No._____

IN THE SUPREME COURT OF THE UNITED STATES

AARON CHRISTOPHER PLEASANT, PETITIONER

V.

UNITED STATES OF AMERICA

_____

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

_____

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QUESTION PRESENTED FOR REVIEW

Whether 18 U.S.C. § 922(g)(1), which criminalizes possession of a firearm by a convicted felon, exceeds Congress's power under the Commerce Clause.

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Aaron Pleasant asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 15, 2021.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the courts below.

OPINION BELOW

The unpublished opinion of the court of appeals is attached to this petition as an appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on September 15, 2021. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATUTORY PROVISION INVOLVED

Title 18 U.S.C. § 922(g)(1) provides:

"It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in and affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or trans-ported in interstate or foreign commerce."

STATEMENT

Petitioner Aaron Pleasant was convicted of a California drug possession felony in 2010. In 2019, he was stopped for a traffic violation in Odessa, Texas. The stop escalated as the officers questioned Pleasant and his passenger and eventually searched the truck. A gun was found in the truck.

Pleasant was charged by indictment with being a previously convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The indictment alleged that "the firearm was in and affecting commerce." Pleasant pleaded guilty to that charge. The factual basis for the plea stated that the firearm found in the truck "was manufactured in Austria and imported to Smyrna, Georgia."

After Pleasant entered his plea, a U.S. probation officer prepared a presentence report. The report recommended a total offense level of 12, which, with Pleasant's criminal history category of V, created an advisory guideline sentencing range of 27 to 33 months' imprisonment. The district court varied upwardly from the guidelines' recommendation and sentenced Pleasant to 60 months' imprisonment.[1]

Pleasant appealed. He argued that 18 U.S.C. § 922(g)(1) exceeds Congress's power under the Commerce Clause. Reasoning from the opinion in *United States v. Lopez*, 514 U.S. 549 (1995), he argued that firearm possession is local, noncommercial conduct and thus is not an activity that substantially affects interstate commerce. The Fifth Circuit granted the Government's motion for summary affirmance, citing

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

its precedent holding § 922(g)(1) to be a valid exercise of Congress's authority over commerce. *See* Appendix.

REASONS FOR GRANTING THE WRIT

BECAUSE MERE POSSESSION OF A FIREARM IS NOT COMMERCIAL ACTIVITY, SECTION 922(g)(1) CANNOT BE JUSTIFIED BY THE COMMERCE POWER.

Title 18 U.S.C. § 922(g) prohibits specified categories of persons from possessing firearms "in or affecting commerce." Subsection 922(g)(1) prohibits firearm possession by persons who were previously convicted of felony offenses. In cases involving previous iterations of a federal felon-firearm prohibition statute, the Court has ruled that the proof of the statutory element "in and affecting commerce" can be satisfied by proof that, at some point in the past, the firearm traveled in interstate commerce. *See Scarborough v. United States*, 431 U.S. 563, 566–67 & n.5 (1977) (interpreting predecessor statute). *Scarborough* did not, however, consider whether a statute that reaches conduct with such a minimal, temporally distant link to interstate commerce is a constitutional exercise of the federal commerce power.

The Court should consider that issue now. In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act, 18 U.S.C. § 922(q), holding that Congress lacked the power to criminalize the mere possession of a firearm on school premises. 514 U.S. 549 (1995). *Lopez* and later decisions indicate that noncommercial activity is not a proper subject for commerce clause regulation. Because that is so, the minimal congressionally created "commerce" element in § 922(g) cannot make the

statute constitutional. Congress cannot, through statutory design, confer upon itself a power the constitution does not grant it.

The U.S. Constitution created a federal government of enumerated powers. *See* U.S. CONST. art. I, § 8; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (Roberts. C.J.) (plurality op.). "The Constitution's express conferral of some powers makes clear that it does not grant others." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534 (Roberts. C.J.) (plurality op.). One power not granted the federal government is a general police power. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000). Because it lacks a police power, Congress cannot criminalize acts simply because it thinks that doing so would advance the societal good. Instead, any crime created by Congress, as with every other exercise of Congressional power, must be justified by reference to a particular grant of enumerated authority. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2578 (Roberts. C.J.).

