No. 20-

IN THE

Supreme Court of the United States

ALVIN CHRISTOPHER PENN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *United States* v. *Lopez*, 514 U.S. 549 (1995), compels overruling *Scarborough* v. *United States*, 431 U.S. 563 (1977), which requires only a minimal nexus to interstate commerce to sustain Congress's exercise of its Commerce Clause power.

2. Whether, under this Court's decision in *United States* v. *Bailey*, 444 U.S. 394 (1980), a felon who flees from law enforcement before discarding a firearm is precluded as a matter of law from presenting an affirmative defense of justification for his unlawful possession of the gun.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner herein, who was the defendant-appellant below, is Alvin Christopher Penn. The respondent herein, which was the appellee below, is the United States. Neither party is a corporation.

RULE 14.3(b)(iii) STATEMENT

This case arises from the following proceedings in the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Northern District of Texas:

United States v. *Penn*, No. 19-10168 (5th Cir. Aug. 5, 2020)

United States v. *Penn*, No. 3:17-CR-00506-L(1) (N.D. Tex. Feb. 7, 2019)

There are no other proceedings in state or federal trial or appellate courts, or in this Court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alvin Christopher Penn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 969 F.3d 450 (5th Cir. 2020) and reprinted in the Petition Appendix ("Pet. App.") at 1a–14a. The judgment of the United States District Court for the Northern District of Texas is unpublished and is reproduced at Pet. App. 15a–21a.

JURISDICTION

The Fifth Circuit entered judgment on August 5, 2020. On March 19, 2020, this Court extended the deadline to file petitions for writs of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides: "Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

Article III, § 2 provides, in pertinent part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI.

18 U.S.C. § 922(g)(1) provides: "(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 OF THE CASE

In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court established the test for the scope of Congress's power to regulate activities that "affect" interstate commerce: "We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559. *Lopez* seemed to, but did not expressly, overrule the more permissive test for federal regulation of gun possession articulated in *Scarborough* v. *United States*, 431 U.S. 563 (1977), which required only the "minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575.

Members of this Court and judges on lower courts have acknowledged the irreconcilability of *Lopez* and *Scarborough*. See *Alderman* v. *United States*, 131 S. Ct. 700, 702 (2011) (Thomas, J., dissenting from denial of certiorari) ("*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez*."); *accord United States* v. *Hill*, 927 F.3d 188, 215 n.10 (4th Cir. 2019) (Agee, J., dissenting) ("While some tension exists between *Scarborough* and the Supreme Court's

decision in *Lopez*, the Supreme Court has not granted certiorari on a case that would provide further guidance"); *United States* v. *Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting) ("[T]he precise holding in *Scarborough* is in fundamental and irreconcilable conflict with the rationale of" *Lopez*.); *Hill*, 927 F.3d at 215 n.10 (Agee, J., dissenting). As Justice Thomas put it: "It is difficult to imagine a better case for certiorari . . . the lower courts' reading of *Scarborough*, by trumping the *Lopez* framework, could very well remove any limit on the commerce power." *Alderman*, 131 S. Ct. at 702–03. Yet lower courts, bound by both decisions, have followed *Scarborough*'s specific guidance. Only this Court can resolve the conflict between these decisions.

The second question reflects an intractable and fractured division in the circuit courts on the availability of the justification defense to those charged with being a felon-in-possession. All circuit courts permit justification as a defense to a § 922(g) prosecution, but the threshold for presenting the defense varies to such a degree that the availability of the defense (and its attendant benefits at trial and during plea negotiations) depends on the accident of geography.

For example, two circuits allow a defendant to present a justification defense so long as he has made a minimal showing on each common law element of the defense. Two other circuits require that where a defendant has the opportunity to turn a firearm over to police, he affirmatively show that he has done so. Pet. App. 7a–8a; *United States* v. *Al-Rekabi*, 454 F.3d 1113, 1117 (10th Cir. 2006). And four circuits require that a defendant show that he did not maintain the possession any longer than absolutely necessary.

There are thousands of prosecutions under § 922(g) each year. For many defendants, the only defense available might be lack of federal nexus between the possession and commerce. For others, the circumstances that led them to take temporary possession of the gun might give rise to a defense. This petition provides the Court an opportunity to resolve these two important and frequently recurring issues.

A. Factual Background

Petitioner Alvin Christopher Penn was serving the last few months of a federal sentence at a halfway house. On July 6, 2017, when he was supposed to be at work, he decided to have lunch with his girlfriend at his grandmother's apartment. Appellant's Initial Brief at 2, *United States* v. *Penn*, 969 F.3d 450 (5th Cir. Oct. 11, 2019) ("Appellant's Br."). When they arrived at the apartment complex's parking lot, they encountered Devante Scott and another man, Kareem Robinson, yelling threats at members of Mr. Penn's family. *Id.* at 2–3. Mr. Penn's aunt ran over to Mr. Penn to warn him that Scott had a gun. *Id.* at 3. She handed him her own gun.

