No. 20-____

IN THE
Supreme Court of the United States

DELAMON A. MARSHALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a prior conviction for domestic violence under Ohio Rev. Code Ann. § 2919.25(A) qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), where the statute only requires that the defendant "cause physical harm" to another and can be violated through omissions, indirect force, or other non-violent conduct?

2. Whether the provision of 18 U.S.C. § 922(g)(1) criminalizing the mere possession of a firearm "in or affecting commerce" by a person convicted of a previous felony is an unconstitutional extension the Commerce Clause of the Constitution of the United States.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States District Court (N.D. Ohio):

United States v. Marshall, No. 5:17-cr-00406-CAB(1) (June 16, 2021)

United States Court of Appeals (6th Cir.):

United States v. Marshall, NO. 21-3574 (Oct. 20, 2022)

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Petitioner Delamon A. Marshall respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit (App., *infra*, Appx. A – 001-009). is unpublished at 2022 WL 11710803. The district court's judgment entry is reprinted in the appendix. (App., *infra*, Appx. B – 001-008).

JURISDICTION

The judgment of the Sixth Circuit was entered on October 20, 2022, making this petition due January 18, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Laura McMullen Ford, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorneys' Office, a federal office which is authorized by law to appear before this Court on its own behalf.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

18 U.S.C. § 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(B)(i) provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year. . . that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another.

Ohio Rev. Code Ann. § 2919.25(A) provides:

> No person shall knowingly cause or attempt to cause physical harm to a family or household member.

Ohio Rev. Code Ann. § 2901.01(A)(3) provides:

> "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

Article 1, Section, 8, Clause 3 of the Constitution of the United States provides:

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

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.

STATEMENT OF THE CASE

In the modern day, Congress has created a federal criminal system extending more broadly than any system the founding generation would have ever dreamed of. This expansion of federal criminal law has created numerous issues and drawn this Court into several disputes the Founders never had cause to consider. *Gamble v. United States*, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring) ("Congress is responsible for the proliferation of duplicative prosecutions for the same offenses by the States and the Federal Government…By legislating beyond its limited powers, Congress has taken from the People authority that they never gave…And the Court has been complicit by blessing this questionable expansion of the Commerce Clause.").

This case that started as an Ohio state case should have remained an Ohio state case. Police officers of the State of Ohio, on two occasions determined that Marshall, an individual with prior Ohio felony convictions, was in possession of two separate firearms. Like many individuals in Marshall's circumstances, to Marshall, the risk of criminal prosecution for his gun possession was outweighed by the risk to his life if he were to be caught without the firearm. Indeed, Marshall's illegally obtained firearm saved his life when he was forced to use it in self-defense after another man attempted to murder him. Found bleeding but alive by Ohio police, Marshall was investigated by law enforcement from the State of Ohio, and his case was presented to an Ohio grand jury who used a no-bill on homicide related charges. Marshall was not guilty of murder, but he could still face charges under Ohio law for

his illegal possession of a firearm. But this was not enough for Ohio law enforcement and prosecutors. These executive officers determined that the thirty-six-month maximum sentence deemed appropriate by Ohio's popularly elected legislature was insufficient. So, like countless others, Marshall was referred to federal prosecutors and now comes before this Court sentenced not to three years in prison, but twenty.

Marshall was indicted by a federal grand jury in the Northern District of Ohio on October 12, 2017, for two counts of possession of a firearm and ammunition as a felon in violation of 18 U.S.C. § 922(g)(1), and two counts of possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k). App., *infra*, Appx. A - 002. On October 2, 2018, Marshall pleaded guilty to all counts without a plea agreement. *Id.*

The presentence report recommended that Marshall be classified as a career criminal under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based on his prior conviction for aiding and abetting armed robbery and two separate convictions for Ohio domestic violence pursuant to Ohio Rev. Code Ann. § 2919.25(A). *Id.* Marshall objected to his classification asserting that his two Ohio domestic violence convictions did not qualify as predicate offenses under 18 U.S.C. §924(e)(2)(B)(i) ("the elements clause"). *Id.*

