NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSHUA WILLIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 922(g)(1) is unconstitutional under the Second Amendment, both facially and as applied to Mr. Willis, in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

2. Whether, as a statutory matter, 18 U.S.C. § 922(g)(1) prohibits a person's present intrastate possession of a firearm or ammunition for the sole reason that the firearm or ammunition previously crossed state lines.

3. Whether Congress may criminalize intrastate possession of a firearm or ammunition solely because they crossed state lines at some point before they came into the defendant's possession.

RELATED PROCEEDINGS

U.S. District Court:

On February 27, 2023, judgment was entered against Petitioner Joshua Willis in *United States v. Willis*, No. 1:22-cr-00186-RMR-1, Dkt. 54 (D. Colo. Feb. 27, 2023). App. A1-A7.

U.S. Court of Appeals:

On February 29, 2024, the Tenth Circuit affirmed Mr. Willis's conviction in an unpublished decision, *United States v. Willis*, No. 23-1058, 2024 WL 857058 (10th Cir. 2024). App. A8-A10.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joshua Willis, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on February 29, 2024.

OPINION BELOW

The Tenth Circuit's unreported opinion in Mr. Willis's case is available at 2024 WL 857058 (10th Cir. 2024), and is in the Appendix at A8.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and entered judgment on February 29, 2024. App. A1. On May 23, 2024, this Court extended the time within which to file a petition for a writ of certiorari until June 28, 2024. App. A11. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment of the United States Constitution, U.S. CONST. amend. II:

> 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.

The Commerce Clause of the Constitution, U.S. CONST. art. I, § 8, cl. 3:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. § 922(g)(1):

> It shall be unlawful for any person . . . 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.

18 U.S.C. § 921(a)(20):

> The term "crime punishable by imprisonment for a term exceeding one year" does not include—
>
> > (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
> >
> > (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

STATEMENT OF THE CASE

The petitioner, Mr. Joshua Willis, pleaded guilty in the District of Colorado to one count of possession of a firearm as a felon under 18 U.S.C. § 922(g)(1) (hereinafter "Section 922(g)(1)"). The charge stemmed from Mr. Willis's possession of a Remington rifle and ammunition on or about February 15, 2022. In both his district court and appellate proceedings, Mr. Willis challenged the constitutionality of Section 922(g)(1) under the Second Amendment and the Commerce Clause.

I. Mr. Willis has consistently argued that Section 922(g)(1) is unconstitutional both facially and as applied to persons like him.

The first question presented in this petition is whether Section 922(g)(1) is unconstitutional under the Second Amendment, either facially or as applied to nonviolent felons like Mr. Willis, in light of this Court's opinion in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

As Mr. Willis argued in his district and appellate proceedings, *Bruen* established a two-part test for evaluating Second Amendment challenges. The threshold inquiry is whether "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 142 S. Ct. at 2126. If so, "the Constitution presumptively protects that conduct," *id.*, and it cannot be restricted unless the *government* demonstrates, as relevant here, a historical tradition of "distinctly similar" regulations, *id.* at 2131-2132.

In establishing this text-and-history test, *Bruen* emphasized that the Second Amendment is robust and not easily infringed upon. If conduct is protected by the

text of the Amendment, then it does not matter why the government wants to regulate it. *See id.* at 2127 (rejecting any form of "means-end scrutiny"). The government can only succeed if it "affirmatively prove[s] that its firearms regulation is part of the [nation's] historical tradition." *Id.* The evidence of any such tradition must be substantial, *see, e.g.*, *id.* at 2153, 2156, and there must be a tight fit between the challenged regulation and any historical evidence, *see, e.g.*, *id.* at 2141-2147. If there are "multiple plausible interpretations" of the government's proffered evidence, the government has not met its burden. *Id.* at 2141 n.11; *see id.* at 2139.

Under *Bruen*, Section 922(g)(1) is unconstitutional, both facially and as applied to persons like Mr. Willis.

