No. _____

In the Supreme Court of the United States

_____

Elmer Alexis Montano Fuentes,
Petitioner,

v.

United States of America,
Respondent

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioner, Elmer Alexis Montano Fuentes, was the Defendant-Appellant before the Court of Appeals. Respondent, the United States of America, was Plaintiff-Appellee. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Montano Fuentes,* Dist. Court No. 3:22-cr-306-N, U.S. District Court for the Northern District of Texas. Judgment entered on April 21, 2024.

- *United States v. Montano Fuentes*, No. 23-10415, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on December 4, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Elmer Alexis Montano Fuentes seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's unreported opinion is reprinted at Pet.App.a1-a2.

JURISDICTION

The Court of Appeals issued its panel opinion on December 4, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves the U.S. Constitution's Commerce Clause:

> 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 petition also involves one of the federal crimes defined at 18 U.S.C. § 922(g):

> It shall be unlawful for any person . . .who, being an alien . . . is illegally or unlawfully in the United States . . . to ship or transport in in-terstate 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 in-terstate or foreign commerce..

18 U.S.C. § 922(g)(5).

STATEMENT OF THE CASE

Mr. Montano pleaded guilty to violating 18 U.S.C. § 922(g)(5) and received a 46-month term of imprisonment. Pet.App.a4. On appeal, Mr. Montano advanced a plain-error challenge to the statute of conviction and argued that § 922(g) exceeds the power granted to Congress by the U.S. Constitution's Commerce Clause. Appellant's Initial Brief at 9-13, *United States v. Montano Fuentes*, Case No. 23-10415 (5th Cir. Oct. 6, 2023). In response, the government filed a motion for summary affirmance. Motion for Summary Affirmance at 4, *United States v. Montano Fuentes*, Case No. 23-10415 (5th Cir. Nov. 14, 2023). The Fifth Circuit granted the government's motion and affirmed Ms. Montano's conviction based on its own precedent. Pet.App.a1-a2 (citing *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996)).

One of the opinions cited in support of summary affirmance directly addressed the claim pressed by Mr. Montano on appeal. Section 922(g)'s "'in or affecting commerce' element," the Fifth Circuit noted in *United States v. Rawls*, "can be satisfied if the firearm possessed by" the defendant "had previously traveled in interstate commerce." *Rawls*, 85 F.3d at 242. That alone, the Fifth Circuit ruled, was sufficient to satisfy the Commerce Clause under this Court's precedent. *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)). Despite this simple rule, a all three panel judges joined a special concurrence questioning whether this Court's precedent made any sense:

> If the matter were *res nova,* one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce.

Id. at 243 (Garwood, J, concurring). From there, the panel asked whether this Court's recent opinion in *United States v. Lopez* could be meaningfully applied to § 922(g):

> It is also difficult to understand how a statute construed never to require any but such a *per se* nexus could "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."

Id. (Garwood, J., concurring). Whatever the merits on these points, the panel felt itself bound by this Court's opinion in *Scarborough v. United States*. *Id*. at n.2. (Garwood, J, concurring) (quoting 431 U.S. 563, 575 (1977)). That opinion and its result "carry a strong enough implication of constitutionality to now bind us, as an inferior court, on that issue in this essentially indistinguishable case," the panel explained. *Id*. (Garwood, J, concurring).

Only this Court can make clear what limits are placed on modern commerce power. Under the predecessor to § 922(g), 18 U.S.C. § 1201(a) (repealed 1986), this Court held that the government could satisfy the interstate commerce element by demonstrating that the firearm traveled across state lines at any point. *Scarborough*, 431 U.S. at 577 . *Scarborough* was primarily concerned with the statutory interpretation of § 1201(a), and did not linger on the constitutional implications of a minimal-nexus requirement under the Commerce Clause. See,

e.g., United States v. *Johnson*, 42 F.4th 743, 750 (7th Cir. 2022) (noting that the decision in *Scarborough* "was one of statutory interpretation"); *United States v. Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing) ("[T]he Court's holding in *Scarborough* was statutory, not constitutional.").

More recently, however, this Court held in *Lopez* that, under the Commerce Clause, Congress can only regulate conduct that "substantially affects" interstate commerce or has another "evident commercial nexus" to interstate commerce. *United States* v. *Lopez*, 514 U.S. at 493; see also *United States* v. *Morrison*, 529 U.S. 598, 611 (2000); *Jones* v. *United States*, 529 U.S. 848, 854–55 (2000). This led to the statute at issue in *Lopez*, 18 U.S.C. § 922(q), being declared an unconstitutional extension of the Commerce Clause.

