NO. 22-7320

IN THE

SUPREME COURT OF THE UNITED STATES

MARY GONZALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

LEAH D. YAFFE
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

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REPLY BRIEF IN SUPPORT OF CERTIORARI

The first issue raised in Ms. Gonzales's petition for a writ of certiorari asks this Court to find that Congress exceeded its Commerce Clause authority in enacting the portion of 18 U.S.C. § 922(g)(1) that makes it a federal crime for somebody with a qualifying prior conviction to "possess in or affecting commerce, any firearm or ammunition." When Ms. Gonzales filed her petition, that issue had already been raised to this Court in a pending petition for writ of certiorari in *Seekins v. United States*, Case No. 22-6853, and so Ms. Gonzales asked that this Court grant the petition in *Seekins* and hold her petition in abeyance. Subsequently, this Court denied the petition in *Seekins*, *see Seekins v. United States*, --- S. Ct. ---, 2023 WL 4163279 (2023); nonetheless, Ms. Gonzales maintains that Section 922(g)(1) is unconstitutional under the Commerce Clause for the reasons stated in that petition and in her own.

The second issue raised in Ms. Gonzales's petition asks this Court to decide that, as a matter of statutory interpretation, 18 U.S.C. § 922(g)(1) must be understood as applying only when a defendant's *own* possession of a firearm or ammunition affected commerce *at the time* the defendant possessed it. Responding in opposition to review, the government asserts that this Court's decision in *Scarborough v. United States*, 431 U.S. 563 (1977), resolves the issue and forecloses further review.

But *Scarborough* is not controlling or persuasive when it comes to interpreting Section 922(g)(1), because that case involved the interpretation of a differently-

structured predecessor statute. The predecessor statute was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. No. 90-351, §§ 1201-1203, 82 Stat. 197, 236-237(June 19, 1968). The 1968 law was repealed and replaced with the Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 102, 104, 100 Stat. 449, 452-459 (May 19, 1986). The new 1986 Act was intended *not* to unduly burden "law-abiding citizens with respect to the acquisition, possession, or use of firearms," *id.* § 1, and, unlike the old 1968 Act, was "painstakingly crafted to focus law enforcement on the kinds of Federal firearms law violations most likely to contribute to violent firearms crime," 131 Cong. Rec. S23-03, 1985 WL 708013, at *2 (daily ed. Jan. 3, 1985) (Statement of Senator McClure); *see Scarborough*, 431 U.S. at 569. *Scarborough*, furthermore, predates the Supreme Court's clarification of the scope of Congress's Commerce Clause authority in cases like *United States v. Lopez*, 514 U.S. 549 (1995).

In addition, the government attempts to refute Ms. Gonzales's argument that the statute, when read as a whole, supports her position that Section 922(g)(1)'s prohibition of possession of firearms requires a contemporaneous effect on interstate commerce. *See* Pet. at 7; Br. in Opp. at 7-8. The government makes the noncontroversial point that Congress knows the difference between limiting its legislation to activities "in commerce" and asserting authority over all activity "substantially affecting interstate commerce." *See* Br. in Opp. at 7-8 (quoting

Scarborough, 431 U.S. at 571)). But that is not responsive to Ms. Gonzales's position: She is not arguing that Congress misunderstood the phrase "affecting commerce," but rather that the phrase specifically qualifies the verb "possess" rather than the nouns "firearm" or "ammunition." And one reason that is true is that Congress, had it actually intended to make it a crime for a felon to possess a firearm that had previously been shipped or transported in interstate or foreign commerce, would have used comparable language to the receipt portion of the statute. *See* Pet. at 7; 18 U.S.C. § 922(g)(1) (using past tense for the section of the statute that criminalizes receiving a firearm or ammunition "which has been shipped or transported in interstate or foreign commerce").

In fact, noticeably absent from the government's brief is any direct response to Ms. Gonzales's primary textual arguments, that: (1) the adverbial phrase "in or affecting commerce" cannot modify the nouns "firearm or ammunition," *see* Pet. at 6 (citing *Nielsen v. Preap*, 139 S. Ct. 954 (2019)); and (2) that the present-participle tense of "affecting commerce" indicates that the effect on interstate commerce must occur at the same time as the possession to fall within the ambit of the Section 922(g)(1), *see* Pet. at 6-7. These arguments make it clear that evidence that a firearm or ammunition was previously shipped or transported in interstate or foreign commerce is not enough to satisfy the requirements of Section 922(g)(1).

Finally, the government never disputes that the meaning of "affecting commerce" in Section 922(g)(1) is important to the millions of people who live with prior felony convictions in this country, and especially to those who are convicted of violating Section 922(g)(1). Instead, the government argues that the decision in Ms. Gonzales's case does not merit review because it does not conflict with any Supreme Court or Court of Appeals decision. *See* Br. in Opp. at 5. But the impact of the inaccurate interpretation of Section 922(g)(1) on millions of Americans is a compelling reason for this Court to grant Ms. Gonzales's petition for a writ of certiorari, regardless of whether the circuits are in conflict. *See* Supreme Court Rule 10.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Leah D. Yaffe
LEAH D. YAFFE
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

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