Mr. Penn knew he wasn't supposed to have a gun. He had just gotten out of prison for a previous § 922(g) conviction. But he also knew that Scott wouldn't hesitate to kill him. Scott had a history of violently terrorizing Mr. Penn and his family. *Id.* at 5. They believed that Scott had murdered one man, then masterminded the murder of Mr. Penn's cousin, who had witnessed the first murder. Scott then showed up to the cousin's wake, uninvited and unwelcome, and drew his gun on Mr. Penn's grieving relatives. And just a few months before the parking-lot encounter, Scott again pointed a gun on another of Mr. Penn's cousins, threatening to kill her and Mr. Penn. *Id.* at 6–7. So when Mr. Penn interrupted the

argument on the day in question here, and when his aunt warned him that Scott was armed, Mr. Penn knew that his life was in imminent danger.

In the midst of the shouting match, Scott placed the gun on the roof of the car. *Id.* at 9. However, Scott's associate, Robinson, picked the gun up during the argument, crouched down, aimed at Mr. Penn, and said, "I got him." *Id.* at 17.

A shootout ensued. *Id.* at 3. Mr. Penn fled in his girlfriend's car while Scott and Robinson chased him, continuing to fire from their own car. *Id.* As he fled, Mr. Penn noticed that a police officer was following him. But Mr. Penn was afraid to pull over. He testified that the last time police found him with a gun, they beat him up. So instead of pulling over, he sped away from the officer. *Id.* at 25–26; Pet. App. 3a. In the course of escaping, Mr. Penn crashed his car, stumbled out of the vehicle with the gun, attempted to scale a fence, and then threw the gun over the fence and ran off. Appellant's Br. at 9–10. About five minutes had elapsed since he first saw the police officer. He remained at large for nearly a month before arrest. *Id.* at 10.

B. Proceedings Below

A federal grand jury charged Mr. Penn with escape from federal custody under 18 U.S.C. § 751(a), and possession "in or affecting commerce" of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1). Pet. App. 4a. Mr. Penn moved to dismiss the felon-in-possession charge, arguing that the prevailing interpretation of the nexus-with-commerce element was wrong and that the statute, as commonly construed, exceeded Congress's powers under the Commerce Clause. Appellant's Br. at 47–48. The district court denied his motion and instructed the jury—over Mr.

Penn's objection—that § 922(g)(1)'s nexus element was satisfied if the firearm "had traveled at some time from one state to another state of the United States, or between any part of the United States and any other country" even if that occurred long before Mr. Penn possessed the firearm. *Id.*

Mr. Penn also attempted to present an affirmative defense of justification to explain to the jury why he took possession of his aunt's firearm. Mr. Penn sought to introduce evidence of Scott's history of threats and violence toward Mr. Penn and his family as well as the immediate danger presented by Scott and Robinson in the parking lot. *Id.* at 16–18. But the district court refused to admit any of Mr. Penn's justification evidence, even after he took the witness stand.[1] The court also refused to instruct the jury on the elements of the defense. *Id.* at 12. In the court's view, a felon loses the right to present that defense at trial if, in fact, he possessed the gun any "longer than absolutely necessary." Pet. App. 7a. Rather than allow the jury to weigh the facts as to whether the duration of possession was reasonable, given the circumstances, the court did that weighing and declared that the defense was unavailable as a matter of law. Appellant's Br. at 12.

Even without the benefit of Mr. Penn's evidence about Scott's history, the jury sensed something was amiss. It sent a note to the court during deliberations asking for instructions on the law of justification. The court refused the request. *Id.* at 4–5. The jury subsequently found Mr. Penn guilty of both charges. The

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[1] Mr. Penn then filed an offer of proof detailing the testimony and evidence he would have offered about Scott. Pet. App. 34a–52a.

district court sentenced Mr. Penn to 168 months in prison. Pet. App. 4a.

The Fifth Circuit affirmed. It reiterated—consistent with all lower courts—that § 922(g)(1)'s nexus element is met so long as a firearm had "a past connection to interstate commerce." *Id.* at 13a (quoting *United States* v. *Fitzhugh*, 984 F.2d 143, 146 (5th Cir. 1993)). Adhering to *Scarborough*'s minimal nexus test, the Fifth Circuit held a felon possesses a firearm "in or affecting commerce," § 922(g), if the firearm passed across state lines at any point in the past. *Id.*

The Fifth Circuit also held that a trial court can preclude a justification defense if the court decides that an otherwise-justified felon held on to the gun any longer than "the time of danger." Pet. App. 6a. The Fifth Circuit agreed with the district court's finding that Mr. Penn held onto his aunt's gun for five minutes longer than the courts, in hindsight, deemed necessary. That meant he could not present a justification defense to the jury.

