No. ________________

In the Supreme Court of the United States

JUAN JESUS VARGAS,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Must district courts comply with the requirements of 18 U.S.C. § 3553(c) to state, in open court, the reasons for the sentence imposed?

2) Should a circuit split regarding the application of § 3553(c) to reasonableness challenges of defendants' sentences be resolved?

3) Should conflicting application by various federal courts from across the country of U.S.C. § 922(g)(1) be resolved?

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Parties to the proceeding and compliance with Rule 14(b)

The parties concerned are included in the caption of this matter, and there are no corporate parties.

Opinions Below

The Fifth Circuit Court of Appeals unpublished decision is attached as [App. A]. The Judgment of the District Court is attached as [App. B].

Jurisdiction

The Fifth Circuit Court of Appeals' jurisdiction was invoked from the denial by the United States District Court for the Western District of Texas, under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The Court of Appeals' decision was entered on March 18, 2024 [App. A]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

This case concerns the district court's failure to meet its statutory obligation to "state in open court the reasons for" imposing the specific sentence, as stipulated in 18 U.S.C. § 3553 (c), leading to Constitutional Due Process implications because the lack of compliance with this statute deprives a criminal defendant of his rights to proper notice and a hearing. Additionally, this case concerns the constitutionality of U.S.C. § 922(g)(1), which prohibits felons, both nonviolent and violent offenders, from possessing ammunition.

Statement of the Case

Mr. Vargas was charged in a one-count indictment, filed on November 16, 2022, that having been convicted of a crime punishable by imprisonment for a term exceeding one year, he did unlawfully and knowingly possess firearms and ammunition, in violation of Title 18, United States Code, § 922(g)(1) and 924(a)(8). (ROA.23-50333.8).

On October 14, 2022, Mr. Vargas, for that same conduct, was charged with violating his Supervised Release on a previous federal case. (ROA.23-50341.47-49)

On January 18, 2023, Mr. Vargas pleaded guilty to the possession of a firearm by a convicted felon with no plea agreement. (ROA. 23-50333.52). However, the record was expressly altered to delete references to his possession of a firearm and rather to indicate that he was in possession of ammunition, which is also prohibited under 922(g). Specifically, the record states,

> MR. FEDOCK: And subject to that, the Government would make an oral motion to abandon the following words, where it says firearms and -- "did knowingly possess firearms and ammunition." The Government would move to abandon the words "firearms and" –

THE COURT: Okay.

MR. FEDOCK: -- so that it reads “did knowingly possess ammunition.”

(ROA. 23-50333.69-70).

Mr. Vargas also pleaded true to the allegation that his conduct in the Felon in Possession case was a violation of the conditions of his Supervised Release. (ROA. 23-50333.52-53).

Sentencing was held on May 5, 2023. (ROA. 23-50333.52). In the Felon in Possession case, Mr. Vargas was sentenced to 115 months confinement in the BOP, with this term to run consecutively to any sentence of pending state charges. (ROA. 23-50333.53). In the revocation case, he was sentenced to 24 months confinement in the BOP, consecutive to 115 months in the Felon in Possession case. (ROA. 23-50333.59).

Written judgment was entered in the Revocation case on May 8, 2023, (ROA. 23-50333.77), and in the Felon in Possession case on May 9, 2023 (ROA 23-50333.52). Mr. Vargas timely filed a notice of appeal on May 5, 2023. (ROA 23-50333.39), (ROA. 23-50333.75-76).

The Fifth Circuit Court of Appeals decided the case on March 18, 2024.

The court admitted that criminal judgment was incorrect in convicting him of possession of a firearm rather than ammunition. As a result, they remanded the case for correction of the clerical error. However, in their ruling, the Fifth Circuit failed to reach the merits of the ammunition parts of the case and dismissed Mr. Vargas's appeal without weighing the significant constitutional issues demanded by *Bruen*, instead concluding that these arguments were foreclosed or not persuasive, but not otherwise articulated in any significant manner.[1]

Specifically, the Court said, "Vargas's Commerce Clause challenge is foreclosed. *See United States v. Jones*, 88 F.4th 571, 573-74 (5th Cir. 2023). Any Second Amendment violation is not clear or obvious. *See id.* Although Vargas attempts to distinguish *Jones* because his offense involves ammunition, he has not pointed to any binding authority holding that ammunition and firearms should be treated differently for Second Amendment purposes. He has failed to show reversible plain error. *See Jones*, 84 F.4th at 574." See *United States v. Vargas,* No. 23-50333 (5th Cir. Mar. 18, 2024) [App. A]. Furthermore, the court dismissed Vargas's challenge to the reasonableness of his sentence and also dismissed his other arguments, including that the sentence was unconstitutional on other grounds.

[1] *New York State Rifle & Pistol Association, Inc. v. Bruen,* 597 U.S. ___ (2022).

What follows is this timely petition for a Writ of Certiorari.

Reasons for granting the Writ

A sentence cannot be determined to be reasonable if a sentencing court does not comply with 18 U.S.C. § 3553 (c) fully; however, conflicting decisions within the Fifth Circuit are creating unnecessary confusion on this issue that only the U.S. Supreme Court can rectify properly.

Mr. Vargas was sentenced to 115 months confinement in the BOP, with this term to run consecutively to any sentence of pending state charges. (ROA. 23-50333.53). In the revocation case, he was sentenced to 24 months confinement in the BOP, consecutive to the 115 months in the Felon in Possession case. (ROA. 23-50333.59). Because of Fifth Circuit precedent holding, in essence, that Judges need not comply with 18 U.S.C. § 3553 (c), except when the defendant objects, Judges feel the freedom not to comply. 18 U.S.C. § 3553(c) specifically requires that "[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." Vargas contends that it is in the interest of justice for the Court to grant *certiorari* that it may be clear that sentencing judges must comply with 18 U.S.C. § 3553 (c),

which requires a sentencing judge to give the reasons for his sentence, and that sentences that do not comply with this statute are unreasonable or incapable of being reviewed for reasonableness.

The purpose of these requirements is, among others, to give the Defendant an opportunity to object to the specific reasons and then to enable the Courts of Appeals to engage in meaningful review of the reasons given. See *United States v. Mondragon-Santiago,* 564 F.3d 357, 360 (5th Cir. 2009) ("The district court must adequately explain the sentence 'to allow for meaningful appellate review and to promote the perception of fair sentencing.'" (Quoting *Gall v. United States,* 552 U.S. 38, 50 (2007)).

