No.________

In The

Supreme Court of the United States

Donte Bacon

Petitioner,

v.

United States of America

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following an unconditional guilty plea, Mr. Bacon was convicted federally of a non-violent, wholly intrastate sale of a handgun and wholly intrastate possession of a handgun with an obliterated serial number in Michigan. The only basis to federally prosecute Mr. Bacon was because the two firearms had, at some point in time, crossed state lines.

The questions presented are:

I. Consistent with *Class v. United States*, 583 U.S. __, 138 S.Ct. 798 (2018), are as-applied constitutional challenges to statutes of conviction waived by an unconditional guilty plea, and is the standard of review *de novo* or plain-error?

II. Consistent with *District of Colombia v. Heller*, 554 U.S. 570 (2008), and *United States v. Lopez*, 514 U.S. 549 (1995), does Congress have authority to federally criminalize a wholly intrastate firearm sale and possession based only on the minimal showing that the firearms, at some point in time, traveled in interstate commerce?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Donte Bacon, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW AND STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered an Opinion affirming the judgment of the United States District Court for the Western District of Michigan on March 8, 2018 that is reported at *United States v. Bacon*, 884 F.3d 605 (6th Cir. 2018). *En banc* review was denied on April 18, 2018. *United States v. Bacon*, No. 17-1166, 2018 U.S. App. LEXIS 9821 (6th Cir. Apr. 18, 2018) (unreported). On July 16, 2018, Justice Kagan extended the time to file a petition to and including September 15, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8, cl. 3 states in relevant part:

> "Congress shall have power….[t]o regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

Article III, § 2 states in relevant part:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treatises made, or which shall be made, under their authority"

The Second Amendment states in relevant part:

> "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"

18 U.S.C. § 922(d)(1) states:

> "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"

18 U.S.C. § 922(k) states:

> "It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce."

18 U.S.C. § 3231 states in relevant part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

STATEMENT OF THE CASE

This case arises out of two firearm transactions that took place in Grand Rapids, Michigan. On August 14th, 2014, Mr. Bacon sold a pistol to a confidential informant ("CI") for the Bureau of Alcohol, Tobacco, Firearms and Explosive ("ATF") that Mr. Bacon had reason to know was a felon. This sale of the pistol to the CI formed the basis of charge 1 of the indictment against Mr. Bacon, Sale of a Firearm to a Prohibited Person in violation of 18 U.S.C. § 922(d)(1). (App. 6-7). Mr. Bacon also possessed a pistol with an obliterated serial number (App. 6-7). This firearm possession formed Count Five of the indictment against him (App. 7).

On November 3, 2017, Mr. Bacon entered an oral guilty plea to the above counts, with the government agreeing, pursuant to an oral plea agreement, to dismiss the remaining five counts of the indictment at the sentencing hearing. (App. 7). At the sentencing hearing, defense counsel stipulated to all the facts proffered by the government in support of the charges. (App. 7). The government proffered that the firearm forming the basis of Count One had "traveled in interstate commerce." (App. 7). With respect to the firearm forming the basis of Count Five, the government proffered that the firearm "was manufactured in Ohio" and thus "had in fact traveled in interstate commerce before it was sold." (App. 7). The government did not introduce any additional information to link Mr. Bacon's firearm sale or possession to interstate commerce. Mr. Bacon was sentenced to sixty months for each offense with the sentences to run concurrently. (App. 7).

Mr. Bacon timely appealed his sentence. The United States Court of Appeals for the Sixth Circuit denied relief, holding that the constitutionality of Mr. Bacon's statutes of conviction did not implicate the district court's subject matter jurisdiction, that Mr. Bacon's statutes of conviction were constitutional and did not exceed the scope of Congress's Commerce Clause authority to federally criminalize wholly intrastate conduct, and that neither of Mr. Bacon's statutes of conviction unconstitutionally regulated conduct protected by the Second Amendment. (App. 7-12). The court declined to review Mr. Bacon's as-applied constitutional challenges to his statutes of conviction and instead "reframe[ed]" them as sufficiency of the evidence challenges that were waived by his guilty plea. (App. 8). Mr. Bacon petitioned the United States Court of Appeals for the Sixth Circuit for discretionary *en banc* review, and review was denied. (App. 1).

