No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIK BECERRA,

Petitioner,

v.

UNITED STATES
OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a criminal prosecution for unlawful possession of a firearm or ammunition, 18 U.S.C. § 922(g), does federal law permit the judicial development of an innocent-transitory possession (ITP) affirmative defense?

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Petitioner Erik Becerra respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *United States v. Becerra*, 958 F.3d 725 (8th Cir. 2020), and is reprinted in the Appendix to this Petition. (App. 1-6). The Appendix also contains the unpublished district court order which is germane to the Question Presented. (App. 7-10).

JURISDICTION

The Eighth Circuit Court of Appeals issued its decision in this case on May 7, 2020. (App. 1). This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

RELEVANT STATUTE

This Petition involves a federal criminal offense defined in the United States Code, as follows—

18 U.S.C. § 922

Unlawful acts

* * *

(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.

INTRODUCTION

This petition asks the Court to review the decision below in order to resolve the question as to whether a federal court may develop an affirmative defense to the federal crime of unlawful possession of a firearm or ammunition, 18 U.S.C. § 922(g). In particular, an affirmative defense that applies in cases where the defendant acquires the firearm or ammunition innocently, and makes reasonable efforts to dispossess the item in a prompt and safe manner, *i.e.,* by turning it over to a law enforcement officer. This has become known as an innocent-transitory possession (ITP) affirmative defense. This Court's prior decisions say that federal courts have a unique perspective and competence to formulate affirmative defenses of this type, and should do so when appropriate in light of traditional common-law principles and

newer experience. The main constraint is an affirmative defense cannot directly contradict the value judgments encapsulated within the criminal statute itself.

The ITP affirmative defense is grounded in traditional common-law principles and addresses a problematic line of cases observed in lived judicial experience. And an ITP defense does not contradict § 922(g), but rather furthers the statute's aims of responsible possession and securement of firearms in the public interest. Nonetheless, lower circuit courts are divided on the question of whether federal courts are permitted to formulate an ITP affirmative defense, with one group going so far as to hold that courts are categorically precluded from doing so. The question presented in this petition would resolve the inter-circuit conflict and supply the lower courts with much-needed guidance on an important topic of federal criminal law. This is why Petitioner seeks this Court's review.

STATEMENT OF THE CASE

1. The original version of the statute at issue here was enacted via the Safe Streets Act of 1968, Pub. L. 90-351, Title IV, § 901 (June 19, 1968), which provided:

> It shall be unlawful for any person who is under indictment or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, or is a fugitive from justice, to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The "has been convicted" provision is now codified as amended at 18 U.S.C. § 922(g)(1).

2. This Court has observed that federal crimes like § 922(g)(1) are "solely creatures of statute." *Liparota v. United States,* 471 U.S. 419, 424 (1985). However, this Court has also recognized that Congress "in enacting criminal statutes legislates

against a background of Anglo-Saxon common law," such that common-law defenses "may well have been contemplated by Congress" an incorporated therein. *United States v. Bailey,* 444 U.S. 394, 415 n.11 (1980).

3. With respect to provisions of the Safe Streets Act—which includes the precursor to § 922(g)(1) as shown above—this Court has *presumed* that certain common-law defenses were contemplated and implicitly incorporated. *Dixon v. United States,* 548 U.S. 1, 13 & nn. 6-7 (2006).[1] However, this Court has not yet had the opportunity to adjudicate whether any particular affirmative defenses are or are not available to a § 922(g) defendant.

4. Lower courts have thus taken varied approaches to what affirmative defenses are available to a defendant charged under § 922(g). *See, e.g., United States v. Leahy,* 473 F.3d 401, 406-09 (1st Cir. 2007). One federal circuit court has developed an affirmative defense which has become known as innocent-transitory possession (ITP), the elements of which were formulated as:

> (a). The firearm or ammunition was attained innocently and held with no illicit purpose; and
>
> (b). Possession of the firearm or ammunition was transitory, meaning the defendant took measures to dispossess the firearm or ammunition promptly and safely in accordance with the public interest, specifically to a law enforcement officer.

United States v. Mason, 233 F.3d 619, 624 (D.C. Cir. 2000).

[1] This Court's *Dixon* decision involved § 922(n), which corresponds with the above-quoted "under indictment" provision of the Safe Streets Act. However, given the similarity to and contemporaneous enactment of what is now § 922(g)(1), courts have said the Court's *Dixon* decision "would appear to be fully applicable to" § 922(g)(1). *United States v. Leahy,* 473 F.3d 401, 405 n.2 (1st Cir. 2007).