The U.S. Supreme Court in *Holguin-Hernandez* easily affirmed a defendant's right to preserve issues such 18 U.S.C. § 3553(c) for appeal. That said, we previously stated that before *Holguin-Hernandez*, this Court considered the mere lack of compliance with 18 U.S.C. § 3553(c) an exercise for which remand would have been an empty formality. But after *Holguin-Hernandez* and its companion cases, this is no longer the case. The statement of reasons required by § 3553(c) now represents an indispensable necessity to appellate review of the reasonableness of the sentence. The preservation of the error on the reasonableness of the sentence, post-*Holguin-Hernandez* necessarily includes preservation of the issue on the lack of compliance with § 3553(c). The appellate review of the reasonableness of the defendant's sentence necessarily depends

upon proper application of the law. Finding otherwise would slight the intent of *Holguin-Hernandez*. See *United States v. Holguin-Hernandez*, 140 S. Ct. 762 (2020).

This Court should clarify that district courts must comply with the statutes that govern the imposition of criminal sentences, even without a specific request by a criminal defendant. Clarifying this point would fully comply with past Supreme Court decisions and would allow judicial resources to be applied more efficiently, likely necessitating fewer appeals.

Even pre-*Holguin-Hernandez* courts affirmed the importance of stating reasons for their sentences. See *Holguin-Hernandez*. In *Zuniga-Peralta* the court stated, "I would hope that sentencing judges would make a habit of giving written and specific factual reasons for any sentence above or below a properly calculated Guideline range." See *U.S. v. Zuniga-Peralta*, 442 F.3d 345 (5th Cir. 2006).

Additionally, cases within the Fifth Circuit further affirm the notion that 18 U.S.C. § 3553 (c) applies to circumstances like Vargas's. For example, in *Davalos* the court said, "Because the district court orally stated its reasons for imposing the particular sentence it did, the dictates of 18 U.S.C. § 3553(c) were satisfied." See *United States v. Davalos,* No. 18-50784 (5th Cir. Apr. 20, 2020).

Martinez further affirms the importance and application of § 3553 (c), stating, "Section 3553(c) requires the district court to state the reasons for a particular sentence in open court at sentencing and the 'specific reason' for a nonguidelines sentence if one is imposed. § 3553(c); See *United States v. Key*, 599 F.3d 469, 474 (5th Cir. 2010). The explanation for the sentence must be sufficient 'to allow for meaningful appellate review and to promote the perception of fair sentencing.' *Gall*, 552 U.S. at 50." See *United States v. Martinez*, No. 21-20414 (5th Cir. Aug. 8, 2022).

However, like Vargas's case, other Fifth Circuit cases refuse to apply § 3553(c) properly. For example, *Monk* dealt with an unpreserved error like Mr. Vargas's. In *Monk,* the court stated, "Monk has failed to establish that the error affected his substantial rights." See *United States v. Monk,* No. 21-51130 (5th Cir. July 21, 2022).

These differing opinions within the Fifth Circuit regarding the application of 3553(c) create uncertainty that only the Supreme Court can rectify. However, rulings in other circuits have contradicted cases like *Monk* or have applied different standards of review. Therefore, only Supreme Court review can ensure that the interests of justice and judicial economy are properly satisfied. See *Monk*.

Furthermore, the failure of district courts to comply with the 3553(c) requirements is intrinsically a violation of a defendant's rights to notice and a hearing under the Due Process Clause and therefore a deprivation of his substantial rights.

Authority outside of the Fifth Circuit is inconsistent on the reasonableness of a sentence that does not comply with 3553(c). This difference of authority creates a circuit split that the U.S. Supreme Court must address to ensure that 18 U.S.C. § 3553 (c) is consistently applied in a uniform manner in all circuits.

Only the United States Supreme Court can address the confusion caused by the differing standards applied to 3553(c). For example, a month before *Holguin-Hernandez* was decided, the Sixth Circuit in *Hatcher* mandated plain-error review where the defendant had objected "to the court's upward variance" but had never objected to "any specific procedural deficiencies at the sentencing hearing." See *United States v. Hatcher,* 947 F.3d 383 (6th Cir. 2020), See *Holguin-Hernandez*. Under the holding of *Hatcher*, then, a plain error that affects a defendant's substantial rights may be considered for review even when it was not previously brought to the court's attention, and Mr. Vargas's

substantial rights were affected when the court did not comply with 18 U.S.C. § 3553(c).

However, after *Holguin-Hernandez*, the Eleventh Circuit applied the *de novo* standard, stating that "Aguilar-Gil's central argument on appeal is that his sentence is procedurally unreasonable because it did not comply with § 3553(c)(1). We review *de novo* whether the district court complied with § 3553(c)(1) regardless of whether the defendant objected below. See *United States v. Cabezas-Montano,* 949 F.3d 567, 608 n.39 (11th Cir. 2020)." See also *United States v. Aguilar-Gil,* No. 19-14117 (11th Cir. July 2, 2020). See also *Holguin-Hernandez.*

The Eleventh Circuit has also held that "[a] sentence is procedurally unreasonable if the district court fails to adequately explain the sentence, including any variance from the guidelines range. See *United States v. Shaw,* 560 F.3d 1230, 1237 (11th Cir. 2009). The court is required 'at the time of sentencing . . . to state in open court the reasons for its imposition of the particular sentence.' 18 U.S.C. § 3553(c). If the sentence is within the guidelines range and exceeds 24 months, the court must state 'the reason for imposing a sentence at a particular point within the range.' *Id.* § 3553(c)(1). And if the sentence is outside the guidelines range, the court must not only state 'the specific reason[s]' for the variance in open court but must also state those

reasons ‘with specificity in a statement of reasons form.’ *Id.* § 3553(c)(2).” See *United States v. Oudomsine,* No. 22-10924 (11th Cir. Jan. 18, 2023).

Next, the Second Circuit recognizes that “[u]nder 18 U.S.C. § 3553(c), ‘the sentencing judge in every case is required to “state in open court the reasons for its imposition of the particular sentence,” and must do so “at the time of sentencing.”’ *United States v. Pruitt,* 813 F.3d 90, 92 (2d Cir. 2016) (quoting 18 U.S.C. § 3553(c)). The district court satisfied that requirement by explaining in open court that the seriousness of Alryashi's offense motivated the sentence imposed.” See *United States v. Alryashi,* No. 20-840-cr (2d Cir. Mar. 26, 2021).

Lastly, the Ninth Circuit also recognizes the importance of following the statute, when it states that “a district court must explain a sentence sufficiently to permit meaningful appellate review.” See *United States v. Murillo-Ramos,* No. 21-10068 (9th Cir. Mar. 25, 2022).

