No. _____

IN THE

Supreme Court of the United States

EMANUEL E. GOINES, JR.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Federal law makes it a crime for a person with a prior felony conviction to "possess . . . affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). Can such a person's present intrastate possession of a firearm violate § 922(g)(1) for the sole reason that the firearm previously crossed state lines, or must the possession itself contemporaneously "affect[ ] commerce"?

(2) Congress cannot exercise its Commerce Clause power to regulate an activity merely because that activity might lead to violent crime. A stronger link is required between the activity and interstate commerce. Assuming § 922(g)(1) prohibits a person with a prior felony conviction from possessing any firearm that previously crossed state lines, can a firearm's past life sufficiently link a person's present possession to interstate commerce, or did Congress exceed its Commerce Clause power when it enacted § 922(g)(1)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Emanuel E. Goines, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished order and judgment is included as Appendix A. The Tenth Circuit's unpublished order denying Mr. Goines's request for initial en banc consideration is included as Appendix B. Transcripts of the district court's oral rulings denying Mr. Goines's motion to dismiss and motion for judgment of acquittal are included as Appendix C and Appendix D, respectively.

JURISDICTION

The Tenth Circuit's judgment was entered on October 5, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. Art. I § 8, cl. 3, provides:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Necessary and Proper Clause of the United States Constitution, U.S. Const. Art. I § 8, cl. 18, provides:

> The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

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 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.

18 U.S.C. § 921(20) provides, in relevant part:

> What constitutes a conviction of such a ["crime punishable by imprisonment for a term exceeding one year"] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

STATEMENT OF THE CASE

This Court has never "declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *United States v. Lopez*, 514 U.S. 549, 558 (1995) (citation omitted). The Tenth Circuit nonetheless adheres to the startlingly broad view "that Congress may regulate any firearm that has ever traversed state lines." *United States v. Patton*, 451 F.3d 615, 634 (10th Cir. 2006). This view cannot hold. But this Court need not confront this view in the 18 U.S.C. § 921(g)(1) context; rather, this Court may (and should) interpret the statute to require something more.

Section 922(g)(1) makes it a crime for a person with a prior felony conviction to "possess . . . affecting commerce, any firearm or ammunition." This Court has never construed § 922(g)'s "affecting commerce" element. The circuit courts have all concluded that this element requires only a minimal nexus between the person's possession of the firearm and interstate commerce—i.e., that the firearm *itself* previously crossed state lines. The circuit courts consider themselves bound to this construction by this Court's reading of a differently structured predecessor statute in *Scarborough v. United States*, 431 U.S. 563 (1977). *See* Pet. App. 1a.

This Court's intervention is necessary to correct the circuit courts' uniform misinterpretation of § 922(g)(1)'s "affecting commerce" element, just as this Court corrected their misinterpretation of the statute's knowledge element three years ago in *Rehaif v. United States*, 139 S.Ct. 2191 (2019). *Scarborough* is neither controlling nor persuasive when it comes to interpreting § 922(g)(1). Reading today's statute to

require proof that the prohibited person's possession contemporaneously affected interstate commerce is required by the text and context of § 922(g)(1), the statutory history, the need to avoid grave federalism concerns, and the rule of lenity. The meaning of "affecting commerce" is important to the millions of people who live with prior felony convictions, and even more so to the increasingly large number of those people who are convicted of violating § 922(g)(1) each year. Construing the "affecting commerce" element according to its plain text would allow the government to continue enforcing the ban whenever a prohibited person's possession contemporaneously affects interstate commerce or occurs *in* interstate commerce.[1] This reading will properly leave any more general policing of felons-in-possession to the States, all of which have their own laws limiting firearms rights after criminal convictions. This Court should grant this petition and decide the reach of § 922(g)(1).

While this Court may resolve this case on statutory-interpretation grounds, this Court should also grant this petition on the second question presented. If this Court were to conclude on the merits that § 922(g)(1) requires no more than the same minimal nexus to interstate commerce that the predecessor statute construed in *Scarborough* required, that conclusion would make it necessary to decide whether Congress exceeded its Commerce Clause power in enacting § 922(g)(1).

The circuit courts have uniformly rejected Commerce Clause challenges to § 922(g)(1), again in reliance on *Scarborough*. *See* Pet. App. 1a. But *Scarborough* did

[1] The statute contains two alternative commerce-related elements: "in or affecting commerce." § 922(g)(1). This petition does not raise any questions regarding the "in . . . commerce" element.

not decide this question, and the circuit court decisions conflict with this Court's actual Commerce Clause precedents. Under those precedents, a felon-in-possession ban with only a minimal nexus to interstate commerce cannot stand. This question could not be more vital: the federal felon-in-possession ban implicates core federalism principles; the circuit courts have recognized tension between *Scarborough* and this Court's Commerce Clause precedents and yet have chosen *Scarborough* as their guiding light.

The Tenth Circuit and other circuit courts have consistently and erroneously relied on *Scarborough* to answer both questions presented, leaving today's statute untested by today's standards. Only this Court can correct course. This case is the perfect vehicle in which to do so. This Court should grant this petition.

1. Legal background

a. The National Firearms Act of 1934 was our country's first nation-wide gun-control legislation. The NFA created tax and registration duties with respect to the manufacture, sale, importation, and possession of certain firearms, and criminalized noncompliance with those duties. 73 Cong. Ch. 757 (June 26, 1934). But the NFA did not ban any category of persons from receiving or possessing any firearms. *Id*. Indeed, Congress did not enact such a ban until more than three decades later, in the Omnibus Crime Control and Safe Streets Act of 1968. PL 90-351 (June 19, 1968).[2]

Two separate titles of that Act (Titles IV and VII) addressed the receipt, transport, and possession of firearms by felons. Title IV made it unlawful for felons either "to

[2] In *Rehaif*, this Court mistakenly stated that "Congress first enacted a criminal statute prohibiting particular categories of persons from possessing firearms in 1938." 139 S.Ct. at 2198 (citing Federal

ship or transport any firearm or ammunition in interstate or foreign commerce" or "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." PL 90-351, Sec. 902 (June 19, 1968) (amended slightly by PL 90-618, Sec. 102 (Oct. 22, 1968)).[3] These provisions were codified at 18 U.S.C. §§ 922(g)(1) and (h)(1), respectively.

Title VII created the felon-in-possession ban, which was codified in a wholly separate chapter, at 18 U.S.C. § 1202(a)(1). PL 90-351, Sec. 1202 (June 19, 1968) (amended slightly by PL 90-618, Sec. 301 (Oct. 22, 1968)).[4] The ban contained alternative jurisdictional hooks making it unlawful for a felon to "possess[ ] . . . in commerce or affecting commerce . . . any firearm." 18 U.S.C. § 1202(a)(1) (1968).

The defendant in *Scarborough* was convicted of being a felon in possession "affecting commerce" under Title VII (§ 1202(a)(1)), on evidence that four firearms he possessed had previously crossed state lines. 431 U.S. at 565 & n.2. He argued on appeal that a comparison of the jurisdictional hooks in Title IV and Title VII supported the view that it was only unlawful to *receive* a firearm that had previously "been shipped or transported" in interstate commerce. Merely possessing a firearm "affecting commerce," in contrast, required an effect on interstate commerce contemporaneous with the possession. *Id*. at 569. This Court rejected the argument

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Firearms Act of 1938). That Act banned certain persons, including persons "convicted of a crime of violence," from *receiving* "any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 52 Stat. 1250, 75 Cong. Ch. 850 (June 30, 1938). But it did not ban any person from *possessing* firearms. *Id*.

[3] This language appears to have been imported from the 1938 Act, *see supra* n.2.

