No. _____

In the Supreme Court of the United States

October Term, 2022

IKLAS DAVIS,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

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

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QUESTIONS PRESENTED

1. In *United States v. Rehaif*, ___ U.S. ___, 139 S.Ct. 2191 (2019), this Court acknowledged the presumption in favor of scienter – that criminal statutes require the degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act – and held that in a prosecution under 18 U.S.C. § 922(g), the government must prove beyond a reasonable doubt that the defendant knew of his prohibiting status at the time he possessed a firearm. The question presented is:

   > Does the Third Circuit's creation of a presumption that all individuals convicted of 18 U.S.C. § 922(g)(1) (felon in possession), knew of their relevant status conflict with Supreme Court precedent and essentially eliminate the knowledge element just established by this Court in *Rehaif*?

2. In recent decisions, this Court and individual Justices have expressed its growing discomfort with the expansion of federal criminal statutes into an area expressly reserved to state police power, by issuing opinions striking down federal criminal statutes that failed to have a bona fide interstate commerce nexus. This is particularly the case in areas that are in fact sufficiently being regulated by the states. The question presented is:

   > Does the federal Unlawful Felon in Possession of a Firearm statute (18 U.S.C. § 922(g)(1)) exceed Congress's authority to regulate under the Commerce Clause?

OTHER PARTIES AND CORPORATE DISCLOSURE

There are no parties to the proceeding, or corporate entities, other than those named in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Iklas Davis, petitions the Supreme Court of the United States for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit, rendered and entered in case numbers 19-1872 and 19-1873 in that court on September 13, 2022, *United States v. Iklas Davis*, No. 19-1872 & 19-1873 (3d Cir. Sept. 13, 2022), which affirmed the judgments and commitments of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

The not precedential opinion of the Court of Appeals for the Third Circuit Court of Appeals (Appendix A) is at *United States v. Davis*, Nos. 19-1872 & 19-1873 (3d Cir. Sept. 13, 2022).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of Appeals was entered on September 13, 2022. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The United States District Court for the Western District of Pennsylvania had jurisdiction because petitioner was charged with violating federal criminal laws. The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that the Court of Appeals shall have appellate jurisdiction of all final decisions of United States District Courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the U.S. Constitution provides in part:

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

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property without due process of law*; nor

shall private property be taken for public use, without just compensation.

18 U.S.C. § 922(g)(1) provides:

> 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 December of 2001, Iklas Davis appeared before an Allegheny County, Pennsylvania trial court to defend an allegation of theft by unlawful taking. (Appendix A at 3). Mr. Davis was accused of stealing from a home he was visiting nearly two years prior, when he was eighteen. He was ultimately convicted and sentenced to time served (137 days) to 23 months. He was immediately released from custody and served a total sentence of approximately four months. (Appendix A at 3).

Sixteen years later, on July 27, 2016, various law enforcement executed a search warrant at his Pennsylvania home. During the course of this search, firearms and ammunition were seized. Mr. Davis was arrested and charged in state court and released on bail pending trial. The United States Attorney's Office of the Western District of Pennsylvania subsequently adopted the case and an arrest warrant was issued for Mr. Davis. (Appendix A at 3).

On October 13, 2017, law enforcement executed the arrest warrant for Mr. Davis and a second search warrant for the home he shared with his partner. During the course of the search, officers seized one additional firearm and ammunition. Mr. Davis was arrested and subsequently charged with a second count of violating 18 U.S.C. § 922(g) resulting from the firearm and ammunition seized during the October 2017 search. (Appendix A at 3).

Mr. Davis was charged in a one-count indictment at Criminal No. 2-17-cr-271 (No. 17-271), with possessing a firearm after having been convicted of an offense

punishable by imprisonment for a term exceeding one year, in violation of 18 U.S. C. § 922(g)(1) for the firearms and ammunition found in the July 2016 search. He was later charged with a second violation of 18 U.S.C. § 922(g)(1) in a separate one-count indictment at Criminal No. 2-18-cr-041 (No. 18-41) for the firearm and ammunition found during the October 2016 search.

