No.

In the Supreme Court of the United States

THELONIOUS WAYNE KIRBY,
PETITIONER

v.

UNITED STATES OF AMERICA

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

2. Whether 18 U.S.C. 922(g)(1) exceeds Congress's Commerce Clause power.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)
United States v. *Kirby*, No. 3:22-cr-00026
(Jan. 2, 2024)

United States Court of Appeals (11th Cir.)
United States v. *Kirby*, No. 24-10142
(June 5, 2024)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Thelonious Wayne Kirby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–3a) is not reported, but is available at 2024 WL 2846679.

The order of the district court (App., *infra*, 4a–13a) is not reported, but is available at 2023 WL 1781685.

JURISDICTION

The United States District Court for the Middle District of Florida had jurisdiction over this criminal case under 18 U.S.C. 3231. Pursuant to 28 U.S.C. 1291, the Eleventh Circuit Court of Appeals had jurisdiction to review the final decision of the district court.

The Eleventh Circuit issued its decision on June 5, 2024. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3

U.S. Const. amend. II

18 U.S.C. 922(g)(1)

These provisions are reproduced in the appendix. App., *infra*, 14a.

STATEMENT

I. Introduction and Legal Background

A. Second Amendment

In *District of Columbia* v. *Heller*, the Court recognized that the Second Amendment conferred an individual right to possess handguns in the home for self-defense. 554 U.S. 570, 635–36 (2008). *Heller* imposed "a test rooted in the Second Amendment's text, as informed by history" for assessment of Second Amendment claims. *See N.Y. State Rifle & Pistol Ass'n*

v. *Bruen*, 597 U.S. 1, 19 (2022). The Court has since explained that when a regulation faces a Second Amendment challenge, "the government must affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Ibid.* The Court recently reaffirmed that decision in *United States* v. *Rahimi*, 144 S. Ct. 1889, 1897 (2024). *Rahimi* also emphasized that "[w]hy and how the regulation burdens the [Second Amendment] right are central to" the inquiry of whether a new law is "'relevantly similar' to laws that our tradition is understood to permit . . . ." *Id.* at 1898.

In *Heller*'s dicta, the Court stated that although it did "not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." 554 U.S. at 626; *see also McDonald* v. *City of Chicago*, 561 U.S. 742, 786 (2010) (stating the Court "made it clear in *Heller* that our holding did not cast doubt on longstanding regulatory measures," including laws disarming felons) (quoting *Heller*, 554 U.S. at 626–27); *Rahimi*, 144 S. Ct. at 1944 n.7 (Thomas, J., dissenting) (describing "the passing reference in *Heller* to laws banning felons and others from possessing firearms" as "dicta."). The Court described such measures as "presumptively lawful." *Heller*, 554 U.S. at 627 n.26. It also noted, however, that because *Heller* "represent[ed] this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ." *Id.* at 635. And "there will be time enough to expound upon the historical justifications for the exceptions [the Court has] mentioned if and when those exceptions come before [it]." *Ibid.*

After *Heller*, the Eleventh Circuit examined the constitutionality of Section 922(g)(1), which categorically and permanently disarms individuals who have been convicted of a felony. *United States* v. *Rozier*, 598 F.3d 768 (11th Cir. 2010). Because the *Heller* decision stated it "assumed" that the applicant was "not disqualified from the exercise of Second Amendment rights," before holding that "the District must permit him to register his handgun and must issue him a license to carry it in the home," *Heller*, 554 U.S. at 635, the Eleventh Circuit concluded "the first question to be asked is . . . whether one is qualified to possess a firearm," *Rozier*, 598 F.3d at 770. The *Rozier* court concluded that *Heller* limited its decision as applying to law-abiding and qualified individuals. *See id.* at 771 & n.6. When read in this context, its statement that felon disarmament laws are "presumptively lawful" resulted in a holding that "statutory restrictions of firearm possession, such as § 922(g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people." *Id.* at 771. The appellate court conducted no analysis to determine whether there were historical justifications or analogues for Section 922(g)(1).

