NO._____

IN THE SUPREME COURT OF THE UNITED STATES

BRENT HOWARD,
Petitioner,

v.

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

(1) Whether 18 U.S.C. § 922(g)(1)—the statute that prohibits firearm possession by any person who was previously convicted of "a crime punishable by imprisonment for a term exceeding one year"—violates the Second Amendment.

(2) Whether 18 U.S.C. § 922(g)(1) violates the Fifth Amendment Due Process Clause because it burdens the fundamental right of firearms possession and is not narrowly tailored to achieve any compelling government interest.

(3) Whether application of 18 U.S.C. § 922(g)(1) to petitioner violated the Commerce Clause where the only proof of a nexus between his firearm possession and interstate commerce consisted of the fact that the firearm had crossed a state line at some point before coming into petitioner's possession.

PARTIES TO THE PROCEEDINGS

All parties to the petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

RELATED PROCEEDINGS

- *United States* v. *Brent Howard*, No. 22-cr-157, U.S. District Court for the Southern District of Texas. Judgment entered July 25, 2023.
- *United States* v. *Brent Howard*, No. 24-40033, U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 9, 2024.

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CONSTITUTIONAL PROVISIONS

MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

Petitioner Brent Lee Howard petitions for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case is attached to this petition as the Appendix ("Pet. App.") 1a–10a. It is also available at 2024 WL 4449866.

JURISDICTION

The Fifth Circuit's judgment and opinion were entered on October 9, 2024. *See* Appendix. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I § 8 of the United States Constitution provides that:

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Fifth Amendment provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

18 U.S.C. § 922(g)(1) provides:

> (g) 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 OF THE CASE

I. District court proceedings.

On May 24, 2022, a federal grand jury in the Houston Division of the Southern District of Texas returned a single-count indictment charging petitioner Brent Howard with possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1).

On June 27, 2023, Mr. Howard pled guilty to the indictment without a plea agreement. At the guilty plea proceeding, the prosecutor offered the following to establish a factual basis for the plea:

> [O]n July 20th of 2021 in Hitchcock, Texas, Police Sergeant D. Pruit saw a silver BMW automobile disregard a stop sign. The event was captured on his dash video. Sergeant Pruit stopped the vehicle on the street, and that stop occurred within the Southern District of Texas. He approached the driver[,] Brent Howard, who is in court today before this Court, [and] who stated that he did not have a driver's license. Sergeant Pruit stated in his report that he smelled a strong odor of marijuana coming from the vehicle while talking to Mr. Howard.
>
> Sergeant Pruit then returned to his car and checked Mr. Howard for warrants. Mr. Howard had open warrants, including one for assault. Sergeant Pruit then arrested Mr. Howard; and during the process, Mr. Howard stated, "I know you are about to search the car. There is weed and a gun in the vehicle."
>
> Sergeant Pruit then asked the location of the contraband; and Mr. Howard stated, "It's about a pound of weed and a gun is under the front passenger seat." Mr. Howard also had a large amount of money in his front short pocket.
>
> The search of the car was conducted by the Hitchcock Police Officer S. Jackson, who located the marijuana and a 9 millimeter Ruger pistol in the passenger area of the car. The contraband was located in the area described by Mr. Howard to Sergeant Pruit. The firearm recovered was a Ruger model, Security 9, 9 millimeter, Serial Number 382611369. It was examined and found to function as designed as a firearm and meets the definition of a firearm under Title 18, United States Code, Section 921(a)(3). The firearm was manufactured outside the state of Texas and traveled in interstate commerce to be found in the defendant's possession on July 20th of '21.

> Mr. Howard knew he had prior felony convictions for aggravated assault with a deadly weapon on or about February 14th of 2017 and [for being] a felon in possession of a firearm on August 16th, 2019. Both prior felony offenses are punishable by a period of incarceration greater than one year.