I. The application of the plain-error standard was erroneous.

The Government argues in its brief that this issue ought to be reviewed under the plain-error standard because no Supreme Court opinion or Fifth Circuit opinion holds that 922(g)(1) violates the Second Amendment. Mr. Vargas

posits that the Supreme Court's holding in *Bruen* is, in fact, tantamount to just such a holding and that this issue ought to be reviewed *de novo*.[2]

Far more than "merely illuminating," *Bruen* "unequivocally overrule[s]" the statute in question here. Regardless, a violation of Mr. Vargas's Constitutional rights under the Second Amendment does, per se, affect his substantial rights. This issue, if not addressed here, will have to be addressed in a 2255 filing alleging that Mr. Vargas's trial counsel should have objected to the constitutionality of the statute. Addressing it now, given the foregoing, will save judicial resources. By using the plain-error standard, the Fifth Circuit erred and deprived Vargas of his fundamental constitutional rights, which *Bruen* demands.[3]

II. Should conflicting application of U.S.C. § 922(g)(1) post-Bruen be resolved?

The Fifth Circuit and the Seventh Circuit now differ on this issue. Other circuits have ruled contrary to challenges to 922(g) as applied to ammunition. See *United States v. Delaney,* 22 CR 463 (N.D. Ill. Nov. 7, 2023). Prior to Mr.

[2] *Bruen,* 597 U.S.
[3] *Id.*

Vargas's case, the Fifth Circuit had not ruled on 922(g) as applied to ammunition prohibitions post-Bruin. This is such a new issue that other circuits are ruling contrary at primary lower levels, creating uncertainty within the judicial system. Therefore, the Supreme Court should intervene and provide clear guidance after *Bruin*.

Furthermore, 922(g) does not pass constitutional muster at least in part. While the Fifth Circuit previously ruled that the firearms portion of 922(g) is constitutional, a statute may be unconstitutional in other parts and still be struck down. In this case, the statute unconstitutionally prohibits felons' mere possession of ammunition, regardless of the statute's position on firearms. The overbroad ammunition prohibition contravenes the text of the Second Amendment as articulated in *Bruen*'s history and tradition test.

Ammunition regulation historically differs from firearms regulation, with ammunition being less heavily regulated. This distinction affects challenges to laws regarding felons' ammunition possession compared to firearms possession, and ammunition restrictions are increasingly invalidated under the *Bruen* Standard nationwide. See *Rhode et al v. Bonta*, U.S. District Court, S.D. Cal.,

No. 18-00802. Therefore, ammunition prohibitions are an active area of judicial review under the *Bruen* Standard.

The government is evading a Second Amendment challenge with procedural tactics. They referenced *Jones*, which involves firearms possession by a felon, not ammunition. The government neglected to clarify this difference and argued that precedent barred Mr. Vargas's challenge because other parts of the statute remain intact. See *Jones,* 88 F. 4th 571.

While Mr. Vargas acknowledges that the constitutionality of 922(g) regarding the possession of firearms is still an open question, as it is in intense litigation across the country with disagreements between courts, he alleges that 922(g) is unconstitutional as applied to the prohibition of the possession of ammunition.[4] As noted, the issue of 922(g) as applied to ammunition is also under active litigation across the country. The Fifth Circuit has not decided on this issue. The government erroneously alleged that no case law supports overturning an ammunition violation of 922(g).

While post-*Bruen* challenges to 922(g) as applied to ammunition are in their infancy, note the Seventh Circuit's recent decision in *Delaney*. See *United*

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[4] See *United States v. Cherry*, U.S. District Court, S.D. Ill., No. 23-cr-30112-SMY. "In sum, Defendant Cherry is included in "the people" protected by the Second Amendment. Because none of the historical laws offered by the Government impose a "comparable burden" on the Second Amendment right of convicted felons to keep and bear arms, the Court finds § 922(g)(1) unconstitutional, facially and as applied."

States v. Delaney, 22 CR 463 (N.D. Ill. Nov. 7, 2023). *Delaney* struck down such an allegation, saying,

> Defendant Kevin Delaney is charged with one count of being a prohibited person in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). Section 922(g)(1) prohibits possession of ammunition by individuals who have been convicted of a felony. Defendant moves to dismiss the indictment, claiming that the pending charge violates his rights under the Second Amendment to the United States Constitution. For the reasons discussed below, defendant's motion to dismiss the indictment (Doc. 24) is granted.[5]

The *Delaney* court struck down the ammunition application of 922(g) on Second Amendment grounds by properly applying the *Bruen* Standard as articulated by the U.S. Supreme Court.[6] Contrary court decisions have misunderstood the new *Bruen* Standard and have had largely unsympathetic defendants with other procedural or substantive defects in their cases.

Furthermore, in a decision just reached by the Ninth Circuit, California's ammunition background-check law was struck down under the *Bruen* Standard. See *Rhode et al,* S.D. Cal.*,* No. 18-00802. Here, the court found no historical analogue to the ammunition background check and struck it down. The Ninth Circuit is likely to step in here and provide its own guidance, which may be contrary to this decision, as the court is staying many decisions pending its own

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[5] *Delaney*, 22 CR 463 at ***1.**

[6] *Bruen*, 597 U.S. 1 (2022).

application of the Bruen test. Therefore, the Supreme Court should step in to provide guidance. Still, while California's firearms background-check law still stands, an ammunition background-check law has been struck down under the *Bruen* Standard—a clear indication that ammunition and firearms are treated differently and are therefore separate issues.

Courts and society today seem to prioritize firearm background checks over ammunition ones, likely due to the presumed greater risks associated with firearm possession. Firearms and ammunition are distinct entities requiring separate analyses under the *Bruen* Standard. *Delaney* addresses this disparity by stating,

> This court acknowledges that this is a close question. The court also recognizes that gun violence plagues our communities and that allowing those who potentially pose a threat to the orderly functioning of society to be armed is a dangerous precedent. *See* 18 U.S.C. § 922(q)(1). However, this court is unable to uphold § 922(g)(1) as constitutional due to *Bruen*'s instruction that the government must provide evidence of a historical analogue that is both comparably justified and comparably burdensome of the right to keep and bear arms. Although there are strong policy reasons for doing everything possible to keep guns off our streets and out of our communities-policies that could be addressed by legislation rather than judicial edict-this court can find no such historical analog.[7]

Therefore, the court understands that the *Bruen* Standard involves balancing societal interests and individual liberty. Analyzing the issues with a 1791 view, the court concludes that the *Bruen* Standard requires that a conviction under 922(g) as applied to ammunition is unconstitutional.

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[7] *Delaney* 22 CR 463, at ***22.**

Delaney immediately introduces the defendant's challenge under *Bruen*. The Court said, "[h]e raises the issue based on the Supreme Court's ruling in *New York Rifle & Pistol Assn. v. Bruen*, 142 S.Ct. 2111 (2022) ("*Bruen*"), and the Seventh Circuit's ruling in *Atkinson v. Garland*, 70 F.4th 1018 (7th Cir. 2023) ("*Atkinson*")." Note that the defendant in *Delaney* had a background of dangerous felonies prior to this charge, just like Mr. Vargas. Specifically, the "[d]efendant has a criminal record that includes prior felony convictions for aggravated battery and being a felon in possession of a firearm."[8] The court ultimately still strikes down the charge under *Bruen*.[9]

III. Inconsistent decisions in the various circuits post-Bruin are creating uncertainty.

Recently, courts have started overturning class-based prohibitions on firearm possession, including the eighteen- to twenty-year-olds class ban and those banned for certain misdemeanors convictions. In *Binderup*, the plaintiff argued that the lifetime bans on firearm possession for individuals convicted of certain nonviolent misdemeanors violated his Second Amendment rights. The

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[8] *Id.* at ***21**.