The Eleventh Circuit reaffirmed its decision after this Court decided *Bruen*. *United States* v. *Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024). The circuit court reasoned that because this Court stated in *Bruen* that the decision was "[i]n keeping with *Heller*," *Bruen* could not have clearly abrogated the circuit court's precedent. *Ibid.* The court further stated it "require[d] clearer instruction from the Supreme Court before [it] may reconsider the constitutionality of section 922(g)(1)." *Ibid.*

After the Eleventh Circuit's decision in *Dubois*, this Court decided *Rahimi*. There, the Court re-

affirmed that the scope of the Second Amendment right is decided by examining the "historical tradition of firearm regulation." *Rahimi*, 144 S. Ct. at 1897. It also cautioned that its decisions in *Heller*, *McDonald*, *Bruen*, and *Rahimi* did not undertake an exhaustive historical analysis of the full scope of the Second Amendment. *Id.* at 1903.

The majority, concurring, and dissenting opinions recognized that *Rahimi* and its predecessors left outstanding questions on the constitutionality of firearms regulations. For example, the majority rejected the government's contention that *Heller* and *Bruen* authorized it to disarm individuals it finds not to be "responsible", because those cases had not decided whether all citizens or categories of citizens are equally protected by the Second Amendment. *Ibid.* The Court explained that although it previously "used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right," "those decisions did not define the term and said nothing about the status of citizens who were not 'responsible.' The question was simply not presented." *Ibid.*

Similarly, in his concurring opinion, Justice Gorsuch noted that the Court did not decide "whether the government may disarm a person without a judicial finding that he poses a 'credible threat' to another's physical safety." *Id.* at 1909 (Gorsuch, J., concurring). "Nor d[id the Court] purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, 'not responsible.'" *Id.* at 1910. Those issues were not decided because they were not the issues presented to the Court. *Ibid.*

When *Rahimi* was decided, several petitions were pending asking the Court to resolve the

constitutionality of Section 922(g)(1). The Court granted the writs, vacated the decisions, and remanded for further consideration (GVR) in light of *Rahimi*. *Garland* v. *Range*, — S. Ct. —, 2024 WL 3259661 (2024) (Mem.); *Vincent* v. *Garland*, — S. Ct. —, 2024 WL 3259668 (2024) (Mem.); *Doss* v. *United States*, — S. Ct. —, 2024 WL 3259684 (2024) (Mem.); *Jackson* v. *United States*, — S. Ct. —, 2024 WL 3259675 (2024) (Mem.); *Cunningham* v. *United States*, — S. Ct. —, 2024 WL 3259687 (2024) (Mem.).

Despite this Court's recent decisions that a gun regulation's constitutionality is decided by looking at history, the Eleventh Circuit continues to adhere to its pre-*Rahimi* decisions in *Rozier* and *Dubois*, which have no historical analysis. *United States* v. *Rambo*, No. 23-13772, 2024 WL 3534730, at *2 (11th Cir. July 25, 2024) ("And our binding precedents in *Dubois* and *Rozier* similarly foreclose his Second Amendment arguments. The Supreme Court's decision in *United States v. Rahimi* did not abrogate *Dubois* or *Rozier* because it did not 'demolish' or 'eviscerate' the 'fundamental props' of those precedents."), *petition for reh'g en banc filed*, Doc. 42 (11th Cir. Aug. 14, 2024).

B. Commerce Clause

In *Scarborough* v. *United States*, the Court construed Section 922(g)'s predecessor to hold, as a matter of statutory interpretation, that Congress did not intend "to require any more than the *minimal* nexus that the firearm have been, at some time, in interstate commerce." 431 U.S. 563, 575 (1977) (emphasis added). Nearly twenty years later, in *United States* v. *Lopez*, the Court "identified three broad categories of activity that Congress may regulate under its commerce power": (1) "channels of

interstate commerce"; (2) "instrumentalities of interstate commerce"; and (3) "activities that substantially affect interstate commerce." 514 U.S. 549, 558–59 (1995) (citations omitted).

In the decades since *Lopez*, many courts have noted the tension between *Scarborough* and *Lopez*, "express[ing] doubts about [*Scarborough*'s] continuing validity." *United States* v. *Patton*, 451 F.3d 615, 634 (10th Cir. 2006) (citing cases). But many circuit courts have recognized their position in the judicial hierarchy and have continued to rely on *Scarborough* to uphold Section 922(g)(1)'s constitutionality despite *Lopez*. *See, e.g.*, *United States* v. *Safeeullah*, 453 F. App'x 944, 948 n.2 (11th Cir. 2012) ("[W]e have continued to apply the minimal nexus test post-*Lopez*. If the minimal nexus test is wrong, it is for the Supreme Court to say so."); *United States* v. *Lemons*, 302 F.3d 769, 773 (7th Cir. 2002) ("If, indeed, *Lopez*'s rationale calls into doubt our construction and application of section 922(g)(1), it is for the Supreme Court to so hold."); *United States* v. *Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir. 2002) ("The vitality of *Scarborough* engenders significant debate. Until the Supreme Court tells us otherwise, however, we follow *Scarborough* unwaveringly."); *United States* v. *Kuban*, 94 F.3d 971, 973 n.4 (5th Cir. 1996) ("[W]ere the matter *res nova* a powerful argument could be made for a contrary result; however, this inferior federal court must regard [*Scarborough*] as barring the way.")