REASONS FOR GRANTING THE PETITION

I. *SCARBOROUGH*'S COMMERCE CLAUSE ANALYSIS IS NO LONGER VIABLE AFTER *LOPEZ*

A. Courts and judges acknowledge that the two decisions are irreconcilable.

"*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook." *Alderman*, 131 S. Ct. at 702 (Thomas, J., dissenting from denial of certiorari). This Court has not clearly addressed whether *Scarborough* survived *Lopez,* leaving the lower courts bound by two irreconcilable opinions. All the lower

courts follow *Scarborough*'s statutory interpretation of the nexus element, and all the lower courts have concluded—sometimes reluctantly—that the "minimal" nexus required by *Scarborough* must be sufficient to invoke Congress's commerce-regulating power. But they cannot avoid the tension between *Scarborough*'s holding and *Lopez*'s constitutional analysis.

Judges often echo Justice Thomas's concern. See, *e.g.*, *United States* v. *Patterson*, 853 F.3d 298, 301–02 (6th Cir. 2017) ("We can appreciate Patterson's concern that the federal government may prosecute him for driving within the borders of Akron with a firearm. And he is not alone in criticizing such a broad definition of federal criminal power."); *Hill*, 927 F.3d at 215 n.10 (Agee, J., dissenting) ("While some tension exists between *Scarborough* and the Supreme Court's decision in *Lopez*, the Supreme Court has not granted certiorari on a case that would provide further guidance"); *Kuban*, 94 F.3d at 978 (DeMoss, J., dissenting) ("[T]he 'minimal nexus' of *Scarborough* can no longer be deemed sufficient under the *Lopez* requirement of substantially affecting interstate commerce."); *United States* v. *Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (Jones, J. supporting reversal) ("We are not at liberty to question" *Scarborough*. "As this broad reading of the Commerce Clause has Supreme Court inprimatur [sic], albeit pre-*Lopez*, we can only note the tension between the two decisions and will continue to enforce § 922(g)(1).").

Lopez makes clear that Congress' power to regulate under the Commerce Clause extends only to activities that involve the channels of interstate commerce, instrumentalities of interstate commerce, and activities having a "substantial relation to interstate commerce." *Lopez*, 514 U.S. at 555–56. "[O]ne 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 before the charged possessor was even born, fortuitously traveled in interstate commerce." *United States* v. *Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (Garwood, J., concurring). Yet without clear direction from this Court, the lower courts have all decided to follow *Scarborough*, concluding that its "minimal nexus" interpretation of "in or affecting commerce" must somehow satisfy the *Lopez* framework.[2]

Established practices—no matter how widespread—do not remake the law. See *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020) ("[*S*]*tare decisis* has never been treated as an inexorable command. And the doctrine is at its weakest when we interpret the Constitution because a mistaken judicial interpretation of that supreme law is often practically impossible to correct through other means.") (quotations omitted). The lower courts' views are now fully solidified: they will not revisit *Scarborough* absent a decision from this Court.[3]

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[2] *See 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) (per curiam); *United States* v. *Gateward*, 84 F.3d 670, 671–72 (3d Cir. 1996); *United States* v. *Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001); *Rawls*, 85 F.3d at 242; *United States* v. *Chesney*, 86 F.3d 564, 570 (6th Cir. 1996); *United States* v. *Lemons*, 302 F.3d 769, 772–73 (7th Cir. 2002); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam); *United States* v. *Hanna*, 55 F.3d 1456, 1461–62, 1462 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).

[3] *See*, *e.g.*, *Hill*, 927 F.3d at 215 n.10 (Agee, J., dissenting) ("While some tension exists between *Scarborough* and the Supreme Court's decision in *Lopez*, the Supreme Court has not

B. The decision below is wrong.

Section 922(g) prohibits firearm possession "in or affecting commerce." Following *Scarborough*, the lower courts have all interpreted this language to require only that the firearm (or one of its components) traveled, at any point in the past, across a state boundary line. This interpretation of the "jurisdictional element" is presumed to satisfy *Lopez* because it "ensure[s], through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Lopez*, 514 U.S. at 561.

But that reading is plainly insufficient to satisfy *Lopez*. Giving the federal government power to regulate even temporary possession or use of a durable good solely because it once moved across state lines is tantamount to a plenary police power. It does not "ensure" that any act of possession "affects interstate commerce." *Id.* And it isn't a good reading of the statutory text.

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granted certiorari on a case that would provide further guidance"); *Patterson*, 853 F.3d at 301 (recognizing that the defendant "is not alone in criticizing such a broad definition of federal criminal power" in a challenge to § 922(g) under *Lopez*); *United States* v. *Sarraj*, 665 F.3d 916, 922 n.3 (7th Cir. 2012) (acknowledging that "the minimal nexus requirement of Scarborough might seem to stand in some tension with the substantial-impact framework of *Lopez*"); *United States* v. *Safeeullah*, 453 F. App'x 944, 948 n.2 (11th Cir. 2012) ("If the minimal nexus test is wrong, it is for the Supreme Court to say so."); *Kirk*, 105 F.3d at 1015 n.25 (Jones, J. supporting reversal) (noting the tension between *Lopez* and *Scarborough*, but continuing to enforce § 922(g) in the absence of Supreme Court intervention). *See also* Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. Marshall L. Rev. 385, 413–21 (2006) (describing judicial protests to the application of *Scarborough*).