[4] This provision also included ship-or-transport and receipt bans notwithstanding the existence of similar, partially overlapping bans in Title IV. *Id*.

in light of the differences in the legislative history of the two provisions. Title IV was "carefully constructed," and "[i]t is obvious that the tenses used throughout Title IV were chosen with care." *Id.* at 570. Title VII, in contrast, "was a last-minute amendment to the Omnibus Crime Control Act enacted hastily with little discussion and no hearings." *Id.* at 569. This Court found the language of Title VII "ambiguous at best." *Id.* at 570. This Court therefore relied on Congress's intent (as expressed through a single legislator) to "keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Id.* at 572 (citation omitted). Consistent with that objective, this Court interpreted "affecting commerce" as requiring nothing more than the "minimal nexus" that the firearm "at some time" crossed state lines. *Id.* at 572, 575. This Court did not decide whether Title VII, so construed, passed Commerce Clause muster.

b. Congress passed the Firearms Owners' Protection Act in 1986. PL 99-308 (May 19, 1986). With this Act, Congress combined the Title IV (receipt/transport) and Title VII (possession) offenses into a single provision at 18 U.S.C. § 922(g), and repealed Title VII of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 1201, et seq.). PL 99-308 Sec. 104(b). Two key features of the 1986 Act's felon-in-possession ban distinguished it from the 1968 Omnibus Act's ban. First, the 1986 bill was "thoroughly scrutinized" and "8 years in the coming." 132 Cong. Rec. S5350-01 (Statement of Senator Hatch). And second, Congress moved the felon-in-possession ban from its own separate chapter into not just the same chapter but the same *sentence* as the receipt and transport bans, where the contrasting requirements

("possess in or affecting commerce" versus "receive any firearm or ammunition which has been shipped or transported" in commerce) would be pellucid to any reader. Despite this new context, the Tenth Circuit, like other circuit courts, has continued to interpret "affecting commerce" as it appears in § 922(g)(1) the same way that *Scarborough* interpreted the phrase as it appeared in § 1202(a)(1) (1968). Pet. App. 1a–3a.

c. In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that the Gun-Free Schools Act, which criminalized the non-economic activity of possessing firearms in school zones, did not pass Commerce Clause muster. *Lopez* (which did not mention *Scarborough*) both crystalized this Court's modern Commerce Clause precedents and confirmed that Congress's Commerce Clause power "is subject to outer limits" that this Court "has ample power to enforce." *Id*. at 557 (citations omitted). As this Court explained, Congress may rely on its Commerce Clause power to regulate three things: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities having a substantial relation to interstate commerce," that is, activities that "substantially affect[ ]" interstate commerce. *Id*. at 558–59.

Because the third category involves activities that "are not themselves part of interstate commerce," Congress may only act in this category when doing so is necessary and proper for carrying its Commerce Clause authority into execution. *Gonzales v. Raich*, 545 U.S. 1, 34–35 (2005) (Scalia, J., concurring). Under this category, Congress may regulate *economic* activities if it has a rational basis for

believing that the activities, taken in the aggregate, substantially affect interstate commerce. *Lopez*, 514 U.S. at 557; *United States v. Morrison*, 529 U.S. 598, 611 (2000); *Raich*, 541 U.S. at 22. But when it comes to *non-economic* activities like the possession of firearms, this Court has never relied on this aggregation principle. *Morrison*, 529 U.S. at 611, 613 n.5; *Raich*, 541 U.S. at 23–26. Rather, Congress may regulate non-economic activities that are not themselves part of interstate commerce through laws that Congress has a rational basis for believing are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561; *see also United States v. Darby*, 312 U.S. 100, 121 (1941). The possession statute at issue in *Lopez* was not an essential part of any such larger scheme. 514 U.S. at 561. Upholding the statute would have required "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id*. at 567.

d. In the decades since this Court decided *Lopez*, circuit courts have recognized considerable tension between *Scarborough* (as they read it) and *Lopez*. They nonetheless consistently read *Scarborough* as foreclosing Commerce Clause challenges to § 922(g)(1), even though *Scarborough* did not decide that question. The Tenth Circuit has even gone so far as to rely on *Scarborough* to uphold the federal felon-in-possession-of-body-armor statute (18 U.S.C. § 931) over a Commerce Clause challenge, *despite* finding that the statute "cannot be justified" under any of this

Court's three Commerce Clause categories. *Patton*, 451 F.3d at 636; *see also* Pet. App. 2a (citing *Patton* as binding precedent).

2. Factual and procedural history

In this case, the Tenth Circuit relied on *Scarborough* to reject Mr. Goines's reading of § 922(g)(1), and relied on both *Scarborough* and *Patton* to reject Mr. Goines's Commerce Clause challenge to § 922(g)(1). Pet. App. 1a–3a.

a. In 2012, Emanuel Goines tried to shoplift a laptop from a Kansas Walmart but was scared away by a manager. R2.261–62. Mr. Goines was arrested; convicted in Kansas state court of aggravated burglary and attempted theft; and sentenced to probation. *Id*. R2.261–62. The case was prosecuted as an aggravated burglary only because Walmart had, after a previous shoplifting incident, ordered Mr. Goines not to enter the store. R2.259–61; R2.179. The Kansas burglary statute was later amended to preclude just this sort of burglary or aggravated-burglary prosecution based on an order not to enter a retail premises. *See* K.S.A. 21-5807(e) (added by 2016 Kansas Laws Ch. 90 § 3 (H.B. 2462)). Had that provision been in effect in 2012, Mr. Goines could not have been charged with felony aggravated burglary, and he would not have obtained prohibited-person status under federal firearms law.

b. Six years later, the federal government invoked Mr. Goines's aggravated burglary conviction—his only prior felony conviction—as the basis for a grand jury indictment charging Mr. Goines with being a felon in possession of a firearm in Wichita, Kansas in violation of 18 U.S.C. § 922(g)(1). R1.16; R1.50. Mr. Goines moved to dismiss the indictment on grounds that Congress exceeded its Commerce Clause power when it passed § 922(g)(1), invoking the reasoning of *Lopez*. R1.28–33. R1.31–

32. He acknowledged that his argument was foreclosed by controlling Tenth Circuit precedent. R1.32. Given that precedent, the district court denied the motion, though it nonetheless noted that the issue "is legitimate and merits some consideration." Pet. App. 5a–6a.

c. Mr. Goines thereafter proceeded to trial. The government presented evidence that Mr. Goines briefly possessed (and then discarded) a firearm while fleeing from an attempted traffic stop. R1.637–44, 649–54, 661, 678–80. The government presented no evidence that Mr. Goines owned the firearm, had purchased the firearm, or had ever possessed it (actually or constructively) at any time other than during his flight. A Special Agent from the Bureau of Alcohol Tobacco and Firearms and Explosives testified at trial that "[t]his firearm "was manufactured in the country of Austria; it was imported to the United States through the State of Georgia; it was recovered in the State of Kansas. This firearm has traveled in both foreign and interstate commerce." R2.259. Mr. Goines stipulated both to the fact of his prior felony conviction, and to his knowledge of that conviction. R1.625–26.

After the government rested, Mr. Goines moved for a judgment of acquittal. R1.272–73. He argued that evidence that the firearm had sometime in the past traveled in foreign and interstate commerce was insufficient to prove that his possession of the firearm "affect[ed] commerce." *Id*. The district court observed that "if we were writing on a clean slate there could be some merit to your argument," but denied the motion because "the Tenth Circuit precedent on that issue forecloses it at this point." Pet. App. 7a. The district court thereafter instructed the jury that, in

order to convict Mr. Goines, it need only find that "before the defendant possessed the firearm, the firearm had moved at some time from one state to another." R1.184.