First, the conduct regulated by Section 922(g)(1) is covered by the Second Amendment. The plain text of the Amendment clearly covers possession of a firearm and ammunition, including the firearm and ammunition in this case. And Mr. Willis is clearly part of "the people" protected by the Amendment: The plain text does not draw a felon/non-felon distinction, *see id.* at 2134, and this Court has already determined that the phrase "the people" contained within the Amendment "unambiguously refers to all members of the political community, *not an unspecified subset*." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (emphasis added).

Second, it is not possible for the government to meet its historical burden to support the constitutionality of the statute because there is no tradition of felon

dispossession statutes predating the 20th century. *See, e.g.*, *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc); 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 Law & Hist. Rev. 139, 142-143 & n.11 (2007) (concluding that "at no time between 1607 and 1815 did the colonial or state governments of what would become the first fourteen states exercise a police power to restrict the ownership of guns by members of the body politic"). In other words, there was no "historical tradition," circa 1791, of gun regulations "distinctly similar" to Section 922(g)(1). *See Bruen*, 142 S. Ct. at 2130-31.

Nevertheless, the Tenth Circuit rejected Mr. Willis's facial and as-applied challenges under *Bruen* pursuant to existing Tenth Circuit precedent. *See Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023) (relying on *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)).

Whether there are certain unconstitutional applications of Section 922(g)(1) is a question that has already been presented to this Court in several pending petitions for certiorari, including *Garland v. Range*, No. 23-374 (U.S. Oct. 5, 2023), and *Vincent v. Garland*, No. 23-683 (U.S. Dec. 21, 2023). The petitions, responses, and replies in those cases have already been distributed for conference (on November 17, 2023, and March 28, 2024, respectively). Both of the petitioners and the government seek review of the question presented (albeit on different timelines). If this Court grants certiorari

in either of those cases, it may recognize the unconstitutionality of Section 922(g)(1) in a substantial number of cases, and it may even find (or leave open the possibility) that the Second Amendment supports a facial challenge to Section 922(g)(1). Accordingly, Mr. Willis asks this Court to grant the petition in *Range* or *Vincent* and resolve the question presented in Mr. Range's or Ms. Vincent's favor. This Court should then grant Mr. Willis's petition and afford him the benefit of that ruling.

II. Mr. Willis has also consistently argued that Section 922(g)(1) cannot, and does not, criminalize firearm possession unless the defendant's own possession affected commerce at the time he possessed it.

The second two questions presented in this petition relate to the interstate commerce element of Section 922(g)(1). Mr. Willis also raised both of these arguments in his district court and appellate proceedings.

First, Mr. Willis preserved the claim that Section 922(g)(1) applies only when the defendant's *own* possession of a firearm or ammunition affected commerce *at the time* the defendant possessed it. Specifically, Section 922(g)(1) makes it a federal crime for somebody who has a qualifying felony conviction to "possess in or affecting commerce, any firearm or ammunition." Since *Scarborough v. United States*, 431 U.S. 563 (1977), federal felon-in-possession statutes have been construed to require only proof that the firearm in question moved across state lines—even if it did so before the person became a felon or possessed the firearm. *See id.* at 577. But as the text of Section 922(g)(1) makes clear, it is the prohibited person's *possession*, and not the

firearm or ammunition, that must affect commerce, and that effect must be contemporaneous with any intrastate possession.

Second, Mr. Willis preserved the alternative argument that, if "affecting commerce" under Section 922(g)(1) has been correctly construed to require only proof that the firearm or ammunition in question moved across state lines at some point in the past, then that part of the statute must be unconstitutional under the Commerce Clause. Such a minimal nexus with interstate commerce is too attenuated to justify the enactment of Section 922(g)(1) under the Commerce Clause, which, while broad, is still "subject to outer limits" and is not a grant of federal police power. *United States v. Lopez*, 514 U.S. 549, 556-57 (1995) (holding that federal law criminalizing possession of firearms within school zones exceeded Congress's commerce clause authority).