REASONS FOR GRANTING THE WRIT

I. CONSISTENT WITH *CLASS V. UNITED STATES*, 583 U.S. __, 138 S.CT. 798 (2018), AS-APPLIED CONSTITUTIONAL CHALLENGES TO STATUTES OF CONVICTION ARE NOT WAIVED BY AN UNCONDITIONAL GUILTY PLEA AND MUST BE REVIEWED *DE NOVO*.

In *Class v. United States*, this Court held that a petitioner does not waive constitutional challenges to his statues of conviction merely by pleading guilty. 583 U.S. __, 138 S.Ct. 798, 807 (2018). In *Class*, the petitioner argued that his statute of conviction was unconstitutional under the Second Amendment and that the statute violated due process both facially and as-applied by failing to give notice of the regulated conduct. *See* Brief of Petitioner, at 9-10, *Class v. United States*, 583 U.S. __, 138 S.Ct. 798 (2018) (discussing procedural history of petitioner's constitutional challenges).[1] This Court did not distinguish between the facial and as-applied nature of the claims, but broadly held the petitioner did not waive his constitutional claims because they "challeng[ed] the Government's power to criminalize [his] (admitted) conduct" and could be resolved without venturing beyond the facts alleged in the indictment and admitted by the petitioner. *Class v. United States*, 583 U.S. ___, 138 S.Ct. 798, 804-05 (2018).

In Mr. Bacon's case, the Sixth Circuit Court of Appeals applied *Class* for the first time in the circuit and held that Mr. Bacon's facial constitutional challenges were not waived by his guilty plea, but did not address his as-applied constitutional challenges, instead "reframe[ing]" them as sufficiency of the evidence arguments that

[1] Accessible at http://scotusblog.com/case-files/cases/class-v-united-states/ (last accessed Sept. 16, 2018).

were waived by admitting the facts in the indictment. (App. 8-9). This differentiation conflicts with *Class* and decisions from other federal circuit courts of appeal – including a panel of the Sixth Circuit Court of Appeals.

In *United States v. Slone*, the defendant, after pleading guilty, argued on appeal that his statute of conviction was unconstitutional because Congress lacked authority to criminalize vote-buying in a federal election when the votes were only directed to a local official. 411 F.3d 643, 646, 648-50 (6th Cir. 2005). A panel of the Sixth Circuit Court of Appeals reviewed the challenge *de novo*, noting where "the question is simply the proper interpretation and application of the [relevant] statute, requiring no new or amplified factual determination…that the argument was not raised below is immaterial." *Id.* at 646; *accord United States v. Whited*, 311 F.3d 259, 262-63, 270-72 (3rd Cir. 2002) (reviewing *de novo* as-applied constitutional challenge that Congress exceeded its Commerce Clause authority in criminalizing the defendant's intrastate embezzlement from a healthcare facility); *United States v. Knowles*, 29 F.3d 947, 952 (5th Cir. 1994) (reviewing as-applied constitutional challenge, raised for the first time on appeal after pleading guilty); *United States v. Sandsness*, 988 F.2d 970, 971-72 (9th Cir. 1993) (noting guilty plea did not waive facial and as-applied constitutional vagueness challenges to defendant's statute of conviction).

Although there are Circuit Courts of Appeals that have previously held that a defendant's guilty plea waives his right to make an as-applied challenge to the constitutionality of his statute of conviction, none of those courts have revisited that

issue since *Class* was decided. *See e.g.*, *United States v. Aranda*, 612 Fed. App'x 177, 178, n. 1 (4th Cir. 2015) (addressing defendant's facial challenge to constitutionality of statute of conviction raised after guilty plea, but refusing to address as-applied challenge); *United States v. Phillips*, 645 F.3d 859, 863 (7th Cir. 2011) (explaining that facial challenge to constitutionality of statute of conviction cannot be waived by guilty plea, unlike as-applied challenge); *accord United States v. Seay*, 620 F.3d 919 (8th Cir. 2010).