The district court asked Mr. Howard if the proffered facts were all true. Mr. Howard correctly denied that he had a 2017 conviction for aggravated assault—his 2017 conviction involved Texas deadly conduct—but agreed he had a prior felony conviction and that the remaining facts were true.

On January 10, 2024, the district court sentenced Mr. Howard to 62 months' imprisonment and three years' supervised release.

II. Fifth Circuit proceedings.

Mr. Howard appealed. On appeal, for the first time, he challenged the constitutionality of his conviction. He argued, in relevant part, that his guilty plea and conviction should be set aside because Section 922(g)(1)'s categorical ban on firearm possession solely on account of a person's status as a felon is inconsistent with the Nation's historical tradition of firearm regulations, and thus violates the Second Amendment under the rule set forth in *New York State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1 (2022). App. 3a–4a. He also argued that Section 922(g)(1)'s ban on firearm possession violates the Fifth Amendment because it burdens his fundamental right to keep and bear arms, thus triggering strict scrutiny, and it is not narrowly tailored to achieve any compelling government interest, because it broadly prohibits all felons from possessing firearms and contains no uniform definition of the circumstances leading to the loss or restoration of that right. App. 4a. Finally, he argued that Section 922(g)(1)'s application to him exceeded Congress's

power under the Commerce Clause because the only proof that his conduct affected interstate commerce consisted of the fact that the firearm had crossed state lines at some point before coming into his possession. App. 5a.

The Fifth Circuit affirmed. App. 10a. Consistent with its practice of rejecting unpreserved *Bruen*-based claims to Section 922(g)(1) on the ground that any constitutional defect is not yet plain in the absence of precedent resolving the issue, the court of appeals rejected the Second Amendment challenge. App. 2a (citing *United States* v. *Jones*, 88 F.4th 571, 573–74 (5th Cir. 2023), and *United States* v. *Diaz*, 116 F.4th 458, 471–72 (5th Cir. 2024)). It also rejected the two other arguments, holding that Fifth Circuit precedent foreclosed both the Fifth Amendment claim, App. 4a (citing *United States* v. *Darrington*, 351 F.3d 632 (5th Cir. 2003)), and the Commerce Clause claim, App. 5a (citing *United States* v. *Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013)).

REASONS FOR GRANTING THE WRIT

The question of whether Section 922(g)(1) is compatible with the Second Amendment, as interpreted by this Court in *Bruen*, has split the circuits and produced widespread confusion and disagreement in the district courts. That question is implicated in thousands of cases each year. It also concerns a fundamental constitutional right and remains unresolved after this Court's recent decision in *United States* v. *Rahimi*, 602 U.S. 680 (2024). The Court should grant the petition and review the merits of this significant constitutional question.

The question of whether Section 922(g)(1)'s application to Mr. Howard separately violates the Fifth Amendment Due Process clause—because it burdens a fundamental right and is not narrowly tailored to achieve any compelling government interest—also warrants review. So too does the question of whether Section 922(g)(1)'s application to petitioner violates the Commerce Clause, because the statute permitted petitioner's conviction based solely upon proof that his firearm at some point moved across state lines. This Court previously declined to find that Section 922(g)(1)'s predecessor violated either the Fifth Amendment or the Commerce Clause, but these conclusions are at a tension with more recent case law. The Court should grant this petition and resolve both questions.

I. The question whether Section 922(g)(1) violates the Second Amendment has divided the courts of appeals and its resolution is of great importance.

The Second Amendment guarantees to "all members of the political community" the individual right to possess and carry firearms in common use for self-protection. *District of Columbia* v. *Heller*, 554 U.S. 570 (2008); *New York Rifle & Pistol Ass'n, Inc.* v.

Bruen, 597 U.S. 1 (2022). In *Bruen*, this Court adopted a new test for determining whether a modern-day regulation impermissibly infringes that right. *Bruen*, 597 U.S. at 19. Under that test, the Court must examine whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 24. If so, the Constitution presumptively protects that conduct and the government must justify the law "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*.