At sentencing, the district court overruled Marshall's objection and determined that Marshall was an armed career criminal noting that the district court was bound by Sixth Circuit precedent regarding the Ohio domestic violence predicates. *Id.* The

district court calculated Marshall's guidelines range at 188 months to 235 months and ultimately issued an upward variance, sentencing Marshall to 240 months on counts 1 and 2, and 60 months on counts 3 and 4 to be served concurrently. *Id.*

Marshall's conviction under 18 U.S.C. § 922(g)(1) and his sentencing enhancement under the ACCA transformed his simple act of possessing a handgun into a sentence that many convicted of homicide would not face. *See* Ohio Rev. Code Ann. 2929.02(B)(1) (first degree murder: fifteen years to life); Ohio Rev. Code Ann. § 2929.14(A)(1)(a) (voluntary manslaughter: eleven to sixteen-and-a-half years). To Counsel and numerous other members of the federal bar, Marshall's story is unremarkably familiar. *See* Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. MARSHALL L. Rev. 385 (2006).

On his direct appeal, Marshall raised five issues. Pet. C.A. Br. 8-9. First, he argued that a conviction under the Ohio domestic violence statute did not qualify as violent felony under the ACCA. Second, Marshall asserted that the provision of 18 U.S.C. § 922(g)(1) which criminalized the possession of a firearm by a felon was an unconstitutional exercise of Congress' commerce power; Marshall additionally asserted that this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995) had displaced the "minimal nexus" test from *Scarborough v. United States*, 431 U.S. 563 (1977). Additionally, Marshall raised three challenges relating to his right to allocution, and the substantive and procedural reasonableness of his sentence which he does not raise in this petition. Along with his appellant brief, recognizing he was

requesting the Sixth Circuit overturn frequently relied upon binding precedent, Marshall filed a petition for an initial hearing en banc with respect to the two questions presented in this petition for writ of certiorari. The petition for an initial en banc hearing was denied. App., *infra*, Appx. C - 001.

The court of appeals rejected each of Marshall's arguments. First, the panel summarily rejected both the ACCA and 922(g)(1) claims noting that it was bound by circuit precedent on both issues. App., *infra*, Appx. A – 002-3. The court of appeals additionally rejected Marshall's argument relating to his allocution claim and found that his sentence was both substantively and procedurally reasonable. *Id.* at Appx. A - 003-8.

Marshall and countless other defendants will continue to serve inappropriate, harsh, and unconstitutional sentences at the hands of a federal government that has all-but obliterated the lines between what is local and what is national absent this Court's intervention. Marshall and other defendants have asked the circuit courts for relief from these issues and have, so far, been ignored. *Cf. Hicks v. United States*, 137 S.Ct. 2000, 2001 (2017) (Gorsuch, J., concurring) ("For who wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes."). This Court should grant Marshall's petition and correct this decades long erosions of the American people's fundamental liberties.

REASONS FOR GRANTING THE PETITION

I. Ohio Rev. Code Ann. § 2919.25(A) and the ACCA

A. This issue is of urgent importance.

This case, although it involves a specific state statute, is of utmost importance because the Sixth Circuit displaced the Ohio legislature's intent with respect to Ohio Rev. Code Ann. § 2919.25(A) and did so using rationale inconsistent with this Court's distinction between physical force and intellectual or emotional force for ACCA purposes, thereby touching on the underlying circuit split as to whether omissions satisfy the "use of force" provision of the ACCA and related federal statutes.