Like the petitioner in *Class*, Mr. Bacon's as-applied constitutional challenges can be resolved on the facts in the record so his as-applied jurisdictional challenges are not waived by pleading guilty. Left unanswered by *Class*, though, is the standard of review that applies to a defendant's constitutional challenges that are raised for the first time on appeal but "challenge the government's power to criminalize" his conduct.

In analyzing Mr. Bacon's facial constitutional challenges to his statutes of conviction, the Sixth Circuit Court of Appeals held, "[e]ven though Bacon has not waived these arguments, the standard of review is constrained by his failure to raise these arguments before the district court. While constitutional challenges are typically reviewed de novo, when the argument was not raised at the district court, Sixth Circuit precedent requires application of the plain error standard." (App. 8) (internal quotations and citations omitted).

However, other federal circuit courts of appeal, including a panel of the Sixth Circuit Court of Appeals, have held that challenges to the constitutionality of a

petitioner's statute of conviction are "jurisdictional" and subject to *de novo* review. *See United States v. Slone*, 411 F.3d 643, 646 (6th Cir. 2005) (applying *de novo* review to defendant's as-applied constitutional challenge to his statute of conviction, raised for the first time after guilty plea); *United States v. Whited*, 311 F.3d 259, 264 (3rd Cir. 2002) (exercising *de novo* review of as-applied constitutional challenge). The Eleventh Circuit Court of Appeals has not explicitly confirmed that an as-applied constitutional challenge is "jurisdictional" but has stated, "whether a claim is 'jurisdictional' depends on whether the claim can be resolved by examining the face of the indictment or the record at the time of the plea without requiring further proceedings." *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011) (reviewing defendant's jurisdictional challenge to the facial constitutionality of his statute of conviction *de novo*). Thus, an as-applied constitutional challenge, such as Mr. Bacon's, that can be resolved on the record at the time of the guilty plea, would be "jurisdictional" and subject to *de novo* review in the Eleventh Circuit.

In contrast, the Seventh Circuit Court of Appeals has held that "a facial attack on a statute's constitutionality, [but] an as-applied vagueness challenge is not." *United States v. Phillips*, 645 F.3d 859, 963 (7th Cir. 2011); *see also United States v. DeVaughn*, 694 F.3d 1141, 1150 (10th Cir. 2012) (holding as-applied constitutional challenge was not "jurisdictional") *United States v. Seay*, 620 F.3d 919, 922 (8th Cir. 2010) (noting claims that a statute is facially unconstitutional are jurisdictional, but as-applied challenges are not).

Other Circuit Courts of Appeals have treated *both* facial and as-applied constitutional challenges as non-jurisdictional. *See United States v. Sealed Appellant*, 526 F.3d 241, 242-43 (5th Cir. 2008) (noting constitutional challenge to statute of conviction was non-jurisdictional); *United States v. Drew*, 200 F.3d 871, 876 (D.C. Cir. 2000) ("we [have] noted the error in labeling a challenge to the constitutionality of a statute a jurisdictional issue."); *United States v. Cardeles-Luna*, 632 F.3d 731, 737-38 (1st Cir. 2011) (rejecting dissenting judge's opinion that challenge to constitutionality of statute of conviction is jurisdictional).

This Court has not explicitly addressed this issue in light of *Class* but has on several occasions used the phrase "jurisdictional element" to describe the connection between intrastate conduct and Congress's authority under the Commerce Clause to regulate that conduct – the very nexus Mr. Bacon has challenged with respect to his statutes of convictions. *See Torres v. Lynch*, 578 U.S. __, 136 S.Ct. 1619, 1624 (2016) (noting that federal statutes include "jurisdictional elements" which "tie[] the substantive offense…to one of Congress' constitutional powers…thus spelling out the warrant for Congress to legislate."); *United States v. Morrison*, 529 U.S. 598, 612 (2000) ("Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) ("[The statute] contains no jurisdictional element which would ensure, though case-by-case inquiry, that the firearm possession in question affects interstate commerce.").