[9] Id.

court ruled that prohibition was too broad and violated the Second Amendment. Significantly, this case precedes *Bruen*.[10]

Bruen gives federal judges the ammunition needed to overturn twentieth-century laws that contradict an accurate historical understanding of America's founding jurisprudence. Specifically, post-*Bruen*, in *Fraser*, the Fourth Circuit just invalidated the federal restriction prohibiting eighteen- to twenty-year-olds from possessing firearms. Judge Pain wrote in his decision that such prohibitions "cannot stand" considering the decision in *Bruen.* Specifically, the court stated, "'*Bruen* marks a sea-change in Second Amendment law, throwing many prior precedents into question. See *United States v. Rahimi,* 61 F.4th 443, 450 (5th Cir. 2023) ("*Bruen* clearly fundamentally changed our analysis of laws that implicate the Second Amendment") (cleaned up).'"[11]

While previous decisions concluded similarly just prior to *Bruen*, this Fourth Circuit case has three noteworthy distinctions. First, it invalidated the prohibition using *Bruen*'s reasoning, stating that no similar law existed at the time of America's founding. Second, the judge struck down a twentieth-century

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[10] *Binderup v. Attorney Gen. of the United States,* No. 14-4549 (3d Cir. 2016).
[11] *John Corey Fraser, et al. v. ATF,* No. 3: 22-cv-410, at 15 (E.D. Va. May 10, 2023).

law with no eighteenth-century analogue, like the ban on felons in possession. Third, the court applied the *Bruen* historical standard using the same reasoning as *Rahimi*. Finally, both laws in question dealt with prohibitions on classes of people. Therefore, this case and its accompanying cases provide similar territory for the Supreme Court to strike down U.S.C. § 922(g)(1).

In the Fifth Circuit, the firearm-possession prohibition on those under felony indictment was struck down. The judge stated, "[t]he Second Amendment is not a 'second class right.' . . . No longer can courts balance away a constitutional right." He further stated this was a direct result of the *Bruen* decision, stating that *Bruen*, "changed the legal landscape." He further went on to say that "'[a]lthough not exhaustive, the Court's historical survey finds little evidence that § 922(n)—which prohibits those under felony indictment from obtaining a firearm—aligns with this Nation's historical tradition. . . . As a result, this Court holds that § 922(n) is unconstitutional.'" The court struck down 922(n), a different section of the statute in question, using the same reasoning found in *Bruen*.[12]

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[12] *United States v. Quiroz,* PE:22-CR-00104-DC (W.D. Tex. Sep. 19, 2022).

IV. The Government fails to establish the existence of a historical analogue at the time of the founding, as *Bruen* required.

Bruen explicitly uses the text, history, and tradition test as its metric to determine if a firearms law is constitutional. Consequently, the bulk of our brief will use that test and discuss why historically analogous laws did not exist during the founding period. Also, throughout American history, the laws disarming persons often relied on racist and prejudiced undertones that on their face and by their application would be unconstitutional today. A recent article from *the Harvard Law Review* summarizes this point best: "Many, perhaps most, gun laws enacted between 1789 and 1940 were influenced at least in part by racism. The concealed carry law at issue in *NYSRPA [Bruen]* traces back to *the*

Sullivan Law, which was at least partially influenced by anti-immigrant sentiment."[13]

Historically, the roots of the federal felon-in-possession ban can be found only in the twentieth century. In 1938 the federal felon-in-possession ban was passed as part of the Federal Firearms Act of 1938.[14] At that time, 922(g)(1) prohibited only violent felons, which the First Circuit addressed in 2011. As Greenlee states,

> [t]he federal felon ban codified in § 922(g)(1) (1938) itself was originally intended to keep firearms out of the hands of violent persons.[15] As the First Circuit explained in 2011, the current federal felony firearm ban differs considerably from the version of the proscription in force just half a century ago. Enacted in its earliest incarnation as the Federal Firearms Act of 1938, the law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses . . . . The law was expanded to encompass all individuals convicted of a felony . . . several decades later, in 1961.[16]

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[13] Adam Winkler, *Racist Gun Laws and the Second Amendment,* 135 Harv. L. Rev. F. 537, See generally *Amici Curiae Brief of Italo-American Jurists and Attorneys in Support of Petitioners, NYSRPA*, No. 20-843 (July 15, 2021)

[14] 52 Stat. 1250, the Federal Firearms Act of 1938.

[15] Greenlee, Joseph, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms from Possessing Arms,* Wyoming Law Review Vol. 20 Num. 9, Art. 7, 2020, Citing See *Federal Firearms Act,* Ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938).

[16] *Id., United States v. Booker,* 644 F.3d 12, 24 (1st Cir. 2011) (citing Federal Firearms Act, Ch. 850, §§ 1(6), 2(f), 52 Stat. 1250,52 Stat. at 1250–51 (1938); An Act to Strengthen the Federal Firearms Act, Pub.L. No. 87–342, § 2, 75 Stat. 757, 757 (1961) (some citations omitted)).

Congress further overstepped its constitutional authority and included non-violent felons when it passed the *Gun Control Act of 1968* in the panic following the assassinations of President Kennedy, Senator Kennedy, and Dr. Martin Luther King Jr. The *Gun Control Act* made possession of a firearm or ammunition a crime for anyone who had been convicted of a crime punishable by imprisonment for more than one year. The key word here is *punishable*, meaning that a party convicted does not actually have to be sentenced to over a year of incarceration. This prohibition includes all handguns, shotguns, and even small-caliber firearms like twenty-two caliber rifles, all of which are in common use.[17]

Furthermore, for federal crimes, only a pardon from the president can restore one's right to possess firearms. In 1992 Congress prohibited the government from spending money to review a felon's application to restore gun rights. The pre-*Bruen* Supreme Court in 2002 upheld this on procedural grounds in *Bean* stating, "no action" does not equal a denial. Specifically, Justice Thomas writing for the majority said, "mere inaction by ATF does not invest a district court with independent jurisdiction to act on an application." Therefore, this ruling essentially established that a citizen had no right to force the government

[17] 18 U.S.C. Ch. 44 § 921.

to review his application if Congress did not want to fund it. See *U.S. v. Bean, 537* U.S. at 76, (2002). However, while the procedural issue on rights restoration has previously been settled by this Court in *Bean*, the issue of whether U.S.C. § 922(g)(1) comports with the *Bruen* test has not.

