No. _____

In the Supreme Court of the United States

TRAVIS WAYNE LOVINGS, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress may criminalize intrastate possession of a firearm solely because it crossed state lines at some point before it came into defendant's possession.

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

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Petitioner Travis Wayne Lovings asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 16, 2024.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

- *United States v. Lovings*, No. 7:23-cr-00027-DC (W.D. Tex. Sept. 11, 2023) (judgment of conviction)
- *United States v. Lovings*, No. 7:20-cr-00199-DC (W.D. Tex. Sept. 11 2023) (order of revocation)

- *United States v. Lovings*, Nos. 23-50653 & 23-50656 (5th Cir. Apr. 16, 2024) (per curiam) (unpublished)

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OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Lovings*, Nos. 23-50653 & 23-50656 (5th Cir. Apr. 16, 2024) (per curiam), is reproduced at Pet. App. 1a–3a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on April 16, 2024. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I § 8 of the U.S. Constitution provides that "Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes …." U.S. Const. art. I § 8 cl. 1, 3.

The Second Amendment to the U.S. Constitution provides that "[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." U.S. Const. amend. II.

FEDERAL STATUTE INVOLVED

18 U.S.C. § 922(g)(1)

> It shall be unlawful for any person—(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year … to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT

1. Lovings is a convicted felon, having been convicted of felony offenses including Texas theft, evading arrest, possessing a firearm as a felon, and drug possession. In 2023, police officers conducted a traffic stop of the car in which Lovings was the passenger. The driver consented to a search of her car, and officers found a Springfield XD-45 ACP .45 caliber handgun between the front passenger seat and the front passenger door frame, next to where Lovings had been seated. The gun had been manufactured in Illinois.

2. Lovings was indicted for one count of possessing a firearm that had been shipped and transported in interstate commerce, knowing that he had been convicted of a crime punishable by imprisonment exceeding one year, in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty. The factual basis for his plea admitted only that the firearm was manufactured in Genesco, Illinois,

and had been shipped or transported in interstate and foreign commerce. The district court sentenced Lovings to 125 months' imprisonment, followed by three years' supervised release.[1]

3. On appeal, Lovings argued that 18 U.S.C. § 922(g)(1) is unconstitutional on two grounds. First, he argued that, under the new analytical test established in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), the statute violates the Second Amendment, both facially and as applied to him. The court of appeals rejected this claim on plain error review in the absence of binding precedent holding that § 922(g)(1) is unconstitutional. Pet. App. 2a (citing *United States v. Jones*, 88 F. 4th 571, 574 (5th Cir. 2023)).

Second, Lovings argued that the statute exceeds Congress's enumerated powers under the Commerce Clause. Lovings conceded that the Fifth Circuit had previously ruled against him on this claim and the court of appeals agreed. Pet. App. 2a (citing

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[1] On the same day that Lovings was sentenced for the felon-in-possession offense, the district court also revoked the supervised release that Lovings was serving for a prior conviction. The court imposed a term of 24 months' imprisonment to run consecutively to the 125-month sentence in the new case. Lovings separately appealed from the revocation, and the cases were consolidated. He did not challenge any aspect of the revocation in the court below, nor does he do so here.

Jones, 88 F. 4th at 573; *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020)).

REASONS FOR GRANTING THE WRIT

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

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534 ("The Constitution's express conferral of some powers makes clear that it does not grant others."). There is no general federal police power. *See United States v. Morrison*, 529 U.S. 598, 618–619 (2000). Every exercise of Congressional power must be justified by reference to a particular grant of authority. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 535 ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions."). A limited central government promotes accountability and "protects the liberty of the individual from arbitrary power." *Bond v. United States*, 572 U.S. 844, 863 (2011).

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

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

It is difficult to square *Scarborough*, and the expansive concept of the commerce power upon which it relies, with more recent hold-

ings of the Court in this area. In *National Federation of Independent Business v. Sebelius*, five members of this Court found that the individual mandate component of the Affordable Care Act could not be justified by reference to the Commerce Clause. *See* 567 U.S. at 557–558 (Roberts., C.J. concurring). Although this Court recognized that the failure to purchase health insurance affects interstate commerce, five Justices did not think that the constitutional phrase "regulate Commerce ... among the several States" could reasonably be construed to include enactments that compelled individuals to engage in commerce. *See id.* at 550 (Roberts., C.J. concurring). Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *See id.* (Roberts., C.J. concurring).