On May 30, 2018, Mr. Davis filed a motion to dismiss both indictments, arguing that the district court lacked jurisdiction because 18 U.S.C. 922(g) unlawfully exceeds Congress's authority under the Commerce Clause. On July 18, 2018, the Honorable Nora Berry Fischer issued an order denying Mr. Davis' motion in both cases, citing to binding Third Circuit precedent in *United States v. Singletary*, 268 F.3d 196 (3d Cir. 2001).[1] (Appendix 001).

Mr. Davis proceeded to trial on both indictments on November 6, 2019. The government introduced testimony of eight police officers, sergeants and agents, all of whom testified about executing search warrants at the home Mr. Davis shared with his fiance and recovering firearms. Finally, one agent testified that each gun attributed to Mr. Davis was manufactured outside of Pennsylvania and therefore, crossed state lines. No evidence was introduced as to Mr. Davis' knowledge of his status as a prohibited person. (*See* Appendix 041-284).

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[1] Citations to the record supporting the factual summary are provided in the briefing filed by Mr. Davis in the Third Circuit Court of Appeals and in the Appendix [hereinafter "Appendix"] filed at Nos. 19-1872 & 19-1873 on the Third Circuit's electronic docket.

After the government rested, defense counsel made a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. The District Court denied Mr. Davis' motion, explaining:

> As the parties are aware, the defendant is charged with violating Title 18, United States Code, Section 922(g)(1) based on his alleged possession of the firearms and ammunition on July 27, 2016 and October 12, 2017. To sustain convictions on these charges, the government has the burden to prove the following three elements beyond a reasonable doubt; first, that the defendant has been convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year.
>
> That has been established by stipulation.
>
> Second, that after his conviction, the defendant has knowingly possessed the firearms and ammunition described in the indictments.
>
> I'll speak to that in more detail in a minute.
>
> Third, that the defendant's possession was in or affecting interstate or foreign commerce.
>
> I don't believe there can be any doubt about that given Agent Namey's testimony
>
> ...
>
> Now, once again, I have to consider the evidence of record in the light most favorable to the government, and to that end, I believe that the government has presented sufficient evidence from which this jury could find beyond a reasonable doubt that the defendant knowingly possessed the firearms and ammunition on both July 27, 2016 and October 12, 2017.

(Appendix 236 - 240). Following this ruling and after consulting with defense counsel and his family, Mr. Davis informed the Court that he did not wish to proceed with his trial. (Appendix 255). On the same day, Mr. Davis entered a

Change of Plea and pled guilty to one count of violating 18 U.S.C. 922(g)(1) at each of the two indictments. (Appendix 278).

Prior to entering his plea, Mr. Davis was informed as follows of the elements the government would be required to prove beyond a reasonable doubt before he could be convicted of the charges:

> MR. CONWAY: ... There are three [elements].
>
> Prior to the alleged possession of the firearm and ammunition, the defendant had been convicted of a felony offense, that is, a crime punishable by imprisonment by a term exceeding one year.
>
> Two, after his conviction, defendant knowingly possessed one or more of the firearms and one or more rounds of ammunition described in the indictment.
>
> And three, that possession was in or affecting interstate or foreign commerce.

(Appendix 273).

When asked to summarize the evidence the government would have used to prove each of the three elements, the government referred to the trial that had just occurred. (Appendix 274).

On April 4, 2019, Mr. Davis appeared for sentencing and made one final plea to the Court:

> I do understand the guns were mine and I do understand I'm taking full responsibility for that, but I never knew I was unable to possess firearms underneath ... Yes, I had a felony, but theft by unlawful taking does not, in the State of Pennsylvania, prohibit you from having a firearm.

(Appendix 291).