For state crimes, restoring one's firearms rights may be possible in extremely narrow circumstances and only on a state-by-state basis. But to restore one's right to possess a firearm at the federal level for a state crime, a party must have his conviction set aside or expunged. This process is extremely difficult for a state-level crime, and very few individuals are allowed to utilize it. To impose such burdens on a fundamental right is absurd and thus unconstitutional.

V. The protected right to possess ammunition is the very reason the American Revolution occurred, and no historical analogue to a ban prohibiting felons from possessing ammunition existed because of this tradition.

The American Revolution started because British troops were attempting to seize gunpowder from American revolutionaries. (Gunpowder was the eighteenth-century equivalent of modern ammunition.) In the spring of 1775, General Thomas Gage, the British governor of Massachusetts, received instructions from Great Britain to seize all stores of weapons and gunpowder

accessible to the American insurgents. On April 18, he ordered British troops to march against Concord and Lexington.[18]

The shot that started the American Revolution was fired over a defense of ammunition. Therefore, the Founding Fathers would not have condoned disarming a man for life without any recourse or imposing nearly a decade of prison for exercising this fundamental right. They so strongly believed in this fundamental right that our Republic, from the first battle, exists to preserve it. Claiming a historical Revolutionary-era tradition to impose such ammunition restrictions on free men absurdly violates the "text, history, and tradition" of ammunition regulation within this nation.

The government bears the impossible burden to point to such a historical tradition at the time of the founding. Consequently, under the Bruen Standard, without a Revolutionary-era law with a "text, history, and tradition" analogous to our modern ban on felons' possessing ammunition, the statute must be struck down and Mr. Vargas's conviction must be overturned.

VI. The Relevant Period Is 1791 When the Second Amendment Was Ratified.

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[18] History.com Editors, *Revere and Dawes warn of British attack,* (November 13, 2009), https://www.history.com/this-day-in-history/revere-and-dawes-warn-of-british-attack.

To be constitutional under the *Bruen* Standard, a law substantially like 922(g) must have been in effect in 1791 when the Second Amendment was ratified. However, no such law exists which either categorically prohibits those convicted of a felony from possessing ammunition or can be reasonably construed as a historical analogue to such a law. Therefore, 922(g) violates the Second Amendment.

VII. What Prohibitions on the Possession of Ammunition Existed Near the Founding?

The seminal battles of Lexington and Concord were fought to safeguard ammunition stores against seizure by the British. Specifically,

> The Revolution had started when Americans resisted with arms the Redcoats' attempt to confiscate arms at Lexington and Concord on April 19, 1775. Before that, to effectively disarm the Americans, the British had banned the import of firearms and gunpowder into the colonies, prevented Americans from accessing arms stored in town magazines, and confiscated arms and ammunition.[19]

[19] Kopel, David B. and Greenlee, Joseph, This History of Bans on Types of Arms Before 1900 (April 25, 2023). Journal of Legislation, Vol. 50, No. 2, 2024, Available at SSRN: https://ssrn.com/abstract=4393197 King George III imposed an embargo on arms and gunpowder imports on October 19, 1774. 5 Acts Of The Privy Council Of England, Colonial Series, A.D. 1766-1783, at 401.

The American Revolution began because a tyrannical government sought to seize gunpowder and ammunition. Consequently, the Founders would vehemently oppose laws like 922(g) that deny an explicit right to free men simply because they had served prison time. Such laws are offensive to the revolutionary ideals of the Founders, as they believed that all free men had an absolute right to access gunpowder, a principle they fought to protect and chose to enshrine in the Constitution and the Bill of Rights.

VIII. Laws at the Time of the Founding Mandated Ownership of Ammunition

Almost all colonies had laws mandating ownership of ammunition and arms. Militia service was open to all men sixteen and older. Men convicted of felonies were not disqualified under such laws, and almost universally, men had to be members of the militia.[20] Greenlee, an established legal historian, continues by stating, "[o]f course ammunition and gunpowder were mandatory. While numerous laws required owning certain quantities of gunpowder and ammunition, some required specific types of ammunition."

States like New Hampshire, Maryland, Connecticut, Massachusetts, and Rhode Island, among others, once had mandatory ownership laws for

[20] Id. at 22.

gunpowder, contrasting sharply with today's mandatory prohibition for felons. This historical precedent serves as a categorical rejection of universal ammunition prohibitions like those in 922(g). Thus, considering these statutes alone, the court should unequivocally reject the notion of a historical analogue supporting a complete ban based on prior incarceration.[21]

IX. The Founding Era's restoration of rights

The Founding Era provided a freer and much more liberal restoration of rights both at the state and the federal levels. Many serious crimes were punished with the death penalty, and "Persons who may have been prohibited from keeping arms in the founding era were often punished by death," making possession moot.[22] But the government established mechanisms for restoring firearms rights to free men. For less serious crimes, "[m]any who committed firearms offenses were not disarmed at all, but instead had to pay a surety to ensure good behavior."[23] For example,

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[21] Id. at 23.

[22] Greenlee at 268 Citing, *Baze v. Rees,* 553 U.S. 35, 94 (2008) (noting "the ubiquity of the death penalty in the founding era" and that it was "the standard penalty for all serious crimes") (Thomas, J., concurring)
(Quoting Stuart B Anner, *the Death Penalty: An American History* 23 (2002)).

[23] Greenlee at 268, For example, in 1759, New Hampshire persons "who shall go armed offensively" were not released "until he or she find such surities of the peace and good behavior." *Acts and Laws of His Majesty's Province of New-Hampshire in New England*

> Connecticut's 1775 law disarmed "inimical" persons only "until such time as he could prove his friendliness to the liberal cause."[24] Massachusetts's 1776 law disarming disaffected persons provided that "persons who may have been heretofore disarmed by any of the committees of correspondence, inspection or safety" may "receive their arms again . . . by the order of such committee or the general court."[25] Many disarmament acts provided exemptions for prohibited persons who swore loyalty to the king.[26]

Greenlee confirms the stark contrast between today and the American Revolutionary Period, namely that the restoration of firearms rights was far more protected than it is today:

> The contrast between Shays's rebels and present-day felons can be stark. For example, in West Virginia, someone who shoplifts three times in seven years, "regardless of the value of the merchandise," is forever prohibited from possessing a firearm.[27] In Utah, someone who twice operates a recording device in a movie theater is forever prohibited from possessing a firearm.[28] And in Florida, a man committed a felony when he released a dozen heart-shaped balloons in a romantic gesture and thus earned a lifetime firearm prohibition.[29] It is inconsistent with history for many nonviolent present-day felons—someone who shoplifts three packs

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2 (1759). For an example of how this process worked, see *Welling's Case,* 47 Va. 670, 670 (Va. Gen. Ct. 1849)

[24] Greenlee at 268 Citing, Gilbert, supra note 92, at 282.