In the wake of these decisions, several courts of appeals have misinterpreted *Scarborough* to state a constitutional holding, leading to extensive confusion as to how *Scarborough* and *Lopez* can coexist. This confusion has led to serious concerns about whether § 922(g) is consistent with the limits placed upon the exercise of congressional power under the Commerce Clause under one, both, or neither of these standards.

REASONS FOR GRANTING THIS PETITION

I. The Court should delineate the boundaries of federal authority under the Commerce Clause in the firearm context.

There is obvious tension between the two precedents governing interstate commerce and the offenses defined at § 922(g). *Scarborough* was a statutory decision interpreting the Omnibus Crime Control and Safe Streets Act of 1968. 431 U.S. 563. *Lopez* was a constitutional decision striking down the Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C. § 922(q)(1)(A), for exceeding the limits of permissible legislative power under the Commerce Clause. 514 U.S. 549.

Lower courts—as a result of misreading *Scarborough* as a constitutional, rather than statutory, decision—have been unable to reconcile these two cases when it comes to determining the constitutionality of the crimes defined in § 922(g). This misreading has resulted in a long-standing and deeply entrenched circuit split that necessitates this Court's intervention. *Morrison*, 529 U.S. at 614 (citing *Lopez*, 514 U.S. at 557).

a. The Courts of Appeals differ on the relationship between *Scarborough* and *Lopez*.

Federal courts have "cried out for guidance from this Court" on this issue for decades. *Alderman* v. *United States*, 562 U.S. 1163, 1166 (2011) (Thomas, J., dissenting from denial of certiorari). The Fifth Circuit explicitly stated that "*Scarborough* is in fundamental and irreconcilable conflict with the rationale of the United States Supreme Court in [*Lopez*]." *United States* v. *Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting). But the Circuit Court has felt compelled to

"continue to enforce § 922(g)(1)" because it is "not at liberty to question the Supreme Court's approval of the predecessor statute to [§ 922(g)]." *United States* v. *Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (per curiam).

The Fifth Circuit is not alone. See, *e.g., United States* v. *Patterson*, 853 F.3d 298, 301–02 (6th Cir. 2017) (pointing out the continued and widespread uncertainty about *Scarborough*'s status after *Lopez*); *United States* v. *Cortes,* 299 F.3d 1030, 1037 n.2 (9th Cir. 2002) (noting that doubts have been raised but choosing, "[u]ntil the Supreme Court tells us otherwise," to "follow *Scarborough* unwaveringly"); *United States* v. *Bishop*, 66 F.3d 569, 587–88, 588 n.28 (3d Cir. 1995) (noting that, until the Supreme Court is more explicit on the relationship between *Lopez* and *Scarborough*, a lower court is "not at liberty to overrule existing Supreme Court precedent"); *United States* v. *Patton*, 451 F.3d 615, 634 (10th Cir. 2006) (collecting cases).

Nine courts of appeals have upheld the offenses defined in § 922(g) based solely on the *Scarborough* 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) (per curiam); *United States* v. *Gateward*, 84 F.3d 670, 671–72 (3d Cir. 1996); *Rawls*, 85 F.3d at 242–43; *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) (per curiam); *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 (11th Cir. 2010).

In these circuits, *Scarborough* controls the outcome, leaving the "empty, formalistic" requirement of a jurisdictional provision as the only check on Congress' power to criminalize this intrastate activity. See *United States* v. *Chesney*, 86 F.3d 564, 580 (6th Cir. 1996) (Batchelder, J., concurring). The Fifth Circuit's opinion in *Rawls* exemplifies the bind courts find themselves in when confronting the precedent of *Scarborough*. In a concurrence explaining a short per curiam opinion, the panel judges said that while they thought § 922(g) failed under *Lopez*, "the opinion in [*Scarborough*] dealing with the predecessor to section 922(g), requires us to affirm denial of relief here." *Rawls*, 240 F.3d at 243 (Garwood, J., concurring).

Two courts of appeals have concluded that § 922(g)(1) is constitutional independent of *Scarborough*. See *United States* v. *Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001); *Chesney*, 86 F.3d at 570. The Fourth Circuit upheld § 922(g)(1) within the *Lopez* framework, while the Sixth concluded that the statute is constitutional outside of *Lopez* and *Scarborough*. The lower courts have thus split on whether the offenses defined in § 922(g) can survive the more exacting test from *Lopez* rather than the minimal-nexus test of *Scarborough*.