1. *Scarborough*'s broad reading of the commerce power is fundamentally at odds with federalist principles.

Scarborough's interpretation of the Commerce Clause creates a plenary federal police power over noneconomic conduct, which is precisely the opposite of our constitutional system. "The Constitution envisions a federalist structure, with the National Government exercising limited federal power and other, local governments—usually state governments—exercising more expansive power." *Fin. Oversight & Mgmt. Bd. for Puerto Rico* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020). "The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566; *accord Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 548–58 (2012); *United States* v. *Morrison*, 529 U.S. 598, 617–19 (2000); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The enumeration presupposes something not enumerated; and that something . . . must be the exclusively internal commerce of a State.").

"The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 at 617–18. The epitome of the plenary police power is a state's interest in "the suppression of violent crime and vindication of its victims." *Id.* at 618. While the Constitution does give the federal government the power to regulate interstate and foreign commerce, Art. I § 8, Congress cannot regulate purely local activity unless it has a "substantial effect on interstate commerce," *Gonzales* v. *Raich*, 545 U.S. 1, 2 (2005). Yet *Scarborough* permits the regulation of temporary, non-economic, and entirely local activity.

It is difficult to conjure a set of facts more local and noncommercial than Mr. Penn's. He was handed a

gun in Texas to respond to an immediate threat in Texas, he briefly possessed the gun, and then he disposed of that gun when he was not in danger anymore. His aunt, who handed him the gun, was gifted the gun in Texas and did not participate in any market to obtain it. All the government has shown is that the gun was manufactured in one state and held—briefly—by Mr. Penn in another. Appellant's Br. at 51–52.

Section 922(g) also stifles states' role as "laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). And it nullifies state laws that approach the issue differently. See, *e.g.*, Vt. Stat. Ann. tit. 13, § 4017 (banning firearm possession only for violent felons); Mich. Comp. Laws § 750.224f (restoring gun ownership rights for felons after either three or five years).

2. Section 922(g)'s possession element should require participation in, or a substantial effect on interstate commerce.

Lopez struck down § 922(q) in part because it lacked a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561. It should be obvious, then, that the facts sufficient to satisfy a "jurisdictional element" must also be sufficient to invoke Congress's jurisdiction.

But the prevailing interpretation of the "in or affecting commerce" element does not require a constitutionally significant connection with commerce. Mr. Penn was not "in" commerce when he possessed the gun. He did not engage in any economic or quasi-economic activity, nor did his brief possession of a

firearm affect commerce in any way. This Court has generally found a substantial effect on commerce only in activities involving a cognizable market. See, *e.g.*, *Taylor* v. *United States*, 136 S. Ct. 2074, 2080 (2016) (cannabis market); *Raich*, 545 U.S. at 18–19 (cannabis market); *Katzenbach* v. *McClung*, 379 U.S. 294, 302–03 (1964) (food and restaurant markets). See also *Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate *noneconomic*, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.") (emphasis added). Even under an aggregation theory—which extends Congress's reach to purely local activity that, when aggregated with other actors engaging in the same activity, *might* affect a market—Mr. Penn's actions do not implicate commerce in the required way. See *Raich*, 545 U.S. at 19 ("that the California [medical marijuana] exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just 'plausible' . . . it is readily apparent"). But Mr. Penn's brief possession of a firearm to defend himself, with no tie to the marketplace, is insufficient to fit within the framework of this Court's Commerce Clause jurisprudence.

Even during the highest ebb of Congress's Commerce Clause power, this Court expressed doubt about whether Congress could prohibit *every* act of firearm possession by a prohibited person—a reach that § 922(g) has, as a practical matter, today. See *United States* v. *Bass*, 404 U.S. 336, 348–49 (1971) (holding that in the legislative history of § 922(g)'s predecessor "Congress ha[d] not plainly and unmistakably made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce.") (internal quota-

tions and citations omitted). Six years later, *Scarborough*'s minimal nexus requirement adopted the same dubious assertion of Congressional power that was rejected in *Bass*. *Scarborough*, 431 U.S. at 575, 577. While *Lopez* might not have explicitly overruled *Scarborough*, its holding requires a much narrower construction of the nexus for § 922(g)'s possession element.

If the purpose of the "jurisdictional element" is to "ensure" that the prohibited activity falls within Congress's commerce power, then the element should be interpreted to require either participation in commerce or a substantial effect on commerce.

3. The plain meaning of the nexus element of § 922(g)'s possession crime does not support the prevailing interpretation.

Under section 922(g), it is "unlawful" for a prohibited person:

> "to ship . . . in interstate or foreign commerce . . . any firearm or ammunition;
>
> to "transport in interstate or foreign commerce . . . any firearm or ammunition;
>
> to "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."