If this Court were to agree with either of Mr. Willis's interstate commerce arguments, his conviction would need to be vacated. The mere fact that the firearm and ammunition found in Mr. Willis's possession were manufactured outside of Colorado would not be sufficient to sustain his conviction. And, as noted, there is nothing else in the record that explains when or how the firearms arrived in Colorado. Nevertheless, the Tenth Circuit affirmed Mr. Willis's conviction pursuant to existing circuit precedent with respect to his interstate commerce claims.

REASONS FOR GRANTING THE WRIT

I. Whether Section 922(g)(1) is unconstitutional under the Second Amendment is an important federal question on which circuits are divided.

With respect to Mr. Willis's Second Amendment challenges to Section 922(g)(1), this Court should grant the *Range* or *Vincent* petitions; resolve the question in Mr. Range's or Ms. Vincent's favor; and then grant this petition, vacate the underlying judgments, and remand to the Tenth Circuit Court of Appeals. It should do so for multiple reasons.

First, whether Section 922(g)(1) is unconstitutional is an important question of federal law. Section 922(g)(1) is heavily enforced. *See* U.S. Sent. Comm'n, "QuickFacts: 18 U.S.C. § 922(g) Firearms Offenses" (July 2023). And it affects not only those persons convicted of violating it, but also nearly everyone else who has previously committed any other felony or felony-equivalent offense (even if they never misused—or even used—a firearm). In other words, the constitutionality of the statute is a question that impacts millions of persons in this country. *See* Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*," Demography 54 (2017) at 1806, 1808 (estimating that, as of 2010, there were 19 million people with felony records in the United States). For those millions of prohibited persons, the infringement on their Second Amendment

rights is substantial: The ban on possession is effectively permanent, and it prohibits possession for any reason, even self-defense within one's home.

This already-important issue is even more significant because *Bruen* clearly set forth, for the first time, the test courts must use to evaluate the constitutionality of firearm laws under the Second Amendment. The heavy burden *Bruen* imposes on the government to defend any regulations that infringe on Second Amendment rights raises a serious question regarding the constitutionality of Section 922(g)(1)—one that has spurred a tremendous amount of litigation across the country.

Second, courts of appeals are divided on this issue. On one hand, the Eighth, Tenth, and Eleventh Circuits have rejected challenges to the constitutionality of Section 922(g)(1). *See United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023); *Vincent*, 80 F.4th 1197; *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024). While the Eighth Circuit endeavored to analyze the issue under *Bruen*'s legal test, the Tenth and the Eleventh Circuits refused to reevaluate their pre-*Bruen* precedent. In the Tenth Circuit, that precedent summarily rejected a Second Amendment challenge to the statute based on the felon-in-possession dictum in *Heller*—*i.e.*, that nothing in that case "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *McCane*, 573 F.3d at 1047 (quoting *Heller*, 554 U.S. at 626). The Eleventh Circuit's precedent also relied heavily on *Heller* and did not put the burden

on the government to demonstrate an adequate historical tradition of distinctly similar statutes. *See United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010).

On the other hand, both the Third Circuit and the Ninth Circuit have ruled that there are at least some unconstitutional applications of the statute. The Third Circuit decided en banc that the statute is unconstitutional as applied to persons like the petitioner (whose qualifying criminal history consisted solely of a nonviolent offense). *Range v. Att'y Gen.*, 69 F.4th 96 (3d Cir. 2023) (en banc). That holding was limited to the as-applied issue presented to it, but its reasoning was expansive and applies more broadly. Likewise, the Ninth Circuit recently ruled the statute unconstitutional as applied to a criminal defendant, in part because the government had not met its burden to prove that the defendant's previous convictions were of "a nature serious enough" by "Founding era standards" to "justify permanently depriving him of his fundamental Second Amendment rights." *United States v. Duarte*, 101 F.4th 657, 691 (9th Cir. 2024).