The government can meet its burden under *Bruen* by showing that the challenged law is "'relevantly similar' to laws that our tradition is understood to permit." *Rahimi*, 602 U.S. at 692. "Why and how the regulation burdens" the Second Amendment right "are central to this inquiry." *Id.* A contemporary law will likely pass the "relevantly similar" test where there is substantial evidence of founding-era laws that "impos[ed] similar restrictions" on firearm use "for similar reasons." *Id.*

Since *Bruen*, the courts of appeals have reached different opinions about whether Section 922(g)(1) is constitutional under the Second Amendment. The Eighth, Tenth, and Eleventh Circuits have concluded that the statute does not violate the Second Amendment and have foreclosed future as-applied challenges. The Fifth Circuit has also rejected facial Second Amendment challenges but has declined to foreclose future as-applied challenges. Meanwhile, the Third and Ninth Circuits have found Section 922(g)(1) unconstitutional as applied to specific defendants. These differing opinions have generated opposite outcomes, with Second Amendment claims entirely foreclosed in certain jurisdictions and not in others.

The Eighth Circuit analyzed the constitutionality of Section 922(g)(1) in *United States* v. *Jackson*, 69 F.4th 495, 502 (8th Cir. 2023), *cert. granted, judgment vacated and remanded*, No. 23-6170, 2024 WL 3259675, at *1 (July 2, 2024). There, it held that Section 922(g)(1) complies with the Second Amendment both "as applied to" the particular defendant and as to all "other convicted felons." *Id.* In reaching this decision, the court found three factors particularly salient: (1) *Heller*'s assurance that the Court's opinion should not be read "to cast doubt on longstanding prohibitions on the possession of firearms by felons," *id.* at 501 (quoting *Heller*, 554 U.S. at 626), (2) evidence of founding-era laws disarming disfavored political and minority groups such as "Native Americans," "Catholics," and "people who refused to declare an oath of loyalty," *id.* at 502–03, and (3) *Bruen*'s "repeated statements" that the Second Amendment "protects the right of a 'law-abiding citizen.'" *Id.* at 503 (citing *Bruen*, 597 U.S at 9, 15, 26, 29–31, 38, 60, 70–71). These factors, the court reasoned, justified the conclusion that "history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society," as well as by "categories of persons based on [the legislature's] conclusion that the category as a whole present[s] an unacceptable risk of danger if armed." *Id.* at 504. Understanding Section 922(g)(1) to reflect that Congress had so concluded as to felons, the court deemed the statute "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 502.

The Tenth Circuit reached the same conclusion in *Vincent* v. *Garland*, 80 F.4th 1197, 1197–1202 (10th Cir. 2023), *cert. granted, judgment vacated and remanded*, No. 23-683, 2024 WL 3259668, at *1 (July 2, 2024). In *Vincent*, the Tenth Circuit concluded that *Bruen*

had not clearly abrogated its prior decisions upholding Section 922(g)(1) against Second Amendment challenge. *See* 80 F.4th at 1200–02. It thus reaffirmed its view that Section 922(g)(1) is constitutional as to "*any* convicted felon's possession of a firearm," *id.* at 1202 (emphasis in original), without requiring the government to demonstrate the statute's "consisten[cy] with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. The Eleventh Circuit applied similar reasoning in *United States* v. *Dubois*, 94 F.4th 1284, 1291–93 (11th Cir. 2024). There, it likewise concluded that *Bruen* had not abrogated its earlier precedent upholding Section 922(g)(1) as constitutional in all applications. *See* 94 F.4th at 1291–92.