The majority of this Court in *NFIB* thus required more than a demonstrable effect on commerce; the majority required that the challenged enactment itself be a regulation of commerce—that it affect the legality of pre-existing commercial activity. Possession of firearms, like the refusal to purchase health insurance, may "substantially affect commerce." But such possession is not, without more, a commercial act.

To be sure, *NFIB* does not explicitly repudiate the "substantial effects" test. Indeed, the Chief Justice's opinion quotes *Darby*'s

statement that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states..." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 549 (Roberts., C.J. concurring) (quoting *Darby*, 312 U.S. at 118–119); *see also id.* at 552–553 (Roberts., C.J. concurring) (distinguishing *Wickard v. Filburn*, 317 U.S. 111 (1942)). It is therefore perhaps possible to read *NFIB* narrowly: as an isolated prohibition on affirmatively compelling persons to engage in commerce. But it is difficult to understand how this reading of the case would be at all consistent with *NFIB*'s textual reasoning.

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

And indeed, much of the Chief Justice's language in *NFIB* is consistent with this view. This opinion rejects the government's argument that the uninsured were "active in the market for health care" because they were "not currently engaged in any commercial activity involving health care...." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 556 (Roberts., C.J. concurring). Significantly, the Chief Justice observed that "[t]he individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity." *Id.* (Roberts., C.J. concurring). He reiterated that "[i]f the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature." *Id.* (Roberts., C.J. concurring). He agreed that "Congress can anticipate the effects on commerce of an economic activity," but did not say that it could anticipate a non-economic activity. *Id.* at 557 (Roberts., C.J. concurring). And he finally said that Congress could not anticipate a future activity "in order to regulate individuals not currently engaged in commerce." *Id.* (Roberts., C.J. concurring). Accordingly, *NFIB* provides substantial support for the proposition that enactments under the Commerce Clause must regulate commercial or economic activity, not merely activity that affects commerce.

Here, the factual basis for Lovings's guilty plea does not state that his possession of the gun was an economic activity. Under the reasoning of *NFIB*, this should have been fatal to the conviction. As explained by *NFIB*, the Commerce Clause permits Congress to regulate only activities, i.e., the active participation in a market. But 18 U.S.C. § 922(g)(1) criminalizes *all* possession, without reference to economic activity. It therefore sweeps too broadly.

Further, the factual basis fails to show that Lovings was engaged in the relevant market at the time of the regulated conduct. The Chief Justice has noted that Congress cannot regulate a person's activity under the Commerce Clause unless the person affected is "currently engaged" in the relevant market. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 557 (Roberts., C.J. concurring). As an illustration, the Chief Justice provided the following example: "An individual who bought a car two years ago and may buy another in the future is not 'active in the car market' in any pertinent sense." *Id*. at 556 (Roberts., C.J. concurring). As such, *NFIB* brought into serious question the long-standing notion that a firearm which has previously and remotely passed through interstate commerce should be considered to indefinitely affect commerce without "concern for when the [initial] nexus with commerce occurred." *Scarborough*, 431 U.S. at 577.

Scarborough stands in even more direct tension with *Bond v. United States*, which shows that Section 922(g)(1) ought not be construed to reach the possession by felons of every firearm that has ever crossed state lines. Bond was convicted of violating 18 U.S.C. § 229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond*, 572 U.S. at 853; 18 U.S.C. § 229(a). She placed toxic chemicals—an arsenic compound and potassium dichromate—on the car door, mailbox, and door knob of a romantic rival. *See id.* at 852. This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 865–866. The Court instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 859–862.

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

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

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

Bond, 572 U.S. at 863.

As in *Bond*, it is possible to read Section 922(g)(1) to reach the conduct admitted here: possession of an object that once moved across state lines, without proof that the defendant's conduct caused the object to move across state lines, nor even proof that it

moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, or to the interstate movement of commodities.

Lovings did not challenge either the sufficiency of his plea's factual resume or the constitutionality of the statute in district court. While this presents a problem for a plenary grant in the present case, the issue is worthy of certiorari.

II. The categorical, lifetime ban on possessing a firearm, under 18 U.S.C. § 922(g)(1), does not comport with the Second Amendment, facially or as applied to persons with non-violent prior convictions unrelated to the misuse of arms.