Mr. Davis was referencing Pennsylvania's Persons not to possess statute codified at 18 Pa.C.S.A. § 6105, which provides:

> A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, see, transfer, or manufacture a firearm in this Commonwealth.

Theft by unlawful taking, criminalized under Pennsylvania law at 18 Pa.C.S.A. § 3921, is the felony underlying Mr. Davis' 922(g)(1) charges at both indictments. While 18 Pa.C.S. § 3921 is enumerated under Pennsylvania's Persons not to possess statute, that statute specifically notes that an individual is prohibited from possessing a firearm only "upon conviction of the second felony offense." 18 Pa.C.S.A. § 1605(b). As such, based upon a reading of the Pennsylvania statute, Mr. Davis was under the impression at the time he possessed the firearm, that he was <u>not</u> a person prohibited from possessing a firearm.[2] He further explained:

> If we're going off the state case, the state clearly says I had permission to have a firearm, so if I then got adopted by the feds, and I understand because I am wrong, because under the federal guidelines, any felony makes you a felon not to possess in the federal guidelines, but how did I know that I was doing that when I was in the state I was still underneath the law?
>
> I didn't try to break the law here. I was inside my home with a firearm. I wasn't carrying unconcealed or any of those things. I wanted

[2] Mr. Davis' conviction at CC No. 200003179, in the Court of Common Pleas of Allegheny County, which is identified as the underlying felony in both indictments, was Mr. Davis' second conviction under 18 Pa.C.S. § 3921. He was 18 years old when he committed this theft and 19 when he was convicted. Mr. Davis committed the first offense of theft by unlawful taking when he was a 17 year-old minor; therefore, it is hardly surprising that Mr. Davis would believe he was not a prohibited person.

> to point that out. That's all I really have to say for right now. I just wanted to point that out to you and I have the documents here to prove it so it's not just words that I'm saying, but this is the original complaint.

(Appendix 292-293).

The District Court acknowledged Mr. Davis' position on the matter and proceeded with the sentencing. The District Court sentenced Mr. Davis to fifty-one months incarceration at each criminal case to be served concurrently. (Appendix A at 3). A timely notice of appeal was filed in both cases. *Id.*

Direct Appeal

Petitioner filed a timely pro se notice of appeal on April 16, 2019. He was permitted to proceed *in forma pauperis* and the Federal Public Defender was appointed to represent him on appeal.

Petitioner raised three issues on direct appeal (1) the District Court plainly erred in accepting his guilty plea without informing him of the government's burden under *Rehaif* to prove beyond a reasonable doubt that he knew of his status as a convicted felon; (2) that his indictments are defective and must be vacated because they did not reference 18 U.S.C. § 924(a)(2) or list the *Rehaif* knowledge-of-status element; and (3) 18 U.S.C. § 922(g)(1) is unconstitutional because it exceeds the authority of the federal government under the Commerce Clause of the United States Constitution. (Appendix A at 6-7).

On September 13, 2022, the Court of Appeals issued an opinion, affirming both district court judgments. The Third Circuit, citing to its own prior precedent in *United States v. Adams*, 36 F. 4th 137 (3d Cir. May 26, 2022) held that there is a

presumption that the knowledge-of-status, or the *Rehaif* element is satisfied whenever a § 922(g)(1) defendant, like Mr. Davis, is, in fact, a felon. The Third Circuit applied this presumption, and without considering most of the evidence and arguments Mr. Davis set forth to support his lack of knowledge, held that Mr. Davis could not meet his burden to prove that but for the *Rehaif* error, there is a reasonable probability that he would not have pled guilty. (Appendix A at 9 -11).

The Third Circuit briefly addressed Mr. Davis' argument regarding the unconstitutionality of 18 U.S.C. § 922(g)(1) but held that the argument is foreclosed by Circuit precedent in *United States v. Shambry*, 392 F.3d. 631 (3d Cir. 2004). (Appendix A at 13).

The petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit has eviscerated the scienter element of 922(g) recognized by this Court in *Rehaif*, by creating a nearly non-rebuttable presumption of knowledge, contrary to this Court's precedent.

In *Rehaif v. United States*, this Court concluded that "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. ___ U.S. ___, 139 S.Ct. 2191, 2200 (2019). In *Greer v. United States*, this Court addressed a *Rehaif* error on plain error review and explained that under plain error review, the defendant has the burden of "showing that, if the District Court had correctly advised him of the *mens rea* element of the offense, there is a "reasonable probability" that he would not have pled guilty." ___ U.S. ___ 141 S. Ct. 2090, 2093 (2021). This Court has already defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

In a few short years, the Third Circuit whittled down this Court's holding in *Rehaif*, to what is now, in effect, a nearly irrebuttable presumption that the *Rehaif* element is met in all felon in possession cases. This presumption was created in *United States v. Adams*, 36 F. 4th 137 (3d Cir. May 26, 2022). In *Adams*, the Third Circuit held that "*Greer*, in effect, created a presumption that the 'knowledge-of-status' element is satisfied whenever a § 922(g)(1) defendant, is in fact, a felon." In *Davis*, the Circuit again applied this "presumption of knowledge" and denied the

claim without consideration of any of the arguments and evidence set forth in his brief that support his lack of knowledge, ultimately applying an irrebuttable presumption against Mr. Davis.

This presumption created by the Circuit is contrary to Supreme Court precedent.

In *Greer*, this Court explained that a defendant faces "an uphill climb" when trying to meet the substantial-rights prong of the plain-error test in a felon-in-possession case because "[i]f a person is a felon, he ordinarily knows he is a felon." But the Court's analysis did not end there. *Greer* continues to say that "[o]f course, there may be cases in which a defendant who is a felon can make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms. *See* Fed. Rule App. Proc. 10(e)." *Id.* at 2097. Indeed, at oral argument, even the government conceded that there are circumstances in which a defendant might make such a showing." *Greer* at 2097.

This Court provided specific examples of circumstances where a defendant might lack knowledge of his felon status. *Rehaif* at 2198, *see also Greer* at 2097. "For example, a defendant may not understand that a conviction in juvenile court or a misdemeanor under state law can be a felony for purposes of federal law. Or he likewise might not understand that pretrial detention was included in his ultimate sentence." *Id* at 2103 (concurrence). The Third Circuit expressly rejected this Court's guidance in that regard and held that "the Supreme Court's far-flung

hypothetical in *Rehaif* is not enough, without more, to surmount the 'uphill climb.'" *Adams* at 153.

Neither *Greer* nor *Gary* made the representations on appeal that they would have presented evidence of their lack of knowledge, which is why this Court did not consider any evidence. Mr. Davis, however, made numerous representations on appeal and submitted evidence of his lack of knowledge that the Circuit is required to consider. Without addressing the evidence and arguments presented by Mr. Davis, the Third Circuit ended its inquiry, when it confirmed that Mr. Davis, regardless of his knowledge, was in fact a felon.

Mr. Davis was rendered a prohibited person under federal law due to his prior theft offense under Pennsylvania law. This conviction occurred nearly 16 years prior to acts alleged in the indictment. At his Pennsylvania sentencing for this theft offense, Mr. Davis was told the "guidelines call for three to six months and six to 12 months in the standard range." He was sentenced to time served (137 days) to 23 months, and immediately released from custody, serving a mere four months of imprisonment for this prior conviction. Under Pennsylvania state law, this prior conviction did not render Mr. Davis a person prohibited from possessing a firearm. Given his lack of prohibited status under state law, the fact of his having served only four months imprisonment, and the passing of more than a decade and a half since his conviction, there was more than just some evidence that Mr. Davis would have put the government to its burden of proving his *mens rea* as required following *Rehaif,* and he would not have pled guilty had he been properly informed of the

elements of the offense. *See Greer* at 2103 (concurrence) (recognizing that "[e]ven if a defendant was incarcerated for over a year ... [c]onfusion along these lines becomes more likely as time passes.").