The jury convicted Mr. Goines, and the district court sentenced him to fifty months in prison followed by two years of supervised release. R1.199, R1.730–31.

d. On appeal to the Tenth Circuit, Mr. Goines filed a combined petition for initial en banc hearing and opening brief. *United States v. Goines*, 10th Cir. Appeal No. 20-3183. He asked the Tenth Circuit to revisit its view that it was bound by *Scarborough* to conclude (1) that having a prior felony conviction and possessing a firearm that previously crossed state lines, without more, violates § 922(g)(1); and (2) that, even under that broad construction, § 922(g)(1) passes Commerce Clause muster. The Tenth Circuit directed the government to respond to Mr. Goines's petition for initial en banc hearing. But the Tenth Circuit ultimately denied that petition. Pet. App. 4a. The panel assigned to review the merits submitted the case on the briefs and affirmed, citing *Scarborough* and *Patton* in an unpublished order and judgment. Pet. App. 1a–3a.

REASONS FOR GRANTING THE WRIT

1. This Court should finally settle the meaning of today's federal felon-in-possession ban at § 922(g)(1).

A. The circuit courts have read § 922(g)(1) inconsistently with the statute's text, context, and legislative history, the Commerce Clause, and the rule of lenity.

1. The text of § 922(g) tells us two things. First, it is the prohibited person's *possession*, not the firearm, that must have an effect on commerce. And second, that effect must be contemporaneous with any intrastate possession. In other words, the

statute does not reach firearms possessions just because the firearms themselves previously crossed state lines.

Section 922(g)(1) makes it a federal crime "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 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.

922(g)(1) (emphasis added).

As a matter of basic grammar, the adverbial phrase, "in or affecting commerce" as used in the possession provision has to modify the verb "possess"; it cannot modify the noun "any firearm." *Nielsen v. Preap*, 139 S.Ct. 954, 964 (2019) ("an adverb cannot modify a noun"). And the fact that "affecting commerce" modifies "possess" rather than "any firearm" tells us that the effect on commerce must be linked to the charged *possession* of the firearm; it cannot just attach itself to and follow the firearm.

Verb tense also matters. "Consistent with normal usage," this Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States*, 560 U.S. 438, 448 (2010). The Dictionary Act states that "words used in the present tense include the future as well as the present." 1 U.S.C. § 1. The implication is "that the present tense generally does not include the past." *Carr*, 560 U.S. at 448. "[A]ffecting commerce" is an adverbial present-participle phrase. As the Seventh Circuit has explained, a present participle "means presently and continuously. It does not include something in the past that has ended or

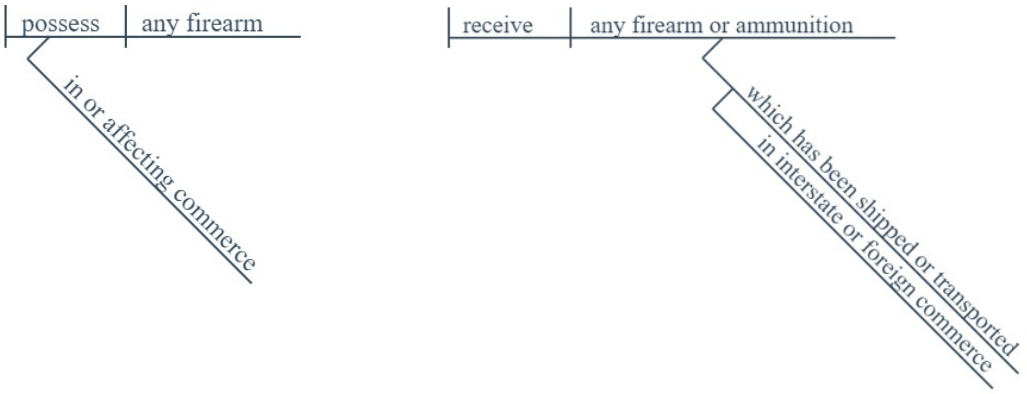
something yet to come." *Shell v. Burlington Northern Santa Fe Railway Company*, 941 F.3d 331, 336 (7th Cir. 2019) (discussing present participle "having"). Congress's use of the present-participle phrase "affecting commerce" is unambiguous. It cannot be read to embrace past effects on commerce caused by some other actor's manufacture or movement of the firearm. It requires instead that any intrastate possession contemporaneously affect commerce.

2. This is the only sensible way to read the possession ban in context. Section 922(g) makes it unlawful for a person with a prior felony conviction to engage in any of three different acts. Each of those acts has its own unique jurisdictional hook. For two acts (transport and possess), the jurisdictional element is an adverbial phrase modifying *the act*, not the firearm. For the third act (receive), the jurisdictional element is an adjective clause modifying the *firearm*. Here again is the statutory language:

> 1. "ship or transport *in interstate or foreign commerce* . . . any firearm or ammunition";
> 2. "possess *in or affecting commerce*, any firearm or ammunition"; or
> 3. "receive any firearm or ammunition *which has been shipped or transported in interstate or foreign commerce*."

922(g)(1) (emphases added).

Very roughly diagrammed, the difference between possession and receipt looks like this [see next page]:



Comparing the provisions shows us that it is only unlawful to *receive* a firearm that has previously "been shipped or transported" in commerce. If this were all it took to prove an unlawful *possession*, then Congress would have said so in the possession provision. And indeed it did say so with respect to *other* possessions within the statute. *See, e.g.,* § 922(j) (unlawful to possess any stolen firearm "which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen"); § 922(k) (unlawful to possess any firearm that has an obliterated serial number and "has, at any time, been shipped or transported in interstate or foreign commerce"). "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Republic of Sudan v. Harrison*, 139 S.Ct. 1048, 1058 (2019) (citation omitted); *see also Shular v. United States*, 140 S.Ct. 779, 785 (2020) (contrasting language in one provision of firearms statute with language in a neighboring provision to determine that first provision meant something different). Congress's retention of different language in these neighboring provisions "reflects its choice that these different [provisions] warrant different treatment." *Pereida v. Wilkinson*, 141 S. Ct. 754, 761 (2021).

c. The statute's history also supports this reading. In 1986, Congress moved the felon-in-possession provision from § 1202(a)(1) into § 922(g)(1). Unlike the original provision, the 1986 provision did not result from hasty, last-minute lawmaking. Rather, the Judiciary Committee "worked long and hard" and "painstakingly crafted" the bill. 131 Cong. Rec. S23-03 (Jan. 3, 1985) (Statement of Senator McClure). The bill was "thoroughly scrutinized" and "8 years in the coming." 132 Cong. Rec. S5350-01 (Statement of Senator Hatch).

Scarborough grounded its reading of § 1202(a)(1) in the fact that its felon-in-possession ban was *not* then part of § 922. 431 U.S. at 569. The tenses in the original § 922 provisions ("shipped or transported in"—past tense) were "chosen with care," whereas § 1202(a)(1) ("affecting"—present participle) was "enacted hastily." *Id*. This Court consequently found any comparison between the tenses "not very meaningful." *Id*. But when Congress consolidated all of the felon-related provisions into § 922(g)(1), it placed them side-by-side in a "painstakingly" constructed statute. Congress corrected *Scarborough*'s perception that the differences didn't matter by creating "something new." *SAS Institute, Inc. v. Iancu*, 138 S.Ct. 1348, 1356 (2018) (Congress's "choice to try something new must be given effect rather than disregarded in favor of the comfort of what came before."); *see also United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (Demoss, C.J., dissenting in part) ("It seems critically important that we note the clear differences between the current statute (§ 922(g)(1)) . . . and the old statute (18 U.S.C.App. § 1202(a)(1)) which was construed in *Scarborough*."). By

Scarborough's own terms, Congress rendered the contrast between the tenses "very meaningful" by moving the felon-in-possession ban into § 922(g)(1).