[25] *Mass. Gen. Laws* 484 (1776).

[26] Greenlee at 268 Citing, See, e.g., 52 *Archives of Maryland,* supra note 87, at 451–52; 7 Hening, supra note 87, at 36; *the Acts of the General Assembly of the Commonwealth of Pennsylvania,* supra note 103, at 193.

[27] Greenlee at 269 Citing, See W. VA. Code § 61-3A-3(c) (2020).

[28] Id. Citing, See Utah Code Ann. § 13-10b-201(2)(b) (West 2020).

[29] Id., Erika Pesantes, *Love Hurts: Man Arrested for Releasing Helium Balloon with His Girlfriend,* Sun Sentinel (Feb. 22, 2013), www.sun-sentinel.com/news/fl-xpm-2013-02-22-fl-helium-balloon-environmental-crime-20130222-story.html [https://perma.cc/2P9W-JTLU]. The felony examples were provided in *United States v. Torres,* 789 F. App'x 655, 658 n.2 (9th Cir. 2020) (Lee, J., concurring).

> of bubble gum in West Virginia—to receive a lifetime firearm prohibition, when prohibited persons in the founding era—including armed insurrectionists—regained their rights once they no longer posed a violent threat.[30]

Therefore, the text, history, and tradition test of *Bruen* directly opposes today's firearms-revoking legislation and the oppressive and often near impossible restoration process. Consequently, U.S.C. § 922(g)(1) and similar laws are not in keeping with the text, history, and tradition of the law as it existed at the founding of our nation. Thus, 922(g)(1) must be set aside by this Court.

X. Examining historical tradition of Class of Person Bans

The history of bans of classes of persons, however, does have an alleged historical analogue. However, this supposed analogue is the banning of classes of persons who are members of protected classes. Today we would find this abhorrent under our current understanding of fundamental rights.

XI. Laws disarming religious minorities

[30] Greenlee at 269, Citing See *W. VA. Code Ann.* § 61-3A-3(c).

Disarming religious minorities unfortunately was a tradition that had its roots in the discriminatory aspects of the common law. English tradition had a long history of disarming religious minorities. For example, in 1689 Catholics were disarmed under English law.[31]

XII. Ammunition Laws Disarming or Forbidding the Acquisition of Arms for Native Americans

Native Americans too were disarmed under the discriminatory laws in existence during the American colonial period and beyond. For example, Maryland, Massachusetts, and Pennsylvania passed such laws in the mid-eighteenth century.[32] Prohibitions such as these were common throughout English and early American history and often targeted the trading of firearms as well as gunpowder, the modern equivalent of ammunition.

XIII. Laws Disarming Those Who Refuse to Take a Loyalty Oath

In 1777 North Carolina and Virginia enacted requirements for loyalty oaths for those who wished to exercise their right to bear arms.

[31] See An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W. & M. Ch. 15 (1689).

[32] See 1757-68 Md. Acts 53, *An Act for Prohibiting all Trade with the Indians, for the Time Therein Mentioned,* Ch. 4, § 3, 1763 Pa. Laws 319, *An Act to Prohibit the Selling of Guns, Gunpowder or Other Warlike Stores to the Indians,* § 1, See *A Collection of Original Papers Relative to The History of The Colony of Massachusetts-Bay* at 492 (1769).

"North Carolina went further, essentially stripping "'all Persons failing or refusing to take the Oath of Allegiance" of any citizenship rights. Those "permitted . . . to remain in the State" could "not keep Guns or other Arms within his or their house. In May 1777, Virginia did the same.'"[33]

Nevertheless, *Bruen* prompts us to consider the founding era when assessing the constitutionality of statutes like 922(g) concerning ammunition possession, and in that time, there were no such public-safety attitudes denying felons' access to ammunition.

XIV. Nineteenth-Century Ammunition Prohibitions Are Not Analogous because They Were Rooted in Discriminatory Intent.

In the nineteenth century, race-based restrictions on accessing arms and ammunition, fueled by fears of slave revolts and native uprisings, were prevalent. Following the Civil War, efforts intensified to disarm people of color. However, these regulations discriminated against freedmen and marginalized groups, like "tramps." Greenlee at 268–70. Notably, these historical laws, much like earlier ones, did not include provisions to disarm felons.

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[33] Greenlee at 265 Quoting, *The State Records of North Carolina* 89 (Walter Clark ed. 1905).

Through a comprehensive examination of printed session laws concerning gun regulation, history professor Robert H. Churchill determined that "at no time between 1607 and 1815 did the colonial or state governments of what would later become the first fourteen states exercise a police power to restrict the ownership of guns by members of the body politic."[34] Churchill made no mention of such prohibition extending to ammunition as well for felons, and if such a prohibition had existed, he certainly would have mentioned it. Access to ammunition or powder was less regulated than access to firearms unless one was a member of a marginalized racial, religious, or economic group.

Even a cursory examination of relevant nineteenth-century laws reveals their obvious race-based animus. For example, a Virginia statute said, "[n]o free negro or mulatto, shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court of the county or corporation in which he resides." Ch. 111, §§ 7 & 8, 1 Va. Code 423 (1819). The purpose of these pre-Civil War disarmament statutes was clear: to disarm persons of color.

Native Americans too were targeted during the nineteenth century. For example, Oregon passed a law in 1853 that forbade one to trade or sell arms or

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[34] Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America*, 25 Law & Hist. Rev. 142,143 n.11 (2007).

powder to Native Americans. This was punishable by six months in jail or a $100 fine.

XIV. Nineteenth century laws sought to disarm classes of persons based on race.

In the aftermath of the Civil War, the Fourteenth Amendment was passed. This was understood to guarantee all citizens regardless of race equal protection and treatment under the law. As a result, restrictions based on race were slowly removed from the law. That said, the laws were rewritten by the former confederates and former slave masters specifically to target blacks and to deny them the right to bear arms. The African American Gun Association describes it well below.

> The Fourteenth Amendment did away with actually naming African Americans in laws prohibiting the right to bear arms. Instead, in the Jim Crow era facially-neutral laws imposed prohibitive fees and restrictions on the poor and were selectively enforced in ways to deny the right of black citizens to possess and carry arms.[35]

[35] *Bruen,* 597 U.S., Amicus Brief of African American Gun Association Inc. at 27 2022.