The Circuit in this case failed to consider the evidence and arguments Mr. Davis presented, in effect making this already improper presumption, an irrebuttable one. The Court also failed to consider that Mr. Davis (1) initially asserted his constitutional right to a jury trial; (2) participated in the trial through the close of the government's case, where it did not present any evidence of his knowledge of status (3) expressed his desire and intention to testify at that trial; (4) pled guilty only after being informed by the trial court that the government had met its burden of proof based on pre-*Rehaif* elements; and (5) made unsolicited statements at his sentencing, which occurred prior to this Court's decision in *Rehaif*, that he did not know of his relevant status prohibiting him from possessing a weapon. None of those factors were ever considered by the Circuit.

The only "presumption" acknowledged by this Court in *Rehaif* is the presumption in favor of scienter – that criminal statutes require the degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act. Black's Law Dictionary 1547 (10th ed. 2014). The Third Circuit is the only circuit court to limit this Court's holding in *Greer* by creating a presumption that the *Rehaif* element is met. As such, this Court should grant certiorari to resolve this issue.

II. This Court should grant certiorari in this case and answer the reoccurring, important question of whether,

when enacting 18 U.S.C. § 922(g)(1), Congress reached into an area reserved to the states' exercise of police power and exceeded its authority under the Commerce Clause.

The reach of the federal government has its limits. It "can exercise only the powers granted to it." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). The states and the people retain the remaining power. *Bond v. United States*, 572 U.S. 844, 854 (2014). The states "have broad authority to enact legislation for the public good—what we have often called a 'police power.'" *Id.* The federal government on the other hand "cannot punish felonies generally." *Cohens v. Virginia*, 19 U.S. 264, 428 (1821). A criminal act committed wholly within a State "cannot be made an offence against the United States, unless it ha[s] some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *United States v. Fox*, 95 U.S. 670, 672 (1878).

Title 18 U.S.C. § 922(g)(1) prohibits firearm possession by convicted felons. The statute requires the government to prove that a defendant possessed a firearm "in or affecting commerce," a requirement that this Court has previously said can be satisfied by proof that, at some time in the past, the firearm traveled, with or without the defendant, in interstate commerce. *See Scarborough v. United States*, 431 U.S. 563, 566–67 & n.5 (1977) (interpreting predecessor statute). Decades after the *Scarborough* decision, this Court began signaling its growing discomfort with the expansion of federal criminal statutes into an area expressly reserved to state police power, by issuing opinions striking down federal criminal statutes that failed to have a bona fide interstate commerce nexus. In response, countless challenges

were raised at the district court and circuit level in hopes that this Court would revisit the 922(g)(1) statute in light of the more recent precedent.

This Court's decisions post-*Scarborough*, in *United States v. Lopez*, 514 U.S. 549 (1995), *Jones v. United States*, 529 U.S. 848 (2000), *United States v. Morrison*, 529 U.S. 598 (2000), and *Bond. v. United States*, 572 U.S. 844, 134 S.Ct. 2077 (2014), compel the conclusion that 18 U.S.C. § 922(g)(1) is unconstitutional because it exceeds Congress's authority under the Commerce Clause.

A. *U.S. v. Lopez*

In *United States v. Lopez*, the defendant challenged his conviction under the Gun-Free School Zones Act, 18 U.S.C. § 922(q). *Lopez* at 552. The passing of the Gun Free School Zones Act made it a federal crime for any individual to knowingly possess a firearm in a school zone. *See* 18 U.S.C. § 922(q). The defendant contended that § 922(q) exceeded Congress' power to legislate under the Commerce Clause. *Id.* This Court agreed and ruled the statute unconstitutional. *Id.* at 567. In doing so, this Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) those activities that substantially affect interstate commerce. *Id.* at 558. This Court found that § 922(q) exceeded Congress's Commerce Clause authority with respect to all three of these categories. *Id.* at 567.