Section 922(g)(1)'s prohibition of firearm possession by felons is said to rest on Congress's exercise of the commerce clause. *See, e.g., United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013); *United States v. Griffith,* 928 F.3d 855, 865 (10th Cir. 2019). The commerce clause grants Congress the authority "[t]o regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. *Lopez* identified three categories of activities that Congress may regulate under its commerce power: "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce

. . . Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558–59 (internal citations omitted). The Court concluded that § 922(q) did not fall within the first two categories. Thus, to survive constitutional scrutiny, it had to fall "under the third category as a regulation of activity that substantially affects interstate commerce." *Lopez*, 514 U.S. at 559.

The third *Lopez* category requires an inquiry to determine "whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559. The Court concluded that section 922(q) failed the "substantial effect" test because mere possession of a gun was not commercial activity and because regulation of such possession was not a part of a greater scheme of commercial regulation. *Lopez*, 514 U.S. at 561–63; *see also Morrison*, 529 U.S. at 615-19 (holding federal statute governing gender-motivated non-economic violence unconstitutional under Commerce Clause).

Section 922(g)(1), like § 922(q), reflects Congress's attempt to regulate simple gun possession, and, like § 922(q), the regulation is of a non-economic activity. The *Lopez* categories do not support a conclusion that § 922(g)(1) is a valid exercise of the commerce clause power.

Section 922(g)(1) does not regulate the channels of commerce. Nor does it regulate only things "in" commerce. *See Scarborough v. United States*, 431 U.S. 563, 573 (1977) (stating that under § 922's predecessor statute, "Congress must have

meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities"). Thus, to be constitutional, § 922(g)(1) must fall within the third *Lopez* category: it must regulate activity that substantially affects interstate commerce.

A substantial effect on commerce cannot be shown merely through arguments that gun possession or violent crime may cause harms that require the spending of money to remedy or that gun possession may harm economic productivity. *Lopez,* 514 U.S. at 563-67; *Morrison,* 529 U.S. at 612-18. This social cost rationale was held to sweep too broadly. Under it "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." *Lopez*, 514 U.S. at 564 If the costs of crime in general qualified firearm possession as economic activity, "it is difficult to perceive any limitations on federal power[.]" *Lopez*, 514 U.S. at 564.

Thus, even if mere possession has some effect on commerce, that effect is too minimal to save § 922(g)(1). Activities with a de minimus commercial impact can be regulated under the Commerce Clause only as part of "a general regulatory statute [that] bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558. Such regulation is permitted if the statute regulates non-commercial activity that is "an essential part of a larger regulation of economic activity, in which the activity would be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 560–61; *see Morrison*, 529 U.S. at 613 (noting that "thus far in our Nation's history," the Court has upheld intrastate regulation under Commerce Clause only where the

regulated activity is economic in nature). Section 922(g)(1), a statute with a police function–to reduce crime–does not meet this criterion. Gun possession is not commercial activity. The sale of guns may be regulated as commercial activity, and thus a law prohibiting sales to felons might be a viable, constitutional way to keep guns from felons. But criminalizing simple, local possession of a gun is not commercial activity. Prohibiting the non-economic act of possessing a gun, as opposing to buying or selling a gun, is not necessary to achieve the goals of reducing sales to felons.

Section 922(g)(1)'s interstate-commerce element, which is supposed to ensure, "through case-by-case inquiry, that the firearm possession in question affects interstate commerce," *Lopez*, 514 U.S. at 561, cannot save the statute. In *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971), the Court considered whether § 922(g)'s predecessor, 18 U.S.C. § 1202(a), barred all possession of firearms by felons without requiring the government to prove that the felon's possession was "in commerce or affecting commerce." *Id.* at 338. The Court declined to reach the constitutional issue, instead resolving the question as a matter of statutory interpretation. *Id.* at 339 n.4. The Court held that the government was required to demonstrate some nexus between interstate commerce and the felon's possession of the weapon. *Id.* at 350.