II. Proceedings below

Mr. Kirby was charged with possessing a firearm knowing that he was convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Doc. 1 at 1–2. The indictment listed several prior felony convictions. *Ibid.*

Mr. Kirby moved to dismiss the indictment, arguing, as relevant to this petition, that (1) Section 922(g)(1) unconstitutionally infringes on his Second Amendment right to keep and bear arms; and (2) Section 922(g)(1) exceeds Congress's authority under the Commerce Clause. Doc. 22 at 1. The district court denied the motion, holding that it was bound by *Rozier* as to the Second Amendment argument, Doc. 30 at 5, and *United States* v. *Wright*, 607 F.3d 708 (11th Cir. 2010) as to the Commerce Clause argument, Doc. 30 at 7.

After the denial of his motion to dismiss, Mr. Kirby waived his right to a jury trial and proceeded to a stipulated-facts bench trial, at which the district court found him guilty. Docs. 34, 35, 36, 37. The district court sentenced him to a 37-month term of imprisonment. Doc. 52. He appealed his conviction and sentence to the Eleventh Circuit.

As relates to this petition, Mr. Kirby argued on appeal that his Section 922(g)(1) conviction should be vacated because the statute is facially unconstitutional under the Second Amendment. He argued that the Eleventh Circuit's precedent in *Rozier* was abrogated by this Court's decision in *Bruen*, he is a member of "the people" who enjoy rights under the Second Amendment, and his proposed course of conduct fell within the Second Amendment's plain text. As a result, his conduct was presumptively lawful under *Bruen*, and the government could not show Section 922(g)(1) was consistent with this Nation's tradition of firearms regulation.

Mr. Kirby also argued that Section 922(g)(1) is unconstitutional, both facially and as applied, because it exceeds Congress's authority under the Commerce Clause. He argued that the Commerce Clause does not permit Congress to criminalize the intrastate

possession of a firearm simply because it crossed state lines in the past.

As to Mr. Kirby's Second Amendment argument, the Eleventh Circuit rejected it based on its decision in *Dubois*: "[W]e recently held that *Rozier* was not abrogated by the Supreme Court's decision in [*Bruen*]." *United States* v. *Kirby*, No. 24-10142, 2024 WL 2846679, at *1 (11th Cir. June 5, 2024) (citing *Dubois*, 94 F.4th at 1293). And, the Eleventh Circuit concluded, it was bound by *Dubois* and *Rozier* because they were earlier published decisions that had not been overruled by this Court or the Eleventh Circuit sitting en banc. *Ibid.* The Eleventh Circuit decided Mr. Kirby's appeal before this Court's decision in *Rahimi*.

Likewise, the Eleventh Circuit rejected Mr. Kirby's Commerce Clause argument, concluding that it was bound to do so based on its prior caselaw. *Id.* at *1 (citing *United States* v. *McAllister*, 77 F.3d 387, 389–90 (11th Cir. 1996) and *Rozier*, 598 F.3d at 770–71).

REASONS FOR GRANTING THE PETITION

I. The Court's review is needed to determine whether Section 922(g)(1) is unconstitutional under the Second Amendment.

A. The decision below is wrong.

Under *Bruen*'s historical test, as affirmed by *Rahimi*, the decision below cannot stand. Section 922(g)(1) violates the Second Amendment because the Nation's historical tradition of firearms regulation does not permit the federal government to permanently disarm someone based only on the fact that they have a felony conviction.

1. The Eleventh Circuit did not apply the history-and-tradition test required by *Bruen* and *Rahimi*.

This Court clarified that for a firearms regulation to survive a Second Amendment challenge, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19; *see also Rahimi*, 144 S. Ct. at 1897. Yet the Eleventh Circuit conducted no analysis of text, history, and tradition. *Dubois*, 94 F.4th at 1291–93; *Kirby*, 2024 WL 2846679, at *1.