This Court has also said that "jurisdiction" refers to federal courts' "statutory or constitutional power to adjudicate the case" and that "[d]ismissal for lack of subject-matter jurisdiction…is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decision of this Court, or otherwise completely devoid of merit so as not to involve a federal controversy." *Steel City v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). This definition would encompass claims that "challenge the government's power to criminalize [a defendant's] admitted conduct…[t]hereby call[ing] into question the Government's power to 'constitutionally prosecute him.'" *Class v. United States*, 583 U.S. __, 138 S.Ct. 798, 805 (2018).

The Circuit Courts of Appeals are split on the issues raised by *Class* – issues of exceptional importance to the plea-bargaining process that potentially impact an overwhelming majority of criminal defendants. *See* Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, Bureau of Justice Statistics, United States Department of Justice, at p. 24 (2013) (finding that 96% of defendants convicted of felonies pleaded guilty). This Court should grant review to resolve the Sixth Circuit Court of Appeals' misapplication of *Class*, to clarify that as-applied challenges to a defendant's statute of conviction are not waived by an unconditional guilty plea and to provide guidance on the standard of review applied to a defendant's constitutional challenge raised after a guilty plea.

II. CONSISTENT WITH *DISTRICT OF COLOMBIA V. HELLER*, 554 U.S. 570 (2008), AND *UNITED STATES V. LOPEZ*, 514 U.S. 549 (1995), CONGRESS DOES NOT HAVE AUTHORITY TO FEDERALLY CRIMINALIZE A WHOLLY INTRASTATE FIREARM SALE AND POSSESSION BASED ONLY ON THE MINIMAL SHOWING THAT THE FIREARMS, AT SOME POINT IN TIME, TRAVELED IN INTERSTATE COMMERCE.

This Court has established that Congress has authority under the Commerce Clause to regulate intrastate activity upon a showing that the conduct substantially affects interstate commerce. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552-85 (2012); *Gonzales v. Raich*, 545 U.S. 1 (2005); *Solid Waste Agency v. United States Army Corp. of Eng'rs*, 531 U.S. 159 (2001); *Jones v. United States*, 529 U.S. 848, 858-59 (2000); *United States v. Morrison*, 529 U.S. 598, 613-14 (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

However, relying on earlier decisions from this Court, federal circuit courts of appeals have instead held that Congress may federally criminalize the wholly intrastate sale or possession of a firearm upon the minimal showing that the firearm, at any point in time, traveled across state lines.

In *United States v. Scarborough*, this Court addressed, as a matter of statutory interpretation only, whether a showing that a firearm had traveled across state lines at some point in time satisfied the "affecting commerce" element of § 922(g)'s predecessor statute that required firearm possession to be "in or affect[ing] commerce." 431 U.S. 563, 564, 575-77 (1977). This Court did not address whether this showing was constitutionally sufficient under the Commerce Clause and concluded – as a matter of statutory interpretation – that it was Congress's intent to broadly criminalize firearm possession by felons and this minimal factual showing fell within

the language of the statute. *See id.* at 575, 577 ("[W]e see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, as some time, in interstate commerce.").

However, in *United States v. Lopez*, this Court held that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." 514 U.S. 549, 559 (1995). Of particular importance in the context of criminal statutes is that this Court has explicitly rejected "costs of crime" and "national productivity" arguments to establish a connection to interstate commerce because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *United States v. Morrison*, 529 U.S. 598, 612-13 (2000) (quoting *Lopez*, 514 U.S. at 564). This is precisely the kind of attenuated connection that *Scarborough* relied on to establish a nexus to interstate commerce.

