No. _____

In the

Supreme Court of the United States

_____

Lakeith Lynn Washington,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Adam Nicholson
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
214.767.2746
Adam_Nicholson@fd.org

QUESTIONS PRESENTED

I. Do the Fifth and Sixth Amendments of the U.S. Constitution require that facts to prove a defendant's prior convictions were for offenses committed on "occasions different from one another," for purposes of increasing the minimum and maximum sentences under the Armed Career Criminal Act ("ACCA"), be alleged in the indictment and either proven to a jury beyond a reasonable doubt or admitted to by the defendant, under the principles articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013)?

II. Whether 18 U.S.C. § 922(g) permits conviction for the possession of any firearm that has ever crossed state lines at any time in the indefinite past, and, if so, if it is facially unconstitutional?

III. Whether 18 U.S.C. § 922(g)(1) comports with the Second Amendment?

Subsidiary Question: Whether this Court should hold the instant Petition pending *United States v. Rahimi*, 22-915, __U.S.__, 2023 WL 4278450 (June 30, 2023) (granting cert.), given the government's concession in *Garland v. Range*, No. 23-374, that *Rahimi* presents "closely related Second Amendment issues" with respect to constitutional challenges to 18 U.S.C. § 922(g)(1), and justifies a decision to "hold the petition for a writ of certiorari" in *Range* "pending its decision *Rahimi*", Government's Petition for Certiorari in *Garland v. Range*, 23-374, at 7 (Filed October 5, 2023), available at https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830_Range%20Pet%2010.5.pdf, last visited October 20, 2023?

PARTIES TO THE PROCEEDING

Petitioner is Lakeith Lynn Washington, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Rules

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lakeith Lynn Washington seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Lakeith Lynn Washington*, No. 22-10574, 2023 WL 5275013 (5th Cir. Aug. 16, 2023) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on August 16, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides in relevant part, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const. Art. I, sec. 8.

The Second Amendment to the U.S. Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II.

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime,

unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

STATUTORY PROVISIONS INVOLVED

Section 922(g)(1) of Title 18 reads in relevant part:

> (g) 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.

18 U.S.C. § 922(g)(1).

Title 18 U.S.C. § 924(e) provides, in pertinent part,

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . 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[.]

18 U.S.C. § 924(e)(1).

LIST OF PROCEEDINGS BELOW

1. *United States v. Lakeith Lynn Washington*, 3:19-CR-184-K, United States District Court for the Northern District of Texas. Judgment and sentence entered on June 1, 2022. (Appendix B).

2. *United States v. Lakeith Lynn Washington*, No. 22-10574, 2023 WL 5275013 (5th Cir. Aug. 16, 2023) (unpublished), Court of Appeals for the Fifth Circuit. Judgment affirmed on August 16, 2023. (Appendix A).

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Lakeith Lynn Washington pleaded guilty to a two-count federal indictment charging him with violations of 18 U.S.C. § 922(g)(1) and 21 U.S.C. § 841(a)(1). ROA.31–34; ROA.117–123; ROA.141–162; ROA.128. Mr. Washington did not move to dismiss the indictment and did not argue that the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), is unconstitutional. The drug count carried no mandatory minimum prison sentence. ROA.235 ¶ 65; see 21 U.S.C. § 841(b)(1)(C). The firearm count would normally carry a statutory range of 0–10 years in prison. 18 U.S.C. § 924(a)(2) (2018). Without the Armed Career Criminal Act ("ACCA") enhancement, Mr. Washington's combined offense level under the U.S. Sentencing Guideline would be 15, (ROA.228 ¶¶ 26, 28, 29); his criminal history category would be V, (ROA.231 ¶ 38); and his recommended range of imprisonment would have been 37–46 months. See Sentencing Table, U.S.S.G., ch. 5, pt. A.

In fact, the district court even imposed a concurrent sentence of 30 months on the drug count "in case" the conviction or sentence on the firearm count "gets reversed." ROA.177–178. However, the district court did apply the ACCA enhancement, over Mr. Washington's objection. ROA.169. The court adopted the PSR's and government's assertions that Mr. Washington had been convicted of Texas burglary three times for crimes committed on different occasions, and that Texas burglary is a violent felony under the ACCA. ROA.264–265; ROA.303.

B. Appellate Proceedings

On appeal, Petitioner argued that 18 U.S.C. § 922(g)(1) is unconstitutional on two grounds. First, he argued the statute exceeds Congress's enumerated powers under the Commerce Clause. Petitioner conceded that this claim was foreclosed by circuit precedent, and the court of appeals agreed. [App. A, at 2] (citing *United States v. Alcantar*, 733 F.3d 143, 145-46 (5th Cir. 2013).