This Court relied on the statute's reorganization in *Rehaif* to interpret § 922(g)(1) contrary to pre-1986 constructions of the possession provision. In *Rehaif*, this Court held that in order to prove a violation of § 922(g), the government "must prove that a defendant knows of his status as a person barred from possessing a firearm." 139 S.Ct. at 2195. The government, arguing against this reading, pointed to what it claimed was a pre-1986 consensus among the circuit courts "that the law did not require the Government to prove scienter regarding a defendant's status." *Id*. at 2199. This Court rejected that argument on grounds that "[a]ny pre-1986 consensus involved the statute as it read prior to 1986." *Id*. This Court pointed out that the Firearms Owners' Protection Act "reorganized the prohibition on firearm possession and added the language providing that only those who violate the prohibition 'knowingly' may be held criminally liable." *Id*. This statutory history made it "all but impossible to draw any inference that Congress intended to ratify a pre-existing consensus when, in 1986, it amended the statute." *Id*.

The same may be said about *Scarborough* and the circuit court cases relying on it. *Scarborough* cannot control the meaning of § 922(g)(1) for the simple reason that it interpreted a different (and differently structured) statute—the 1968 felon-in-possession ban codified at 18 U.S.C. § 1202(a)(1). Congress did not ratify *Scarborough* when it adopted § 922(g)(1).[5] If anything, when Congress "reorganized the prohibition

[5] None of the Congressional findings mention *Scarborough*. PL 99-308 Sec. 1. And we have found no sponsor statements invoking *Scarborough*. *See*, *e.g.*, 132 Cong. Rec. S5350-01 (May 6, 1986); 131 Cong.

on firearm possession," *Rehaif*, 139 S.Ct. at 2199, it repudiated *Scarborough*'s interpretation of "affecting commerce."

d. Reading "affecting commerce" according to its plain text to require that the possession have a contemporaneous effect on commerce is necessary given "the background assumption that Congress normally preserves 'the constitutional balance between the National Government and the States.'" *Bond v. United States*, 572 U.S. 844, 862 (2014) (citation omitted); *id*. at 863 (noting that "the principle that Congress does not normally intrude upon the police power of the States is critically important"). The statute should, if possible, be interpreted in a way that avoids any Commerce Clause challenge. *See, e.g., id*. at 856 (narrowly construing chemical-weapons statute); *Jones v. United States*, 529 U.S. 848, 858 (2000) (narrowly construing jurisdictional element in federal arson statute "to avoid the constitutional question that would arise were we to read § 844(i) to render the 'traditionally local criminal conduct' in which petitioner Jones engaged 'a matter for federal enforcement'" (citation omitted)). That task is made easy by the plain text of the statute.

e. Finally, to the extent that the phrase "affecting commerce" appears ambiguous, this Court should apply the rule of lenity and adopt our reading of the statute. The *Scarborough* Court found the language of Title VII "ambiguous at best." 431 U.S. at

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Rec. S8686-01 (June 24, 1985); 131 Cong. Rec. S23-03 (Jan. 3, 1985). This Court has previously found the presence or absence of such evidence meaningful when asking whether statutory amendments codify a prior judicial construction. *See TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1521 (2017) (noting absence of indication that Congress ratified prior judicial construction when amending statute); *Texas Dept. of Hous. and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 535–36 (2015) (relying on legislative history discussing judicial precedent to find that "Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text").

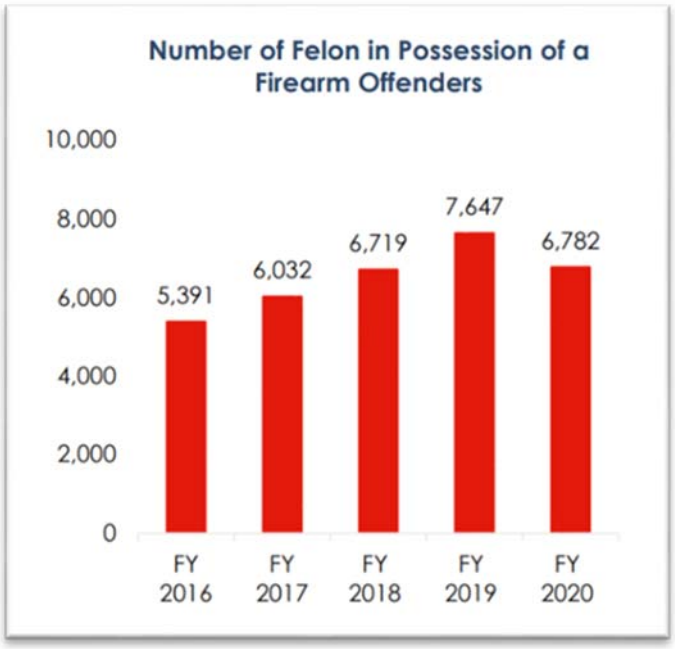
570. The Court therefore relied on Congress's intent—as stated by a single Senator promoting the bill—when it interpreted "affecting commerce" broadly to cover the possession of a firearm that previously crossed state lines. *Id*. It declined to apply the rule of lenity on grounds that "the intent of Congress is clear." *Id*. at 577.

This Court now recognizes that "it is quite mistaken to assume . . . that 'whatever' might appear to 'further[ ] the statute's primary objective must be the law.'" *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1725 (2017) (citation omitted). Moreover, this Court does not read "ambiguous" statutes to conform with a single legislator's stated objectives, but rather reads such statutes consistent with the rule of lenity. That rule instructs that, when a criminal statute has two possible readings, courts should not "choose the harsher alternative" unless Congress has "spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971). Absent that clarity, any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010); *accord Jones*, 529 U.S. at 858 (limiting reach of federal arson statute consistent with rule of lenity); *Bass*, 404 U.S. at 347; *Jones*, 529 U.S. at 858.

f. Having a prior felony conviction and possessing a firearm that previously crossed state lines does not "affect[ ] commerce" so as to violate § 922(g)(1). Rather, a prohibited person's intrastate possession must contemporaneously affect commerce. This Court should grant this petition and settle the reach of today's felon-in-possession ban.

B. The meaning of § 922(g)(1) is exceptionally important, as millions of people in the United States have prior felony convictions, and every year thousands of them are convicted of violating § 922(g)(1).

Settling the reach of § 922(g)(1) is exceptionally important in light of the fact that millions of people in our country live with prior felony convictions. Nicholas Eberstadt, *America's Invisible Felon Population: A Blind Spot in US National Statistics, Statement before the Joint Economic Committee on the Economic Impacts of the 2020 Census and Business Uses of Federal Data* 3–4 (May 22, 2019) (discussing limits on available data and concluding that "[r]ough calculations suggest that the total population with a felony in America today (2019) might equal or exceed 24 million").[6] Every (non-pandemic) year, an increasingly large number of these people are convicted under § 922(g)(1), as this Sentencing Commission graphic illustrates. QUICK FACTS: FELON IN POSSESSION OF A FIREARM (USSC May 2021).[7]



[6] Available at https://www.jec.senate.gov/public/_cache/files/b23fea23-8e98-4bcd-aeed-edcc061a4bc0/testimony-eberstadt-final.pdf.

[7] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf. The Sentencing Commission attributes the decrease in firearms convictions during 2020 to "the impact of the COVID-19 pandemic on the work of the courts." FISCAL YEAR 2020: OVERVIEW OF FEDERAL CRIMINAL CASES 2 (USSC April 2021), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf.

The vast majority of people convicted in 2020 were sentenced to prison (96.7%), with an average term of 62 months. *Id*. The maximum statutory penalty for a § 922(g)(1) violation is 10 years' imprisonment—unless the person has three qualifying prior convictions, in which case the *minimum* statutory penalty is 15 years' imprisonment. 18 U.S.C. § 924(a)(2); *see Rehaif v. United States*, 139 S.Ct. 2191, 2197 (2019) (describing § 922(g) penalty as "harsh"). Both the frequency of § 922(g)(1) prosecutions and the severity of § 922(g)(1) sentences render the questions presented here exceptionally important.

