No. _____

IN THE

Supreme Court of the United States

_____

ISAAC THOMAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant's guilty plea entered before *Rehaif v. United States*, 139 S. Ct. 2191 (2020), in which the defendant was not advised of the essential elements of the crime with which he was charged, constitutes a due process violation requiring vacatur of the guilty plea?

2. Whether 18 U.S.C. § 922(q)(2)(A) is unconstitutional facially and as applied to the purely intrastate conduct of possessing a firearm within a school zone, because the statute suffers from the same infirmities that led the Court to strike down the earlier version of the statute in *United States v. Lopez*, 514 U.S. 549 (1995)?

3. Whether 18 U.S.C. § 922(g)(1) exceeds Congress's Commerce Clause power, facially and as applied to the purely intrastate conduct of possessing a firearm and ammunition as a convicted felon, where the only connection to interstate commerce occurred before the defendant's possession?

PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO THIS CASE

United States Supreme Court:

United States v. Isaac Thomas, No. 19-5025 (Oct. 15, 2019) (granting certiorari, vacating judgment, and remanding for further proceedings in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019)).

United States Court of Appeals (11th Cir.):

United States v. Isaac Thomas, No. 18-10956

767 F. App'x 758 (Mar. 29, 2019) (original opinion)

810 F. App'x 789 (Apr. 22, 2020) (opinion on remand)

United States District Court (M.D. Fla.):

United States v. Isaac Thomas, No. 8:17-cr-90-T-23MAP (Feb. 26, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Isaac Thomas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS

On October 15, 2019, this Court granted Mr. Thomas's certiorari petition, vacated the Eleventh Circuit's judgment, and remanded for further consideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *See Thomas v. United States*, 140 S. Ct. 397 (2019).

On remand, the Eleventh Circuit affirmed, 810 F. App'x 789 (11th Cir. 2020), and its decision is provided in the petitioner's appendix (Pet. App.) at 1a-9a.

The Eleventh Circuit's original decision affirming Mr. Thomas's convictions, 767 F. App'x 758 (11th Cir. 2019), is provided at Pet. App. 10a-17a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on April 22, 2020. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Mr. Thomas has timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rules 29.2 and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3 of the U.S. Constitution provides:

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Section 922(g)(1) of Title 18 of the U.S. Code provides, in relevant part:

> 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 . . . possess in or affecting commerce, any firearm or ammunition.

Section 922(q) of Title 18 of the U.S. Code provides, in relevant part:

> (1) The Congress finds and declares that—
>
> (A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;
>
> (B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
>
> (C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary [of the] House of Representatives and the Committee on the Judiciary of the Senate;
>
> (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;
>
> (E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;
>
> (F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
>
> (G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;
>
> (H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves--even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and
>
> (I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.
>
> (2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign

> commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

Section 924(a) of Title 18 provides, in relevant part:

> (2) Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both . . . .
>
> (4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

STATEMENT OF THE CASE

The circuits are split on whether guilty pleas that are plainly erroneous in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2020), are reversible *per se*. In the decision below, the Eleventh Circuit declined to vacate Mr. Thomas's guilty plea, even though he was not advised of the additional, essential element of the offense the Court recognized in *Rehaif*. Had Mr. Thomas's case been before the Fourth Circuit, his guilty plea would have been vacated. Mr. Thomas accordingly requests this Court's review or, alternatively, that his case be held pending the resolution of other petitions raising this issue.

Mr. Thomas's petition additionally presents the fundamental issue whether 18 U.S.C. §§ 922(q)(2)(A) and 922(g) exceed Congress's power under the Commerce Clause. Mr. Thomas's offense was local—he possessed the firearm and ammunition in a school zone and as a convicted felon in Plant City, Florida. The only connection to interstate commerce occurred before Mr. Thomas's possession. Indeed, to prosecute Mr. Thomas federally, the government solely relied on the fact that the firearm and ammunition had been manufactured in states other than Florida and the inference that they had therefore crossed state lines at some point before Mr. Thomas's possession. Mr. Thomas's case accordingly challenges Congress's power to

criminalize, and the federal government's authority to prosecute, his purely local conduct. *See Gamble v. United States*, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring) ("Indeed, it seems possible that much of Title 18, among other parts of the U.S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty").

