 624 F.Supp.3d 1262, 1267-1268 (W.D. Okla. 2022); *United*

States v. Bartucci, 658 F.Supp.3d 794, 805-808 (E.D. Cal. 2023); *United States v. Simien*, 655 F.Supp.3d 540, 549-552 (W.D. Tex. 2023); *United States v. Jackson*, 661 F.Supp.3d 392, 413-415 (D. Md. 2023); *United States v. Ogilvie*, No. 2:23-CR-00063-TC, 2024 WL 2804504, at *4 (D. Utah May 31, 2024), and, troublingly, "laws that disarmed groups of people perceived as per se dangerous, on the basis of their religious, racial, and political identities," *United States v. Rowson*, 652 F.Supp.3d 436, 466 (S.D.N.Y. 2023); *Ogilvie*, 2024 WL 2804504, at *4 ("…having construed 'the people' broadly at the first step of the Bruen inquiry to include people convicted of or accused of crimes, the court declines to construe 'the people' narrowly at the second stage of the inquiry by restricting its analysis of historical regulations only to those laws affecting the rights of white, male landowners."); *Bartucci*, 658 F.Supp.3d at 804-805; *Jackson*, 661 F.Supp.3d at 413-415.

The constitutionality of Petitioner's statute of conviction thus represents a close and divisive question, upon which reasonable jurists have issued conflicting opinions. The Fifth Circuit, where this case originates, is currently deciding the question on plenary review in *United States v. Quiroz*, No. 22-50834. The case was argued in February of last year, *see United States v. Quiroz*, No. 22-50834, (5th Cir. February 8, 2023)(docket entry 67), suggesting both that decision may be imminent and that the court regards the question as a substantial one. Further evidence that the court below has devoted substantial consideration to the case may be seen in its decision to invite participation by the Solicitor General. *See United States v. Quiroz*, No. 22-50834, Panel Request (5th Cir. February 16, 2023)(docket entry 69).

In the event that the Fifth Circuit finds 18 U.S.C. §922(n) unconstitutional, Petitioner will be entitled to relief under the law of that circuit. Petitioner did not preserve error in the district court, so he is entitled to relief only upon a showing of 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).

A ruling that Petitioner's statute of conviction suffers from constitutional invalidity will certainly demonstrate error under Fifth Circuit law. It is the rule of that court that each "panel is bound by the precedent of previous panels absent an intervening Supreme Court case explicitly or implicitly overruling that prior precedent…" *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999). So if a published case shows that §922(n) violates the Second Amendment, another panel will be required to acknowledge the error in Petitioner's case too.

A victory for the defendant in *Quiroz* would also satisfy the requirement of "clear or obvious" error. Although the court below found the law insufficiently settled when it issued its opinion in this case, the clarity requirement may be satisfied any time while the case remains on direct appeal. *See Henderson v. United States*, 568 U.S. 266 (2013). Petitioner's conviction is not final until this Court denies certiorari.

Such a ruling would also affect the defendant's substantial rights. Ordinarily, an error affects substantial rights if it "affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. A victory for the defendant in *Quiroz* will take the outcome here – conviction for violating §922(n) – entirely off the table.

Finally, the decision would show an effect on the fairness, integrity, and public reputation of judicial proceedings. The Second Amendment protects an ancient and basic natural right to self-preservation, and a structural guarantee against the kind of oppressive factional government that characterized Pre-Revolutionary England. *See District of Columbia v. Heller*, 554 U.S. 570, 592-595 (2008). To sentence someone to prison for the exercise of this basic and constitutionally guaranteed right would contravene the fairness, integrity, and public reputation of judicial proceedings.

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996). A published opinion from the court below fully vindicating Petitioner's claim would create, at the very least, a "reasonable probability" of a different result upon reconsideration.

Although the most common "intervening development" triggering GVR is of course an opinion of this Court, such events also:

> may include a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general.

Lawrence, 516 U.S. at 166–67 (internal citations omitted)(citing *Conner v. Simler*, 367 U.S. 486, (1961); *Schmidt v. Espy*, 513 U.S. 801 (1994); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *Louisiana v. Hays*, 512 U.S. 1230 (1994); *NLRB*

v. Federal Motor Truck Co., 325 U.S. 838 (1945); *Wells v. United States*, 511 U.S. 1050 (1994); *Reed v. United States*, 510 U.S. 1188 (1994); *Ramirez v. United States*, 510 U.S. 1103 (1994); *Chappell v. United States*, 494 U.S. 1075 (1990); *Polsky v. Wetherill*, 403 U.S. 916 (1971)). An opinion in favor of the defendant in *Quiroz* would have an unusually clear and direct impact on the outcome of the case, readily satisfying this Court's standards for remand.