5. In the case at hand, Petitioner was charged with unlawful possession of a firearm and ammunition under § 922(g)(1). (App. 7). The matter proceeded to jury trial, at which point the prosecution moved to preclude Petitioner from presenting evidence (including Petitioner's own testimony) seeking to "justify" the alleged possession of a firearm and ammunition, *i.e.,* "by claiming that he was merely handing over the weapon and ammunition to his probation officer." (App. 7). The government further sought to "preclude the [ITP] defense at trial." (App. 7). The district court deferred ruling on the motion until the close of the prosecution's case-in-chief. (App. 8).

6. After the government had presented its case-in-chief, Petitioner gave notice of intent to offer testimony in his own defense. (App. 8). The district court requested a proffer for purposes of ruling on the above prosecution motions to exclude evidence and to preclude the ITP defense. (App. 8).

7. Accordingly, Petitioner offered the following version of events and anticipated testimony via proffer:

(a). In May 2015, Petitioner was attempting to purchase a car. Petitioner contacted a prospective seller of a car on May 4, who permitted Petitioner to "keep the car temporarily in order to test drive it." (App. 8).

(b). In the early morning hours of May 5 (approximately 4:30 or 5:00 a.m.), Petitioner became fearful for his personal safety due to an unspecified domestic dispute, and drove away in the car to elude the hazard. But while in transit, he perceived what he thought to be a pursuing vehicle. (App. 8).

(c). He stopped at a nearby airport and sought assistance from airport police. But in his view, these officers "did not take seriously his requests to follow up regarding a vehicle that was following him." Rebuffed, Petitioner returned to the car to depart. (App. 8).

(d). Upon returning to the car, Petitioner spotted a firearm under the driver's seat. He did not report the firearm to the airport police because the above incident caused him to lose faith in the officers. Instead, he resolved to deliver the firearm to his probation officer. (App. 8).

(e). Petitioner drove to his probation office several miles away, but discovered it not yet open for business. He returned later, but his probation officer was not yet available to speak with him. He therefore drove around on errands until finally making personal contact with the probation officer around 12:45 p.m. But by that time probation officials suspected he may be armed and placed him under arrest before he was able to transfer the firearm and ammunition, as originally planned. (App. 8-9).

6. Assuming the truth of the above proffer, the district court determined that Petitioner could not invoke the ITP affirmative defense. (App. 10). The district court explained that Petitioner had opportunities to deliver the firearm to some other law enforcement officer between time of discovery and his face-to-face contact with the probation officer. (App. 10).

7. The jury returned a guilty verdict, and the district court ultimately entered a judgment of conviction with an 80-month term of imprisonment. (App. 3). Petitioner appealed to the Eighth Circuit Court of Appeals, challenging the district

court's decision to preclude the ITP affirmative defense and evidence relating thereto. (App. 5-6).

8. The Eighth Circuit affirmed, eschewing the district court's targeted approach and instead making a blanket holding that there exists "no innocent-possessor defense" to a § 922(g) charge. 958 F.3d at 730. The court of appeals explained that, in its view, "there is no statutory basis" for an ITP affirmative defense in this context. *Id.* That last holding diverges from other circuits as well as this Court's framework for evaluating the viability of affirmative defenses to federal crimes, and so Petitioner asks this Court to review the decision for the reasons that follow.

REASONS FOR GRANTING THE PETITION

This Petition asks the Court to resolve the question of whether a judicially-crafted affirmative defense of innocent-transitory possession (ITP) may be adopted in cases involving a defendant charged with unlawful possession of a firearm or ammunition under 18 U.S.C. § 922(g)(1). Petitioner respectfully requests the Court accept review of the question, because: (A) the question has generated conflicting authority among the lower circuit courts; (B) the question is an important one, with a deep impact upon the administration of criminal justice in federal courts; and (C) this case presents an apt vehicle by which to resolve the question.

A. The question encapsulates a conflict among the lower courts.

The question of whether a federal court is permitted to craft an ITP affirmative defense to a § 922(g) prosecution divides the lower circuit courts into a three-way split, comprised of cohorts which: (1) endorse an ITP affirmative defense; (2) remain

open to an ITP affirmative defense; and (3) reject an ITP affirmative defense. Each competing viewpoint is discussed below, in turn.

1. Endorsement of ITP affirmative defense

The seminal judicial decision crafting an ITP affirmative defense was issued by the District of Columbia Circuit in *United States v. Mason*, 233 F.3d 619, 624 (D.C. Cir. 2000). The decision employs principles for judicial development of non-statutory affirmative defenses, which are briefly described next before turning to the *Mason* decision itself.