In *Lopez*, this Court sought to define the "outer limits" of Congress's Commerce Clause power and to reaffirm the principles of federalism on which the Clause is based. 514 U.S. at 557-58. In doing so, this Court held that Congress has three basic areas of authority to regulate commerce: (1) regulation of the "channels of interstate commerce"; (2) regulation and protection of the "instrumentalities of interstate commerce" and (3) regulation of "those activities having a substantial relation to interstate commerce." *Id.* at 558-59.

Neither § 922(d) or § 922(k) purport to regulate the "channels" or "instrumentalities" of interstate commerce, and thus, to pass muster under Lopez,

Mr. Bacon's conduct must fall within the category of "activities having a substantial relation to interstate commerce." *Id. Lopez* restricted the third category of Congress's commerce power to regulations that have either a substantial effect on interstate commerce or that are "essential part[s] of a larger regulation of economic activity." *Id.* at 560-61. In restricting Congress's power under the Commerce Clause in this manner, *Lopez* reflected a concern that a broader interpretation of the Commerce Clause would leave "no activity by an individual that Congress is without power to regulate." *Id.* at 564; *see also United States v. Morrison*, 529 U.S. 598, 610 (2000) ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case"). Facing criminal statutes that reached conduct traditionally left to the States, *Lopez* and *Morrison* recognized the key constitutional "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18 (citing *Lopez*, 514 U.S. at 568).

Three circuit courts of appeals, including the Sixth Circuit in Mr. Bacon's case, have held that, although § 922(d) lacks a jurisdictional nexus element, it is a valid exercise of Congress's Commerce Clause based on the conclusion that Congress intended § 922(d) to regulate wholly intrastate activity as part of a larger interstate regulatory scheme that would be undercut if the intrastate activity was not regulated. (*See* App. 10) (noting there is a "logical connection" between the intrastate sale and disposition of firearms and the interstate market in firearms) (citing *United States v. Rose*, 522 F.3d 710 (6th Cir. 2008); *United States v. Peters*, 403 F.3d 1263, 1277 (11th Cir. 2005) ("Congress intended § 922(d) 'to reach transactions that are wholly

intrastate…on the *theory* that such transactions affect interstate commerce.'") (*citing Huddleston v. United States*, 415 U.S. 814, 833 (1974)) (emphasis added); *United States v. Monteleone*, 77 F.3d 1086, 1092 (8th Cir. 1996) (relying on Congressional intent to hold § 922(d) constitutional exercise of Commerce Clause authority).

However, this Court's decisions have established that the existence of a national firearms market – *without more* – does not establish that the regulated conduct substantially affects interstate commerce. *See e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552-85 (2012) (holding Congress could not exercise Commerce Clause authority to require uninsured individuals to purchase health insurance based on the fact that they may seek healthcare while uninsured, thereby increasing healthcare premiums across the board – this connection to interstate commerce was too attenuated); *Solid Waste Agency v. Army Corps of Engr's*, 531 U.S. 159, 172-74 (2001) (holding existence of national commercial market for migratory bird-watching was not a basis for federal regulation of state land where migratory birds lived, noting the absence of legislative intent to regulate area traditionally managed by the states); *Jones v. United States*, 529 U.S. 848, 858-59 (2000) (rejecting government's argument that personal property affected interstate commerce because it received natural gas from another state, had been used to secure a mortgage and had an insurance policy). "The Constitution requires a distinction between what is truly national and what is truly local." *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

The Omnibus Crime Control and Safe Streets Act of 1968 – the origin of § 922(d) – lacks Congressional findings to support the conclusion that the wholly intrastate sale of a firearm to a felon has a substantial effect on interstate commerce. *See United States v. Rose*, 522 F.3d 710, 718-19 (6th Cir. 2008) (reviewing the legislative history of the Act). Although Congressional findings are "not required" for Congress to legislate, this Court has stated that they are "certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident." *Gonzales v. Raich*, 545 U.S. 1, 21 (2005) (holding Congress had Commerce Clause authority to regulate intrastate sale of medical marijuana, relying on congressional findings about the effect of intrastate marijuana sales on interstate commerce).