B. United States v. Morrison

In *Morrison*, this Court built upon its decision in *Lopez,* further emphasizing the limits to Congress's use of the Commerce Clause as a basis for federal jurisdiction over intrastate violent activity. The *Morrison* opinion struck down the Violence Against Women Act, 42 U.S.C. § 13981, because the activity being regulated, gender-motivated violence, was deemed not an activity that substantially affects interstate commerce. *Morrison*, 529 U.S. at 617. This Court explained that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. *Id.* at 613. Indeed, *Morrison* held that the "economic effect" aspect of Commerce Clause power, and even Congressional findings regarding such economic effects, will not serve to save a criminal statute where, in commercial reality, no economic activity is involved. *Id.* at 617.

C. Jones v. United States

The Supreme Court applied the limiting principles of *Lopez* and *Morrison* once again in *Jones*. At issue in *Jones* was the constitutionality of the federal arson statute, 18 U.S.C. § 844(I), a statute which, like the 922(g), explicitly has a jurisdictional element within it. *Jones* at 850. The statute at issue in *Jones* makes it a federal crime to "maliciously damage[] or destroy[] ... any building ... used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(I). This Court granted certiorari to answer two questions: (1) should the statute be construed not to reach owner-occupied private

dwellings; and (2) if the statute is construed to reach private owner-occupied residences, is it constitutional under the Commerce Clause? *Id.* at 851-52. This Court, heeding its previous teaching in *Lopez* as well as "the interpretive rule that constitutionally doubtful constructions should be avoided," answered the first question in the affirmative and thereby avoided the second question. *Id.* at 851. This Court did so despite the presence of a specific jurisdictional element in the statute, and despite arguments that the house used natural gas from interstate commerce and was insured by and mortgaged to out-of-state banks. *Id.* at 855. To avoid holding the statute unconstitutional under *Lopez*, as well as to maintain "the federal-state balance" as a matter of statutory construction, this Court held that the statute "covers only property currently used in commerce or in an activity affecting commerce." *Id.* at 859.

D. *Bond. v. United States*

Finally, this Court reversed a conviction under 18 U.S.C. § 229, the possession of a chemical that can cause death (poison). *Bond* at 215. *Bond* presented the question of whether federalism limits the authority of Congress to implement a treaty that criminalizes areas of traditional state concern, specifically the deployment of poisons. This Court answered that question affirmatively and held that while Congress has the authority to create legislation to enforce treaties, it must do so while respecting the traditional division of sovereign responsibility between the federal government and the states. *Id.* at 866. In deciding, this Court weighed the fact that "the laws of the Commonwealth of Pennsylvania (and every

other State) are sufficient to prosecute Bond. Pennsylvania has several statutes that would likely cover her assault. *See* 18 Pa. C.S.A. § 2701 (2012) (simple assault), 2705 (reckless endangerment), 2709 (harassment). And state authorities regularly enforce these laws in poisoning cases."

For virtually all of the reasons set out there, its holding–that prohibitions on the use of poison represent an area of traditional state concern, outside the scope of federal authority – would also support a finding that federal prohibitions on firearms possession are likewise unconstitutional. Firearms, like poison, are a dangerous instrumentality traditionally committed to the State police power. Both arguably affect commerce, but prohibitions on firearm possession or the deployment of poison are not, either of them, prohibitions on commercial activity.

E. Application of this Court's precedent to 18 U.S.C. § 922(g)(1).

This Court's position established in *Lopez* and confirmed further in the cases that followed re-established the basic constitutional proposition that the Founders did not cede to Congress a general police power. Rather, as this Court said in *Morrison*, "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison* at 618. The provision at issue here, 18 U.S.C. § 922(g), makes it unlawful for certain individuals 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. *See* 18 U.S.C. § 922(g). The statute regulates the mere possession

of firearms and ammunition by certain categories of people. It is not a regulation of the channels of interstate commerce and thus does not fit into the first *Lopez* category.