The Fifth Circuit has rejected specific as applied challenges to Section 922(g)(1) but has not foreclosed future such challenges. In *United States* v. *Diaz*, 116 F.4th 458, 465 (5th Cir. 2024), the Fifth Circuit parted ways with the Tenth and Eleventh Circuits, holding that that *Bruen* abrogated its prior decisions upholding Section 922(g)(1) against Second Amendment challenge. It held that *Heller*'s reference to "longstanding prohibitions on the possession of firearms by felons" did not reflect "binding precedent on the issue now before us," ultimately concluding that felons were amongst "the people" protected by the Second Amendment. *Id.* at 466 & n.2. However, it found that Section 922(g)(1) was constitutional on its face and as applied to that particular defendant. *Id.* at 472. It explained that Section 922(g)(1)'s application was consistent with this Nation's historical tradition of firearm regulation because "[a]t the time of the Second Amendment's ratification, those—like Diaz—guilty of certain crimes—like theft—were punished permanently and severely," that is, by death or estate forfeiture, and "permanent disarmament was [also] a part of our

country's arsenal of available punishments at that time." *Id.* Nonetheless, the court expressly held that "[o]ur opinion today does not foreclose future as-applied challenges by defendants with different predicate convictions." *Id.* at 470 n.4.

The Third and Ninth Circuits, in contrast, issued decisions striking down Section 922(g)(1)'s application as unconstitutional under *Bruen*. *See Range* v. *Att'y Gen.*, 69 F.4th 96 (3d. Cir. 2023) (en banc), *rev'd and rem'd*, No. 23-374, 2024 WL 3259661, at *1 (July 2, 2024), *rev'd and rem'd*, No. 21-2835, 2024 WL 5199447 (3d Cir. Dec. 23, 2024) (en banc); *United States* v. *Duarte*, 101 F.4th 657, 664–91 (9th Cir.), *reh'g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. July 17, 2024). In *Range*, the en banc Third Circuit applied *Bruen*'s text-and-history test and found Section 922(g)(1) unconstitutional as applied to a person whose prior conviction for making false statements in relation to food stamps had exposed him to more than a year in prison. *Range*, 69 F.4th at 98; *see also Range*, 2024 WL 5199447, at *1. First, the court rejected the government's contention that a person's past conviction for an offense punishable by over one year operates to remove him from "the people" to whom the right to keep and bear arms is vested. *Range*, 69 F.4th at 101–03; *Range*, 2024 WL 5199447, at *3–5. Then, upon examination of the relevant historical evidence, the court held that the government had failed in its attempt to demonstrate a broad tradition of American laws imposing anything near a permanent ban on firearm possession on account of past misdeeds. *Range*, 69 F.4th at 103–06; *see also Range*, 2024 WL 5199447, at *5–8. In reaching these conclusions, the Third Circuit rejected each of the factors the Eighth Circuit relied upon in *Jackson*. *See id.* at 101–06. As a dissenting judge observed, "the ruling is not cabined in any way and, in fact, rejects

all historical support for disarming any felon." *See Range*, 69 F.4th at 116 (Shwartz, J., dissenting); *see also Range*, 2024 WL 5199447, at *58.

The Ninth Circuit, in *Duarte*, also concluded there was no historical tradition of permanently disarming people convicted of certain felony offenses—those that did not exist or were punished as misdemeanors during the founding era. The Ninth Circuit accordingly invalidated Section 922(g)(1)'s application to a defendant with prior convictions for modern-day felonies that included possessing drugs for sale, vandalism, and evading arrest. *See Duarte*, 101 F.4th at 688–91.

This Court's recent decision in *Rahimi* did not resolve these disagreements. In *Rahimi*, the Court analyzed the constitutionality of another statute, Section 922(g)(8)(C)(i), which prohibits firearm possession by a person subject to a domestic violence restraining order. *See Rahimi*, 602 U.S. at 684. The Court found the Second Amendment covered the conduct regulated by the statute. *See id.* at 701–02. However, it concluded that the government satisfied its burden to show that the statute was consistent with the Nation's historical tradition of firearm regulation, noting the government presented "ample" historical evidence that the founding generation approved of the temporary disarmament of individuals found to pose "a clear threat of physical violence to another" upon a judicial determination that they "likely would threaten or had threatened another with a weapon." *Id.* at 698–99. It concluded that these historical analogues aligned with the "how" and "why" of the modern statute, which similarly applied temporary restriction on firearms possession to individuals a court had found to pose a "credible threat to the physical safety" of another. *See id.* Thus, it upheld the constitutionality of Section 922(g)(8), as applied to