Relying on *Scarborough's* minimal nexus requirement, courts have upheld § 922(k) based only on the finding that the firearm in question has, at any time, been shipped or transported in interstate commerce. *United States v. Bacon*, 884 F.3d 605, 612 (2018) (holding § 922(k) is a valid exercise of Congress's Commerce Clause authority because "travel in interstate commerce", which the court interprets to mean that the firearm has "at any time, been shipped or transported in interstate or foreign commerce" is an element of the statute); *United States v. Baer*, 235 F.3d 561, 564 (10th Cir. 2000) ("'[the] requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause;'" *accord United States v. Mack*, 164 F.3d 467, 473 (9th Cir. 1999); *United States v. Hernandez*, 85 F.3d 1023, 1030-31 (2nd Cir. 1996); *United States v.*

Diaz-Martinez, 71 F.3d 946, 953 (1st Cir. 1995) (cited with approval by *United States v. Teleguez*, 492 F.3d 80, 86-87 (1st Cir. 2007) (affirming *Diaz-Martinez's* holding that § 922(k) is constitutional)).

Some courts have acknowledged the tension between *Lopez* and its progeny but they have ultimately concluded that they are bound to accept *Scarborough* in the absence of further guidance from this Court. *See United States v. Patton*, 45 1 F.3d 615, 636 (10th Cir. 2006) (noting the "considerable tension between *Scarborough* and the three-category approach adopted by the Supreme Court in its recent Commerce Clause cases" in the context of 18 U.S.C. § 931(a) – which applies to body armor has been interpreted to have the same jurisdictional nexus requirement as § 922(d) and stating "a jurisdictional hook that restricts a statute to items that bear a 'trace of interstate commerce' is no restriction at all."); *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (Garwood, J., concurring) (noting "it is difficult to understand how a statute construed never to require any but such a per se nexus could 'ensure, though case-by-case inquiry, that the firearm possession in question affects the interstate commerce."); *United States v. Kuban*, 94 F.3d 971, 973 n.4 (5th Cir. 1996) (noting that if it were faced with the constitutionality of § 922(g) "res nova a powerful argument could be made for a different result"); *see also United States v. Vasquez*, 611 F.3d 325, 337 (7th Cir. 2010) (Manion, J., dissenting) (criticizing *Scarborough's* "legal fiction that once a gun has crossed state lines it is forever 'in or affecting' commerce"); (Becker, J., concurring in part and dissenting in part) (noting the juxtaposition between *Lopez* and *Scarborough* and stating that application of

Scarborough after *Lopez* "effectively renders the Supreme Court's three-part Commerce Clause analysis superfluous, and permits Congress, through the inclusion of a meaningless interstate commerce provision, to 'convert congressional power…to a general police power[.]").

In fact, two Justices of this Court have commented on the need to address this conflict. In *Alderman v. United States*, this Court denied review of a decision from the Ninth Circuit Court of Appeals that upheld the constitutionality of 18 U.S.C. § 931(a), which criminalizes the purchase, ownership or possession of body armor by a person convicted of a crime of violence. 562 U.S. 1163 (2011). The petitioner pleaded guilty to a violation of § 931(a) but there was no dispute the petitioner purchased the body armor in his home state and he never carried it across state lines. *Id.* at 1163 (Scalia, J., and Thomas, J., dissenting). The Ninth Circuit Court of Appeals applied *Scarborough* to hold that the jurisdictional element of § 931(a) was satisfied by the showing that the body armor had been sold in interstate commerce three years before the petitioner purchased it. *Id.*