The Second Amendment guarantees "the right of the people to keep and bear arms." Yet 18 U.S.C. § 922(g)(1) denies that right, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. Despite this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges for many years. *See United States v. Moore*, 666 F.3d 313, 316–317 (4th Cir. 2012) (collecting cases). This changed, however, following *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1

(2022). *Bruen* held that where the text of Second Amendment plainly covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation's historical tradition of gun regulation. *See Bruen*, 597 U.S. at 24. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id*. at 19–24.

After *Bruen*, the courts of appeals split as to whether 18 U.S.C. § 922(g)(1) trenches on rights protected by the Second Amendment. The Ninth Circuit held in *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024), *petition for rehearing en banc pending*, No. 22-50048, that Section 922(g)(1) violated the Second Amendment as applied to a person who—like Lovings—has previous convictions, including for possession of drugs for sale, evading a police officer, and possession of a firearm as a felon. Similarly, the Third Circuit sustained the Second Amendment challenge of a man previously convicted of making a false statement to obtain food stamps, notwithstanding the felony status of that offense. *See Range v. Attorney General of the United States*, 69 F.4th 96 (3d Cir. 2023), *cert. granted, judgment vacated, remanded*, No. 23-374 (U.S. 2024). By contrast, the Eighth Circuit held that Section 922(g)(1) is constitutional in all instances, at least against Second Amendment attack.

See United States v. Cunningham, 70 F.4th 502 (8th Cir. 2023), *cert. granted, judgment vacated, remanded*, No. 23-6602 (U.S. 2024). The Eleventh Circuit held that "felons are categorically 'disqualified' from exercising their Second Amendment rights." *United States v. Dubois*, 94 F.4th 1285 (11th Cir. 2024). And the Seventh Circuit determined that the issue could be decided only after robust development of the historical record, remanding to consider such historical materials as the parties could muster. *See Atkinson v. Garland*, 70 F.4th 1018, 1023–1024 (7th Cir. 2023).

The Court's recent decision in *United States v. Rahimi*, 602 U.S. ___, No. 22-915 (2024), which applied the *Bruen* framework for analyzing Second Amendment challenges to a criminal law for the first time, did not resolve the conflict over the constitutionality of Section 922(g)(1).[2] In *Rahimi*, the Court held that 18 U.S.C. § 922(g)(8)(C)(i)—which prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that

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[2] Although the Court "GVR'ed" a number of cases, including *Range* and *Cunningham*, to be considered in light of *Rahimi*, a direct split continues to exist between the Ninth and Eleventh Circuits. *See Duarte*, 101 F.4th 657 (Ninth Circuit) (petition for rehearing en banc pending); *Dubois*, 94 F.4th 1285 (Eleventh Circuit) (no petition for writ of certiorari filed).

order includes a finding that the person represents a credible threat to the physical safety of others—is constitutional. *Rahimi*, slip. op. at 17.

But *Rahimi* is a narrow decision that embraces *Bruen*'s focus on text, history, and tradition. *First*, the Court rejected the government's theory that the Second Amendment allows Congress to disarm anyone who is not "responsible" and "law-abiding."[3] *Rahimi*, slip op. at 17; *see id.* at 27 (Thomas, J., dissenting) ("The Government … argues that the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding.' Not a single Member of the Court adopts the Government's theory."). Not only did the Court state that "responsible" is a "vague term" and it is "unclear what such a rule would entail," *id.* at 17 (majority opinion), but it further clarified that the government's proposed rule

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[3] At oral argument, the government said that it was not invoking the "law-abiding" prong of its proposed rule for individuals subject to § 922(g)(8). *See* Tr. of Oral Arg. 8–9, *United States v. Rahimi*, No. 22-915 (U.S. Nov. 7, 2023). So the majority opinion discussed only the "responsible" prong. *Rahimi*, slip op. 17. In his dissenting opinion, Justice Thomas—who agreed with the majority in rejecting the government's theory—provided a more robust analysis discussing both prongs. *Id.* at 27–31 (Thomas, J., dissenting).

did not "derive from [its] case law." *Id.* It noted that *Heller*[4] and *Bruen* used the term "responsible" to "describe the class of ordinary citizens who undoubtedly enjoy the right," but neither decision adopted that formulation to define the limits of the Second Amendment. *Id.*; *see also id.* at 27 (Thomas, J., dissenting) ("The Government's claim that the Court already held the Second Amendment protects only 'law-abiding, responsible citizens' is specious at best.").