Marshall is asking this Court to grant a writ of certiorari and render a decision that overturns the Sixth Circuit's decision in this case and, effectively, overturns the decision it is based on, *United States v. Gatson*, 776 F.3d 405 (6th Cir. 2015). In the instant case, the Sixth Circuit concluded, "we are bound by *Gatson*, and Marshall's prior domestic-violence convictions qualify as violent felonies for ACCA purposes." App., Appx. A - 002. However, as Sixth Circuit Judge Moore has consistently recognized, *Gatson* "read in an assumption of force that the statutory language does not include. Ohio Rev. Code § 2919.25 does not specify that the "physical harm" even be inflicted through force. Its plain language requires only that the perpetrator 'cause or attempt to cause physical harm'; the means are not specified." *United States v. Solomon*, 763 F. App'x 442, 449 (6th Cir. 2019) (Moore, J., concurring); *see also United States v. Melendez-Perez*, No. 20-3925, 2021 WL 3045781, at *3 (6th Cir. July 20,

2021) (Moore, J., concurring) ("I agree with the majority that our earlier decision in *United States v. Gatson*, 776 F.3d 405 (6th Cir. 2015), controls the outcome of this appeal. I write separately, however, to note that the panel in *Gatson* 'read in an assumption of force that the statutory language does not include' and did not 'assess how the statute is applied in Ohio' as required under our precedent.").

Judge Moore's observation that *Gatson* read in an assumption of force that the Ohio legislature deliberately omitted from the specific subsection of the statute at issue is correct. Two of Marshall's prior offenses held by the district court to be ACCA predicates were Ohio domestic violence which states in relevant part, "no person shall knowingly *cause or attempt to cause physical harm* to a family or household member." Ohio Rev. Code Ann. § 2919.25(A) (emphasis added). The Ohio General Assembly defined "physical harm" to include "any injury, illness, or other physiological impairment, regardless of its gravity or duration." Ohio Rev. Code. Ann. § 2901.01(A)(3). The word "force" is not included in subsection (A) of the statute. Nevertheless, the Sixth Circuit has held Ohio Rev. Code Ann. § 2919.25(A) to be an ACCA predicate stating, "[f]orce that causes any of those things is (to some extent, by definition) force "capable of causing physical injury or pain to another person."' *United States v. Gatson*, 776 F.3d 405, 411 (6th Cir. 2015) (quoting *Johnson v. United States,* 559 U.S. 133, 140 (2010)).

That the Sixth Circuit has read "force" into a statute that omits the element of "force" is all the more striking given the fact that the Ohio General Assembly did

expressly include force in a different subsection of the same statute. Ohio Rev. Code Ann. § 2919.25(C) notably provides, "[n]o person, by threat of *force*, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member." (emphasis added). The Ohio General Assembly's express act of including "force" as an element in one subsection and omitting "force" as an element in another demonstrates that Ohio intended for § 2919.25(A) to be broader than 18 U.S.C. § 924(e)(2)(B)'s definition of "violent felony" as interpreted through *Johnson v. United States*, 559 U.S. 133 (2010). Indeed, as this Court has noted repeatedly, where a legislature "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion. *Johnson*, 559 U.S. at 147 (Alito, J., dissenting) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

While a circuit erring in the ACCA context is always a serious error warranting review, when that error requires the incorrect interpretation and displacement of a state legislature's express intent, the error is far worse. In the context of the ACCA, a court's error can convert what would previously be a maximum term of imprisonment of ten years under 18 U.S.C. § 922(g) into a mandatory minimum of fifteen. Given the frequency of prosecutions under 18 U.S.C. § 922(g) and enhancements under the ACCA, a circuit's errors in determining that a particular prior sentence serves as a predicate offense can have serious consequences to the

thousands of individuals charged federally each year with firearm offenses and is, thus, always a serious error. That error is worsened here because the Sixth Circuit has displaced the Ohio General Assembly's legislative design and enacted its own erroneous interpretation of Ohio's laws. In doing so it has shown a disregard for the state's sovereignty.