Native Americans too were not spared being prohibited from the access to arms in the nineteenth century. A Mississippi law greatly restricted others from trading with them so that they could have hunting equipment or arms. This law was based on discriminatory intent well known to exist during the nineteenth century. Illinois passed a similar law in 1813.[36] These discriminatory laws forbidding Native Americans access to arms were not restricted to the mid-nineteenth century. A 1901 Arizona statute imposes penalties on "any person [who] shall hereafter trade or give any guns, rifles, pistols or any other deadly weapons, ammunition or spirituous liquors to any Indian, without having a license."[37]

XV. Not Until the Twentieth Century Did Laws Begin Banning Felons from Possessing Ammunition.

Most twentieth-century bans on felons specifically targeted firearms, not ammunition. Additionally, state bans on felons possessing firearms in general

[36] Harry Toulmin, *The Statutes of the Mississippi Territory, Revised and Digested by the Authority of the General Assembly* at 593, Image 612 (Natchez, 1807), See *an Act Prohibiting the Trading with Indians,* Sec. 2, in Nathaniel Pope, *Laws of the Territory of Illinois* (1815).

[37] 1901, AZ, Title 10, §§ 342 & 362 *of the AZ Penal Code*.

began only in the mid-twentieth century. See Greenlee at 272-275. A federal ban preventing violent felons from possessing firearms would not occur until 1938, expanding to nonviolent felons only in 1961 and to include all possession in 1968.[38]

XVI. 922(g) as Applied to a Complete Lifetime Ban on Ammunition is Unconstitutional because it is Overbroad.

The array of felonies, both historical and current, that could result in a lifetime ban on possessing even a single round of ammunition under 18 U.S.C. Section 922(g) is staggering. Examples include tax evasion, cattle rustling, fraudulent food stamp applications, Medicare reimbursement issues, releasing party balloons, shoplifting bubble gum, and the now-repealed transportation of dentures across state lines. Such laws extend far beyond what the Founders intended, subjecting individuals convicted of a wide range of offenses punishable by a year or more in prison to disproportionate lifelong penalties without relief.

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[38] *See* Federal Firearms Act of 1938, 75 Cong. Ch. 850, § 2(e), 52 Stat. 1250, 1251 (repealed); Act of Oct. 3, 1961, Pub. L. No. 87–342, 75 Stat. 757 (repealed); Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921–928), also see *See* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) ("Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding."); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1357 (2009).

(18 U.S.C. Section 1821 - Repealed. Pub. L. 116-260, div. O, title X, §1002(8), Dec. 27, 2020, 134 Stat. 2155).

XVII. 18 U.S.C. Section 922(g) is unconstitutional under the Commerce Clause.

Congress may not create a criminal statute beyond the powers specifically enumerated to it in the U.S. Constitution. Congress exceeds its constitutionally limited power by seeking to prohibit the mere possession of firearms, as it does in 18 U.S.C. § 922(g). Though the statute requires proof of a nexus to interstate commerce, the inclusion of this provision does not cure the defect. The Supreme Court in *United States v. Lopez,* 115 S. Ct. 1624 (1995) made clear that a statute that criminalizes mere possession of a firearm cannot be constitutional.

In Mr. Vargas's case, mere possession of ammunition within the state of Texas is the criminal act at issue, while §922(g) claims to be from Congress's power under the Commerce Clause. See 18 U.S.C. § 922(g) ("It shall be unlawful . . . to . . . possess in or affecting commerce any firearm . . . ."). As applied to Mr. Vargas, mere possession is not unconstitutional, because Congress does not have power under the Commerce Clause to prohibit it (not to mention the protections under the Second Amendment).

The Commerce Clause gives Congress permission to regulate only: (1) use of the channels of interstate commerce; (2) instrumentalities of interstate commerce and persons and things in interstate commerce; and (3) activity having a substantial relation to interstate commerce or substantially affecting interstate commerce. *Lopez*, 115 S. Ct. at 1629-30. As interpreted by *Lopez*, the scope of this authority does not encompass the mere possession of weapons. *Lopez* held that mere possession of a firearm within 1,000 feet of a school does not substantially affect interstate commerce. *Id.* at 1631-34.

As applied to mere possession, § 922(g) lies outside the reach of the Commerce Clause. As applied in the case at bar, § 922(g) does not regulate the use of channels of interstate commerce. It does not constitute the prohibition of the interstate transportation of a commodity, the protection of an instrumentality of interstate commerce, or the protection of a thing in interstate commerce.

Therefore, § 922(g) is a criminal statute that by its language has nothing to do with "commerce" or any sort of economic enterprise by even the broadest definition. Nothing about § 922(g)'s prohibition of the mere possession of a firearm brings it within Congress's Commerce Clause power.

Lopez says that the regulated activity must substantially affect interstate commerce. However, § 922(g)'s nexus requirement fails to establish that mere possession of ammunition in the circumstances of Mr. Vargas's case has any

effect on interstate commerce, much less a substantial effect. Regardless of whether a possessed shell or bullet once crossed a state line, a person—felon or otherwise—no more affects interstate commerce by merely possessing a bullet on a public street than a person does by possessing a bullet within 1,000 feet of a school. In this case, even more shockingly, the ammunition in question was found within Mr. Vargas's home, further reducing any possible impact upon interstate commerce.

CONCLUSION

Disarming felons as a class with the threat of extended incarceration is potentially to disarm all Americans. Anyone can be charged and convicted of a felony because the law is without end. Nothing is more dangerous to the ordered liberty found within our Republic than to allow 922(g)(1) as it is written to stand.

This case presents an opportunity for this Court to settle a circuit split regarding whether district courts must comply with the requirements of 18 U.S.C. § 3553 (c). In addition, it provides the court an opportunity to ensure that justice is properly applied to post-conviction appellate actions and to ensure that judicial economy is promoted within all districts by applying consistent application of 18 U.S.C. § 3553 (c). More importantly, this case allows the court to address the unconstitutionality of 922(g)(1) as it is applied to defendants like Mr. Vargas who have been convicted of a felony and to provide clarity to

differing decisions reached by various appellate courts from separate circuits on the issue of ammunition possession for felons.

FOR THESE REASONS, Petitioner Juan Jesus Vargas requests of this Court that his Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

By: /s/ Chad Van Cleave
Chad Van Cleave
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App. A

United States Court of Appeals for the Fifth Circuit

No. 23-50333
CONSOLIDATED WITH
No. 23-50341

United States Court of Appeals
Fifth Circuit
FILED
March 18, 2024
Lyle W. Cayce
Clerk

United States of America,

Plaintiff—Appellee,

versus

Juan Jesus Vargas,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC Nos. 7:22-CR-256-1,
7:16-CR-203-1

Before King, Haynes, and Graves, *Circuit Judges*.

Per Curiam:[*]

Juan Jesus Vargas pleaded guilty of violating 18 U.S.C. § 922(g)(1) by being a felon in possession of ammunition,[1] and the district court sentenced

[*] This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

[1] His previous felony convictions include aggravated assault via shooting someone to kill them.

him to a within-guidelines 115-month term of imprisonment and to a three-year period of supervised release. Vargas's supervised release in case number 7:16-CR-203-1 was revoked, and Vargas was sentenced to a consecutive 24-month term of imprisonment. Timely notices of appeal were filed, and the two appeals have been consolidated.

