

No. _____

In the Supreme Court of the United States

October Term, 2018

JOHNY GARDNER, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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

MAUREEN SCOTT FRANCO
Federal Public Defender

JUDY FULMER MADEWELL
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether 18 U.S.C. § 922(g), which criminalizes possession of a firearm by a convicted felon, exceeds Congress's power under the Commerce Clause.

No. _____

In the Supreme Court of the United States

October Term, 2018

JOHNY GARDNER, Petitioner,

v.

UNITED STATES OF AMERICA

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

Petitioner Johny Gardner asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on August 15, 2018.

PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

<i>Jones v. United States</i> , 529 U.S. 848 (2000)	6, 7
<i>Scarborough v. United States</i> , 431 U.S. 563 (1977)	3, 4, 6, 7
<i>United States v. Cortes</i> , 299 F.3d 1030 (9th Cir. 2002)	7
<i>United States v. Kuban</i> , 94 F.3d 971 (5th Cir. 1996)	8
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	<i>passim</i>
<i>United States v. Morrison</i> , 529 U.S. 598 (2000)	4, 5
<i>United States v. Rawls</i> , 85 F.3d 240 (5th Cir. 1996)	6, 7
<i>United States v. Scott</i> , 263 F.3d 1270 (11th Cir. 2001)	8

Constitutional Provision

<u>U.S. CONST. art. I, § 8, cl. 3</u>	<i>passim</i>
---	---------------

Statutes

<u>18 U.S.C. § 922</u>	4
<u>18 U.S.C. § 922(g)</u>	<i>passim</i>
<u>18 U.S.C. § 922(g)(1)</u>	2, 3, 7
<u>18 U.S.C. § 922(q)</u>	3, 4

18 U.S.C. § 844(i) 6

18 U.S.C. § 3231 2

28 U.S.C. § 1254(1) 1

Rule

Supreme Court Rule 13.1 1

OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Gardner*, No. 18-50024, unpub. op. (5th Cir. Aug. 15, 2018), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on August 15, 2018. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I of the United States Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States[.]” U.S. CONST. art. I, § 8, cl. 3.

STATUTE INVOLVED

Title 18 U.S.C. § 922(g) provides, in pertinent part, that:

(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

Petitioner Johny Gardner was discovered in possession a firearm on July 21, 2016. He had previously been convicted of a felony in Texas. Gardner pleaded guilty in federal court to possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. § 922(g)(1), and was sentenced to 100 months' imprisonment. The district court exercised jurisdiction under 18 U.S.C. § 3231. The indictment alleged that Gardner had violated § 922(g) by possessing "in and affecting commerce" a firearm, "which had been shipped and transported in interstate commerce[.]" App. B.

On appeal, Gardner argued that § 922(g) is unconstitutional under the Commerce Clause analysis set out in *United States v. Lopez*, 514 U.S. 549 (1995). He contended that because firearm possession is local, noncommercial conduct, it is not an activity that substantially affects interstate commerce. Following its precedent, the Fifth Circuit found the law constitutional and affirmed Gardner's conviction. App. A.

REASONS FOR GRANTING THE WRIT

This Court Should Decide Whether 18 U.S.C. § 922(g)(1) Unconstitutionally Extends Federal Control Over Non-Commercial Firearm Possession.

Title 18 U.S.C. § 922(g) prohibits firearm possession by convicted felons. The statute requires that the possession be “in commerce or affecting commerce,” a requirement that this Court has said can be satisfied by proof that, at some time in the past, the firearm traveled in interstate commerce. *See Scarborough v. United States*, 431 U.S. 563, 566–67 & n.5 (1977) (interpreting predecessor statute). However, neither *Scarborough* nor any other decision of this Court has considered whether a statute that reaches conduct with such a minimal link to interstate commerce is a constitutional exercise of the federal commerce power.

The Court should consider that issue now. In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act, 18 U.S.C. § 922(q), holding that Congress lacked authority to prohibit the possession of a weapon on school premises. 514 U.S. 549 (1995). *Lopez* and its Supreme Court progeny indicate that non-commercial activity like firearm possession is not a subject for commerce regulation, and that the minimal commerce element in § 922(g) cannot render the statute constitutional.

Lopez identified three categories that Congress may regulate under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of, and persons or things in, interstate commerce; and (3) activities having a substantial relation to interstate commerce. 514 U.S. at 558–59. The Court considered whether 18 U.S.C. § 922(q), which prohibited gun possession near a school, fit within the third category of commerce regulation. Under that category, “the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.” *Lopez*, 514 U.S. at 559. The Court held that § 922(q) failed the “substantial effect” test: gun possession near a school had nothing to do with “commerce” and was not a part of a greater scheme of commercial regulation, and the statute contained no element that would assure a substantial connection with commerce in each prosecution. *Id.* at 561–62; *see also United States v. Morrison*, 529 U.S. 598, 608–10 (2000) (discussing *Lopez*).