The first two actions plainly fall within Congress's power. Shipping or transporting a firearm "in interstate commerce" is a "use of the channels of interstate commerce." *Lopez*, 514 U.S. at 558. Properly under-

stood, "receiv[ing]" a firearm also requires participation in a commercial market.[4]

This case involves the third action, possession. Unlike the others, possession is not inherently commercial. It thus makes sense that the Commerce Clause would require a more robust nexus element for the possession crime. Section 922(g) only applies to possessions "in commerce or affecting commerce." *Id.* at 562. The nexus element for possession plainly reaches prohibited persons who possess guns while they are "in . . . commerce," which invokes Congress's power "to regulate . . . persons or things in interstate commerce." *Id.* at 558. That leaves only the prohibition against possessing guns "affecting commerce." § 922(g). *Lopez* speaks directly to that power: Congress may only regulate "those activities that substantially affect interstate commerce." *Id.* at 559.

Scarborough interpreted identical statutory language to eliminate both of those requirements. To the *Scarborough* Court, the statute reached any firearm that "ha[s] been, at some time, in interstate commerce." 431 U.S. at 575. Congress used different nexus elements for possession and receipt; it only makes sense to conclude that the possession language is narrower. It cannot be stretched to include any item that ever crossed a state line.

Scarborough bars courts from inquiring into whether and how any particular possession substantially affects commerce. If the item ever moved in

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[4] The Government did not charge Mr. Penn with "receiv[ing]" a firearm, so the proper interpretation of that statutory phrase is not at issue in this case. But for the reasons expressed elsewhere in this petition related to this Court's Commerce Clause holdings, the phrase should be limited to *commercial* receipt of a firearm.

commerce, then the federal government can regulate its possession in perpetuity. But Congress knows how to create that kind of nexus element. In § 922(k), for example, Congress criminalized possession or receipt of a firearm with a removed serial number that "has, *at any time*, been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(k) (emphasis added).[5] This broad wording was available to Congress when drafting § 922(g), and it declined to extend the felon-in-possession statute to cover possession of a gun that had travelled across state lines at some indeterminate point in the past. That purposeful decision, combined with *Lopez*, compels the conclusion that Congress did not intend to reach every possession of every gun by a prohibited person. See *Dean* v. *United States*, 556 U.S. 568, 573 (2009) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

C. This case presents an ideal vehicle to overrule *Scarborough*.

Mr. Penn fully preserved his constitutional and statutory challenges to the prevailing interpretation of § 922(g). He moved to dismiss the indictment, arguing that the interpretation of the nexus element was too broad, and if not, that the statute "would amount to a federal police power," in violation of the constitution. Pet. App. 64a (citing *Morrison*, 529 U.S. at 618–619). He also objected to the jury instruction on the nexus element on the same grounds. *Id.* at

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[5] Whether § 922(k) comports with the Commerce Clause is a separate issue not raised by this petition.

30a–31a. At trial, the government proved that the weapon was manufactured outside Texas, but not when it was manufactured, to which state it traveled for distribution, where it was sold at retail, or even how it came to be in Texas. Appellant's Br. at 48. That is, the government never proved how, when, or if it moved in commerce, nor any connection between the previous commerce and Mr. Penn's brief possession.

This was not a case involving purchase, sale, or theft of a firearm. Mr. Penn's brief act of possession did not put him in or take him out of the market for guns. He possessed the gun very briefly, in Grand Prairie, Texas, performing entirely noncommercial acts of self-defense and flight.

Moreover, Mr. Penn's § 922(g)(1) conviction drastically increased his sentence by at least nine years. The jury found him guilty on two charges, escape from federal custody and being a felon in possession of a firearm, Pet. App. 4a. His total sentence was 168 months; without the firearm sentence, it would have been—at most—60 months. *Id.*; 18 U.S.C. § 751(a).

D. Federal overreach under § 922(g) is an important and recurring issue.

Because every gun has at least some part that, at some point, crossed a state line, *Scarborough* federalizes thousands of firearm possessions and commandeers the local police power. Courts of Appeal are so entrenched in the *Scarborough* framework that the Commerce Clause has disappeared from their analysis; today, they offhandedly permit § 922(g)(1)'s vast scope without question. See, *e.g.*, *United States* v. *Massey*, 849 F.3d 262, 263–64 (5th Cir. 2017); *United States* v. *Swinton*, 797 F. App'x 589, 601 (2d Cir.

2019); *United States* v. *Finley*, 805 F. App'x 823, 829 (11th Cir. 2020).