1. In 2017, Mr. Thomas was charged by indictment in the U.S. District Court for the Middle District of Florida with possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2) (Count One), and possessing a firearm within 1,000 feet of the grounds of Plant City High School, in violation of 18 U.S.C. § 922(q)(2)(A) and § 924(a)(4) (Count Two). Doc. 1.[1] That same year, Mr. Thomas entered guilty pleas pursuant to a plea agreement. Docs. 36, 80. The district court sentenced Mr. Thomas to a total prison term of 15 years, consisting of a 10-year term on the § 922(g)(1) count and a 5-year consecutive term on the § 922(q)(2)(A) count. Doc. 70 at 2.

Rehaif error: At the time of Mr. Thomas's district court proceedings, the Eleventh Circuit's binding precedent held that the government was required to prove the defendant's knowledge only as to his possession of the firearm/ammunition, not as to his felon status. *See, e.g., United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997); *Rehaif*, 139 S. Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing decisions, including *Jackson*). In accordance with this binding precedent, the court advised Mr. Thomas at his guilty plea hearing that he had to knowingly possess the ammunition. Doc. 80 at 24. Mr. Thomas was not advised that he had to know his felon status at the time of the possession. *See id.* And, as the Eleventh Circuit

[1] Docket entries from Mr. Thomas's district court proceedings, Case No. 8:17-cr-90-T-23MAP (M.D. Fla), are cited herein as "Doc."

recognized in its original opinion, "There was nothing in the plea agreement's factual basis indicating whether Thomas was aware of his prohibited felon status when he possessed the firearm." Pet. App. 11a; *see* Doc. 36 at 16-18 (plea agreement).[2]

Commerce Clause: Mr. Thomas's offense was local. On January 20, 2017, a fight broke out at a basketball game at Plant City High School. Thereafter, several people, including Mr. Thomas, moved a few blocks away from the school, where the fight resumed. Local law enforcement, the Plant City Police Department, responded. Doc. 36 at 16.

One local law enforcement officer arrived in a marked car with the lights and sirens activated. The officer saw Mr. Thomas emerge from the crowd holding a firearm, which Mr. Thomas fired. *Id.*[3]

Mr. Thomas ran with the firearm down a road that was 910 feet away from Plant City High School and got into a car as a passenger. Local law enforcement officers pursued the vehicle. Ultimately, the car crashed into a building. Mr. Thomas fled on foot, but was then shot by one of the local law enforcement officers and apprehended. Doc. 36 at 16-17.

The State of Florida originally charged Mr. Thomas for this conduct. Those charges were dismissed the day after Mr. Thomas was charged federally. *See* Doc. 57 (PSR) ¶¶ 1, 52.

To prosecute Mr. Thomas federally for possessing a firearm in a school zone, the government relied upon the manufacture of the firearm in Arizona and the inference that the "firearm had traveled in or affected interstate commerce at some point during its existence." Pet. App. 4a (emphasis added); *see* Doc. 36 at 3, 17-18; Doc. 80 at 25. Similarly, to prosecute Mr.

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[2] The Eleventh Circuit deleted this sentence from its opinion on remand from this Court for further consideration in light of *Rehaif*. *Compare* Pet. App. 3a (opinion on remand), *with* Pet. App. 11a (original opinion).

[3] Neither the officer nor the police vehicle were shot. *See* Doc. 84 at 5-6.

Thomas for possessing a firearm and ammunition as a convicted felon, the government relied upon the manufacture of the firearm in Arizona, and the manufacture of the ammunition casings in Minnesota, Missouri, or Idaho, and the inference that the firearm and ammunition "had to travel in or affect interstate commerce prior to arriving in Florida." Doc. 36 at 17-18; *see* Doc. 80 at 24. The connection between the firearm and ammunition and interstate commerce therefore had occurred, and ended, before Mr. Thomas's local criminal activity.