Rather than conducting the test prescribed by this Court, the Eleventh Circuit relied on *Heller*'s dicta that felon disarmament laws are presumptively lawful. *Dubois*, 94 F.4th at 1291–93; *Kirby*, 2024 WL 2846679, at *1. But as this Court said, *Heller* did not examine the historical justifications for such laws. *Heller*, 554 U.S. at 635. Nor did it, or any subsequent decision, define who enjoys rights under the Second Amendment. *Rahimi*, 144 S. Ct. at 1903. This Court did not accept that the simple fact that an individual may not be a "responsible," law-abiding citizen is enough to remove him from the people protected by the Second Amendment, as argued by the government in *Rahimi*. *Ibid.* The circuit court's reliance on dicta founded on a presumption and the incorrect conclusion that *Heller* limited the Second Amendment right to law-abiding and qualified individuals to categorically ban all Second Amendment challenges to Section 922(g)(1) with no historical analysis was error.

Under a proper analysis, Section 922(g)(1) is unconstitutional. There is no historical justification for excluding Mr. Kirby from "the people" solely based on

past felony convictions, nor is there a historical justification for permanently disarming him on this basis.

2. Mr. Kirby is among "the people" described in the Second Amendment.

The phrase "the people" in the Second Amendment "unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. As then-Judge Barrett recognized, felons are not "categorically excluded from our national community" and fall within the amendment's scope. *Kanter* v. *Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting).

As *Heller* explained, "the people" is a "term of art employed in select parts of the Constitution," including "the Fourth Amendment, . . . the First and Second Amendments, and . . . the Ninth and Tenth Amendments." 554 U.S. at 579–80. Felons are among "the people" whose "persons, houses, papers, and effects" enjoy Fourth Amendment protection. U.S. Const. amend. IV; *United States* v. *Lara*, 815 F.3d 605, 609 (9th Cir. 2016). Felons likewise enjoy "the right of the people" to "petition the government for redress of grievances." U.S. Const. amend. I; *Entler* v. *Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017). If a person with a felony conviction is one of "the people" protected by the First and Fourth Amendments, *Heller* teaches that this person is one of "the people" protected by the Second Amendment too. *Range* v. *Att'y Gen.*, 69 F.4th 96, 102 (3d Cir. 2023) (en banc), *vacated by Range*, 2024 WL 3259661 (Mem.).

3. The government cannot show a historical tradition of permanently disarming felons who have not been found to be a danger.

When examining a regulation's validity under the Second Amendment, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898. To evaluate whether a modern regulation is relevantly similar to what our tradition is understood to permit, courts should not require regulations be "dead ringers" or "historical twins." *Ibid.* Instead, "[w]hy and how the regulation burdens the right are central to th[e] inquiry." *Ibid.*

"[I]f laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Ibid.* Even so, a modern-day regulation "may not be compatible with the [Second Amendment] right if it [imposes restrictions] to an extent beyond what was done at the founding." *Ibid.* Instead, a challenged regulation must "be analogous enough to pass constitutional muster." *Ibid.* (quoting *Bruen*, 597 U.S. at 30).

The government cannot show a relevant Founding-Era analogue to either the "why" or the "how" of Section 922(g)(1). As to the "why," no evidence has emerged of any significant Founding-era firearms restrictions on citizens like Mr. Kirby. While the historical record suggests that dangerousness sometimes supported disarmament, conviction status alone did not connote dangerousness to the Founding

generation. At the Founding, "[p]eople considered dangerous lost their arms. But being a criminal had little to do with it." *United States* v. *Jackson*, 85 F.4th 468, 470–72 (8th Cir. 2023) (Stras, J., dissenting from denial of rehearing en banc).

As to the "how," no Founding-era evidence has emerged of class-wide, lifetime bans on firearms possession just because of conviction status. Total bans on felon possession existed nowhere until at least the turn of the twentieth century. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009). As then-Judge Barrett explained: "The best historical support for a legislative power to permanently dispossess all felons would be founding-era laws explicitly imposing-or explicitly authorizing the legislature to impose-such a ban. But at least thus far, scholars have not been able to identify any such laws." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).