II. This Court should grant certiorari to resolve the tension between *Scarborough v. United States*, 431 U.S. 563 (1963), on the one hand, and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and *Bond v. United States*, 572 U.S. 844 (2014), on the other.

A. *Scarborough* stands in tension with more recent precedents regarding the Commerce Clause.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See Nat'l Fed'n of Indep. Bus*., 567 U.S. at 534 ("The Constitution's express conferral of some powers makes clear that it does not grant others.") There is no general federal police power. *See United States v. Morrison*, 529 U.S. 598, 618-619 (2000). Every exercise of Congressional power must be justified by reference to a particular grant of authority. *See Nat'l Fed'n of Indep. Bus*., 567 U.S. at 535 ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions."). A limited central government promotes

accountability and "protects the liberty of the individual from arbitrary power." *Bond v. United States*, 572 U.S. 844, 863 (2011).

The Constitution grants Congress a power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. But this power "must be read carefully to avoid creating a general federal authority akin to the police power." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 536

Notwithstanding these limitations, and the text of Article I, Section 8, this Court has held that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," and includes a power to regulate activities that "have a substantial effect on interstate commerce." *United States v. Darby*, 312 U.S. 100, 118-119 (1941). Relying on this expansive vision of Congressional power, this Court held in *Scarborough v. United States*, 431 U.S. 563 (1963), that a predecessor statute to 18 U.S.C. §922(g) reached every case in which a felon possessed firearms that had once moved in interstate commerce. It turned away concerns of lenity and federalism, finding that Congress had intended the interstate nexus requirement only as a means to insure the constitutionality of the statute. *See Scarborough*, 431 U.S. at 577.

It is difficult to square *Scarborough*, and the expansive concept of the commerce power upon which it relies, with more recent holdings of the Court in this area. In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), five members of this Court found that the individual mandate component of the Affordable Care Act could not be justified by reference to the Commerce Clause. *See Nat'l Fed'n of Indep.*

Bus., 567 U.S. at 557-558 (Roberts., C.J. concurring). Although this Court recognized that the failure to purchase health insurance affects interstate commerce, five Justices did not think that the constitutional phrase "regulate Commerce ... among the several States," could reasonably be construed to include enactments that compelled individuals to engage in commerce. *See id.* at 550 (Roberts., C.J. concurring). Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *See id.* (Roberts., C.J. concurring).

The majority of this Court in *NFIB* thus required more than a demonstrable effect on commerce: the majority required that the challenged enactment itself *be* a regulation of commerce – that it affect the legality of pre-existing commercial activity. Receipt of firearms, like the refusal to purchase health insurance, may "substantially affect commerce." But such receipt is not, without the involvement of commercial exchange, a commercial act. Certainly, it is not necessarily interstate commerce. In this case, moreover, there is no evidence that the firearm crossed state lines to effectuate the transaction – the record shows only that it moved across state lines at some point in the unspecified past. See Record in the Court of Appeals.42, 143.

To be sure, *NFIB* does not explicitly repudiate the "substantial effects" test. Indeed, the Chief Justice's opinion quotes *Darby*'s statement that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states..." *Nat'l Fed'n of Indep. Bus.,* 567 U.S. at 549 (Roberts., C.J. concurring); *see also id.* at 552-553 (Roberts., C.J. concurring)(distinguishing *Wickard v. Filburn*, 317 U.S. 111 (1942)). It is therefore perhaps possible to read *NFIB*

narrowly: as an isolated prohibition on affirmatively compelling persons to engage in commerce. But it is difficult to understand how this reading of the case would be at all consistent with *NFIB*'s textual reasoning.

This is so because the text of the Commerce Clause does not distinguish between Congress's power to affect commerce by regulating non-commercial activity (like non-commercial receipt of firearms), and its power to affect commerce by compelling people to join a commercial market (like health insurance). Rather it simply says that Congress may "regulate ... commerce between the several states." And that phrase either is or is not limited to laws that affect the legality of commercial activity. Five justices in *NFIB* took the text of the Clause seriously and permitted Congress to enact only those laws that were, themselves, regulations of commerce. *NFIB* thus allows Congress only the power "to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 196, 9 Wheat. 1 (1824).