To be sure, many of the thousands of federal convictions likely satisfy the heightened standard that Mr. Penn advocates.[6] But some will not. Under *Scarborough*, courts short-circuit the jurisdictional analysis. They look only at the state of manufacture of any part of the firearm or ammunition and, if different from the state of seizure, sustain the exercise of federal police power. See, *e.g.*, *United States* v. *Clay*, 355 F.3d 1281, 1287 (11th Cir. 2004) (sustaining jurisdiction when a gun with "Connecticut" printed on it as its state of manufacture was seized in Georgia); *United States* v. *Shambry*, 392 F.3d 631, 634–35 (3d Cir. 2004) (holding the jurisdictional element of § 922(g)(1) satisfied when the only evidence presented was that the gun was manufactured in a different state than where it was possessed); *United States* v. *Hill*, 835 F.3d 796, 800 (8th Cir. 2016) (finding the government satisfied the interstate commerce element of § 922(g)(1) by showing defendant possessed ammunition in a different state than the one where the propellant powder found inside had been manufactured). But such a test is tautological and amounts to no test at all. Accordingly, those circuit courts that consider the nexus test to satisfy the jurisdictional element of § 922(g)(1) have rendered that statutory language superfluous. Nor can *Scarborough* be limited to guns alone. In today's interconnected economy, almost all durable goods—like guns or ammunition—and all nondurable goods—like garments, or even

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[6] In Fiscal Year 2019 alone, for example, over 7,600 defendants were convicted under § 922(g). U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm* (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf.

"broccoli," *cf. Seblius*, 567 U.S. at 557-58—have, at one time or another, passed across state lines. Under *Scarborough*'s conception of the commerce power, the national government gets to say who may "possess" these goods and how they may be used.

This Court should overrule *Scarborough* and restrict the possession element of § 922(g)(1) to what it says: possession "in or affecting commerce."

II. THE CIRCUITS ARE INTRACTABLY SPLIT OVER WHEN TO ALLOW A DEFENDANT TO PRESENT A JUSTIFICATION DEFENSE FOR ILLEGALLY POSSESSING A FIREARM

A. The circuits are divided.

The Fifth Circuit's decision in this case conflicts with decisions in the Fourth and Ninth Circuits, which have held that a defendant can present a justification defense to a charge of being a felon in possession of a firearm so long as he has evidence that would satisfy the traditional elements of that defense[7] and proffers evidence that he discarded the firearm when he believed the danger was over.[8]

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[7] All circuits agree on the four factors that form the basis of the common law defense:

i. That he was in imminent danger of death or serious bodily injury,

ii. That he did not recklessly or negligently place himself in this position,

iii. That he had no reasonable alternative to violating the law by taking possession of the weapon and

iv. That there was a direct relationship between his taking of the weapon and avoidance of the harm.

B. Two circuits allow the defense so long as the defendant has satisfied the common law elements of the defense.

In the Fourth and the Ninth Circuits, a defendant need only proffer evidence that he discarded the gun when he believed it was safe to do so. In these two circuits, the jury gets to decide whether the duration of possession was reasonable, given all the circumstances. *United States* v. *Ricks,* 573 F.3d 198, 204 (4th Cir. 2009); *United States* v. *Gomez*, 92 F.3d 770, 775 (9th Cir. 1996).

In *Gomez*, the defendant possessed the firearm for two days before discarding it, but the Ninth Circuit held that he should have been allowed to present his defense to the jury. The defendant was receiving death threats and the police would not protect him, so he acquired a firearm and kept it for over 48 hours. 92 F.3d at 773. The defendant finally disposed of the firearm *while he was fleeing* from federal agents who had arrived at his home. *Id.* "Gomez was arrested the next day." *Id.* at 773–74.

The district court refused to allow the defense, but the Ninth Circuit reversed: "[I]f the evidence, when

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United States v. *Perrin,* 45 F.3d 869, 873–74 (4th Cir. 1995); *United States* v. *Gomez,* 92 F.3d 770, 775 (9th Cir. 1996); *United States* v. *Butler*, 485 F.3d 569, 572 (10th Cir. 2007).

[8] In *United States* v. *Bailey*, 444 U.S. 394 (1980), this Court held that a defendant who wishes to raise a defense of necessity to a continuous federal crime must present evidence of a "bona fide effort to" stop committing the crime once they were free from the intolerable conditions. *Id.* at 412–413. "[F]uture good intentions" are not good enough; a defendant must actually stop committing the crime at the "earliest possible opportunity." *Id.* at 415.

viewed in the light most favorable to Gomez, was adequate to make out a justification defense, he was entitled to present it and have the jury instructed accordingly." *Id.* at 775 (citing *United States* v. *Lemon*, 824 F.2d 763, 764–65 (9th Cir. 1987)). The court rejected the government's argument that the justification defense was unavailable because the defendant did not discard the weapon as soon as possible. Instead, the court reasoned: "If Gomez's story is believed, there *was* no time before his arrest when we could have safely dumped the shotgun, as there was no clear cessation in the string of threats he received." *Id.* at 778. The Ninth Circuit acknowledged that some of the facts of Gomez's case were "in dispute," but his offer of proof was sufficient to "entitle[] [him] to tell the jury his side of the story. His evidence, if believed, sufficed to make out a justification defense." *Id.*

Similarly, in *Ricks,* the defendant was attacked by his partner, who had a gun. 573 F.3d at 199. Ricks disarmed his partner, removed the magazine, and then threw the gun and the magazine in opposite directions. *Id.* When his partner left, Ricks picked up the gun and placed it on a dresser in his bedroom. *Id.* at 200. The court rejected the government's argument that turning a gun over to police was the only way to reasonably dispossess oneself of a gun, and therefore Ricks was entitled to a justification defense. *Id.* at 203–04. Ultimately, the court held "the reasonableness of a defendant's course of conduct is a question for a jury." *Id.* at 204. See also *United States* v. *Paolello*, 951 F.2d 537, 538 (3d Cir. 1991) (holding that a defendant was entitled to a justification defense where he disposed of a gun after police shouted at him to stop fleeing).