2. The Eleventh Circuit issued its original opinion affirming Mr. Thomas's convictions on March 29, 2019, before this Court issued its decision in *Rehaif*. *See* Pet. App. 10a-17a. Mr. Thomas filed a petition for a writ of certiorari, seeking further review of his § 922(g) conviction in light of *Rehaif* and of both convictions on the grounds that § 922(g) and § 922(q) are unconstitutional. *See* Petition for a Writ of Certiorari, *Thomas v. United States*, No. 19-5025. On October 15, 2019, this Court granted Mr. Thomas's petition, vacated the Eleventh Circuit's judgment, and remanded for further consideration in light of *Rehaif*. *See Thomas v. United States*, 140 S. Ct. 397 (2019).

3. On remand, the Eleventh Circuit agreed that plain error had occurred at Mr. Thomas's guilty plea hearing, because the lower court had "failed to advise Thomas during the plea colloquy that knowledge of his status as a felon at the time of his offense was an element of his §§ 922(g) and 924(a)(2) offense that the government must prove." Pet. App. 7a. The Eleventh Circuit did not address Mr. Thomas's argument that the plea colloquy's failure to provide him with "real notice of the true nature of the charge against him" violated his due process rights and required vacatur of his guilty plea. *Compare id.* at 7a-9a, *with* Supp. Ltr. Br. of Appellant Thomas, *United States v. Thomas*, No. 18-10956, 2019 WL 6609353, at *3-8 (11th Cir. Dec. 3, 2019) ("Supp. Ltr. Br.") (quoting *Bousley v. United States*, 523 U.S. 614, 618 (1998); citing *United*

States v. Dominguez Benitez, 542 U.S. 74, 83-84 & n.10 (2004)) (internal quotation marks omitted).

The Eleventh Circuit instead applied the standard that this Court has applied to non-constitutional errors under Federal Rule of Criminal Procedure 11, which requires the defendant to "show a reasonable probability that, but for the error, he would not have entered the plea." Pet. App. 8a (quoting *Dominguez Benitez*, 542 U.S. at 83). The Eleventh Circuit found that Mr. Thomas, contrary to his arguments, could not meet this standard. *Id.* at 8a-9a.

The Eleventh Circuit also maintained its rejection of Mr. Thomas's challenges to the constitutionality of § 922(g) and § 922(q)(2)(A). *Id.* at 2a, 5a-7a, 14a-15a. The court of appeals disagreed that either statute is unconstitutional in light of *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598, 610 (2000).

REASONS FOR GRANTING THE WRIT

I. The circuits are split on whether a constitutionally invalid guilty plea in light of *Rehaif* is reversible *per se*

Before *Rehaif*, the courts of appeals had uniformly held in § 922(g) prosecutions that the government was required to prove the defendant's knowledge only as to his possession, not as to his status. *See, e.g., United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997); *Rehaif*, 139 S. Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing decisions, including *Jackson*). In guilty pleas entered before this Court's decision in *Rehaif*, the lower courts accordingly did not advise the defendant of an essential element of the offense—knowledge of status. *See, e.g.*, Pet. App. 7a. Following *Rehaif*, the circuits are divided on whether such guilty pleas are reversible *per se*. The Fourth Circuit has held that such guilty pleas violate due process and, as such, constitute "structural error" requiring reversal. *See United States v. Gary*, 954 F.3d 194, 200-08 (4th Cir.),

reh'g en banc denied, 963 F.3d 420 (4th Cir. 2020). Other circuits have disagreed, acknowledging the circuit split that has resulted.[4]

The Eleventh Circuit has repeatedly affirmed pre-*Rehaif* guilty pleas, without addressing the constitutional errors that occurred in those pleas.[5] In Mr. Thomas's case, he argued that his pre-*Rehaif* guilty plea was unknowing and involuntary, in violation of due process, because no one—not the court, counsel, or Mr. Thomas—had understood the elements of the offense. Supp. Ltr. Br., 2019 WL 6609353, at *6-7 (citing *Bousley*, 523 U.S. at 618). Mr. Thomas further contended that he did not knowingly and voluntarily waive his trial rights—including his right to trial, to testify and present evidence, and to confront the evidence against him—because he had not been informed of all the elements of the offense that the government would have to prove at trial. *Id.* at *7 (citing *Dominguez Benitez*, 542 U.S. at 84 n.10). Applying this Court's standard for constitutional errors in the guilty plea, *Dominguez Benitez*, 542 U.S. at 83-84 & n.10, Mr. Thomas contended that his unknowing and involuntary guilty plea "must be reversed." *Id.* at *6.