Vargas contends that the district court failed to provide an adequate explanation of its application of the statutory sentencing factors. Vargas's request for a sentence in the middle of the range did not preserve this procedural error, and our review is for plain error. *See United States v. Coto-Mendoza*, 986 F.3d 583, 585-86 (5th Cir. 2021). Here, the district court provided an adequate explanation. There was no error, plain or otherwise, with respect to the adequacy of the district court's reasons. *See id.* at 586-87; *see also Rita v. United States*, 551 U.S. 338, 356-57 (2007).

Vargas also asserts that the sentences were substantively unreasonable. Vargas has not rebutted the presumption of reasonableness that is accorded to within-Guidelines sentences. *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009).

For the first time on appeal, Vargas also asserts that § 922(g) violates the Commerce Clause and the Second Amendment. He invokes *United States v. Lopez*, 514 U.S. 549 (1995), and *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111 (2022). Our review is for plain error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

Vargas's Commerce Clause challenge is foreclosed. *See United States v. Jones*, 88 F.4th 571, 573-74 (5th Cir. 2023). Any Second Amendment violation is not clear or obvious. *See id.* Although Vargas attempts to distinguish *Jones* because his offense involves ammunition, he has not pointed to any binding authority holding that ammunition and firearms

should be treated differently for Second Amendment purposes. He has failed to show reversible plain error. *See Jones*, 84 F.4th at 574.

However, the criminal judgment states incorrectly that Vargas was convicted of being a felon in possession of a firearm, rather than ammunition. Thus, we remand for correction of the clerical error. *See* FED. R. CRIM. P. 36.

The judgments are AFFIRMED, and this matter is REMANDED for correction of the clerical error.

App. B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA

v.

Case Number: 7:22-CR-00256(1) DC
USM Number: 78139-380

JUAN JESUS VARGAS
Alias(es):
AKA Jesus Vargas,; **AKA** Juan J Vargas,; **AKA** John J Vargas,; **AKA** Jun AJ Vargas,; **AKA** Jun A J Vargas,; **AKA** Juan Vargas,; **AKA** John Vargas,; **AKA** Vargas John J,; **AKA** Rogelio Rstorga,; **AKA** Hilbert Anaya,;
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, Juan Jesus Vargas, was represented by Sandra Lynne Stewart.

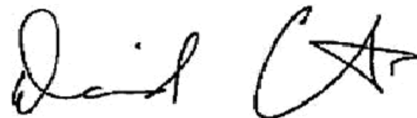
The defendant pled guilty to Count(s) 1, of the Indictment on January 18, 2023. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Offense Ended	Count(s)
18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(a)(8)	Possession of a Firearm by a Convicted Felon	October 21, 2022	1

As pronounced on May 5, 2023, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 9th day of May, 2023.



David Counts
United States District Judge

DEFENDANT: JUAN JESUS VARGAS
CASE NUMBER: 7:22-CR-00256(1) DC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **One Hundred Fifteen (115) months. This term to run consecutive to any sentenc imposed in Case No. A-21-1310-CR pending in 70th Judicial District Court of Ector County, TX, and concurrent to any sentenc imposed with pending charge of Manufacture/Delivery of a Controlled Substance Penalty Group One Under One Gram in a Drug Free Zone pending in Ector County District Attorney's Office, Odessa, TX,** with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serve this sentence at F.C.I. Bastrop.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on ________________________ to ____________________________________
at ____ with a certified copy of the Judgment.

____
United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) years**.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court and shall comply with the following additional conditions:

The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search shall be conducted at a reasonable time and in a reasonable manner.

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CASE NUMBER: 7:22-CR-00256(1) DC

CONDITIONS OF SUPERVISED RELEASE

(As Amended November 28, 2016)

It is ORDERED that the Conditions of Probation and Supervised Release applicable to each defendant committed to probation or supervised release in any division of the Western District of Texas, are adopted as follows:

Mandatory Conditions:

[1] The defendant shall not commit another federal, state, or local crime during the term of supervision.

[2] The defendant shall not unlawfully possess a controlled substance.

[3] The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.

[4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

[5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et. seq.) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.

[6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

[7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

[8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.

[9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

[1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

[2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

[3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

[4] The defendant shall answer truthfully the questions asked by the probation officer.

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[5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change

[6] The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.

[7] The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

[8] The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

[9] If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

[10] The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

[11] The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

[12] If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

[13] The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

[14] If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

[15] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

[16] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

[17] If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

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CASE NUMBER: 7:22-CR-00256(1) DC

CRIMINAL MONETARY PENALTIES/ SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 200 E. Wall St. Room 222, Midland, TX 79701 or online by Debit (credit cards not accepted) or ACH payment (direct from Checking or Savings Account) through pay.gov (link accessible on the landing page of the U.S. District Court's Website). **Your mail-in or online payment must include your case number in the exact format of DTXW722CR000256-001 to ensure proper application to your criminal monetary penalty.**

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTAL:	$100.00	$0.00	$0.00	$0.00	$0.00

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of **$100.00**.

Fine

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA Assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA *Plaintiff*	§	
	§	
VS	§	**Case No. MO-16-CR-00203-DC**
	§	
(1) JUAN JESUS VARGAS *Defendant*	§	
	§	

ORDER REVOKING SUPERVISED RELEASE and RESENTENCING OF DEFENDANT

On this the May 5, 2023, came on to be heard the Petition for Revocation of Supervised Release granted by virtue of Judgment entered on January 5, 2017, in the above numbered and styled cause.

Defendant appeared in person and was represented by attorney of record, Sandra Lynne Stewart. The United States was represented by Assistant United States Attorney, John Fedock.

After reviewing the petition and the records in this case as well as hearing testimony and arguments of counsel, the Court is of the opinion that said Defendant has violated the provisions of his Supervised Release and that the ends of justice and the best interests of the public and of the Defendant will not be subserved by continuing said Defendant on Supervised Release. Further, the Court is of the opinion that the Petition for Revocation of Supervised Release should be, and it is hereby **GRANTED**.

IT IS THEREFORE ORDERED that the term of Supervised Release of Defendant named above granted by the Judgment entered on January 5, 2017, and it is hereby **REVOKED** and **SET ASIDE** and the Defendant is resentenced as follows:

The Defendant, JUAN JESUS VARGAS, is hereby committed to the custody of the United States Bureau of Prisons to serve a term of imprisonment of Twenty-Four (24) months. No further Supervised Release shall be imposed. Term to run consecutive to MO-22-CR-256.

The Clerk will provide the United States Marshal Service with a copy of this Order and a copy of the Judgment entered on January 5, 2017, to serve as the commitment of the Defendant.

SIGNED this 8th day of May, 2023.

David Counts
United States District Judge