C. In other circuits, the failure to surrender the firearm at the moment of first contact with police precludes the defense as a matter of law.

The Fifth Circuit held, as a matter of law, that Mr. Penn lost the right to present his explanation for possessing the gun because he fled from a police officer. Mr. Penn testified that he was afraid of the police, and the undisputed evidence showed that (like Gomez) he discarded the firearm shortly after officers gave chase. Even so, the Fifth Circuit affirmed the district court's refusal to allow the defense and any related evidence: the court found that when a defendant encounters a police officer, "'the officer's presence gives the defendant an immediate chance to give up possession' . . . and [he] can't assert a justification defense if he 'fails to take advantage of that chance.'" Pet. App. 7a–8a (quoting *United States* v. *Moore*, 733 F.3d 171, 174 (6th Cir. 2013)).

The Tenth Circuit reached a similar outcome in *Al-Rekabi*, where it held that the defendant could not present a justification defense where he took a pistol from his younger brother and subsequently stashed it away or gave it to a friend. 454 F.3d at 1119. The court explained that "some attempt to place a stolen pistol into the hands of the police is an irreducible minimum in evaluating" a justification defense. *Id.* at 1123. Accordingly, the Tenth Circuit held that the defendant had not disposed of it in the required fashion, even though the common law elements of the defense say nothing about turning the weapon over to police. *Id.* at 1127.

D. Four circuits allow the court to exclude the defense if the court finds the danger ended before the defendant discarded the gun.

In *United States* v. *White*, the Second Circuit affirmed that the justification defense was unavailable to a defendant who handled a weapon (removing bullets) after the imminent danger had passed. 552 F.3d 240, 247–48 (2d Cir. 2009). The defendant's girlfriend pointed a shotgun at him during a verbal argument. *Id.* at 244. The defendant knocked the gun out of her hand, and she fled from the house. *Id.* Because his girlfriend's young son was in the house and the defendant did not want the child to shoot himself, the defendant picked up the gun and moved it into a different room. *Id.* He was attempting to remove shells from the gun when police arrived less than ten minutes later. *Id.*

The Second Circuit held that he could not present a justification defense. Although the defendant was justified in possessing the gun through the time he knocked it out of his girlfriend's hand, the "imminent danger" ceased to exist at the exact moment she left. *Id.* at 247. In dicta, the court of appeals found that the defendant was likely not justified in possessing the gun long enough to move it to a different room to protect his girlfriend's son because the child had not "expressed an intention to handle the shotgun" and there was no indication that "having pleaded with his mother to put the gun down, he would after her departure attempt to pick it up and play with it." *Id.* at 249. The circuit court ultimately held that the defendant lost his right to present a justification defense to the jury when he began removing the shells from the gun. "We have no difficulty concluding that

White was not entitled to a jury instruction on this defense." *Id.* at 248.

Similarly, the Sixth Circuit in *United States* v. *Ridner* held that a defendant was not entitled to a justification defense where he only possessed ammunition, not a gun, in order to keep it from his suicidal brother. 512 F.3d 846, 848 (6th Cir. 2008). There, the brother's ex-wife asked the defendant to supervise his brother because he was suicidal. *Id.* at 849. The defendant and his brother returned to the ex-wife's house, where the brother gathered ammunition and expressed a desire to go to his pawnshop to get a gun to kill himself. *Id.* When his brother dropped the shotgun shells during the course of the conversation, the defendant picked them up and put them in his pocket. *Id.* Shortly after, police officers approached to execute a warrant. *Id.* The defendant attempted to escape but was captured nearly immediately, and police officers found the ammunition in his pocket. *Id.*

The Sixth Circuit reasoned that because the brother's "spirits had picked up" over the course of their conversation, the threat of suicide had subsided, and the defendant could have turned over the ammunition to the police. *Id.* at 851. Because it was the police, rather than the defendant, who "could have protected his brother from [the moment they arrived] forward," the court of appeals affirmed that the defendant was not entitled to a justification defense. *Id.*

The Third and Fifth Circuits align with the Second and Sixth, because they also allow *the court*, rather than *the jury*, to assess whether the defendant possessed the gun "any longer than necessary." The Third Circuit has affirmed the denial of a defense because the defendant did not "dispossess himself of the gun in an objectively reasonable manner once the

threat ha[d] abated," *Gov't of the V.I.* v. *Lewis,* 620 F.3d 359, 369 (3d Cir. 2010). And the Fifth Circuit here affirmed a decision to exclude the defense because—in the trial judge's estimation of the facts—Mr. Penn did not get rid of the gun soon enough after the threat subsided. Pet. App. 7a–8a.