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[4] *See, e.g., United States v. Lavalais*, 960 F.3d 180, 184 (5th Cir. 2020) ("The circuits are already split over how *Rehaif* claims should be analyzed for plain error. The Fourth Circuit has held that *Rehaif* error is structural error, warranting reversal even in the absence of evidence of prejudice. *See United States v. Gary*, 954 F.3d 194, 203 (4th Cir. 2020). But we have held the opposite—that defendants must show that any error under *Rehaif* actually prejudiced the outcome. *See United States v. Hicks*, 958 F.3d 399 (5th Cir. 2020)."), *pet. for cert. filed*, No. 20-5489; *United States v. Coleman*, 961 F.3d 1024, 1029-30 & n.3 (8th Cir. 2020) ("The circuit courts that have considered the issue are split, with the Fifth, Sixth, and Tenth Circuits holding that a constitutionally invalid plea is not structural error, while the Fourth Circuit holds otherwise") (citations omitted); *United States v. Trujillo*, 960 F.3d 1196, 1205 (10th Cir. 2020) (disagreeing with the Fourth Circuit's decision in *Gary*).

[5] *See, e.g.*, Pet. App. 7a-9a; *United States v. Stokeling*, 798 F. App'x 443, 446-47 (11th Cir. 2020) (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)), *pet. for cert. filed*, No. 20-5157; *United States v. Sanchez-Rosado*, 805 F. App'x 855, 858 (11th Cir. 2020) (same), *pet. for cert. filed*, No. 20-5453.

Rather than addressing these arguments, the Eleventh Circuit applied this Court's standard for non-constitutional errors, which requires a defendant to show a reasonable probability that, but for the plain error, he would not have entered his plea. Pet. App. 7a-9a (citing *Dominguez Benitez*, 542 U.S. at 83). The Eleventh Circuit's decision thus conflicts with the Fourth Circuit's decision in *Gary*. *See Gary*, 954 F.3d at 203 (citing *Dominguez Benitez*, 542 U.S. at 84 n.10; *Bousley*, 523 U.S. at 618; *Henderson v. Morgan*, 426 U.S. 637, 645 (1976)). Indeed, had Mr. Thomas's case been before the Fourth Circuit, his guilty plea would have been vacated. *See Gary*, 954 F.3d at 200-01.

The Eleventh Circuit's decision is incorrect. The Eleventh Circuit discounted Mr. Thomas's arguments that he has a viable defense in light of *Rehaif*. *See* Pet. App. 8a-9a.[6] The Eleventh Circuit instead affirmed by reviewing the record in Mr. Thomas's case as if *Rehaif* had been decided before Mr. Thomas's guilty plea and sentencing. *See* Pet. App. 8a-9a & n.5. But that approach ignores that binding Eleventh Circuit precedent at the time of Mr. Thomas's guilty plea and sentencing had misinformed Mr. Thomas of the elements the government would be required to prove at trial. *See Jackson*, 120 F.3d at 1229, *abrogated by Rehaif*, 139 S. Ct. at 2194.

The Fourth Circuit, by contrast, has correctly recognized that the effect of the error—a "constitutional violation where [the defendant] was misinformed about the nature of the charges against him—is "unquantifiable." *Gary*, 954 F.3d at 206. Indeed, the effect of the error may

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[6] Mr. Thomas has only one prior felony conviction, an attempted carjacking offense committed when he was 17 years old. He was sentenced to 364 days and probation for this offense. He was later sentenced to 13 months; but that was for violating his probation, and he was released less than two months later. He therefore never served a more-than-one-year period of incarceration. As Mr. Thomas thus contended, his young age, limited education (he did not complete the 9th grade), and sentence supported that he lacked the guilty state of mind required by *Rehaif*. Supp. Ltr. Br., 2019 WL 6609353, at *9-10; Supp. Reply Ltr. Br. of Appellant Thomas, *United States v. Thomas*, No. 18-10956, 2020 WL 132669, at *4-5 (11th Cir. Jan. 9, 2020).