Justices Scalia and Thomas sharply dissented from the denial of review, acknowledging the conflict between *Lopez* and *Scarborough* and that lower courts, including the Ninth Circuit Court of Appeals in *Alderman*, had "cried out for guidance from this Court." *Id.* at 1165-67 (Scalia, J., and Thomas, J., dissenting). The Justices noted "*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….Further, the lower court's reading of *Scarborough*, by trumping

the *Lopez* framework, could very well remove any limit on the commerce power….trespass[ing] on traditional state police powers." *Id.* at 1167 (Scalia, J. and Thomas, J., dissenting). Gun experts estimate that over ninety-five percent of all firearms in the country have crossed state lines at some point. *See* Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez*, 3 J. App. Prac. & Process 671, 681-82 (Fall 2001). As this Court noted in *Morrison*, there is "no better example of the police power, which the Founders denied the National government and reposed in the States, than the suppression of violent crime and the vindication of its victims." 529 U.S. 529, 612-13 (2000).

This issue takes on even more importance when this Court's recent Second Amendment decisions are considered. In *District of Colombia v. Heller*, this Court held that the Second Amendment protects the fundamental individual right to keep and bear firearms, and courts must analyze restrictions on fundamental rights protected by the Second Amendment under heightened scrutiny. 554 U.S. 570, 577, 595, 628, n. 27 (2008). This Court unequivocally denied that rational basis review could apply to regulations burdening conduct protected by the Second Amendment, but left open the question of what level of scrutiny would apply to challenges to such regulations or the framework to analyze those challenges. *See District of Colombia v. Heller*, 554 U.S. 570, 628, n. 27 (2008).

In this absence of clear direction from this Court, the lower courts have, for the most part, adopted a two-step approach where the first question asks whether the regulation imposes a burden on conduct falling within the scope of the Second

Amendment. If it does, then the constitutionality of the burden must be analyzed under either heightened or strict scrutiny. *See New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 55 (2nd Cir. 2018); *Tyler v. Hillsdale Cnty Sheriff's Dept.,* 837 F.3d 678, 686-97 (6th Cir. 2016) (*en banc*); *Nat'l Rife Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85, 95 (3rd Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-801 (10th Cir. 2010).[2]

Courts have differed on the application of this two-step test, though. Some courts have held that the government bears the burden of showing that conduct is unprotected by the Second Amendment and where the historical evidence is inconclusive, the court presumes the conduct *is* protected. *Tyler v. Hillsdale Cnty Sheriff's Dept*, 837 F.3d 678, 690 (6th Cir. 2016) (*en banc*); *United States v. Chester*, 628 F.3d 674, 680-83 (4th Cir. 2010).

Other courts appear to apply a *sua sponte* review of the historically understood scope of the Second Amendment without clearly establishing whether either party had the burden of establishing that the regulated conduct is protected or unprotected. *See e.g.*, *New York Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254-55 (2nd Cir. 2015); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms &*

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[2] The Seventh Circuit Court of Appeals, however, has adopted a different test altogether. *See Freidman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (abandoning heightened scrutiny analysis to adopt interest balancing test that examines the costs and benefits of regulations on conduct protected by the Second Amendment).

Explosives, 700 F.3d 185, 194 (5th Cir. 2012); *see also Peterson v. Martinez*, 707 F.3d 1197, 1211-12 (10th Cir. 2013) (conducting apparently *sua sponte* analysis, concluding Second Amendment does not protect conduct at issue but noting that the petitioner had no "convincingly argue[d] otherwise"); *United States v. Marzzarella*, 614 F.3d 85, 90-96 (3rd Cir. 2010) (focusing analysis primarily on defendant's arguments that his conduct is protected by Second Amendment but ultimately concluding *arguendo* that the conduct is protected).

Courts have also differed on the level of scrutiny to apply to these kinds of challenges. Several courts have employed a balancing test that "the level of scrutiny should depend on (1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on that right." *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (applying intermediate scrutiny where the regulation did not burden "core" rights but was a "substantial burden"); *accord Tyler v. Hillsdale Cnty Sheriff's Dept,* 837 F.3d 678, 690 (6th Cir. 2016) (*en banc*); *United States v. Chester*, 628 F.3d 674, 682 (4th Cir. 2010) (holding the level of scrutiny applied should depend on "the nature of the conduct being regulated and the degree to which the challenged law burdens that right."). In *United States v. Marzarella*, the court, in the face of uncertainty concerning the application of this test, opted not to pick a level of scrutiny and held that § 922(k) would pass constitutional muster under intermediate or strict scrutiny. *See* 614 F.3d 85, 96 (3rd Cir. 2010).