(a). Principles for judicial recognition of affirmative defense

In *United States v. Bailey*, this Court has explained that non-statutory affirmative defenses may be available to a defendant charged with a federal statutory offense, because "in enacting criminal statutes legislates against a background of Anglo-Saxon common law," such that certain defenses "may well have been contemplated by Congress" and incorporated therein. 444 U.S. 394, 415 n.11 (1980). Later, in *Dixon v. United States,* this Court instructed that in seeking to determine which non-statutory affirmative defense are available to a defendant charged with a given federal offense, a court's task is to "determine what the defense would look like as Congress may have contemplated it." 548 U.S. 1, 13 (2006)

A concurring opinion in *Dixon* observed that, absent statutory indicators to the contrary, courts should assume that "Congress acted against a certain background of understandings set forth in judicial decisions" as well as "legal treatises and the American Legal Institute's Model Penal Code." *Id.* at 17-18 (Kennedy, J., concurring). Beyond this, courts may also consider new authorities and "innovative arguments in

resolving issues not confronted in the statute and not within the likely purview of Congress when it enacted the criminal prohibition." *Id.* at 18 (Kennedy, J., concurring).

Thus, under this Court's *Bailey-Dixon* line of authority, a non-statutory affirmative defense to federal crime may be judicially inferred based upon a number of sources, *e.g.,* the common-law backdrop at the time of the statute's enactment, as well as the criminal law treatises and authorities in existence at the time and now. *Id.* In addition, the concurring opinion in *Dixon* and the tradition of judicially-created common law offers that courts may craft "innovative" affirmative defenses as a consequence of unique judicial competence and experience, recognizing that the judicial branch is in the best position to observe and remedy anomalous cases that Congress may not have contemplated in enacting the criminal statute at issue. *Id.*

(b). Application to development of ITP affirmative defense

The above principles aptly describe the development of the innocent-transitory possession (ITP) affirmative defense as formulated by the District of Columbia Circuit in *United States v. Mason*, 233 F.3d 619, 624 (D.C. Cir. 2000). There, the defendant was a delivery driver with a felony record who, while on his route, found a paper bag on the sidewalk near a housing complex. *Id.* at 621. Closer inspection revealed the bag to contain a firearm. *Id.* The housing complex was within proximity of homes and schools, and so he retrieved the hazardous item so a child would not stumble upon the bag and come to harm. *Id*. According to the defendant, the next stop on his route was the Library of Congress, where he "intended to turn over the gun to a [] police officer he knew." *Id.* He did not turn the items over to the first police officer he met

at the library gate, but rather made his scheduled delivery at the loading dock. *Id.* It was there that another officer spotted the firearm, leading to an arrest and unlawful-possession charge under § 922(g)(1). *Id.*

Having conceded the above, the defendant admitted the essential elements of the § 922(g)(1) offense, *i.e.,* knowing possession of a firearm and ammunition by a person of prohibited status. *Rehaif v. United States,* 139 S. Ct. 2191, 2200 (2019). The defendant was thus unable to present a failure-of-proof defense. Nor was he able to avail himself of another judicially-crafted "justification" affirmative defense, owing to the decisional law providing such a defense is available only when the defendant can show he was "under an unlawful and present threat of death or serious bodily injury." *Mason,* 233 F.3d at 622. So at trial, the defendant proposed a tailored affirmative defense, requesting an instruction to the effect that the defendant would not be guilty of the § 922(g)(1) charge if he lacked criminal purpose in possessing the firearm, and instead temporarily possessed it to "aid social policy," such as protecting others from harm, turning it over to police, or otherwise securing it. *Id.*

The District of Columbia Circuit agreed that, under the above circumstances as proffered, a § 922(g)(1) defendant should be entitled to present an affirmative defense for a jury panel's consideration. *Mason,* 233 F.3d at 624. To establish the affirmative defense, said the *Mason* court, the defendant must show:

(i). The firearm was attained innocently and held with no illicit purpose;

(ii). Possession of the firearm was transitory, meaning taking measures to safely dispossess the firearm promptly.

Id. Beyond this, the defendant would be required to prove that he "had the intent to turn the weapon over to the police" and that "he was pursuing such an intent with immediacy and through a reasonable course of conduct." *Id.* (punctuation and citation omitted). This is what has become known as a form of innocent-transitory possession (ITP) affirmative defense.