Additionally, consideration of § 922(g)(1)'s reach and constitutionality under the Commerce Clause will serve as a necessary check against the overcriminalization of a vulnerable population. Today's felon-in-possession ban exists under the long shadow of racism. It is the direct descendant of a 1968 ban that was meant to keep "the wrong kind of people" from possessing firearms. *Scarborough*, 431 U.S. at 572 (quoting sponsor of 1968 bill). That ban itself descended from state laws that—even if facially neutral—were widely understood to have been passed "for the purpose of disarming the negro," and "never intended to be applied to the white population." *Watson v. Stone*, 4 So.2d 700, 703 (Fla. 1941) (Buford, J., concurring); *accord District of Columbia v. Heller*, 554 U.S. 570, 614 (2008) ("Blacks were routinely disarmed by Southern States after the Civil War").

Even now, despite its facial neutrality, § 922(g)(1) is enforced against a disproportionately high number of Black and Hispanic people. *Compare* QUICK FACTS: FELON IN POSSESSION OF A FIREARM (of persons convicted under § 922(g)(1) in 2020,

71.5% were Black or Hispanic, while only 25.4% were white) *with* U.S. Census Bureau (2019) (31.2% of 2019 U.S. population Black or Hispanic; 53.6% white);[8] *see also* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1023 (2020) (noting "highly discretionary" nature of decision to bring felon-in-possession charges in federal, rather than state court). Against this unsettling backdrop, it is exceptionally important that, at the very least, § 922(g)(1)'s reach be fully vetted by this Court.

C. Review should not be denied out of concern that a plain-text reading of § 922(g)(1) will result in enforcement difficulties.

Construing § 922(g)(1)'s "affecting commerce" element according to its plain text will not end federal oversight of felons who possess firearms. Far from it. The government will still be able to enforce the statute whenever a prohibited person's possession either contemporaneously affects interstate commerce or actually occurs *in* interstate commerce. And the government will still be able to prosecute appropriate cases under the transport and receipt provisions of the statute. Construing the statute according to its plain text will simply (and properly) leave more general policing of felons-in-possession to the States. All fifty states have exercised their respective general police powers to limit the firearms rights of people convicted of certain crimes.[9] This Court need not worry about enforcement when deciding whether to grant this petition.

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[8] Available at https://data.census.gov/cedsci/profile?q=United%20States&g=0100000US.

[9] See 50-State Comparison: Loss & Restoration of Civil/Firearms Rights (Restoration of Rights Project Dec. 2021) (firearms-rights chart available at https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/).

2. This Court should decide for the first time whether, if § 922(g)(1) requires nothing more than a minimal nexus to interstate commerce, Congress exceeded its Commerce Clause authority when it enacted § 922(g)(1).

A. Interpreting § 921(g)(1) to contain only a minimal nexus to interstate commerce implicates grave federalism concerns.

Article 1 of the Constitution vests in Congress only those powers "herein granted." U.S. Const. Art. 1, Sec. 1. Those powers "are defined, and limited." *Marbury v. Madison*, 1 Cranch 137, 176 (1803); *see also* U.S. Const. Art. 1, Sec. 8. Congress may also make such laws as are "necessary and proper" for carrying those powers into execution. Art. 1, Sec. 8, cl. 18. All other legislative powers, so long as they are not prohibited, "are reserved to the States respectively, or to the people." U.S. Const. Amend. 10. This includes the reservation of the general police power to the States—a principle "deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000).

This division of legislative authority between federal and state governments is "for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). It rests on the theory that allocating authority between two governments "enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). Reserving general police powers to the States secures individual freedom from arbitrary laws because it "allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely on the political processes that control a remote central power." *Id.* Put more plainly, it's easier to

participate in state government than in national government. States should be the ones to make criminal laws so that ordinary people whose behavior those laws target can participate in the criminal-law-making process. That is why 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.

That said, this Court has sometimes taken an expansive view of Congress's Commerce Clause power. *Id*. at 554-57. But in *Lopez*, this Court demonstrated that "Congress' regulatory authority is not without effective bounds." *Morrison*, 529 U.S. at 608. This Court expressed concern in *Lopez* "that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 529 U.S. at 615 (discussing *Lopez*). Section 922(g)(1), as currently construed by the circuit courts, threatens to do just that. The statute implicates our very structure of government. The questions presented are important questions of federal law that have not been, but should be, settled by this Court. Supreme Court Rule 10(c). This Court should grant this petition.

B. Only this Court can resolve the tension between its Commerce Clause precedents and *Scarborough* as the circuit courts read it.

Ever since this Court decided *Lopez*, judges across the circuits have noted the tension between *Scarborough* and *Lopez*, even while the circuit courts have continued to read *Scarborough* as controlling both the reach and constitutionality of § 922(g)(1). *See, e.g., United States v. Bishop*, 66 F.3d 569, 595 n.13 (**3d Cir.** 1995) (Becker, J., concurring in part and dissenting in part) ("the broad application of the statute in *Scarborough* is probably undermined by *Lopez*"); *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 . . . and circuit courts have routinely relied on *Scarborough* as a basis for distinguishing *Lopez* in the context of firearms-related offenses."); *United States v. Kirk*, 105 F.3d 997 (**5th Cir.** 1997) (Jones, J., for half of an evenly divided en banc court) ("As [*Scarborough*'s] broad reading of the Commerce Clause has Supreme Court imprimatur, albeit pre-*Lopez*, we can only note the tension between the two decisions and will continue to enforce § 922(g)(1)."); *United States v. Sarraj*, 665 F.3d 916, 922 n.3 (**7th Cir.** 2012) ("We have relied on *Scarborough* on numerous occasions with the understanding that *Lopez* did not invalidate or call into question the analysis or rule of *Scarborough*, even if the minimal nexus requirement of *Scarborough* might seem to stand in some tension with the substantial-impact framework of *Lopez*."); *United States v. Alderman*, 565 F.3d 641, 646 (**9th Cir.** 2009) ("Other circuits have similarly endorsed the continuing vitality of *Scarborough*, albeit sometimes with skepticism, in decisions dealing with a variety of felon firearm statutes . . . . Although we consider *Scarborough* as the defining case, we cannot ignore the Supreme Court's shifting emphasis in its Commerce Clause jurisprudence over the past decade."); *United States v. Patton*, 451 F.3d 615, 636 (**10th Cir.** 2006) ("Like our sister circuits, we see considerable tension between *Scarborough* and the three-category approach adopted by the Supreme Court in its recent Commerce Clause cases, and like our sister

circuits, we conclude that we are bound by *Scarborough*, which was left intact by *Lopez*.").

The circuit courts have long awaited this Court's guidance. In *Patton*, for instance, the Tenth Circuit stated that "[a]ny doctrinal inconsistency between *Scarborough* and the Supreme Court's more recent [Commerce Clause] decisions is not for this Court to remedy," and predicted that "the Supreme Court will revisit this issue in an appropriate case—maybe even this one." 451 F.3d at 636. The Seventh Circuit has similarly noted that "[i]f, indeed, *Lopez*'s rationale calls into doubt our construction and application of section 922(g)(1), it is for the Supreme Court to so hold." *United States v. Lemons*, 302 F.3d 769, 773 (7th Cir. 2002). And in *Alderman*, the Ninth Circuit concluded that it would "follow *Scarborough* unwaveringly" "until the Supreme Court tells us otherwise." 565 F.3d at 648. This Court has so far declined to tell the circuit courts whether or not to continue following *Scarborough*, despite the view of at least two members that "*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez*." *Alderman v. United States*, 562 U.S. 1163, 131 S.Ct. 700, 702 (2011) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).[10] It is time for this Court to weigh in by granting this petition.