B. The circuits have split on the issue.

Separate from the sovereignty issue, the Sixth Circuit's rationale in *Gatson*, as highlighted in its more recent decision in *United States v. Harrison*, 54 F.4th 884 (6th Cir. 2023), touches on a circuit split as to whether omissions satisfy the "use of force" provision of the ACCA and related federal statutes. *See United States v. Mayo*, 901 F.3d 218, 230 (3d Cir. 2018) (collecting cases) (finding that the ACCA does not capture omissions); *cf. Harrison*, 54 F.4th at 889 (finding that a "serious violent felony" under 21 U.S.C. § 841 requiring the "use, attempted use, or threatened use of force against the person of another" can be satisfied by omissions); *United States v. Scott*, 990 F.3d 94, 100-01 (2d Cir. 2021), *cert. denied*, 211 L. Ed. 2d 212, 142 S. Ct. 397 (2021) (finding omissions to constitute an affirmative action resulting in the "use of force" under the specialized meaning of "act" found within the criminal law); *United States v. Lopez-Garcia*, No. 21-51018, 2022 WL 2527667, at *1 (5th Cir. July 7, 2022) (stating that circuit precedent holding that statutes committed through indirect force qualify as crimes violence extended to statutes criminalized through omissions). In addition, the Southern District of New York has held that a statute was not a "crime of violence"

where there was a realistic probability that the statute criminalized omissions. *United States v. Brown*, 322 F. Supp. 3d 459, 462 (S.D.N.Y. 2018).

The Sixth Circuit's interpretation of conduct or omissions that can qualify as satisfying the "use of force" provision of the ACCA runs afoul of this Court's distinction between physical force and intellectual or emotional force for ACCA purposes set forth in *Johnson*, 559 U.S. at 140. In *Johnson*, this Court noted, "The adjective "physical" is clear in meaning but not of much help to our inquiry. It plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force." *Id.* at 138. The Sixth Circuit has recently set forth analysis that practically destroys any distinction between physical force and intellectual or emotional force. A few months ago, the Sixth Circuit set out to resolve the question of whether, "under the categorial approach…Is it possible to be found guilty of complicity to commit murder without proof of any 'use of physical force'?" *Harrison*, 54 F.4th at 888–89. The Sixth Circuit answered, "No. Complicity to commit murder always requires the use of physical force, because murder always requires the use of physical force." *Id.* at 889. Directly relevant to the issues at hand and the circuit split regarding omissions, the Sixth Circuit espoused:

> That's true even when murder is carried out by omission rather than commission. For instance, if a parent intentionally fails to give his child food, his child will die of starvation. At first blush, the parent's failure to act doesn't seem forceful. But the type of omission that constitutes murder—omission that intentionally or wantonly causes the death of another—still uses physical force as section

> 3559 requires. The malicious parent uses the force that lack of food exerts on the body to kill his child.

Id. This rationale uses the same conception of force applied in *Gatson*. The *Gatson* court concluded that it is impossible to cause physical harm without using force. "Force that causes" any injury, illness, or other physiological impairment "is (to some extent, by definition) force 'capable of causing physical injury or pain to another person.'" *Id.* (citing *Johnson,* 559 U.S. at 140). The problem here is that emotional and intellectual force can cause physical harm. For example, in a case that made national headlines, in *Commonwealth v. Carter*, "a Massachusetts Juvenile Court trial judge found Michelle Carter guilty of involuntary manslaughter for encouraging her long-distance boyfriend, Conrad Roy, to commit suicide." *Criminal Law-Liability for Physical Harm-Trial Court Convicts Defendant of Involuntary Manslaughter Based on Encouragement of Suicide*, 131 HARV. L. REV. 918 (2018). According to the Harvard Law Review, Criminal Law section, the trial judge incorporated a theory of omission liability into his analysis. *Id.* The prosecution's theory was that the defendant "preyed" on the decedent's "vulnerable mental state through callous text messages and phone calls in pursuit of attention." *Id.* at 919. Cases such as this expand the scope of what it means to "cause physical harm" and capture conduct which clearly employs psychological and emotional force yet results in physical harm. Because the circuits have held that force that causes physical harm necessarily involves the use of physical force, they have implicitly expanded the scope of "use of

force" to encompass omissions and obliterated the distinction between harm caused by physical force and harm caused by intellectual or emotional force.