Significantly, the *Mason* court grounded its ITP affirmative defense not in the text of the statute defining the offense, § 922(g), but rather in common-law affirmative defenses. This is aptly demonstrated by this passage:

> When these requirements are met, possession is 'excused and justified as stemming from an affirmative effort to aid and enhance social policy underlying law enforcement.'

233 F.3d at 624 (quoting *Hines v. United States,* 326 A.2d 247, 248 (D.C. 1974)). And the above rationale was drawn from case law defining the proper scope of common-law affirmative defenses applied to District of Columbia firearms-possession laws. *Hines*, 326 A.2d at 248 (holding defense is "entirely consistent with the well-established principle that the showing of a legally valid excuse or justification will negate liability for the doing of an act normally held criminal").

Hence, the underpinnings of the ITP affirmative defense, as formulated by *Mason*, are derived from traditional common-law affirmative defenses. Affirmative defenses like the traditional form of "necessity," a doctrine that recognizes that "sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.1(a) (Westlaw 3d ed. 2019). And execution-of-public-duty, which recognizes that "conduct is justifiable" when authorized by "the duties or functions of a public officer

or the assistance to be rendered to such officer in the performance of his duties." Am. Law Inst., *Model Penal Code* § 3.03 (1985) (emphasis added).

The District of Columbia Circuit, in short, encountered an anomalous § 922(g) case falling within the literal purview of the statute, but likely not contemplated by Congress in enacting the law. For this reason, the circuit court developed and endorsed a form of ITP affirmative defense in § 922(g) prosecutions. Thus far, it is the only circuit to have done so; though others have remained open to the affirmative defense or some analogue as described next.

2. Receptive to ITP affirmative defense

In the wake of the District of Columbia Circuit's *Mason* decision, other circuits have declined to formally endorse an ITP affirmative defense. But simultaneously, have recognized the potential for anomalous § 922(g) prosecutions. And hence have remained receptive to an ITP affirmative defense should the need arise.

Take, for example, the First Circuit's decision in *United States v. Teemer*, 394 F.3d 59 (1st Cir. 2005). There, the circuit court rejected a defendant's proposed "transitory possession" theory-of-defense instruction as overbroad. *Id.* at 63. But the court also recognized the ilk of vexing cases which led to the D.C. Circuit's formation of an ITP affirmative defense:

> With this statute, as with many others, there are circumstances that arguably come within the letter of the law but in which conviction would be unjust—arguably so in some cases, and clearly so in others. Consider if a schoolboy came home with a loaded gun and his ex-felon father took it from him, put it in drawer, and called the police[.]

Id. at 64.

The First Circuit recognized that under the above scenario, the § 922(g) defendant may well meet resistance in trying to invoke already-established common-law affirmative defenses to a § 922(g) charge. *Id.* And though the court found it unnecessary to endorse the ITP affirmative defense or an analogue in the case at hand, it did acknowledge the possibility of future "abusive indictments of innocent contact [with a firearm]," and assured that "courts are competent to deal with such cases individually or in gross when they arrive." *Id.* at 65. Put differently, the First Circuit remains open and receptive to recognizing an ITP affirmative defense or some analogue, should future cases or circumstances warrant the action.

Similarly, the Second Circuit has said that "circumstances may be imagined where possession of a firearm is too fleeting to violate" § 922(g). *United States v. Williams*, 389 F.3d 402, 405 (2d Cir. 2004) (punctuation and citation omitted). For example, a case where a bystander with a felony record "notices a police officer's pistol slip to the floor while the officer was seated at a lunch counter, picks up the weapon, and immediately returns it to the officer." *Id.* (punctuation and citation omitted). Here again, while the Second Circuit found no cause to recognize the ITP affirmative defense in the case under consideration, it expressed a willingness to entertain such a defense under the right circumstances. *Id.* at 405 & n.4.

And the Seventh Circuit has also expressed openness to the usage of an ITP affirmative defense, should circumstances like those mentioned above or in the *Mason* case warrant it. *United States v. Jackson,* 598 F.3d 340, 350-51 (7th Cir. 2010).

In sum, there exists a cohort of circuit courts that have thus far declined to develop or adopt an ITP affirmative defense. But yet also acknowledge the type of

anomalous cases which prompted the development of the ITP affirmative defense in the first place. These circuit courts express openness to an ITP affirmative defense or some analogue, should the cases or circumstances call for it. And these circuits stand in contrast to the final cohort of circuit courts, which have outright rejected the *Mason* form of ITP affirmative defense or any other.