well not be recorded on the pre-*Rehaif* record. As the Fourth Circuit explained, "It is impossible to know how [defendant]'s counsel, but for the error, would have advised him, what evidence may have been presented in his defense, and ultimately what choice [defendant] would have made regarding whether to plead guilty or go to trial." *Id.*

The Fourth Circuit's decision in *Gary* is binding precedent in that circuit, as the Fourth Circuit denied the government's petition for rehearing en banc. *See United States v. Gary*, 963 F.3d 420 (4th Cir. 2020). Mr. Thomas accordingly requests this Court's review of this important issue that intractably divides the circuits. Alternatively, Mr. Thomas asks that his petition be held pending resolution of the other petitions raising this issue.[7]

II. This Court's review is needed to resolve whether 18 U.S.C § 922(q), as amended, suffers from the same constitutional infirmities that this Court found in *Lopez*

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), concluding that it exceeded Congress's power under the Commerce Clause. Congress amended § 922(q) after *Lopez* by adding a purported jurisdictional hook, making it unlawful to possess, in a school zone, "a firearm that has moved in or that otherwise affects interstate or foreign commerce." 18 U.S.C. § 922(q)(2)(A). Congress also added a number of findings. 18 U.S.C. § 922(q)(1). As shown below, these amendments to § 922(q) have failed to cure the constitutional infirmities that led this Court to strike down the earlier version of the statute in *Lopez*. Mr. Thomas's case, in particular, demonstrates this point.

Mr. Thomas's offense was local. He possessed a firearm within 1,000 feet of Plant City High School following a fight that broke out at a basketball game. Local law enforcement

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[7] *See, e.g., Stokeling v. United States*, No. 20-5157; *Sanchez-Rosado v. United States*, No. 20-5453; *Ross v. United States*, No. 20-5404.

responded to the offense. Pet. App. 2a-3a. He was initially charged in state court, but those charges were dropped once the federal government stepped in. *See* Doc. 57 (PSR) ¶¶ 1, 52. To prosecute Mr. Thomas, the federal government relied on the firearm's manufacture in Arizona and inference that it would have traveled across state lines at some point in time before Mr. Thomas's possession in Florida. Pet. App. 4a; *see* Doc. 36 at 3, 17-18; Doc. 80 at 25. The connection between the firearm and interstate commerce therefore occurred, and ended, before the criminal activity prosecuted in this case. Indeed, the federal government did not rely upon any effect of Mr. Thomas's offense conduct—his possession—on interstate commerce.

In *Lopez*, this Court considered four factors in deciding that the earlier version of § 922(q) exceeded Congress's Commerce Clause authority. 514 U.S. at 559-68. Considering these same factors demonstrates that § 922(q), as amended, is also unconstitutional.

1. Just as in *Lopez*, § 922(q) regulates noneconomic activity—i.e., possession. *Lopez*, 514 U.S. at 561, 567. As the Court found in *Lopez*, "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id*. at 567. This Court later explained that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*. *United States v. Morrison*, 529 U.S. 598, 610 (2000).

2. This Court in *Lopez* addressed that § 922(q) lacked a jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561. As the Court further described, § 922(q) lacked an "express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id*. at 562.

Congress later added a purported jurisdictional element to § 922(q), but this element fails to cure the deficiency identified in *Lopez*. The jurisdictional element in § 922(q)(2)(A), as amended, merely requires that there be a connection between the firearm and interstate commerce at some point in the past. 18 U.S.C. § 922(q)(2)(A) (proscribing possession in a school zone of "a firearm that has moved in or that otherwise affects interstate or foreign commerce"). The government presented this very interpretation of the jurisdictional element in the district court here, expressing that the element required that the "firearm had traveled in or affected interstate commerce at some point during its existence." Pet. App. 4a; *see* Doc. 36 at 3, 17-18; Doc. 80 at 25. The jurisdictional element therefore does not ensure that the criminal activity—the "firearm possession in question"—affects interstate commerce, as this Court explained was required in *Lopez*. 514 U.S. at 561 (emphasis added); *see id.* at 562.