This overly broad interpretation of what constitutes "use of force" is particularly problematic in the context of domestic violence convictions. Criminal liability resulting from a failure to act is far more likely to occur in the domestic violence context where those in the household often owe affirmative duties to each other, the breach of which, while certainly capable of causing physical harm, strains to fall within the conception of "violent force" described by this Court. *See Johnson*, 559 U.S. at 139. Notably, the pattern jury instructions for Ohio Rev. Code Ann. § 2919.25(A) provide that liability can attach from the defendant's "act or failure to act." 2 CR Ohio Jury Instructions 417.23. Those circuits that have blessed the imposition of severely harsh mandatory minimum sentences premised solely on a defendant's past "act" of omission—of doing nothing—flies in the face of the ordinary meaning of the statutory language and resolves a hard question of statutory interpretation against the defendant when this Court's case law, and the rule of lenity, should dictate otherwise. *See Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring).

Domestic violence statutes which often focus exclusively on the harm that occurs to the victim of the crime are consistently far broader than the conduct captured by the elements clause. Indeed, under Ohio's domestic violence statute:

> Physical harm to persons is conceived as personal, physical harm including, but not limited to, personal injury. In the

> context of tort law personal injury implies a trauma, but in the context of the criminal law a precedent trauma is not viewed as a necessary requirement before it can be held that personal harm is caused or threatened, **such as when an offender deliberately, through other than traumatic means, sets out to drive his victim mad or arranges for his victim to contract pneumonia.**

State v. Morrison, 5th Dist. Stark No. 2007-CA-00083, 2007-Ohio-4786, ¶ 23 (emphasis added). Again, the specific subsection of the statute of Mr. Marshall's ACCA qualifying prior convictions states in relevant part, "no person shall knowingly *cause or attempt to cause physical harm* to a family or household member." Ohio Rev. Code Ann. § 2919.25(A) (emphasis added).

A recent Ohio case involving surreptitiously causing a person to ingest semen demonstrates how physical harm in Ohio can be caused by conduct falling outside of the definition of a "violent felony" under the ACCA. Ohio courts have recently held that a schoolteacher suffered "physical harm" where a number of students caused the teacher, without her knowledge, to ingest a piece of food containing semen; after the teacher learned of this several hours later, she became sick to her stomach which was held to be sufficient evidence of physical harm to support an assault conviction. *Matter of G.K.*, 5th Dist. Delaware No. 21 CAF 01 0006, 2022-Ohio-2124, ¶ 20. While this conduct was certainly disturbing, it is hard to suggest that it involved the use of *violent* force against the person of another. If the conduct was committed against a family or household member, instead of a teacher, the conduct could result in a

conviction under Ohio Rev. Code Ann. § 2919.25(A) and would constitute a predicate offense under the ACCA.

The Sixth Circuit's interpretation of "use of force" has subjected countless individuals convicted under Ohio Rev. Code Ann. § 2919.25(A) to extremely lengthy sentences based on convictions under a statute that, for a first-time violation, comprises conduct only viewed by Ohio as a misdemeanor. Ohio Rev. Code Ann. § 2919.25(D). Domestic violence statutes tend to be charged as misdemeanors with potential felony enhancements targeted at recidivist offenders. Ohio Rev. Code Ann. § 2919.25(D); 720 Ill. Comp. Stat. Ann. 5/12-3.2(b). The fact that many state domestic violence statutes are charged initially as misdemeanors is significant as it demonstrates that theses statutes attempt to capture a broad range of conduct that, while serious, falls below what would be considered felony conduct absent recidivist considerations.

II. 18. U.S.C. § 922(g)(1)'s possession clause is unconstitutional

A. This issue is of urgent importance.

There is no doubt that the Founders of our Nation would be shocked by the scope of a number of federal powers at force today. Among the many changes the Founders likely did not envision is the expansive reach of the federal government exerted through the Commerce Clause. Indeed, as members of this Court have noted, the modern Commerce Clause jurisprudence has "drifted far from the original understanding of the Commerce Clause." *United States v. Lopez*, 514 U.S. 549, 584

(1995) (Thomas, J., concurring). Modern Commerce Clause jurisprudence has formulated a test which is not rooted in the text or history of the Constitution resulting in the federal government now exercising what can only be described as a general police power—a concept indisputably violative of the constitutional design. *Lopez*, 514 U.S. at 566 ("The Constitution mandates this uncertainty by withholding from Congress a plenary police power); *Id.* at 584 (Thomas, J., concurring) ("we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power.").