Second, the Court conducted a historical analysis and concluded that surety laws and "going armed" laws established a tradition—temporarily disarming someone found by a court to pose a credible threat to the physical safety of others—similar to § 922(g)(8). *Rahimi* thus endorses an incremental approach to Second Amendment challenges driven by a detailed historical analysis applied to a specific law, not sweeping generalities.

To justify a firearm law infringing on otherwise protected conduct, *Bruen* instructed that "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. The Court clarified in *Rahimi* that, to do so, "[a] court must ascertain whether

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[4] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances." *Rahimi*, slip op. at 7 (cleaned up). "Why and how the regulation burdens the right are central to this inquiry." *Id.*

In *Rahimi*, the Court held that the government had justified § 922(g)(8)(C)(i) by pointing to a tradition of "temporarily disarm[ing]" an "individual found by a court to pose a credible threat to the physical safety of another." *Rahimi*, slip op. at 17. In particular, the Court relied on surety laws and "going armed" laws. *Id.* at 10–16.

But *Rahimi*'s historical analysis provides little guidance here because § 922(g)(8) and § 922(g)(1) are very different. Section 922(g)(8)(C)(i) restricts gun possession if a restraining order "includes a finding that [a] person represents a credible threat to the physical safety of [an] intimate partner or child." In other words, the statute "restricts gun use to mitigate demonstrated threats of physical violence" and applies only once a court has made an individualized finding that such a threat exists. *Rahimi*, slip op. at 14. By contrast, § 922(g)(1) is a categorical ban that prohibits everyone convicted of a crime punishable by more than a year in prison from

possessing a gun—without any individualized finding and regardless of whether they misuse firearms to threaten others.

The Court also emphasized that § 922(g)(8)'s restriction is "temporary." *Rahimi*, slip op. at 14. That is, the statute "only prohibits firearm possession so long as the defendant 'is' subject to a restraining order." *Id.* (cleaned up). Section 922(g)(1), however, imposes a "permanent, life-long prohibition on possessing firearms." *Id.* at 2 (Thomas, J., dissenting); *see Duarte*, 101 F.4th at 685 (discussing "§ 922(g)(1)'s no-exception, lifetime ban").

The stark differences between § 922(g)(1) and § 922(g)(8) confirm that the Court's decision upholding the latter does not resolve the circuit split over the constitutionality of the former, and the issue plainly merits certiorari. It involves a direct conflict between the federal courts of appeals as to the constitutionality of a criminal statute. The statute in question is a staple of federal prosecution.[5] It criminalizes primary conduct in civil society; it does not

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[5] *See* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 20, Federal Offenders Sentenced under Each Chapter Two Guideline, p.2 (2022) (showing that 9,367 people were sentenced under U.S.S.G. § 2K2.1 in FY 2022, which governs prosecutions under 18 U.S.C. § 922(g)), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table20.pdf (last visited July 10, 2024).

merely set forth standards or procedures for adjudicating a legal dispute. A felon living in a neighborhood beset by crime deserves to know whether he may defend himself against violence by possessing a handgun, or whether such self-defense is undertaken only on pain of 15 years imprisonment.

Although Lovings has previous convictions, this Court may well find that the Second Amendment supports a broad or facial challenge to Section 922(g)(1). The dissenters in *Range* expressed serious doubts as to whether the logic of that decision could be contained to those convicted of relatively innocuous felonies. *See, e.g.*, *Range*, 69 F.4th at 131–132 (Krause, J., dissenting). Likewise, the Seventh Circuit has expressed doubt as to whether the Second Amendment distinguishes between violent and non-violent felonies. *See Atkinson*, 70 F.4th at 1023. And a district court in the Southern District of Mississippi has sustained a Second Amendment challenge to a defendant previously convicted of aggravated assault and manslaughter. *See United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *2–3 (S.D. Miss. Jun. 28, 2023). In its view, the government's authorities showed a right only to punish those who possessed a firearm after conviction of a death-eligible offense, or after a finding of dangerousness that prospectively disarmed the defendant. *Id*.

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

CONCLUSION

FOR THESE REASONS, Lovings asks this Honorable Court to grant a writ of certiorari. If this Court grants certiorari in another case to address either issue, it should hold the instant petition pending the outcome. If the constitutionality of § 922(g)(1) is called

into question, or if its scope is limited, the Court should grant certiorari in the instant case, vacate the judgment below, and remand for reconsideration. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

Respectfully submitted.

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