3. In *Lopez*, this Court observed that Congress had not made findings as to the effects gun possession in a school zone has on interstate commerce. *Id.* at 562-63. Congress had thus provided no "legislative judgment that the activity in question substantially affected interstate commerce," and the Court observed that "no such substantial effect was visible to the naked eye." *Id.* at 563.

Congress has now added findings in § 922(q)(1) in an attempt to link gun possession in a school zone with an effect on interstate commerce. Congress, however, relied upon the same faulty reasoning that the government presented, and the Court expressly rejected, in *Lopez*. *Compare* 18 U.S.C. § 922(q)(1), *with Lopez*, 514 U.S. at 563-64. The existence of congressional findings, therefore, does not make the statute constitutional. In *Morrison*, for example, the Court considered Congress's findings as to the Violence Against Women Act and rejected those findings "as unworkable if we are to maintain the Constitution's enumeration of powers." 529 U.S. at 615.

4. Finally, in *Lopez*, the Court found that the link between the possession of a firearm in a school zone and interstate commerce was attenuated. 514 U.S. at 563-68; *see Morrison*, 529 U.S. at 612-13. In reaching this conclusion, the Court rejected the government's attempt to connect gun possession in a school zone and interstate commerce. The Court summarized the government's contention:

> The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

Lopez, 514 U.S. at 563-64 (citations omitted).

The Court, however, rejected this argument as providing no limit on the activities that Congress could regulate. The Court stated:

> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564 (citation omitted).

Just as in *Lopez*, the link between gun possession in a school zone and interstate commerce is attenuated. 514 U.S. at 563-68. Section 922(q), as amended, is therefore unconstitutional. *Id.* at 561-68; *Morrison*, 529 U.S. at 610-19.

Mr. Thomas's case is a good vehicle to resolve whether § 922(q) is unconstitutional. As discussed above, his offense was local, handled by local law enforcement, and initially prosecuted by the state until the federal government stepped in to take the case. This Court has recognized that general police power has traditionally been reserved to the states. *Lopez*, 514 U.S. at 566 ("The Constitution. . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."); *id.* at 564 (referring to "criminal law enforcement" as an area "where States historically have been sovereign"); *id.* at 561 n.3 ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law.") (citations and internal quotation marks omitted). Addressing violent crime in particular, the Court has explained, "we can think of 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 vindication of its victims." *Morrison*, 529 U.S. at 618. If a defendant such as Mr. Thomas may be federally prosecuted based on the firearm's past travel in interstate commerce, a connection to interstate commerce that has no connection to the offense, then there is no effective limit on Congress's police power under the Commerce Clause.

The limits of Congress's authority under the Commerce Clause presents an important and recurring issue. *See, e.g.*, *Gamble*, 139 S. Ct. at 1980 n.1 (Thomas, J., concurring) ("it seems possible that much of Title 18, among other parts of the U.S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty"). Section 922(q)(2)(A) is

particularly worthy of this Court's review given this Court's prior decision in *Lopez* and the question whether Congress's subsequent addition of a purported jurisdictional element cures the unconstitutionality of the statute. Indeed, while some lower courts have upheld § 922(q), as amended, against Commerce Clause challenges, Mr. Thomas respectfully submits that these decisions do not accord with *Lopez*.[8] Mr. Thomas's violation of § 922(q)(2)(A) was punished by a consecutive prison term of five years in prison. *See* 18 U.S.C. § 924(a)(4); Doc. 70 at 2. Review is therefore warranted.

III. This Court's review is needed to resolve whether 18 U.S.C § 922(g) is unconstitutional

Mr. Thomas's case also presents the opportunity to resolve whether § 922(g) is unconstitutional.[9] The same four considerations in *Lopez* demonstrate that § 922(g), like § 922(q), does not pass constitutional muster.