that defendant. *Id.* at 702. However, it offered no opinion as to the constitutionality of Section 922(g)(1). *See id.*; *see also* Supplemental Brief for the Federal Parties at 2, *Garland* v. *Range*, No. 23-374 (June 24, 2024). It subsequently decided to grant, vacate, and remand ("GVR") the petitions in *Jackson*, *Range*, *Vincent*, and other Section 922(g)(1) cases, ordering reconsideration in light of *Rahimi* without providing further guidance as to the constitutionality of the statute. *See United States* v. *Duarte*, 108 F.4th 786, 787–88 (9th Cir. July 17, 2024) (Van Dyke, J., dissenting from the grant of rehearing en banc) (collecting GVR cases). Thus, the circuit split regarding the constitutionality of Section 922(g)(1) remains.

Resolving the question presented is also important. Despite serious concerns as to Section 922(g)(1)'s constitutionality, the statute continues to result in the imprisonment of thousands of American citizens each year. *See* Petition for Writ of Certiorari at 22–24, *Garland* v. *Range*, No. 23-374 (Oct. 5, 2023) (marshaling statistics demonstrating that Section 922(g)(1) is the most frequently applied provision of Section 922(g)). And, for fear of the same fate, countless more individuals—like Ms. Vincent, Mr. Duarte, and Mr. Howard—are deterred from engaging in conduct that would otherwise come within the Second Amendment's core. Only this Court can settle this monumental question upon its inevitable return to the Court's docket.

II. The question of whether Section 922(g)(1) violates the Fifth Amendment's Due Process Clause is important and warrants review.

In the court below, petitioner preserved for this Court's potential review a separate question regarding Section 922(g)(1)'s constitutionality under the Fifth Amendment's Due

Process Clause. This Court, in *Lewis*, previously rejected a due process challenge to Section 922(g)(1)'s predecessor statute. *Lewis* v. *United States*, 445 U.S. 55, 65–68 (1980). It applied the deferential rational basis standard of review after finding the statute did not burden a fundamental right. *Id.* But *Lewis* is now at a tension with this Court's current case law, which recognizes the Second Amendment to protect a fundamental, individual right. The Court should grant this petition to resolve this tension.

The Fifth Amendment provides that no one shall be "deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. "The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *United States* v. *Windsor*, 570 U.S. 744, 774 (2013). When reviewing an equal protection challenge, this Court will apply one of three standards of review: rational basis review, intermediate scrutiny, or strict scrutiny. Laws that significantly burden a fundamental right are generally subject to strict scrutiny. *See Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). Under a strict scrutiny analysis, the government must prove that the challenged statute uses narrowly tailored means to further a compelling government interest. *Citizens United* v. *EEC*, 558 U.S. 310, 340 (2010). Intermediate scrutiny requires only that the government show that the law advances an important government objective through a means substantially related to that objective. *See Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 213–14 (1997). The lowest level of scrutiny, rational basis review, places the burden on the individual challenging the law to demonstrate either that the government lacks any legitimate interest in the law or

that there is no reasonable or rational nexus between the restricted interest and the law at issue. *See Romer* v. *Evans*, 517 U.S. 620, 631–32 (1996).

In *Lewis*, this Court rejected an equal protection challenge to 18 U.S.C. § 1201(a) (repealed 1986), the predecessor to Section 922(g)(1), which proscribed the possession of firearms by any person who "has been convicted by a court of the United States . . . of a felony." *Lewis*, 445 U.S. at 61. It applied rational basis review and found that the felon-in-possession statute "clearly meets that test," identifying a nexus between Congress's concern about violent crime and the statute. *Id.* at 66. However, it only applied rational basis review because it proceeded on the assumption that the Second Amendment did not protect a fundamental individual right. *Id.* at 65 n.8.