And indeed, much of the Chief Justice's language in *NFIB* is consistent with this view. This opinion rejects the government's argument that the uninsured were "active in the market for health care" because they were "not currently engaged in any *commercial* activity involving health care..." *id.* at 556 (Roberts., C.J. concurring) (emphasis added). The Chief Justice significantly observed that "[t]he individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing *commercial* activity." *Id.* (Roberts., C.J. concurring)(emphasis added). He reiterated that "[i]f the individual mandate is targeted at a class, it is a class whose *commercial* inactivity rather than activity is its defining feature." *Id.*

(Roberts., C.J. concurring)(emphasis added). He agreed that "Congress can anticipate the effects on commerce of an *economic* activity," but did not say that it could anticipate a *non-economic* activity. *Id.* (Roberts., C.J. concurring)(emphasis added). And he finally said that Congress could not anticipate a future activity "in order to regulate individuals not currently engaged *in commerce*." *Id.* (Roberts., C.J. concurring)(emphasis added). Accordingly, *NFIB* provides substantial support for the proposition that enactments under the Commerce Clause must regulate commercial or economic activity, not merely activity that affects commerce.

Here, the factual resume did not state that Petitioner's receipt of the firearm was an economic activity, and certainly doesn't say that it was an act of interstate commerce. Under the reasoning of *NFIB*, this should have been fatal to the conviction. As explained by *NFIB*, the Commerce Clause permits Congress to regulate only activities, *i.e.*, the active participation in a market. But 18 U.S.C. §922(n) criminalizes all receipt, *without* reference to economic activity. Rather, the mere receipt of a firearm that has ever traveled in interstate commerce is sufficient, even if the receipt is a non-commercial act. Accordingly, it sweeps too broadly.

Further, the factual resume failed to show that Petitioner was engaged in the relevant market at the time of the regulated conduct. The Chief Justice has noted that Congress cannot regulate a person's activity under the Commerce Clause unless the person affected is "currently engaged" in the relevant market. *Id.* at 557. As an illustration, the Chief Justice provided the following example: "An individual who bought a car *two years ago* and may buy another in the future is not 'active in the car

market' in any pertinent sense." *Id.* at 556 (emphasis added). As such, *NFIB* brought into serious question the long-standing notion that a firearm which has previously and remotely passed through interstate commerce should be considered to indefinitely affect interstate commerce without "concern for when the [initial] nexus with commerce occurred." *Scarborough*, 431 U.S. at 577.

Scarborough stands in even more direct tension with *Bond v. United States*, 572 U.S. 844 (2014), which shows that §922(n) ought not be construed to reach the receipt by felons of all firearms that have ever crossed state lines. Bond was convicted of violating 18 U.S.C. §229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond*, 572 U.S. at 853; 18 U.S.C. §229(a). She placed toxic chemicals – an arsenic compound and potassium dichromate – on the doorknob of a romantic rival. *See id.* This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 859-862.

Notably, §229 defined the critical term "chemical weapon" broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. §229F(8)(A). Further, it criminalized the use or possession of "any" such

weapon, not of a named subset. 18 U.S.C. §229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." [*United States v.*]*Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones* [*v. United States*], 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 572 U.S. at 863

As in *Bond*, it is possible to read §922(n) to reach the conduct admitted here: receipt of an object that once moved across state lines, without proof that the defendant's conduct caused the object to move across state lines, nor even proof that it moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, nor to the interstate movement of commodities.

The better reading of the phrase "receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" – which appears in §922(n) – therefore requires a meaningful connection to interstate commerce. Such a reading would 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.

B. This case is an excellent vehicle to determine the reach and/or constitutionality of 18 U.S.C. §922(n)

The present case is an excellent vehicle to address the tension between Scarborough and more recent precedent of this Court. The issue is fully preserved in both district court and the court of appeals. *See* [Appx. A]; *United States v. Bangash*, No. 23-10228, 2024 WL 1070276, at *1 (5th Cir. Mar. 12, 2024)(unpublished). Unlike many cases presenting the issue, moreover, the defendant preserved both constitutional challenges and statutory arguments pertaining to constitutional avoidance, providing this Court the flexibility to tread carefully near the constitutional line. Record in the Court of Appeals.29-33. The record discloses no more substantial connection to interstate commerce than the firearm's past movement across state lines – the defendant said he obtained the firearm with false identification, but there is no indication that the transaction caused the firearm's movement. Record in the Court of Appeals.143.

CONCLUSION

Petitioner 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 June, 2024.

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