Despite frequent language in this Court's opinions noting that "[t]he Constitution requires a distinction between what is truly national and what is truly local," *United States v. Morrison*, 529 U.S. 598, 617–18 (2000), the circuit courts have permitted Congress to expand the reach of the federal government to the point where there is no meaningful distinction between the federal government's commerce power and an individual state's police powers. *See Alderman v. United States*, 131 S. Ct. 700, 703 (2011) (Thomas, J., dissenting from denial of certiorari) (noting that the government conceded it believed the commerce power permitted Congress to ban possession of French fries offered for sale in interstate commerce).

Enter 18 U.S.C. § 922(g)(1). The relevant clause of the statute prohibits any person convicted of a felony from possessing a firearm "in or affecting commerce." Nearly every state has a parallel law that in some form bars convicted felons from

possessing firearms. What many states do not have, however, are the mandatory minimum penalties found in 18 U.S.C. § 924(e) associated with a conviction under 18 U.S.C. § 922(g). Otherwise purely local conduct, such as Marshall's possession of a firearm used in self-defense, have become subject to the reach of harsh federal sentences. Whenever a state prosecutor determines that their potential homicide or assault case will not succeed or will not result in a sufficient sentence in the prosecutor's eyes—such as in Marshall's case—the prosecutor may simply forego use of the state felon-in-possession statute and state sentencing scheme and refer the case to the local federal prosecutor transforming a state crime with a potentially relatively short sentence—Ohio's weapons under disability statute carries a maximum sentence of thirty-six months, Ohio Rev. Code Ann. § 2923.13(B); Ohio Rev. Code Ann. § 2929.14(A)(3)(b)—into a fifteen year minimum federal sentence. The federal government's assertion of jurisdiction over possession of a firearm by a prohibited person allows state law enforcement and prosecutors to circumvent the deliberate policy choices of state legislatures with respect to a crime that occurred wholly within the state. *See* Dean A. Strang*, Felons, Guns, and the Limits of Federal Power,* 39 J. Marshall L. Rev. 385, 386 (2006) (discussing how federal and state prosecutors began using federal gun restrictions to expand federal jurisdiction and "trump state legislative choices about punishment with federal choices.").

The several State's views on the appropriate restrictions on a felon's right to possess a firearm vary widely. Or. Rev. Stat. Ann. § 166.270(4) (excepting those

convicted of a single non-homicide related felony from state felon-in-possession statute); Vt. Stat. Ann. tit. 13, § 4017(a) (limiting weapons disability to those convicted of a "violent crime"); Fla. Stat. § 790.23(1)(a) (baring possession of a firearm by a person convicted of any felony). Federal displacement of these legitimate and diverse views offends the federalism-based restraints the Founders established under the Constitution. This is especially so given the States' historic role as the primary enforcers of criminal law. This case offers the Court an opportunity to pass on 922(g)(1)'s prohibition on mere possession, recognize the State's authority to decide on the proper restriction of firearms, and "return the authority to the people and their elected representatives." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

B. The federal judiciary has consistently called 922(g)(1) into question.

Since this Court issued its landmark decision in *United States v. Lopez*, 514 U.S. 549 (1995), the "lower courts have cried out for guidance from this Court." *Alderman v. United States*, 131 S. Ct. 700, 702 (2011) (Thomas, J., dissenting). Though a vast number of federal judges have recognized that *Lopez* cast serious doubt on a number of federal statutes barring the mere possession of firearms and other items, the courts have felt constrained by *Scarborough v. United States*, 431 U.S. 563 (1977)—a case decided in "a 'bygone era' characterized by a more freewheeling approach to statutory construction." *Wooden v. United States*, 142 S. Ct. 1063, 1085 (2022) (Gorsuch, J., concurring) (citing *Food Mktg. Inst. v. Argus Leader Media*, 139

S. Ct. 2356, 2364 (2019)). Though *Lopez* established three discrete categories of activities falling within Congress's commerce power, the lower courts, by expanding *Scarborough*, have created a fourth: Congress may forever regulate an item if any part of that item has ever, since the dawn of time, crossed a state line.