[10] *Patton* and *Alderman* involved not the firearms ban in § 922(g)(1), but the body-armor ban in 18 U.S.C. § 931(a), as defined in 18 U.S.C. § 921(a)(35). The firearm and body-armor provisions rely on similar jurisdictional hooks, and are routinely subjected to identical Commerce Clause analyses.

C. The circuit courts' continuing application of what they read as *Scarborough*'s "implicit" Commerce Clause holding conflicts with this Court's explicit Commerce Clause precedents.

This Court should grant this petition in order to correct the circuit court's continuing reliance on *Scarborough* as a constitutional precedent. *Scarborough* did not decide whether the Commerce Clause authorizes Congress to criminalize the possession of firearms by people with prior felony convictions simply because those firearms once crossed state lines. As Justice Thomas has observed, "[n]o party [in *Scarborough*] alleged that the statute exceeded Congress' authority, and the Court did not hold that the statute was constitutional." *Alderman v. United States*, 562 U.S. 1163, 131 S.Ct. 700, 701 (2011) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

The circuit courts have nonetheless concluded that *Scarborough* would not have interpreted the predecessor felon-in-possession ban without at least *implicitly* deciding that, as interpreted, that ban was constitutional. *See, e.g., Patton*, 451 F.3d at 634 ("The constitutional understanding implicit in *Scarborough*—that Congress may regulate any firearm that has ever traversed state lines—has been repeatedly adopted for felon-in-possession statutes by this Court."); *Alderman*, 565 F.3d at 645 ("although the [*Scarborough*] Court did not address the statute from a constitutional perspective, it implicitly assumed the constitutionality of the 'in commerce' requirement"). They assume that *Scarborough* implicitly created a Commerce Clause test that this Court has never explicitly articulated: if a possession statute contains a "minimal nexus" element requiring proof that the thing possessed once crossed state lines, the statute need not pass this Court's other (explicit) Commerce Clause tests.

See Patton, 451 F.3d at 636 ("Because Mr. Patton's bulletproof vest moved across state lines at some point in its existence, Congress may regulate it under *Scarborough*, *even though it does not fall within any of the three categories the Court now recognizes for Commerce Clause authority*.") (emphasis added).

But this Court does not decide a statute's constitutionality every time it interprets the statute. In *United States v. Castleman*, for instance, this Court broadly interpreted the misdemeanant-in-possession ban in 18 U.S.C. § 922(g)(9). 572 U.S. 157 (2014). This Court explicitly declined to consider whether its interpretation implicated the constitutional right to keep and bear arms, because the petitioner there "ha[d] not challenged the constitutionality of § 922(g)(9), either on its face or as applied to him." *Id.* at 173.

Additionally, this Court does not decide important constitutional questions *sub rosa*. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *accord Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (explaining that prior case had no effect on constitutional claim where "the issue was by no means adequately presented to and necessarily decided by this Court"). Given the complexity and contentiousness of this Court's modern Commerce Clause jurisprudence,[11] it is implausible that this Court would silently and unanimously approve the constitutionality of a statute banning a non-economic activity with only a "minimal

[11] *Lopez* alone generated six opinions, *Morrison* four, and *Raich* four.

nexus" to interstate commerce. The circuit courts are mistaken to assume that *Scarborough* implicitly decided that § 1202(a)(1) passed Commerce Clause muster.

Even if *Scarborough* had decided that a possession ban with only a "minimal nexus" to interstate commerce passed Commerce Clause muster, that decision would be "in fundamental and irreconcilable conflict" with *Lopez*. *Kuban*, 94 F.3d at 977 (Demoss, C.J., dissenting in part). *Lopez* emphasized that this Court has never "declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." 514 U.S. at 558 (citation omitted). As we show below, under *Lopez* and this Court's other recent Commerce Clause cases, if § 922(g)(1) covers the same conduct that *Scarborough* said its predecessor covered, then Congress exceeded its Commerce Clause authority in passing § 922(g)(1).

Scarborough is neither controlling nor persuasive regarding this question, and the circuit courts are wrong to assume otherwise.

D. Under this Court's explicit Commerce Clause precedents, if § 922(g)(1) contains only a minimal nexus to interstate commerce, it cannot be sustained.

To be clear, we are challenging Congress's exercise of its Commerce Clause authority to enact § 922(g)(1)'s felon-in-possession ban only to the extent that the ban criminalizes possessions "affecting commerce." We are not challenging the alternative "in commerce" element.[12] This Court may, should it reach this issue and find a

[12] That element was not in play here. The jury was instructed only to decide whether Mr. Goines possessed the firearm "affecting commerce" as that phrase was interpreted in *Scarborough*. That is, the jury was instructed only to decide whether "before the defendant possessed the firearm, the firearm

Commerce Clause violation, invalidate and strike just the challenged element. *See Barr v. American Association of Political Consultants, Inc.*, 140 S.Ct. 2335, 2350 (2020) (discussing "strong presumption" that "an unconstitutional provision in a law is severable from the remainder of the law or statute").

Because the circuit courts have relied on *Scarborough* to reject this challenge, none of them have fully subjected the statute to this Court's actual, explicit Commerce Clause precedent. Under that precedent, § 922(g)(1) cannot be sustained.

1. Congress may rely on its Commerce Clause power to regulate three things: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities having a substantial relation to interstate commerce," that is, activities that "substantially affect[ ]" interstate commerce. *Lopez*, 514 U.S. at 558–59. This case challenges only the criminalization of possessions "affecting commerce" (as interpreted by the circuit courts) and so it concerns only the third category.[13] *Cf. Lopez*, 514 U.S. at 559 (statute prohibiting possession of firearms in local school zones did not fall within first two categories).

2. The statute in *Lopez* contained no jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm possession *in question* affects interstate commerce." 514 U.S. at 562 (emphasis added). Similarly, section

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had moved at some time from one state to another." R1.184; *see also* R1.390–91 (government's closing argument linking firearm-origin evidence to jury instruction on movement from one state to another).

[13] The second category would apply to the alternative "in commerce" element. *Cf. United States v. Bass*, 404 U.S. 336, 350 (1971) (suggesting that "in commerce" element in predecessor statute could be satisfied if "at the time of the offense the gun was moving interstate or on an interstate facility").

921(g)(1)'s "affecting commerce" element, as interpreted by the circuit courts, "does not seriously limit the reach of the statute." *Patton*, 451 F.3d at 633. To begin with, the universe of possessions "affecting commerce" is on its face broader than the universe of possessions *substantially* affecting commerce. And the "affecting commerce" element, as interpreted, ensures only that the firearm, at some point in the past, crossed state lines; it does nothing to connect the simple intrastate possession *in question* with any effect on interstate commerce. Congress may not use such a trivial connection to commerce as an excuse for controlling who may possess firearms. *See Lopez*, 514 U.S. at 558.

3. When evaluating whether a statute satisfies the third category of Commerce Clause authority, the question is whether Congress had a rational basis for believing that the federal felon-in-possession ban was essential to Congress's larger effort to regulate and track firearms. *Lopez*, 514 U.S. at 561; *Raich*, 541 U.S. at 24, 27. No such rational basis existed to support § 922(g)(1). To begin with, the federal firearms regulatory scheme does not aim either to prohibit the possession of firearms entirely or to exclude them entirely from interstate commerce.[14] It is thus unlike the scheme at issue in *Raich* to "prohibit entirely" the possession or use of controlled substances, 545 U.S. at 24, and unlike the scheme in *Darby* to "exclud[e] from interstate commerce all goods" that do not conform to specified labor standards, 312 U.S. at 121.

[14] Indeed, such a purpose would be prohibited by the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Indeed, it is not at all obvious how failing to ban *some* people[15] from possessing *some* firearms[16] would leave a "gaping hole" in the firearms scheme. *Raich*, 545 U.S. at 22.