Founding-era surety and forfeiture laws are not analogous enough to Section 922(g)(1) to survive Second Amendment scrutiny. Unlike Section 922(g)(1), Founding-era surety laws at most temporarily deprived an owner of his arms if he was found to pose a unique danger to others. *Rahimi*, 144 S. Ct. at 1899–1900; *Bruen*, 597 U.S. at 55–59. Section 922(g)(1), in contrast, imposes a permanent ban class wide, regardless of a class member's actual peaceableness. Nor are Founding-Era forfeiture laws like Section 922(g)(1) because those laws involved forfeiture only of specific firearms. They did not prevent the subject from acquiring replacement arms or keeping other arms they already possessed. *See, e.g.*, Act of Dec. 21, 1771, ch. 540, N.J. Laws 343–44 (providing for forfeiture of hunting rifles used in illegal game hunting); Act of Apr. 20, 1745, ch. 3, N.C. Laws 69–70 (same); *see also*

Range, 69 F.4th at 104–05 (Krause, J., dissenting).

The Eleventh Circuit's categorical rule disqualifying all felons from exercising their Second Amendment right is without historical or textual support and is wrong.

B. This is an important and recurring question.

The Court should grant Mr. Kirby's petition because the question is critical. Section 922(g) "is no minor provision." *Rehaif* v. *United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting). It accounts for almost 12.5% of all federal criminal convictions. *See* U.S. Sent'g Comm'n, *Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses* (July 2024), https://perma.cc/NX92-F9ZQ. Around 88.5% of all Section 922(g) convictions in fiscal year 2023 were under Section 922(g)(1). *Ibid.*

Although the right to keep and bear arms is among the "fundamental rights necessary to our system of ordered liberty," *McDonald*, 561 U.S. at 778, felony convictions are "the leading reason" for background checks to result in the denial of this individual right, and over two million denials have taken place since the creation of the federal background-check system in 1998. *See* Crim. Justice Info. Servs. Div., Fed. Bureau of Investigation, U.S. Dep't of Justice, National Instant Criminal Background Check System Operational Report 2020–2021, at 18 (Apr. 2022), https://perma.cc/EQ6B-94DD.

Whether permanently disarming felons categorically is appropriate, or whether the Second Amendment permits as-applied challenges to Section 922(g)(1) convictions is exceptionally important. It is a question on which courts cannot agree. *Compare*

United States v. *Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024) (holding that Section 922(g)(1) constitutionally disarmed all felons) and *Dubois*, 94 F.4th at 1291–93 (same), *with Range*, 69 F.4th at 106 (holding Section 922(g)(1) unconstitutional as applied to the plaintiff). As the government previously stressed, there are "important interests in certainty regarding the constitutionality of one of the most-often enforced criminal statutes, which can only be provided by this Court resolving the question." Supp. Br. of Respondent, *Garland* v. *Range*, No. 23-374, 2024 WL 3258316, at *4 (June 26, 2024).

C. Alternatively, the Court should GVR in light of *Rahimi*.

After *Rahimi*, the Court GVR'd the then-pending petitions for further consideration. In Mr. Kirby's appeal, the Eleventh Circuit issued its decision before *Rahimi*. Should this Court not grant plenary review of this petition, he alternatively asks that the Court GVR for further consideration in light of *Rahimi*.

The Eleventh Circuit's reliance on *Heller*'s dicta also conflicts with *Rahimi*'s statements that the Court's precedent did not address the status of citizens who were not responsible because that question was not presented, and earlier decisions did not undertake an exhaustive historical analysis of the full scope of the Second Amendment. *Rahimi*, 144 S. Ct. at 1903. *Rahimi* was clear that the proper method for analyzing a Second Amendment challenge to a regulation is to look to history to determine whether the law squares with the nation's tradition of firearms regulations. *Id.* at 1898. For this reason, and given the Court's GVR of petitions raising a similar question, the Court should, in the alternative, GVR here as well.

II. The Court's review is needed to determine whether Section 922(g)(1) exceeds Congress's Commerce Clause power.

In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q)(1)(A), concluding that it exceeded Congress's power under the Commerce Clause. *See* 514 U.S. at 567–68. The same four considerations in *Lopez* show that Section 922(g)(1), like Section 922(q)(2)(A), does not pass constitutional muster. *Cf. Rahimi*, 144 S. Ct. at 1940 (Thomas, J., dissenting) ("I doubt that § 922(g)(8) is a proper exercise of Congress's power under the Commerce Clause.").