3. Rejection of ITP affirmative defense

A number of circuit courts have issued across-the-board rejections of an ITP affirmative defense in the § 922(g) context, for now and evermore. This last grouping includes: the Fourth Circuit as embodied in *United States v. Gilbert,* 430 F.3d 215, 218-20 (4th Cir. 2005); the Ninth Circuit in *United States v. Johnson*, 459 F.3d 990, 994-98 (9th Cir. 2006); the Tenth Circuit in *United States v. Baker,* 508 F.3d 1321, 1324-27 (10th Cir. 2007); and the Eleventh Circuit in *United States v. Vereen*, 920 F.3d 1300, 1306-12 (11th Cir. 2019). Now added to this list is the Eighth Circuit via the decision below, *United States v. Becerra*, 958 F.3d 725, 730-31 (8th Cir. 2020) (reprinted in App. 1-6).

The rationale employed by the Eighth Circuit is typical of other circuits within this cohort—

(a). The Eighth Circuit notes the elements of a § 922(g) charge include knowing possession of a firearm or ammunition by a person of prohibited status; the offense calls for no inquiry into the motive or purpose of that possession. *Id.* at 730.

(b). From this observation, the Eighth Circuit concludes: "Even if Becerra intended to turn over the gun (or the ammunition) to his probation officer, it is still a crime to knowingly possess it in the first place." *Id.* at 730-31.

(c). And according the Eighth Circuit, there is no need for a "safety valve" for anomalous cases evincing innocent-and-transitory possession, because a similar function is served by the "knowing" *mens rea* requirement. *Id.* at 731.

In other words, the Eighth Circuit—following the other circuit decisions within this grouping—rejects any ITP affirmative defense based upon the statutory text alone. And further, closes its mind to future circumstances or anomalous cases that might warrant an ITP affirmative defense or some analogue.

The above broad and fractured split of authority among the lower circuit courts would justify this Court's review all on its own. *See* S. Ct. R. 10(a). But beyond the split itself, the substantive question is important to the judicial administration of criminal justice at the federal level, as explained next.

B. The question implicates an important question of law, with a deep impact upon the judicial administration of criminal justice in the federal system.

This Court's decisions ably demonstrate the importance of the judiciary's traditional role in crafting non-statutory affirmative defenses to federal offenses. *Dixon v. United States,* 548 U.S. 1, 13 & nn. 6-7 (2006); *see also id.* at 17-18 (Kennedy, J., concurring). Absent this crucial function, twin injustices ensue: (i) congressional will is thwarted when a criminal statute is applied to cases not contemplated or anticipated at original enactment; and (ii) the defendant is subjected to a criminal penalty under those same anomalous circumstances. *See id.* It is thus drastic for circuit courts in the third cohort above—including the Eighth Circuit via the opinion below—to entirely rule out an innovative affirmative defense which finds its roots in the common law. *See id.*

True, in one case this Court has issued a blanket rejection of a particular affirmative defense in the context of a federal criminal statute. *United States v. Oakland Cannabis Buyers' Co-op,* 532 U.S. 483, 490-95 (2001). But such an extreme position is justified only when the proposed affirmative defense is fundamentally "at odds with the terms of" the criminal statute's plain value judgments. *Id.* at 491. For example, where Congress enacts a statutory scheme providing that marijuana "has no medical benefits," a defendant cannot raise a medical necessity affirmative defense which offers the opposite claim. *Id.*

No such fundamental disconnect exists between § 922(g) and an ITP affirmative defense. The Safe Streets Act of 1968, from which § 922(g)(1) originated, was premised on the notion that firearm possession by persons in certain status categories is "contrary to the public interest" and a "significant factor in the prevalence of lawlessness and violent crime." Pub. L. 90-351, Title IV, § 901(a)(2) (June 19, 1968); *accord Barrett v. United States,* 423 U.S. 212, 220 (1976) (history of 1968 Act reflects concern with "keeping firearm out of the hands of categories of potentially irresponsible persons").

An ITP affirmative defense is fully consistent with this statutory purpose. For the defense merely serves to exempt from criminal sanction those members of a prohibited category who demonstrably *do not* possess the firearm "against the public interest." But rather, who briefly possess the firearm for a commendable public aim, *i.e.,* to secure and safely dispose of a loose firearm, which would otherwise present a public hazard. Moreover, this Court has had no difficulty in assuming that less public-

spirited affirmative defenses, such as common-law duress, are fully consistent with the 1968 Safe Streets Act. *Dixon,* 548 U.S. at 13 & n.6.