Lopez’s analysis demonstrates that § 922(g), like the former § 922(q), is an improper exercise of Congress’s commerce power. Like § 922(q), § 922(g) must be examined under the third “substantial effects” category of commerce legislation; the statute does not regulate the channels of commerce, or things “in” commerce. *See Scarborough*, 431 U.S. at 572 (in passing § 922’s predecessor statute,

Congress reached more than “simply those possessions that occur in commerce or in interstate facilities”). To meet the requirements of the “substantial effects” category, the statute must either involve commercial activity, or include an interstate-commerce element sufficient to provide case-by-case proof of a substantial relation to commerce.

Section 922(g) does not meet either of these requirements. Possession of a firearm by a felon, like possession of a firearm near a school, is non-commercial, non-economic activity. While firearm possession could lead to violent crime, which in the aggregate could hurt the nation’s economy, Congress may not “regulate non-economic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” *Morrison*, 529 U.S. at 617.

Section 922(g) includes an element regarding commerce. While *Lopez* suggested that the presence of such a statutory nexus should be considered in determining whether a statute is constitutional, it also made clear that, “to be within Congress’ power to regulate it under the Commerce Clause,” the prohibited activity’s effect on commerce must be substantial. 514 U.S. at 559. Accordingly a commerce element must ensure, “through case-by-case inquiry,” that the regulated activity actually “affects interstate commerce.” *Id.* at 561. The commerce element of § 922(g) does not do so. It requires

only that the firearm have traveled in interstate commerce at some time in the past. *See Scarborough*, 431 U.S. at 575 (interpreting predecessor statute); *cf. United States v. Rawls*, 85 F.3d 240, 242–43 (5th Cir. 1996) (citing *Scarborough* in § 922(g) case). Even if a gun has traveled at some time in interstate commerce, its mere possession has nothing to do with business or commerce. Accordingly, it does not fall within the category of activities that the federal government may regulate under the Commerce Clause.

This conclusion is supported by the Court’s decision in *Jones v. United States*, 529 U.S. 848 (2000). *Jones* considered whether the federal arson statute, 18 U.S.C. § 844(i), criminalizes the destruction of privately owned property. 529 U.S. at 850. Section 844(i) contains a jurisdictional element like that in § 922(g); the Court, however, construed the statute narrowly, to limit its reach to arson of property that is “currently used in commerce or in an activity affecting commerce.” *Id.* at 859. In so ruling, the Court noted that a broader construction might render the statute unconstitutional under *Lopez*. *Jones*, 529 U.S. at 858.

Although *Jones*’s analysis turned on the definition of the word “use” in the arson statute—a term not present in the felon-in-possession statute—the case nonetheless has important implications

for § 922(g)(1). *Jones* indicated that the mere presence of a jurisdictional element will not save a statute from a Commerce Clause challenge. Instead, that element must be construed, if possible, to bring the statute within the parameters set by the Constitution. *Id.* at 858. And as *Jones* recognized, those parameters were established in *Lopez*. 529 U.S. at 858.

Considered together, *Lopez* and *Jones* cast substantial doubt on whether the minimal nexus required in *Scarborough* is adequate to support § 922(g)'s constitutionality. *See, e.g., United States v. Cortes*, 299 F.3d 1030, 1037 (9th Cir. 2002) (“The vitality of *Scarborough* engenders significant debate.”). Even before *Jones*, one Fifth Circuit panel stated that “[i]f 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 . . . fortuitously traveled in interstate commerce.” *Rawls*, 85 F.3d at 243 (Garwood, J., concurring). Another Fifth Circuit judge put it even more forcefully: “[T]he precise holding in *Scarborough* is in fundamental and irreconcilable conflict with the rationale of . . . *Lopez*. . . . [T]he ‘minimal nexus’ of *Scarborough* can no longer be deemed sufficient under the *Lopez* requirement of

substantially affecting interstate commerce.” *United States v. Kubbán*, 94 F.3d 971, 977–78 (5th Cir. 1996) (DeMoss, J., dissenting in part).

This Court should grant certiorari to address the legitimate doubts about the constitutionality of § 922(g). In light of *Lopez* and its progeny, the statute has faced repeated challenges not only in the Fifth Circuit, but throughout the country. *See United States v. Scott*, 263 F.3d 1270, 1274 (11th Cir. 2001) (collecting cases). The prevalence of § 922(g) prosecutions ensures the recurrence of the issue, and litigation will undoubtedly continue unless this Court provides a definitive statement regarding the application of *Lopez*’s principles to this statute. Gardner’s case gives the Court an opportunity to do so.

CONCLUSION

FOR THESE REASONS, Gardner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Judy Fulmer Madewell
JUDY FULMER MADEWELL
Assistant Federal Public Defender

Attorney for Defendant-Appellant

DATED: November 13, 2018.