Indeed, Congress did not find it necessary to adopt any status-based possession crimes until decades after it passed the National Firearms Act of 1934. When Congress first added a felon-in-possession ban in 1968, its purpose was not to track firearms in commerce, but to control crime, and it articulated only a weak "costs of crime" connection to commerce. PL 90-351, Title VII, Sec. 1201 (finding that receipt, possession, or transportation of firearms by felons and others constitutes "a burden on commerce or threat affecting the free flow of commerce"); 114 Cong. Rec. 13868 (1969) (statement of bill's sponsor: "You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you would like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce."). When Congress imported the ban into 922(g)(1), it did not mention commerce at all. PL 99-308 Sec. 1 (1986) (finding only a need to reaffirm the rights of law-abiding citizens to own and use firearms). Fighting crime is not a legitimate congressional end. And neither is a "costs of crime" justification sufficient to sustain a criminal statute under the Commerce Clause. *Lopez*, 514 U.S. at 563–64 (rejecting government's "costs of crime" reasoning); *Morrison*, 529 U.S. at 617 ("We

[15] Only those with a prior conviction for "a crime punishable by imprisonment for a term exceeding one year," § 922(g)(1), as "determined in accordance with the law of the jurisdiction in which the proceedings were held," § 921(a)(20).

[16] Only those that have previously crossed state lines.

. . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

4. Allowing § 921(g)(1) to stand as currently interpreted would leave Congress free to 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 563–64. Dictating who may possess firearms is an area "where States historically have been sovereign." *Id*. at 564. If "affecting commerce" as used in § 922(g)(1) means what the circuit courts say it means, then Congress exceeded its Commerce Clause power and exercised a traditional state police function when it enacted § 922(g)(1). This Court should grant this petition. And if this Court agrees that the statute requires no more than a minimal nexus to interstate commerce, this Court should invalidate the statute.

3. There will be no better case than this one in which to decide the questions presented.

This Court will find no better case in which to consider the reach and constitutionality of 18 U.S.C. § 922(g)(1). Unlike nearly every other petitioner who has brought these questions to this Court in recent years (including four whose petitions have been distributed for a conference scheduled the week this petition is being filed),[17] Mr. Goines raised both questions presented in the district court, and put the government to its burden of proof on the "affecting commerce" element at trial. He was convicted on only remote and indirect "affecting commerce" evidence—

[17] *Moore v. United States*, No. 21-6581; *United States v. Guinyard*, No. 21-6589; *United States v. Thomas*, No. 21-6482; *United States v. Owens*, No. 21-6406.

testimony that the firearm he allegedly possessed in Kansas had been "manufactured in the country of Austria" and "imported to the United States through the State of Georgia." R2.259. On appeal, the Tenth Circuit decided both questions presented on their merits and affirmed Mr. Goines's conviction.

This Court has repeatedly denied certiorari on petitions presenting the same or similar questions presented here.[18] Those denials have "no legal significance whatever bearing on the merits of the claim[s]." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1404 n.56 (2020) (citation omitted). Rather, those denials simply reflect the importance of finding a case like Mr. Goines's in which the petitioner *both* (1) preserved the questions presented in the district court *and* (2) went to trial and put the government to its burden of proof on the "affecting commerce" element. This Court typically only reviews the reach of a federal criminal statute when it can do so in the context of evidence relied on by the government at trial to convict someone under the statute. *See, e.g.*, *Van Buren v. United States*, 141 S.Ct. 1648 (2021) (reviewing reach of Computer Fraud and Abuse Act in appeal from jury verdict); *Rehaif v. United States*, 139 S.Ct. 2191 (2019) (construing § 922(g)'s knowledge requirement in appeal from jury verdict); *McDonnell v. United States*, 136 S.Ct. 2355 (2016) (construing "official act" as used in federal bribery statute in appeal from jury

[18] In recent years, government responses were requested in several cases before this Court denied certiorari. *See, e.g., Perryman v. United States*, No. 20-6640 (response requested Jan. 8, 2021; cert. den. April 29, 2021); *Johnson v. United States*, No. 19-7382 (response requested Feb. 18, 2020; cert. den. June 22, 2020); *Gardner v. United States*, No. 18-6771 (response requested Dec. 10, 2018; cert. den. Mar. 18, 2019); *Garcia v. United States*, No. 18-5762 (response requested Sept. 14, 2018; cert. den. Jan. 7, 2019); *Robinson v. United States*, No. 17-9169 (response requested July 6, 2018; cert. den. Dec. 10, 2018); *Brice v. United States*, No. 16-5984 (response requested Oct. 11, 2016; pet. den. Jan. 17, 2017); *Gibson v. United States*, 136 S.Ct. 2482 (response requested Jan. 19, 2016; pet. den. June 20, 2016).

verdict); *Taylor v. United States*, 579 U.S. 301 (2016) (reviewing reach and constitutionality of Hobbs Act in appeal from jury verdict); *Jones v. United States*, 529 U.S. 848 (2000) (reviewing reach of federal arson statute in appeal from jury verdict); *but see Bond v. United States*, 572 U.S. 844 (2014) (reviewing reach of Chemical Weapons Convention Implementation Act in appeal after conditional guilty plea reserving right to challenge application of statute to particular, apparently undisputed facts).

This Court will be best positioned to determine whether possessing a firearm that previously crossed state lines "affect[s] commerce" for 18 U.S.C. § 922(g)(1) purposes in a case like this one, where the government relied on nothing more than the firearm's out-of-state provenance to obtain a conviction at trial. We have found only one similar case in the last six-plus years,[19] that is, a case in which the petitioner both preserved the questions presented in the district court, and put the government to its burden of proof on the "affecting commerce" element at trial. *See United States v. Terry*, No. 17-9136 (cert. pet. filed May 24, 2018). But the *Terry* petition (which did not generate a request for a government response) presented seven wide-ranging trial- and sentencing-related questions, thus diluting the importance of the § 922(g)(1) issues. *Id*. Mr. Goines, in contrast, seeks only this Court's consideration of the § 922(g)(1) issues. No more-appropriate case will come before this Court.

[19] We reviewed as many petitions for certiorari raising these questions as we could find from the 2015 term through the present.

The fact that the Tenth Circuit's decision here was unpublished does not weigh against granting this petition. Because the circuit courts have already uniformly decided the questions presented here in the government's favor, they tend to dispatch them now in unpublished opinions (unless there are other publication-worthy issues in the case). *See, e.g., United States v. Johnson*, 781 Fed. Appx. 370 (5th Cir. 2019); *United States v. Bonet*, 737 Fed. Appx. 988 (11th Cir. 2018); *United States v. Gardner*, 734 Fed. Appx. 311 (5th Cir. 2018); *United States v. Terry*, 726 Fed. Appx. 939 (4th Cir. 2018). And even when circuit courts reject the claims in published decisions, they do so summarily. *See, e.g., United States v. Penn*, 969 F.3d 450, 459-60 (5th Cir. 2020) (summarily rejecting Commerce Clause challenge: "our precedent forecloses this argument"); *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020) (summarily rejecting challenge to sufficiency of evidence on "affecting commerce" element: "this argument is foreclosed under our caselaw"). Given the state of the law in the circuits, there is no reason to expect a more-deeply-analyzed decision (published or unpublished) to come along.

Moreover, publication has never been a prerequisite to review or a reliable measure of a decision's importance. *See, e.g., Carter v. United States*, 530 U.S. 255 (2000) (reviewing unpublished circuit court decision); *Los Angeles County, California v. Rettele*, 550 U.S. 609 (2007) (same); *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) (same); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (same); *Eastern Assoc. Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57 (2000) (same); *Wisconsin Right to Life, Inc.*

v. F.E.C., 546 U.S. 410 (2006) (reviewing unpublished three-judge district court decision); *Kaupp v. Texas*, 538 U.S. 626 (2003) (reviewing unpublished Texas Court of Appeals decision); *Ewing v. California*, 538 U.S. 11 (2003) (reviewing unpublished California Court of Appeal decision).