Section 922(g) prohibits possession—a non-economic activity—and does not ensure that this activity "substantially affects" interstate commerce. *United States* v. *Morrison*, 529 U.S. 598, 610–12 (2000); *Lopez*, 514 U.S. at 559, 561, 567. The jurisdictional element in Section 922(g) does not ensure on a case-by-case basis that the activity being regulated—possession—substantially affects interstate commerce. *See Morrison*, 529 U.S. at 611–12; *Lopez*, 514 U.S. at 559, 561–62. To prosecute Mr. Kirby, the government only relied on the firearm's manufacture in Massachusetts and his eventual possession of it in Florida. *See* Doc. 35 at 2 ¶ 3. Finally, the link between possession by a felon and interstate commerce is attenuated. *See Morrison*, 529 U.S. at 612–13; *Lopez*, 514 U.S. at 563–68.

The *Lopez* framework is the obvious place to start when analyzing the constitutionality of federal gun possession statutes. But many circuits (including the Eleventh Circuit) have affirmed Section 922(g) under

Scarborough.[1] Contrary to what lower courts often hold, *Scarborough* did not survive *Lopez*, and Section 922(g) does not pass muster under the three categories identified in *Lopez*. The *Scarborough* Court decided, as a matter of statutory interpretation, that Congress did not intend "to require any more than the *minimal* nexus that the firearm have been, at some time, in interstate commerce"—a standard well below *Lopez*'s substantially affects test. *Compare Scarborough*, 431 U.S. at 575 (emphasis added); *id.* at 564, 577; *with Lopez*, 514 U.S. at 559. Given its incompatibility with *Lopez*, *Scarborough* is no longer good law. *Cf. United States* v. *Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc) ("For too long, our circuit precedent has allowed the federal government to assume all but plenary power over our nation. In particular, our circuit precedent licenses the federal government to regulate the mere possession of virtually every physical item in our nation—even if it's undisputed that the possession of the item will have zero impact on any other state in the union. The federal government just has to demonstrate that the item once traveled across state lines at some point in its lifetime, no matter how distant or remote in time. . . . That is no limit at all." (citation omitted)).

This petition presents an issue only this Court can

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[1] *See, e.g.*, *United States* v. *Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States* v. *Santiago*, 238 F.3d 213, 216–17 (2d Cir. 2001); *United States* v. *Gateward*, 84 F.3d 670, 671–72 (3d Cir. 1996); *United States* v. *Rawls*, 85 F.3d 240, 242–43 (5th Cir. 1996); *Lemons*, 302 F.3d at 772–73; *United States* v. *Shelton*, 66 F.3d 991, 992–93 (8th Cir. 1995); *United States* v. *Hanna*, 55 F.3d 1456, 1461–62 & n.2 (9th Cir. 1995); *United States* v. *Dorris*, 236 F.3d 582, 584–86 (10th Cir. 2000); *Wright*, 607 F.3d at 715.

resolve—how to reconcile the statutory interpretation decision in *Scarborough* with the constitutional decision in *Lopez*. *See Alderman* v. *United States*, 562 U.S. 1163, 1168 (2011) (Thomas, J., dissenting from the denial of certiorari) ("If the *Lopez* framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent [*Scarborough*] that does not squarely address the constitutional issue."). Because the circuit courts cannot overrule this Court's precedent, the *Lopez* test will disappear for intrastate possession crimes without the Court's intervention. *See Gamble* v. *United States*, 587 U.S. 678, 710 n.1 (2019) (Thomas, J., concurring) ("[I]t seems possible that much of Title 18, among other parts of the U.S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty.").

Thousands of defendants are convicted under Section 922(g) every year.[2] The Court is regularly presented with significant questions in such prosecutions, ranging from the elements of the offense in *Rehaif*, 588 U.S. at 225, to this Court's many decisions addressing constitutional and statutory issues arising under the Armed Career Criminal Act. Mr. Kirby's case squarely presents the fundamental question whether Congress may even reach the activity routinely prosecuted under Section 922(g), the intrastate possession of a firearm, based on the historical connection between the firearm and interstate commerce. Because the federal government's authority to

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[2] The Sentencing Commission reports that there were 8,040 Section 922(g) sentencings in fiscal year 2023. *See* U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm*, https://perma.cc/5SED-9CW2.

prosecute such cases raises an important and recurring question, Mr. Kirby respectfully seeks this Court's review.

CONCLUSION

For the above reasons, Mr. Kirby respectfully asks this Court to grant his petition for a writ of certiorari and review, or remand for further consideration in light of *Rahimi*.

Respectfully submitted.

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