The Eighth Circuit and others reject the ITP affirmative defense on the ground that the elements or other terms of § 922(g) do not provide for the defense. *Becerra*, 958 F.3d at 730. Or that the "knowing" *mens rea* element serves as an adequate safeguard. *Id.* at 731. As this Court has explained in its *Bailey-Dixon* line of authority, however, the entire point of a judicially-crafted affirmative defense is to exempt anomalous cases from liability, even though the elements of the criminal statute have technically been met. *Dixon,* 548 U.S. at 6 (an affirmative defense "normally does not controvert any of the elements of the offense itself"). Such affirmative defenses may and frequently are appropriate regardless of "knowing" *mens rea* as one of the offense elements. *Dixon,* 548 U.S. at 6-7. And, moreover, an affirmative defense is typically deemed outside the elements of a criminal offense entirely; but rather generally serves as a "separate issue on which the defendant is required to carry the burden of persuasion." *Patterson v. New York,* 432 U.S. 197, 207 (1977).

All of this demonstrates that a great many circuit courts fail to envisage this Court's instructions concerning the role of federal courts in the development of non-statutory affirmative defenses. As stated in the *Bailey-Dixon* line of authority and elsewhere, federal courts play a unique and crucial role in spotting lines of cases which present facts that meet the literal elements of a given criminal statute, but were unlikely to have been contemplated by Congress as acts to be proscribed and punished. When such cases arise, federal courts are tasked with determining what

affirmative defenses might be available to the defendant, and "what the defense would look like as Congress may have contemplated it." *Dixon,* 548 U.S. at 13.

With respect to § 922(g) unlawful-possession cases, numerous federal courts have recognized the problem of a person within a prohibited category taking possession of a firearm or ammunition for a short period of time, and for the demonstrated purpose of publicly beneficial securement. These courts rightly suspect that such cases were not contemplated by Congress in enacting § 922(g). In response, federal courts have developed an ITP affirmative defense, or otherwise remain open to such a defense. This is fully consistent with the history and purpose of § 922(g).

Thus, Petitioner respectfully requests that this Court accept review of the Eighth Circuit's decision below. In part, to instruct lower courts on these important points of judicial development of affirmative defenses to criminal statutes. As shown, the point is crucial to a well-functioning federal criminal justice system. And the point is ably demonstrated by reviewing the Eighth Circuit's opinion below, as shown next in the final subsection.

C. The decision below offers an apt vehicle by which to consider the question presented here.

In the decision below, the Eighth Circuit issued an outright rejection of an ITP affirmative defense for all § 922(g) prosecutions, for now and evermore. The stated rationale for doing so echoes that offered by a number of other circuit courts. *Supra* REASONS § B. Hence, the case presents an apt vehicle for this Court to consider the question presented, as the case encapsulates the varied rationales for and against the viability of an ITP affirmative defense.

Further, the relevant facts (according to Petitioner's proffer which is to be deemed true for present purposes) show a man who found a loose firearm and made reasonable efforts to provide the item to his probation officer in a timely manner.[2] *Supra* STATEMENT OF CASE ¶ 7. This is a fact pattern which bears pertinent similarities to a number of scenarios which circuit courts have suggested would constitute innocent and transitory possession that may well justify an ITP affirmative defense. For this additional reason, this case presents an apt vehicle by which this Court may consider the question presented. And thus Petitioner requests that the Court take the opportunity to accept review of the decision below, to resolve the circuit split and clarify the law on this important topic as discussed above.

[2] The district court below determined that, assuming Petitioner's version of events to be true, the *Mason* version of the ITP affirmative defense would not be available because Petitioner had opportunities to turn the firearm over to other police officers rather than delaying to turn it over to his probation officer. (App. 10). But in *Mason*, the defendant did not call the police nor "surrender the weapon to the first police officer that he saw." 233 F.3d at 625. And yet the *Mason* court did not view this as foreclosing the ITP affirmative defense, but rather as a question for the jury to determine whether the affirmative defense had been substantiated. *Id.* Moreover, the point is academic because the Eighth Circuit of Appeals did not consider the question at all, but rather issued a blanket ruling that an ITP affirmative defense is *never* available to a § 922(g)(1) defendant, under *any* circumstances. *Becerra,* 958 F.3d at 730-31.

CONCLUSION

For all these reasons, Petitioner respectfully asks the Court to grant this Petition for a Writ of Certiorari.

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Respectfully submitted,

s/ Manny Atwal

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