No future case will be better positioned for this Court to address the reach and constitutionality of § 922(g)(1). This Court should grant this petition.

4. The absence of any circuit conflict regarding either question presented should not preclude review.

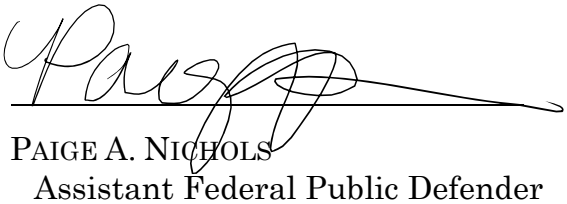
A circuit conflict is only one consideration governing review on certiorari. *See* Supreme Court Rule 10. This Court took up the meaning of § 922(g)'s knowledge element in *Rehaif* notwithstanding the fact that the circuit courts had uniformly rejected the petitioner's proposed reading of that element. 139 S.Ct. at 2195. This Court should grant this petition not just despite, but *because* the circuit courts are in agreement, and regardless of whether this Court ultimately agrees with them. If the circuit courts are right about both questions presented, this Court's final say-so will ultimately preserve judicial resources by settling this matter once and for all. If they are right for mistaken reasons (because of their continued reliance on *Scarborough*, for instance), then their mistakes stand in need of correction. If they are wrong, then their mistakes stand in need of correction, *and* Mr. Goines stands in need of a remedy. The circuit courts *are* wrong, and uniformly so, which makes review that much more pressing.

CONCLUSION

For the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender



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FILED
United States Court of Appeals
Tenth Circuit

October 5, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EMANUEL E. GOINES, JR.,

Defendant - Appellant.

No. 20-3183
(D.C. No. 6:19-CR-10103-JWB-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **SEYMOUR**, and **PHILLIPS**, Circuit Judges.

Emanuel Goines presents two issues on appeal: Is 18 U.S.C. 922(g)(1)'s prohibition on a felon's possession of a firearm unconstitutional? And, does prosecution under 18 U.S.C. § 922(g)(1) require the government to prove that the accused's possession of the firearm contemporaneously affected commerce?

Both questions have been answered in the negative by the Supreme Court's decision in *Scarborough v. United States*, 431 U.S. 563 (1977) and precedents of this

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

court. *See, e.g.*, *United States v. Campbell*, 603 F.3d 1218, 1220 n.1 (10th Cir. 2010); *United States v. Urbano,* 563 F.3d 1150, 1154 (10th Cir. 2009); *United States v. Patton*, 451 F.3d 615, 634–35 (10th Cir. 2006); *United States v. Dorris*, 236 F.3d 582, 584 (10th Cir. 2000).

Goines's appeal invites us to reexamine *Scarborough* and our precedents interpreting it based on the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzalez v. Raich*, 545 U.S. 1 (2005). Among other reasons for a reexamination, Goines points to Justice Thomas's dissent from the denial of certiorari in *Alderman v. United States*, 562 U.S. 1163, 131 S. Ct. 700 (2011). In that dissent, Justice Thomas, joined by Justice Scalia, stated that "*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez*[,]" and that "[i]f the *Lopez* framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent that does not squarely address the constitutional issue." 131 S. Ct. at 702–03.

But several layers of precedent foreclose us from accepting Goines's invitation. "Absent the Supreme Court overturning its own precedent or our own, we are bound by it." *Contreras ex rel. A.L. v. Doña Ana Cnty. Bd. of Cnty. Comm'rs*, 965 F.3d 1114, 1130 n.3 (10th Cir. 2020). This proposition becomes no less binding on our decisions if the reasoning of a prior Supreme Court decision is undermined by a subsequent decision. And the same holds true if two Justices express their personal views about a case in a dissent from the denial of certiorari. *See Schell v. Chief Just.*

and Justs. of Okla. Sup. Ct., --- F.4th ----, 2021 WL 3877404, at *1 (10th Cir. Aug. 25, 2021). As for our own precedents, absent an en banc decision from our circuit, three-judge panels are bound by previous panel decisions. *United States v. Manzanares*, 956 F.3d 1220, 1225 (10th Cir. 2020). Goines's en banc petition was denied on March 23, 2021. So, here, our only task is to determine whether the district court's decision was consistent with on-point Supreme Court and Tenth Circuit precedent. We find that it was and, exercising jurisdiction under 28 U.S.C. § 1291 and reviewing de novo, uphold the decision below.

Affirmed.

Entered for the Court

Gregory A. Phillips
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

March 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EMANUEL E. GOINES, JR.,

Defendant - Appellant.

No. 20-3183
(D.C. No. 6:19-CR-10103-JWB-1)
(D. Kan.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HARTZ**, **HOLMES**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, and **CARSON**, Circuit Judges.

This matter is before the court on the Petition for Initial En Banc Hearing contained within Appellant's opening brief, and the United States' response to the petition. No judge in regular active service on the court requested that the court be polled. As a result, Appellant's request for initial en banc consideration is DENIED. Appellee's response brief shall be filed and served within 30 days of the date of this order.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

whether he needs some exceptional treatment or we need to come up with a different plan to get him that treatment.

All right. So, Motion to Reconsider Denial of Appeal of Detention Order at Docket Entry 32 is denied for the reasons stated here on the record.

I think since I already have a written order out there I don't necessarily believe I need to generate a new one based on this new evidence. It's fairly straightforward. I think I have expressed my views and findings on the record here.

If anyone thinks I need an additional written order in order to comply with the statutory requirements, tell me now.

MR. HENRY: Your Honor, I believe the minute order that will be entered on for this motion is sufficient.

I will also be requesting a copy of the transcript of today's hearing so I'll have that also available. Thank you.

THE COURT: Okay. And then the last thing I think we had was the motion to dismiss and strike some surplusage. I looked over that, I'm not concerned about surplusage issue, I don't see what that really makes much difference so I'm going to deny that.

With respect to the motion to dismiss, I'm not unsympathetic to the defense's argument, particularly in

light of *Lopez* and I think it's a -- an issue that is legitimate and merits some consideration but as the defense noted in their filing, I don't have any authority to do that because existing circuit precedent already forecloses the relief that the defense is asking for and the conclusion of law that would be necessary to support it so I can't give it to you.

I understand that to be an effort to preserve a good faith nonfrivolous argument for a change in the law to return existing precedent and I think that's all I need to rule on that one.

Is there anything else that needs to be ruled on today for what we called this for today before we call it quits?

MS. ANDRUSAK: No, Your Honor.

MR. HENRY: No, Your Honor.

THE COURT: Very well. Take a short recess, and press on with the next matters that need to be addressed.

(Proceedings conclude at 12:30 p.m.)

talking about the twigs, they heard the difference between the twigs laying on top of the magazine versus being over the magazine so at this point the Government viewing the light -- viewing the evidence presented in the light most favorable to the Government -- I think I said state earlier, and I apologize -- light most favorable to the Government, the Government would request that you deny the motion.

THE COURT: Well, with regard to the interstate commerce argument, Mr. Henry, as I told you before, I think if we were writing on a clean slate there could be some merit to your argument but as previously indicated, the Tenth Circuit precedent on that issue forecloses it at this point and I don't have the authority to question that, so the motion will be denied on the interstate commerce basis for those reasons and for the reasons previously stated when this came up in a prior motion in this case.

With respect to the evidence, defendant stipulated that he had a prior felony conviction and that he knew about it so that satisfies two of the four elements of the charged crime the way I have them broken out in the instructions. I have a four-element instruction: One of them is that he had the prior felony conviction; the other is that he knew about it. Those are satisfied.