This statute also does not fall within the second *Lopez* category, which contemplates a "thing in commerce" meaning one that is ***currently*** in interstate commerce. *See Jones*, 529 U.S.at 858; *Perez v. United States*, 402 U.S. 146, 150 (1971) (example of things in commerce that need protection includes interstate shipments subject to theft). The mere fact that a gun was once shipped across state lines does not give it a permanent status as "a thing in interstate commerce." Accordingly, § 922(g)(1) does not fit into the second *Lopez* category.

This statute also does not fit within the third and final category of interstate commerce regulation, an activity that substantially affects interstate commerce. The Court's decisions in *Jones* and *Morrison* make it clear that previous case law and Congressional enactments relying on the proposition that a minimal nexus or effect on interstate commerce is enough to pass constitutional muster are no longer valid. Evaluating the statute under the third category, it seems clear that § 922(g)(1) does not regulate an activity that ***substantially*** affects interstate commerce because the statute has nothing to do with commerce or any sort of economic activity, and Congress has made no legislative findings as to how the intrastate possession of a firearm by a convicted felon impacts upon interstate commerce. Moreover, the mere fact that § 922(g)(1) contains a jurisdictional element, an element which has been interpreted to require evidence that the

firearm moved across state lines at some point in time during its existence, does not make the federal statute constitutional.

The intrastate possession of a firearm that crossed state lines at some point during its existence, without more, is not a commercial activity and does not have a substantial impact upon interstate commerce. In light of this Court's decision in *Lopez* and its progeny, a single transportation of a firearm from one state to another, by unknown persons and means, no longer bears a sufficient nexus with interstate commerce to fall within the enumerated powers of the federal government, and thus a conviction relying on such evidence must be unconstitutional under the Commerce Clause.

Following *Lopez*, there exists legitimate doubts as to the constitutionality of the federal felon in possession statute. This Court should grant certiorari to address these doubts. In light of *Lopez* and its progeny, the statute has faced repeated challenges not only in the Third Circuit, but throughout the country. *See United States v. Scott*, 263 F.3d 1270, 1274 (11th Cir. 2001) (collecting cases). The prevalence of § 922(g) prosecutions ensures the recurrence of the issue, and litigation will undoubtedly continue unless this Court provides a definitive statement regarding the application of *Lopez's* principles to 18 U.S.C. 922(g)(1).

F. This case presents an ideal vehicle to address this outstanding issue, as this case demonstrates how the federal government's overreach into an area reserved to and actively being regulated by the states creates confusion among the people of the United States.

This case is the ideal vehicle to address this issue because but for the federal government exceeding its powers under the Commerce Clause, Iklas Davis' conduct

would not have been deemed criminal. This case demonstrates how the federal government's overreach creates confusion and results in citizens unintentionally and unknowingly committing a felony offense.

18 U.S.C. 922(g)(1) makes it unlawful for anyone who has been convicted of a crime punishable by one year or more to possess a firearm. Nearly all U.S. states have a statute that in some fashion, prohibits those convicted of felony offenses from possessing firearms. However, many of these statutes, like Pennsylvania's felon in possession statute are narrower than 18 U.S.C. 922(g)(1). Instead of barring those convicted of *any* felony offense, and certain misdemeanors like 922(g)(1), 18 Pa.C.S.A. § 6105 provides a specific list of felonies covered under the statute.

18 Pa.C.S.A. § 6105 provides:

> A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, see, transfer, or manufacture a firearm in this Commonwealth.