Those lending their voice to the criticism of *Scarborough* and the unchecked expansion of federal power under the commerce clause include members of this court. *Alderman*, 131 S. Ct. at 702 (Thomas J., dissenting from denial of certiorari) (joined by Justice Scalia); *Gamble v. United States*, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas J., concurring) ("Indeed, it seems possible that much of Title 18, among other parts of the U.S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty."); *see also Barrett v. United States*, 423 U.S. 212, 229 (1976) (Stewart, J., dissenting) (arguing that under former 18 U.S.C. § 922(h), a defendant was not guilty of receiving a firearm unless the government proved the defendant engaged in interstate activity involving the firearm).

Numerous judges on the lower courts have noted the significant constitutional concerns present in statutes such as 18 U.S.C. § 922(g) held up by *Scarborough*. *See United States v. Bishop*, 66 F.3d 569, 593 (3d Cir. 1995), *as amended* (Sept. 29, 1995) (Becker, J., concurring in part and dissenting in part) (stating that *Lopez* undermined *Scarborough*); *United States v. Hill*, 927 F.3d 188, 215 (4th Cir. 2019) (Agee J., dissenting) (arguing that 18 U.S.C. § 249(a)(2)(B)(iv)(1) is unconstitutional and

noting tension between *Lopez* and *Scarborough*); *United States v. Seekins*, 52 F.4th 988 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc); *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (Garwood, J., specially concurring) (Judge Garwood, joined by Judges Wiener and Garza, noting that *Scarborough* seems to conflict with *Lopez* but stating that as an inferior court, the court is bound by it); *United States v. Kuban*, 94 F.3d 971, 976-77 (5th Cir. 1996) (Demoss, J., dissenting in part) (discussing meaningful differences between statute in *Scarborough* and current version of 922(g) and stating, "the precise holding in *Scarborough* is in fundamental and irreconcilable conflict with the rationale of *Lopez*."); *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996) (Batchelder J. concurring in the judgment); *United States v. Patterson*, 853 F.3d 298, 301 (6th Cir. 2017) (Judge Sutton writing for the court stating, "[w]e can appreciate Patterson's concern that the federal government may prosecute him for driving within the borders of Akron with a firearm. And he is not alone in criticizing such a broad definition of federal criminal power…But he does not challenge the extent of that power here."); *United States v. Sarraj*, 665 F.3d 916, 922 (7th Cir. 2012) (observing tension between *Scarborough* and *Lopez*); *United States v. Storey*, 571 F. Supp. 3d 1296, 1298 (M.D. Fla. 2021) (noting considerable tension between *Scarborough* and *Lopez*).

Judge Ho's dissenting opinion from denial of rehearing en banc in *United States v. Seekins* demonstrates that without a doubt, this issue continues to be of urgent importance to both the members of the federal judiciary and the thousands of

individuals charged each year under these federal statutes barring mere possession of firearms which have been upheld by a case grounded solely in statutory interpretation. 52 F.4th 988 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc). Judge Ho specifically noted,

> Our precedent on felon-in-possession statutes allows the federal government to regulate any item so long as it was manufactured out-of-state—without any regard to when, why, or by whom the item was transported across state lines. But that would mean that the federal government can regulate virtually every tangible item anywhere in the United States. After all, it's hard to imagine any physical item that has not traveled across state lines at some point in its existence, either in whole or in part.

Id.

Numerous scholars have additionally questioned *Scarborough's* continued validity. *See* J. Richard Broughton, *The Ineludible (Constitutional) Politics of Guns*, 46 CONN. L. REV. 1345 (2014) (detailing lower courts' struggles with *Scarborough* post-*Lopez*); Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. MARSHALL L. REV. 385, 395 (2006) ("Scarborough neither decided nor even considered in passing what standard the Commerce Clause might set for 'minimal.'"); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 85 (1999) (stating that *Scarbrough* and related "cases stretched the Commerce Clause far beyond its appropriate realm of commercial legislation"); Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce*

Clause Counter-Revolution?, 9 LEWIS & CLARK L. REV. 879, 891 (2005) ("the mere possession of goods, without intent to sell them, has never been considered "commerce"'); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 562 (1995) (criticizing the current Commerce Clause doctrine's formalistic fixation on state-line crossing); David E. Engdahl, *The Necessary and Proper Clause As an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 119-21 (1998) (describing cases such as *Scarborough* as depending "on the 'herpes' theory that some lingering federal power infects whatever has passed through the federal dominion—a premise that is simply ridiculous").