In addition, the Seventh Circuit has remanded a Section 922(g)(1) case with instructions regarding the thorough examination of the historical evidence now required under *Bruen*. *Atkinson v. Garland*, 70 F.4th 1018 (7th Cir. 2023). In remanding, the Seventh Circuit rejected the government's attempt to "avoid a *Bruen* analysis altogether" using *Heller*'s felon-in-possession dictum, finding that "[n]othing allow[ed] [the Court] to sidestep *Bruen* in the way the government invites" and that the Court

"must undertake the text-and-history inquiry the [Supreme Court] so plainly announced and expounded upon at great length." *Id.* at 1022. In another case, the Seventh Circuit rejected one defendant's *Bruen* claim while leaving open the possibility that there is "room for as-applied challenges" to Section 922(g)(1) in other cases. *United States v. Gay*, 98 F.4th 843, 847 (7th Cir. 2024).

Third, the Tenth Circuit's decision in Mr. Willis's case (and, in the first instance, in Ms. Vincent's case) declined to apply this Court's decision in *Bruen* even though it recognized that *Bruen* established the legal test for Second Amendment challenges. As noted, the Tenth Circuit relied on its pre-*Bruen* precedent that summarily rejected a Second Amendment challenge to Section 922(g)(1) based entirely on unexplained dictum in *Heller*. The Eleventh Circuit, too, did not apply *Bruen*'s test, including *Bruen*'s instruction that the burden to demonstrate a historical tradition of distinctly similar statutes falls on the government. In other words, at least two of the circuits that have rejected *Bruen* challenges to Section 922(g)(1) have done so without correctly applying the mandatory legal test set forth by this Court. That provides a separate reason that this Court's review of the issue is warranted.

Indeed, this Court has made clear that the legal tests it imposes are binding and trump its dicta. In *Seminole Tribe of Fla. v. Florida*, it stated that both the "result" of its opinions and "those portions of the opinion necessary to that result" are binding, even on itself. 517 U.S. 44, 67 (1996). In contrast, this Court has repeatedly stressed

that its dicta, even when repeated, does not resolve issues it has not yet addressed. In *Oklahoma v. Castro-Huerta*, for example, it found entirely unpersuasive prior "tangential dicta" that addressed an issue that, until that case, "did not previously matter all that much and did not warrant [the] Court's review." 142 S. Ct. 2486, 2499 (2022); *see id.* at 2498 ("[T]he Court's dicta, even if repeated, does not constitute precedent."). And in *Heller* itself, the Court stated that "[i]t is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued." 554 U.S. at 625 n.25. Thus, while this Court's dicta has significant weight on lower courts, *see, e.g.*, *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996), the upshot of this Court's cases is evident: If faced with a choice between relying exclusively on this Court's dicta or applying a binding legal test, lower courts must employ the latter.

Here, *Bruen* unquestionably established a binding test for courts to use when analyzing Second Amendment challenges. *See Vincent*, 80 F.4th at 1200 (noting that *Bruen* "created a test"). The second step requires a careful and robust historical analysis, and it expressly places the burden on the government to present any historical evidence. *See id.* Accordingly, courts must hold the government to its task and undergo the requisite historical analysis before rejecting or accepting any Second Amendment challenges to Section 922(g)(1). That some circuits have not done so—instead preferring to rely on pre-*Bruen* precedent that does not correctly apply the legal

test—is another reason this Court should address the merits of the issue by granting certiorari in either *Range* or *Vincent*.

II. Mr. Willis's interstate commerce arguments raise important federal questions that impact millions of people in the United States.

In addition, this Court should also grant Mr. Willis's petition on his alternative arguments that: (1) the text of Section 922(g)(1) requires more than a minimal nexus to interstate commerce, and (2) Congress exceeded its Commerce Clause authority when it enacted the relevant portion of the statute.

First, like Mr. Willis's *Bruen* claims, the resolution of his interstate commerce claims would impact millions of people in the United States. *See supra* at 8-9.

In addition, his statutory argument raises the distinct concern that courts across the country have been applying one of this nation's most heavily enforced criminal statutes in a manner that is both contrary to Congress's intent and which overreads and misconstrues this Court's decision in *Scarborough*, 431 U.S. 563.