Theft by unlawful taking, criminalized under Pennsylvania law at 18 Pa.C.S.A. § 3921, is the felony underlying Mr. Davis' 922(g)(1) charges at both federal indictments. While 18 Pa.C.S.A. § 3921 is enumerated under Pennsylvania's Persons not to possess statute, that statute specifically notes that an individual is prohibited from possessing a firearm only "upon conviction of the second felony offense." 18 Pa.C.S.A. § 1605(b). Based upon a reading of the Pennsylvania statute, Mr. Davis was under the impression at the time he possessed the firearm, that he

was not a person prohibited from possessing a firearm. At the time of his sentencing, he explained to the court:

> If we're going off the state case, the state clearly says I had permission to have a firearm, so if I then got adopted by the feds, and I understand because I am wrong, because under the federal guidelines, any felony makes you a felon not to possess in the federal guidelines, but how did I know that I was doing that when I was in the state I was still underneath the law?
>
> I didn't try to break the law here. I was inside my home with a firearm. I wasn't carrying unconcealed or any of those things. I wanted to point that out. That's all I really have to say for right now. I just wanted to point that out to you and I have the documents here to prove it so it's not just words that I'm saying, but this is the original complaint.

(Appendix 292 – 293).

Other states also have felon in possession statutes that expressly authorize conduct that is prohibited by 922(g)(1). Louisiana, for example, authorizes individuals convicted of some felonies to possess firearms if they remain felony free for a period of ten years from the date of completion of sentence, probation, parole, suspension of sentence, or discharge from a mental institution by a court of competent jurisdiction. La. Rev. Stat. § 14:95.1 (C). Similarly, South Dakota permits the possession of a firearm by an individual convicted of a felony after 15 years from the date of their release from custody. *See* S.D. Codified Laws § 22-14-15 ("No person who has been convicted in this state or elsewhere of a crime of violence or a felony pursuant to § 22-42-2, 22-42-3, 22-42-4, 22-42-7, 22-42-8, 22-42-9, 22-42-10 or 22-42-19, may possess or have control of a firearm. A violation of this section is a Class 6 felony. The provisions of this section do not apply to any person who was

last discharged from prison, jail, probation, or parole more than fifteen years prior to the commission of the principal offense.")

"Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States v. Bass*, 404 U.S. 336, 349 (1971). That principle goes to the very structure of the Constitution, and "protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011). The states have exercised their police power and sufficiently regulated the intrastate possession of firearms.

There are undoubtedly countless individuals, like Iklas Davis, who wrongly believe that they are in lawful possession of a firearm based upon the language of their state's statute. The prevalence of § 922(g) prosecutions in states with narrower felon in possession statutes, like Pennsylvania, ensures the recurrence of the issue, and litigation will undoubtedly continue unless this Court provides a definitive statement regarding the application of principles established in *Lopez* to this statute. Mr. Davis' case gives the Court an opportunity to do so.

CONCLUSION

Based upon the foregoing petition, this Court should grant a writ of certiorari to review the decision of the Court of Appeals for the Third Circuit.

Dated: December 12, 2022

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP IN BAR

I, Gabrielle Lee, Assistant Federal Public Defender, hereby certify that I am a not a member of the Bar of the Supreme Court of the United States; however, I am authorized to file on behalf of Mr. Davis pursuant to U.S. Sup.Ct. Rule 9. Undersigned counsel was appointed under the Criminal Justice Act of 1964.

GABRIELLE LEE
Assistant Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2022

IKLAS DAVIS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

DECLARATION PURSUANT TO RULE 29.2 OF THE RULES OF THE SUPREME COURT

I hereby declare on penalty of perjury, as required by Supreme Court Rule 29, that the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari were sent to the Clerk of the United States Supreme Court in Washington, D.C., through the United States Postal Service by first-class mail, postage prepaid, on December 12, 2022, which is timely pursuant to the rules of this Court. The names and addresses of those served in this manner are as follows:

Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

The filing pursuant to Rule 29.2 was contemporaneous with the electronic filing.

Date: December 12, 2022

Gabrielle Lee
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