The Court again addressed the statutory interstate nexus issue in *Scarborough*, concluding that proof the firearm previously traveled in interstate commerce satisfied the "statutorily required nexus" between the firearm possession and commerce. 431 U.S. at 564, 566–67. *Scarborough* addressed only the type of proof

needed to meet the statutory requirements of what was then § 1202. 431 U.S. at 570–76. In *Scarborough,* as in *Bass*, the statutory-nexus question was distinct from the constitutional issue whether a statute regulating mere possession falls without the commerce power and was not addressed.

Lopez acknowledged that the presence of a statutory nexus should be considered in determining whether a statute violates the commerce clause. *Lopez*, 514 U.S. at 561. Some courts have inferred from this suggestion that the mere presence of a jurisdictional element of the type found in § 922(g)(1) will always save a statute from a commerce clause challenge. *See, e.g.*, *United States v. Santiago*, 238 F.3d 213, 216 (2d Cir. 2001); *United States v. Dorris*, 236 F.3d 582, 585 (10th Cir. 2000); *cf. United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996) (upholding § 922(g)(1), in part, on presence of jurisdictional element). But that inference treats too lightly our constitutional structure of a limited central government with enumerated powers. And the Court appeared to cast significant doubt on the viability of the inference in *Jones v. United States*, 529 U.S. 848 (2000).

Jones considered whether the federal arson statute, 18 U.S.C. § 844(i), which contains a jurisdictional element like the one in § 922(g)(1), criminalizes the destruction of privately-owned property. *Jones*, 529 U.S. at 850. The Court construed the jurisdictional element in § 844(i) narrowly and limited its reach to the crime of arson of property that is "currently used in commerce or in an activity affecting commerce." *Jones*, 529 U.S. at 859. In so ruling, the Court noted that a broader construction might render the statute unconstitutional under *Lopez*. *Id.* at 858.

Although *Jones*'s analysis turned on the definition of the word "use" in the arson statute—a term not present in the felon-in-possession statute—the case nonetheless has important implications for § 922(g)(1). *Jones* indicated that the mere presence of a jurisdictional element will not save a statute from a commerce clause challenge. Instead, that element must be construed, if possible, to bring the statute within the limits set by the Constitution. *Id.*

Thus, both *Lopez* and *Jones* cast doubt on the constitutionality of the *Scarborough* statutory analysis, which requires no more than a showing under the statute's terms of a tangential connection to commerce. *See United States v. Bell*, 70 F.3d 495, 498 (7th Cir. 1995) (noting doubt). *Lopez* acknowledged that previous cases were unclear on the point. It clarified that the regulated activity must substantially affect commerce "to be within Congress's power to regulate it under the Commerce Clause." *Lopez*, 514 U.S. at 559.

The Court should grant certiorari to address the doubts raised about the constitutionality of § 922(g)(1). The statute has faced and continues to face repeated challenges to its constitutionality throughout the nation. *See United States v. Scott*, 263 F.3d 1270, 1274 (11th Cir. 2001) (collecting cases to that point); *see also United States v. Moore,* 2021 WL 3502933 (10th Cir. Aug. 10, 2021); *United States v. Libsey,* 2021 WL 3466041 (9th Cir. Aug. 6, 2021); *United States v. Williams,* 2021 WL 1961649 (11th Cir. May 17, 2021). These ongoing challenges and the thousands of § 922(g) prosecutions brought each year, *see* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-

reports-and-sourcebooks/2020/FigureF4.pdf, mean that the issue presented will recur until the Court provides a definitive statement regarding the application of *Lopez*'s principles to the statute.

Conclusion

FOR THESE REASONS, Petitioner asks that the Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: October 6, 2021.