Since *Lewis*, this Court has clarified that the Second Amendment creates an individual right. *Heller*, 554 U.S. at 628. It has also recognized that right as "among those fundamental rights necessary to our system of ordered liberty." *McDonald* v. *City of Chicago*, 561 U.S. 742, 778 (2010). And, as discussed above, it has set forth an entirely new framework for evaluating the constitutionality of regulations impacting Second Amendment rights, further "delineat[ing] the contours of [the] right." *Rahimi*, 602 U.S. at 691 (citing *Bruen*, 597 U.S. at 17).

At least one circuit court of appeals has recognized the tension between *Lewis* and the more recent precedent from this Court. In *Vongxay*, the Ninth Circuit noted that *Lewis* only applied a rational basis test "because it found that the right to bear arms was not a fundamental right." *United States* v. *Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010), *rev'd on other grounds*, *Duarte*, 101 F.4th at 661. It observed that "if the right to bear arms is a

fundamental right, rational basis analysis may no longer be appropriate." *Vongxay*, 594 F.3d at 1118–19 (ultimately applying rational basis review after concluding "the right established by *Heller* [did] not apply to felons.").

Recognizing the impact of *Heller* and its progeny, several district courts have applied intermediate scrutiny to equal protection challenges under Section 922(g)(1). *See, e.g.*, *United States* v. *Radencich*, No. 3:08-CR-00048(01)RM, 2009 WL 127648, at *4–5 (N.D. Ind. Jan. 20, 2009); *United States* v. *Schultz*, No. 1:08-CR-75-TS, 2009 WL 35225, at *5 (N.D. Ind. Jan. 5, 2009); *United States* v. *Bledsoe*, No. SA08-CR-13(2), 2008 WL 3538717 (W.D. Tex. Aug., 8, 2008) (discussing Section 922(a)(6)). One example is the Northern District of Indiana's decision in *Radencich*. There, the court noted that *Lewis* was rooted in pre-*Heller* case law. *See Radencich*, 2009 WL 127648, at *4–5. It concluded that, after *Heller*, rational basis review was no longer the appropriate standard for assessing due process challenges to Section 922(g)(1). *Id.*

This is an important question that merits review. There are a significant number of Section 922(g)(1) prosecutions each year, as noted above. However, this court's equal protection precedent addressing a felon in possession statute is not aligned with its current case law. Only this Court can resolve that tension.

III. The question of whether Section 922(g)(1) exceeds Congress's power under the Commerce Clause is also important and warrants review.

In the court below, petitioner additionally preserved for this Court's potential review a separate and distinct question regarding Section 922(g)(1)'s constitutionality: whether the statute's application to petitioner contravenes this Court's modern Commerce Clause

jurisprudence by permitting conviction where, as here, the only proof of a nexus to interstate commerce is the fact that the firearm at some point crossed state lines in the past. Numerous judges have flagged the apparent tension between the Court's updated understanding of the scope of Congress's power to regulate commerce and the comparatively minimal effect on commerce that this Court deemed sufficient to satisfy Section 922(g)(1)'s jurisdictional element in *Scarborough* v. *United States*, 431 U.S. 563 (1977). That question is important and worthy of this Court's resolution.

In *Scarborough*, this Court held, as a matter of statutory interpretation, that the government could satisfy the interstate commerce element of Section 922(g)'s predecessor, 18 U.S.C. § 1201(a) (repealed 1986), by proving that the firearm had traveled across state lines at any prior point, even if the defendant's possession occurred all in one state. *See* 431 U.S. at 577. Eighteen years later, in *United States* v. *Lopez*, 514 U.S. 549 (1995), the Court struck down a statute that made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," 18 U.S.C. § 922(q)(1)(A), reasoning that the law violated the Commerce Clause because it "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce." 514 U.S. at 551. *Lopez* clarified that, for a law that regulates neither the channels nor the instrumentalities of commerce to nevertheless comport with the Commerce Clause, the regulated activity must "substantially affect" interstate commerce. *Id.* at 559. Section 922(q) failed that test because there was no evidence that the *intra*state, non-commercial act of possessing a gun in close proximity to a school had the requisite "substantial" impact on interstate economic

activity, and the statute "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." *Id.* at 561.

