**No. _____**

# In the Supreme Court of the United States

LUCIANO DIAZ-CONTRERAS, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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


MAUREEN SCOTT FRANCO
Federal Public Defender

BRADFORD W. BOGAN
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

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

**No. _____**

**In the Supreme Court of the United States**

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

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Petitioner Luciano Diaz-Contreras 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 20, 2019.

## 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.

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A copy of the unpublished opinion of the court of appeals, *United States v. Diaz-Contreras*, No. 19-50081 (5th Cir. Aug. 20, 2019) (per curiam), is reproduced at Pet. App. 1a–2a.

## 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 20, 2019. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

Article I of the United States Constitution grants Congress 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)(1) provides:

> It shall be unlawful for any person … 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 and 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

In 2016, Luciano Diaz-Contreras was convicted of unauthorized use of a motor vehicle in Texas, a state jail felony punishable by up to two years' imprisonment. *See* Tex. Penal Code Ann. §§ 12.35(a), 31.07 (West 2019). In 2017, he was arrested after Texas Department of Public Safety troopers found two firearms in a car in which he was a passenger. One firearm was in the center console, and the other was in the passenger area. Both firearms had been manufactured outside the State of Texas. The driver of the car told the troopers that Diaz had pulled one of the firearms from his waistband and concealed it in the car, and that he had told Diaz of the other firearm located in the center console.

Diaz was charged with being a felon who "knowingly possess[ed] in and affecting commerce a firearm" that had "been shipped and transported in interstate and foreign commerce," in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty. The district court sentenced him to 24 months' imprisonment, to be followed by three years' supervised release.

Diaz appealed. Relying on *United States v. Lopez*, 514 U.S. 549 (1995), he argued that 18 U.S.C. § 922(g) exceeds Congress's power under the Commerce Clause, and is therefore unconstitutional.

Pet. App. 1a. He contended that because firearm possession is local, noncommercial conduct, it is not an activity that substantially affects interstate commerce. Pet. App. 1a.

The Fifth Circuit granted the Government's motion for summary affirmance. The court followed its precedent holding that "§ 922(g) can constitutionally applied if a firearm has traveled across state lines[,]" and that "the constitutionality of § 922(g)(1) is not open to question." Pet. App. 2a (cleaned up).

## REASONS FOR GRANTING THE WRIT

**This Court should decide whether 18 U.S.C. § 922(g), which criminalizes noncommercial firearm possession by certain persons, exceeds Congress's power under the Commerce Clause.**

1. Title 18 U.S.C. § 922(g) prohibits firearm possession by convicted felons. The statute requires that the possession be "in 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). But 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 later decisions indicate that noncommercial activity like firearm possession is not a subject for commerce regulation, and that the minimal commerce element in § 922(g) cannot make the statute constitutional.

2. *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, because the statute does not regulate the channels of commerce or things "in" com-

merce. *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 neither of these things. First, possession of a firearm by a felon, like possession of a firearm near a school, is noncommercial, noneconomic 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.

Second, § 922(g)'s commerce element does not salvage the statute. While *Lopez* suggested that the presence of such a statutory nexus should be considered in determining whether a statute is constitutional, *Lopez* 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 that. The element 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) (per curiam) (citing *Scarborough* in § 922(g) case). Even if a gun traveled in interstate commerce sometime in the past, possessing it *now* has nothing to do with business or commerce. Thus, such possession does not fall within the category of activities that the Congress 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 private property. 529 U.S. at 850. Section 844(i) contains a jurisdictional element like that in § 922(g), but the Court 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 enough to make § 922(g)'s a lawful exercise of Congress's commerce power. *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. Kuban*, 94 F.3d 971, 977–78 (5th Cir. 1996) (DeMoss, J., dissenting in part).

3. The Court should grant certiorari to address the legitimate doubts about the constitutionality of § 922(g). In light of *Lopez* and later decisions, 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. Diaz's case gives the Court an opportunity to do so.

## CONCLUSION

FOR THESE REASONS, Diaz asks this Honorable Court to grant a writ of certiorari.

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/ Bradford W. Bogan
BRADFORD W. BOGAN
Assistant Federal Public Defender

*Counsel of Record for Petitioner*

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