The application of this two-part balancing test is far from consistent. *See Kolbe v. Hogan*, 813 F.3d 160, 179 (4th Cir. 2016) (applying strict scrutiny to law banning

semi-automatic rifles and noting strict scrutiny is appropriate for burdens on Second Amendment rights in the home); *Heller v. District of Colombia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (applying intermediate scrutiny to large capacity magazine and semi-automatic rifle ban); *Jackson v. City & County of San Francisco*, 746 F.3d 953, 963-65 (9th Cir. 2014) (applying intermediate scrutiny to regulation that burdened "core" rights of firearm possession at home but was not a substantial burden).

The Sixth Circuit Court of Appeals' decision in Mr. Bacon's case only muddied these waters more. The court held that § 922(d)(1) did not infringe on a Second Amendment right, but reached this conclusion by succinctly stating: "Bacon has not provided and we are unable to find any historical indication that the Second Amendment encompasses such sales [prohibited by § 922(d)(1). All of the relevant caselaw supports the opposite conclusions." (App. 10) (citing *District of Colombia v. Heller*, 554 U.S. 570, 626, 27 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons…or laws imposing conditions and qualifications on the sale of arms.")).

However, *Heller's* dictum cannot be used to avoid heightened scrutiny of Second Amendment challenges. As the Sixth Circuit Court of Appeals, sitting *en banc* observed, "*Heller* only established a presumption that such bans were lawful; it did not invite courts into an analytical off-ramp to avoid constitutional analysis….The mere fact that Congress created a categorical ban does not give the government a free pass; it must still be shown the presumption applies in the instant case." *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686-87 (6th Cir. 2016) (*en banc*). Such

an approach to these challenges "approximates rational-basis review" and fails to acknowledge that even presumptively lawful measures could be unconstitutional as-applied. *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010).

In a similarly conclusory fashion, the court in Mr. Bacon's case held that § 922(k) would withstand constitutional challenge by adopting, in a footnote and without explanation, the Third Circuit Court of Appeals' holding in *United States v. Marzzarella*, 614 F.3d 85, 100 (3rd Cir. 2010). (App. 9, n, 3). Given the fact that Mr. Bacon raised an as-applied challenge to § 922(k) under the Second Amendment, the court's whole cloth reliance on *Marzzarella* hardly equates to heightened scrutiny analysis. The government presented no evidence that Mr. Bacon's conduct was unprotected by the Second Amendment or that § 922(k) is a valid restriction on Mr. Bacon's Second Amendment rights.

Prior to this case, Mr. Bacon was not a felon and could lawfully possess firearms. Since the government did not present evidence that Mr. Bacon or his conduct are categorically excluded from the protections of the Second Amendment, this Sixth Circuit Court of Appeals was required to apply heightened scrutiny to determine the constitutionality of § 922(d)(1) and § 922(k).

District of Colombia v. Heller was a landmark decision interpreting the Second Amendment, but questions about its application were left open and this Court has not addressed the contours of the rights protected by the Second Amendment in nearly eight years. *See Silvester v. Becerra*, 583 U.S. __, 138 S.Ct. 945, 952 (2018) (Thomas, J., dissenting) (dissenting from denial of writ of certiorari to the Ninth

Circuit Court of Appeals where the Ninth Circuit Court of Appeals applied rational-basis review to Second Amendment challenge). This case provides the Court with an excellent opportunity to provide the lower courts with instruction and guidance on the analytical framework courts must use to address restrictions on individual Second Amendment protections and the level of scrutiny applicable to those restrictions.

CONCLUSION

For the above reasons, Mr. Bacon respectfully prays that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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