Indeed, the plain language of Section 922(g)(1) makes clear that it is the defendant's possession that must affect commerce, at the time of that possession. For example, the adverbial phrase "in or affecting commerce" directly follows—and clearly modifies—the verb "possess"; it does not—and cannot—modify the nouns "firearm or ammunition." *Cf. Nielsen v. Preap*, 139 S. Ct. 954, 964 (2019) (reasoning that, because "an adverb cannot modify a noun," an adverbial phrase cannot be read to modify a noun). This conclusion is reinforced by the present-participle phrase

"affecting commerce," which indicates that the effect on interstate commerce must occur at the same time as the possession to fall within the ambit of Section 922(g)(1). That forecloses any reading of the statute to concern possession of a firearm that occurs only *after* the conduct affecting interstate commerce has been completed.

Interpreting Section 922(g)(1)'s prohibition of possession of firearms to require a contemporaneous effect on interstate commerce also makes sense when the statute is read as a whole. If Congress wanted to make it a crime for a felon to possess a firearm that had previously "been shipped or transported in interstate or foreign commerce," it would have said so—as it did with respect to the *receipt* portion of the statute. *See* 18 U.S.C. § 922(g)(1) (also making it a crime for a felon "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce").

Nonetheless, relying on *Scarborough*, the Tenth Circuit and other courts have wrongly construed Section 922(g)(1) to include circumstances in which a firearm or ammunition crossed state lines at some point before the defendant's possession, whether or not the defendant had anything to do with that. *See, e.g.*, *United States v. Hoyle*, 697 F.3d 1158, 1165 (10th Cir. 2012). *Scarborough*, however, addressed a different felon firearms prohibition, enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. No. 90-351, § 1201, 82 Stat. 197, 236 (June 19, 1968). The 1968 law was repealed and replaced with the Firearms Owners' Protection

Act of 1986, Pub. L. No. 99-308, §§ 102, 104, 100 Stat. 449, 452, 459 (May 19, 1986). Unlike the 1968 Act, *see Scarborough*, 431 U.S. at 570-71, the 1986 Act was "painstakingly crafted to focus law enforcement on the kinds of Federal firearms violations most likely to contribute to violent firearms crime," 131 Cong. Rec. S23-03, 1985 WL 708013, at *2 (daily ed. Jan. 3, 1985). *Scarborough*, furthermore, predates this Court's clarification of the scope of Congress's Commerce Clause authority in cases like *Lopez*. This Court's intervention is needed to clarify that *Scarborough* is neither controlling nor persuasive regarding the statutory interpretation of Section 922(g)(1).

Finally, Mr. Willis's alternative, constitutional argument under the Commerce Clause asserts that circuit courts have understood the statute in a way that conflicts with *United States v. Lopez*, 514 U.S. 549 (1995). Under modern Commerce Clause jurisprudence, Congress may rely on the clause to regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce," or the movement of "persons or things in interstate commerce" using those instrumentalities; and (3) "activities having a substantial relation to interstate commerce," *i.e.*, activities that "substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. But Section 922(g)(1) does not fall within any of those three categories of permissible Commerce Clause regulation. *See id.* at 561 (firearms possession in a school zone "has nothing to do with 'commerce' or any sort of economic enterprise").

Any theoretical link between a felon's mere possession of a firearm and potential

downstream effects on commerce is so attenuated that, if accepted, it would allow Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 564. Such a broad reading of Congress's Commerce Clause authority would be antithetical to the Founders' purpose in creating a federal government of enumerated powers—and in withholding from Congress "a plenary police power that would authorize enactment of every type of legislation." *Id.* at 566. This Court's intervention is thus necessary to avoid grave federalism concerns.

* * *

CONCLUSION

The Court should grant the petition in *Range* or *Vincent* and grant Mr. Range or Ms. Vincent relief. Thereafter, it should grant this petition for a writ of certiorari, vacate the underlying judgment, and remand for reconsideration in light of the resolution of that petition. The Court should also grant Mr. Willis's petition on the interstate commerce questions presented within.

Respectfully submitted,

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