While to date, no federal circuit has declared the provision of 18 U.S.C. § 922(g) prohibiting the mere possession of a firearm unconstitutional, the ever-increasing chorus of judges, scholars, and incarcerated individuals deserve recognition and resolution of the issue by this honorable Court.

C. The decisions below are wrongly decided.

Despite the significant expansion of federal power inherent in a federal prohibition of the mere possession of an item, the early circuit decisions upholding the possession clause of 922(g) contain shockingly sparse analysis. *See United States v. Turner*, 77 F.3d 887, 889 (6th Cir. 1996); *United States v. Chesney*, 86 F.3d 564, 568 (6th Cir. 1996). The circuits have chosen to remain bound by weak precedent all

of which fail to analyze the necessary predicate to the exercise of Congress's commerce power—is the activity being regulated commerce?

It is clear that the term "commerce" cannot include simple possession of an item under the original understanding of the word commerce or under a narrower understanding offered by Justice Thomas. The original understanding of "commerce" included "buying, selling, and transporting merchandise" and "the compensated provision of services as well as activities in preparation for selling property or services in the marketplace." *United States v. Patton*, 451 F.3d 615, 624 (10th Cir. 2006) (citing Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserved state Control over Social Issues*, 85 IOWA L. REV. 1 (1999)). In contrast, Justice Thomas has consistently called for an even narrower definition of commerce limited to "selling, buying, and bartering, as well as transportation for these purposes." *Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring).

While the definitions of commerce may be broad, they do not extend to capture possession. First, the word possession appears in no definition of commerce. *Lopez* was clear that possession of a firearm in a school "has nothing to do with 'commerce' or any sort of economic enterprise." *Lopez*, 514 U.S. at 561. *Morrison* affirmed *Lopez's* holding noting that "[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far." *Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 580

(Kennedy, J., concurring)). Second, nothing in either definition supports the idea that once a thing is transported in interstate commerce, it is forever and always subject to regulation by the federal government.

Further, 922(g)(1) is not part of a larger regulatory scheme which might permit Congress to regulate purely intrastate possession via the Necessary and Proper Clause. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005). The Supreme Court in Lopez found that 18 U.S.C. § 922(q), a subsection of the same statute:

> is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Lopez, 514 U.S. at 561.

Similarly, 922(g)(1) is not part of a larger comprehensive scheme regulating firearms. No scheme generally prohibits the production, transportation, sale, or purchase of general firearms. Companies can manufacture, distribute, and sell firearms and citizens are free to purchase and possess them. "The prohibition of possession by a class of persons, felons, is unrelated to any broader attempt to suppress the market…or to comprehensively control supply." *Patton*, 451 F.3d at 627. The small prohibition of possession limited solely to felons distinguishes 922(g)(1) from other comprehensive prohibitions on possession of items such as machine guns or child pornography which extend to all people. 18 U.S.C. § 922(o); 18 U.S.C. §

2251(a). The lack of a comprehensive regulatory scheme prohibiting firearms generally reveals what 922(g)(1) is: "a regulation of possession for its own sake." *Patton*, 451 U.S. at 628.

Absent this Courts intervention, there is no reason to suspect that Congress will rescind, let alone halt, its continued incursion into what has historically been the domain of the states. This case offers the Court the chance to demonstrate that under a proper legal analysis, there are very real limits on the federal power—limits the Founders created not arbitrarily but to protect the People's fundamental liberties and "reduce the risk of tyranny and abuse." *Lopez*, 514 U.S. at 552.

CONCLUSION

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

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