Further complicating the field, some circuits have held that *Scarborough* at least implicitly ruled the predecessor to § 922(g) constitutional, compelling the same result despite *Lopez*. See, e.g., *Gateward*, 84 F.3d at 671 ("We do not understand Lopez to undercut the *Bass*/*Scarborough* proposition that the jurisdictional element . . . keeps the felon firearm law well inside the constitutional fringes of the Commerce Clause."). Because courts often fail to apply the *Lopez* test to these

firearm possession cases at all, defendants across the country lack the constitutional protection from congressional overreach provided by *Lopez*.

Each circuit is stuck in its current interpretation of the relationship between *Scarborough* and *Lopez* without a decision from this Court. Judge Ho pointed out that the Fifth Circuit only affirmed the district court's decision in a case involving § 922(g)(1) because the panel was "duty-bound to uphold the conviction as a matter of circuit precedent." *Seekins*, 52 F.4th at 990 (Ho, J., dissenting from denial of rehearing). See also *Patton*, 451 F.3d at 636 (citation omitted) (noting that "[a]ny doctrinal inconsistency between *Scarborough* and the Supreme Court's more recent decisions is not for this Court to remedy"); *United States* v. *Moore*, 855 F. App'x 460, 461–62 (10th Cir. 2021), *cert. denied,* 142 S. Ct. 840 (2022) (mem.); *United States* v. *Haile*, 758 F. App'x 835, 837 (11th Cir. 2019) (per curiam) (holding that "because we are bound by a prior panel opinion unless it has been overruled by the Supreme Court or this Court sitting en banc . . . we affirm Haile's conviction under § 922(j)").

b. The question presented is important because an unchecked commerce power would significantly expand Congress' reach into state affairs.

The federal government's enumerated powers are "few and defined," while the powers which remain in the state governments are "numerous and indefinite." *Lopez*, 514 U.S. at 552. One of these enumerated powers granted to Congress is "[t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. Without limits on federal regulatory power, our nationwide regulation would become "for all practical purposes . . . completely centralized" in a federal government. *A.L.A.*

Schechter Poultry Corp. v. *United States*, 295 U.S. 495, 548 (1935). As Judge Ho recently noted in a dissent from denial of rehearing *en banc* in a case involving § 922(g)(1), "constitutional limits on governmental power do not enforce themselves"; instead, "[t]hey require vigilant—and diligent—enforcement." *Seekins*, 52 F.4th at 989 (Ho, J., dissenting from denial of rehear-ing).

The *Lopez* test is meant to define and enforce these limits. Congress can regulate three general categories of activity with its Commerce power post-*Lopez*: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) "those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558–59 (citations omitted). This Court considered § 922(q) in the *Lopez* decision, which provided that "it shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A). Finding that the first two categories were inapplicable, this Court analyzed § 922(q) under the third category and found it lacking. *Lopez*, 514 U.S. at 558–68.

So too here. Congress cannot meet the standard that something has a "substantial relation to interstate commerce" by merely inserting the phrase "which has been shipped or transported in interstate or foreign commerce" after any object they strive to regulate. 18 U.S.C. § 922(g). See *Morrison*, 529 U.S. at 614. Allowing

this phrase to fulfill the Constitution's requirements would "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 564, 557 (citing *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937)). The Commerce Clause power would become a rubber stamp, allowing congressional overreach into all kinds of activity.

Yet this is essentially what the modern-day application of *Scarborough* allows in this area of the law. The lower courts have upheld § 922(g) when a simple jurisdictional box is checked, which ignores the three categories of permissible regulation from *Lopez*. Justices Thomas and Scalia recognized this when they wrote 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." *Alderman*, 562 U.S. at 1166.

Treating *Scarborough* as a constitutional decision ignores all of this Court's concerns in *Lopez* that a loose interpretation "would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez,* 514 U.S. at 567. Permitting this loose interpretation would allow Congress to unconstitutionally regulate all aspects of criminal law. In short, "the Commerce Clause power 'must be read carefully to avoid creating a general federal authority akin to the police power.'" *Seekins*, 52 F.4th at 9990 (Ho, J., dissenting from denial of rehearing) (quoting *NFIB* v. *Sebelius*, 567 U.S. 519, 536 (2012)).

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted March 4, 2025.

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