In the following years, numerous jurists have identified and called upon this Court to resolve the apparent tension between *Lopez* and *Scarborough*. Justice Thomas, for instance, has observed that "*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook" that, like Section 922(g)'s jurisdictional element, "seems to permit Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines." *Alderman* v. *United States*, 131 S. Ct. 700, 702–03 (2011) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari). That result, Justice Thomas explained, is not only inconsistent with the *Lopez* framework but "could very well remove any limit on the commerce power" if taken to its logical extension. *Id.* at 703.

Despite similarly perceiving *Scarborough* as in fundamental and irreconcilable conflict with *Lopez*, the prevailing view of the courts of appeals is that *Scarborough* "implicitly assumed the constitutionality of" Section 922(g)'s predecessor statute, and that "[a]ny doctrinal inconsistency between *Scarborough* and [this] Court's more recent decisions is not for [the lower courts] to remedy." *United States* v. *Alderman*, 565 F.3d 641, 645 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 700 (2011); *United States* v. *Patton*, 451 F.3d 615, 636 (10th Cir. 2006), *cert. denied*, 549 U.S. 1213 (2007); *United States* v. *Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting); *see also United*

States v. *Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (Jones, J., for half of the equally divided court) ("not[ing] the tension between" *Scarborough* and *Lopez* but observing that the Fifth Circuit has felt constrained to nevertheless "continue to enforce § 922(g)(1)" because a court of appeals is "not at liberty to question the Supreme Court's approval of [Section 922(g)'s] predecessor statute"). The courts of appeals have therefore made clear their intention to follow *Scarborough* "until the Supreme Court tells [them] otherwise." *Patton*, 451 F.3d at 648. And nine of those courts have specifically upheld the constitutionality of Section 922(g)(1) based on *Scarborough*'s minimal-nexus test. *See 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); *United States* v. *Lemons*, 302 F.3d 769, 771–72 (7th Cir. 2002); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995); *United States* v. *Hanna*, 55 F.3d 1456, 1461–62, 1462 n.2 (9th Cir. 1995); *United States* v. *Dorris*, 236 F.3d 582, 584–86 (10th Cir. 2000); *United States* v. *Wright*, 607 F.3d 708, 715–16 (11th Cir. 2010).

This question is important and independently warrants review. As already noted, Section 922(g)(1) is one of the most often-applied federal criminal statutes. Yet, as Justice Thomas has observed, and as many lower-court judges have echoed, the degree of proof needed to convict under that statute is in serious tension with the Court's modern understanding of the limited nature and scope of the federal power to regulate noneconomic, intrastate activity. In recently urging the Fifth Circuit to reconsider this issue en banc, Judge Ho emphasized that the "constitutional limits on governmental power do

not enforce themselves." *United States* v. *Seekins*, 52 F.4th 988, 989 (5th Cir. 2022) (Ho, J., dissenting from the denial of rehearing en banc). The interpretation of Section 922(g)(1)'s jurisdictional element that the circuits understand *Scarborough* to require effectively "allows the federal government to regulate any item so long as it was manufactured out-of-state—without any regard to when, why, or by whom the item was transported across state lines." *Id.* at 990. That broad conception of federal regulatory authority is at odds with the *Lopez* framework. Only this Court can "prevent [that framework] from being undermined by a 1977 precedent that d[id] not squarely address the constitutional issue." *Alderman*, 131 S. Ct. at 703 (Thomas, J., dissenting from the denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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