Section 922(g) prohibits possession—a non-economic activity. *Lopez*, 514 U.S. at 561, 567; *Morrison*, 529 U.S. at 610. The jurisdictional element set forth in § 922(g) does not ensure on a case-by-case basis that the activity being regulated—possession—affects interstate commerce. *Lopez*, 514 U.S. at 559, 561-62; *Morrison*, 529 U.S. at 611-12. Just as with its prosecution under § 922(q), the government relied here on the manufacture of the firearm and ammunition outside of Florida, and the inference that these items had crossed state lines before Mr. Thomas's possession in Plant City, Florida. Pet. App. 3a; Doc. 36 at 17-18; Doc. 80 at 24. The connection between the firearm and ammunition and interstate commerce therefore had ended

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[8] *See* Pet. App. 5a-7a; *United States v. Danks*, 221 F.3d 1037, 1038-39 (8th Cir. 1999); *United States v. Dorsey*, 418 F.3d 1038, 1045-46 (9th Cir. 2005); *see also United States v. Hill*, 927 F.3d 188, 206-07 (4th Cir. 2019) (discussing courts of appeals' decisions upholding firearms convictions against Commerce Clause challenges, in upholding the Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249(a)(2)), *pet. for cert. filed*, No. 19-7778.

[9] This issue is currently pending in *Owens v. United States*, No. 20-5646.

before Mr. Thomas's criminal activity (possession). Finally, the link between possession by a convicted felon and interstate commerce is attenuated. *See Lopez*, 514 U.S. at 563-68; *Morrison*, 529 U.S. at 612-13.

The *Lopez* framework is thus the obvious place to start when analyzing the constitutionality of federal gun possession statutes. But instead, many circuits (including the Eleventh Circuit) have affirmed § 922(g) under *Scarborough v. United States*, 431 U.S. 563 (1977), a much older precedent that construed § 922(g)'s predecessor.[10] Contrary to what lower courts often hold, *Scarborough* did not survive *Lopez*, and § 922(g) does not pass muster under *Lopez*. The *Scarborough* Court decided, as a matter of statutory interpretation, that Congress did not intend "to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce"—a standard well below *Lopez*'s substantial affects test. *Compare Scarborough*, 431 U.S. at 575 (emphasis added); *id*. at 564, 577; *with Lopez*, 514 U.S. at 559. Given its incompatibility with *Lopez*, *Scarborough* is no longer good law.

This petition presents an issue only this Court can resolve—how to reconcile the statutory interpretation decision in *Scarborough* with the constitutional decision in *Lopez*. *See Alderman v. United States*, 562 U.S. 1163, 1168 (2011) (Thomas, Scalia, JJ., dissenting from the denial of certiorari) ("If the *Lopez* [constitutional] framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent [*Scarborough*] that does not squarely address the constitutional issue."). Because the courts of appeals cannot overrule this

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[10] *See, e.g.*, *United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992-93 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d 1456, 1461-62 & n.2 (9th Cir.1995); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

Court's precedent, the *Lopez* test will disappear for intrastate possession crimes without this Court's intervention. *See Gamble*, 139 S. Ct. at 1980 n.1 (Thomas, J., concurring).

Thousands of defendants are convicted under § 922(g) every year.[11] This Court has resolved questions concerning the elements of the § 922(g) offense and many questions arising under the Armed Career Criminal Act. The Court has not resolved whether the statute underlying these convictions is constitutional. Mr. Thomas's federal conviction under § 922(g) rests on an interstate commerce connection that occurred before his purely local crime. Mr. Thomas's case thus squarely presents the fundamental question whether Congress may reach this frequently prosecuted activity—the intrastate possession of a firearm—based on the historical connection between the firearm and interstate commerce. Because the federal government's authority to prosecute such cases raises an important and recurring question, Mr. Thomas respectfully seeks this Court's review.

[11] The Sentencing Commission reports that there were 7,647 cases involving § 922(g) convictions in fiscal year 2019, a significant increase from 4,984 such cases in fiscal year 2015. *See* U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm* (May 2020), https://www.ussc.gov/research/quick-facts/section-922g-firearms.

CONCLUSION

Based on the foregoing, the petition should be granted.

Respectfully submitted,

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