E. The Fifth Circuit's decision is wrong.

Everyone agrees that a felon, even if initially justified, must stop committing the crime once the threat subsides. See *United States* v. *Bailey*, 444 U.S. 394, 413 n.9 (1980) (A defendant who wishes to raise a necessity defense to a continuous federal offense must present some evidence of a "bona fide effort to" stop committing the crime "as soon as the claimed duress or necessity has lost its coercive force."). But once he proffers evidence that he stopped committing the crime, it is up to the jury to decide whether he stopped soon enough.

By excluding Mr. Penn's evidence of justification, the trial judge usurped the jury's role as trier of fact, stripping Mr. Penn of his constitutional right to trial by jury. "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)). "[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *United States* v. *Gaudin*, 515 U.S. 506, 514 (1995).

In this case, the courts decided that—as a matter of law—the danger that justified Mr. Penn's decision to take possession of his aunt's gun had ended, even though his pursuers were still at large. Mr. Penn testified that he feared harm from the police if he sur-

rendered the gun to them. That belief—"if a jury finds it to be true"—would support the continuation of the defense, at least for the five minutes or so it took him to find an opportunity, safe from all of his pursuers, to discard the weapon. *Bailey,* 444 U.S. at 415. The lower courts unconstitutionally prevented the jury from passing on that question and Mr. Penn from presenting his defense. This violates the due process clause. *Id.* A judge can restrict a jury from hearing evidence of a defense only where "testimony . . . is insufficient to sustain it *even if believed.*" *Id.* at 416 (emphasis added).

Even if a judge does not believe the defendant, the defendant still has the right to present the defense to the jury. This right stems from the essential role of a jury in a criminal trial: "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses . . . and draws the ultimate conclusion as to the facts." *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944). It is "the very essence of [the jury's] function . . . to select from among conflicting inferences and conclusions that which it considers most reasonable." *Id.* Therefore, the Fifth's Circuit requirement that Mr. Penn prove to the trial court's satisfaction that he did not retain the firearm for longer than absolutely necessary violates Mr. Penn's due process right to present his justification defense.

F. The question presented is important and recurring.

Since *Bailey* decided that defendants could raise common law defenses, every circuit has analyzed this issue as it applies to the felon in possession of a firearm statute, either § 922(g) or its predecessor. But in the forty years since that decision, the circuits have come to different conclusions as to what burden a de-

fendant must meet before he is allowed to present evidence of that defense. As it stands, defendants in some circuits get to present their defense to the jury, who can then decide whether they were justified in their possession of a firearm. In other circuits, like the Fifth, judges make that decision because the circuits have layered additional elements on the common law elements.

The conflict means that the availability of this defense depends on the accident of geography. In the Ninth Circuit, for example, a defendant can present a justification defense even when he kept the gun for 48 hours and threw the gun away upon the arrival of police. And in the Fourth Circuit, a defendant can present the defense if he leaves the weapon on a dresser in a shared bedroom. But those defendants would be precluded from presenting such a defense in the Tenth Circuit because the weapon was not turned over to the police. Still other circuits, including the Second, Third, Fifth and Sixth, preclude the defense if the defendant does not relinquish the weapon the moment that the imminent danger has ceased. See, *e.g.*, *White,* 552 F.3d at 248; *Ridner*, 512 F.3d at 848.

The right to present a justification defense not only matters at trial, but it also factors into plea bargaining strategy. If a defendant can present a justification defense, the defendant has significantly greater bargaining power in negotiating a plea deal. If he cannot, the defendant is left with virtually no defense to the charge.

G. This case is a strong vehicle.

Mr. Penn had overwhelming evidence that Scott was ready, willing, and able to murder him. The jury didn't get to hear most of that evidence. Mr. Penn did everything he could to tell his side of the story to the

jury, including taking the stand in his own defense, but the court would not let him. In the district court's view, Mr. Penn waited too long to let go of the firearm as a matter of law.

Without the defense, the trial was an empty ritual. The only element of § 922(g) Mr. Penn disputed was the nexus element. Even without most of the justification evidence, the jury knew *something* was up, as evidenced by their request to the trial court for instructions on the law of justification. Appellant's Br. at 4–5. But the Court refused. *Id.*

Mr. Penn's case also cleanly addresses this issue. He inadvertently crossed paths with Scott, a man who he believed had killed and assaulted multiple members of his family and had threatened to kill Mr. Penn. His aunt handed him the gun when Scott and his accomplice were actively threatening Mr. Penn and his family with a firearm of their own. Mr. Penn tried to escape, but Scott and his associate gave chase, shooting at Mr. Penn's vehicle. Mr. Penn lost his pursuers and disposed of the gun less than five minutes later. He did not stop for the police, but he did stop possessing the gun once he believed he could safely do so.

Mr. Penn had a right to tell his side of the story to a jury, and the jury had the right to judge between the government and the accused. The decision below was wrong.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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