Second, he argued that, in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), the statute violates the Second Amendment. However, explaining that it had not yet addressed the constitutionality of § 922(g)(1) in light of *Bruen*, the court of appeals relied on its prior rejection of Second Amendment challenges to § 922(g)(1) to conclude that Petitioner could not demonstrate plain error. [App. A, at 2-3] (citing *United States v. Darrington*, 351 F.3d 632, 633-34 (5th Cir. 2003)).

Third, based on *Wooden v. United States*, 595 U.S. 360 (2022), Petitioner argued that his ACCA-enhanced sentence was unlawful because the allegation that his offenses occurred on different occasions was neither pleaded in the indictment, nor proven to a jury beyond a reasonable doubt, nor admitted as a part of his plea. The court of appeals rejected this argument, citing its recent conclusion that *Wooden* did not invalidate the prior opinion authorizing a sentencing judge to conduct the "different occasions" inquiry under § 924(e)(1). [App. A, at 3-4] (citing *United States v. Valencia*, 66 F.4th 1032, 1032-33 (5th Cir. 2023) (per curiam).

REASONS FOR GRANTING THIS PETITION

I. The Court should grant certiorari to resolve whether the Constitution requires facts that prior convictions were for offenses "committed on occasions different from one another" be alleged in the indictment and proven to a jury beyond a reasonable doubt, to support an enhanced ACCA sentence.

Justices Gorsuch and Sotomayor recognized in *Wooden* that "[a] constitutional question simmers beneath the surface" of the Court's decision. *Wooden v. United States*, 142 S. Ct. 1063, 1087 n.7 (2022) (Gorsuch, J., joined by Justice Sotomayor, concurring). The constitutional question concerns the administration of the Armed Career Criminal Act's (ACCA), which increases the prescribed minimum and maximum sentences for criminal defendants convicted under 18 U.S.C. § 922(g), who have three qualifying prior convictions. In *Wooden*, this Court held that the ACCA's requirement that the prior convictions be for offenses "committed on occasions different from one another" involved a "multi-factored" factual inquiry. *Id.* at 1070–71. This Court has consistently held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum or minimum must be alleged in the indictment and either proved to a jury beyond a reasonable doubt or admitted to by the defendant. *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *United States v. Cotton*, 535 U.S. 625, 627 (2002); *Apprendi*, 530 U.S. at 490. The *Wooden* Court did not reach the question whether this constitutional principle applied to the ACCA's "occasions-different" inquiry, however, because the defendant "did not raise it." *Wooden*, 142 S. Ct. at 1068 n.3. But, as Justice Gorsuch noted, "there is little doubt

that [the Court] will have to do so soon." *Id.* at 1087 n.7 (Gorsuch, J., concurring). This Court now should address the question left unanswered in *Wooden*.

A. This Court's precedent dictates the resolution of the question presented.

In *Apprendi*, this Court held that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. "In federal prosecutions," under the Fifth Amendment, "such facts must also be charged in the indictment." *Cotton*, 535 U.S. at 632 (citing *Jones v. United States*, 526 U.S. 277, 243 n.6 (1999)). Later, in *Alleyne*, this Court applied *Apprendi*'s rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range—not just a sentence above the mandatory maximum—must be alleged in the indictment and proven to a jury beyond a reasonable doubt. 570 U.S. at 110–11, 114–16.

The only exception to this general rule—and it is a "narrow" one—is for the "fact" of a prior conviction. Apprendi, 530 U.S. at 490 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998)); see also *Alleyne*, 570 U.S. at 111 n.1. In recognizing this exception, this Court stressed that a prior conviction "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249; *Apprendi*, 530 U.S. at 496 (a prior conviction will have been "entered in a proceeding in which the defendant had the right to require the prosecutor to prove guilt beyond a reasonable doubt"). Accordingly, a judge is limited to considering only the elements of the prior offense of

conviction, not the manner in which it was committed or "non-elemental facts." *Mathis v. United States*, 579 U.S. 500, 511–12 (2016).

This Court has repeatedly applied the *Apprendi* rule to the ACCA. The ACCA increases a defendant's punishment for a violation of 18 U.S.C. § 922(g) from zero to 15 years' imprisonment to a mandatory minimum 15 years' imprisonment and a maximum of life. *Compare* 18 U.S.C. § 924(a)(8), *with* 18 U.S.C. § 924(e)(1). For the increases to apply, the defendant must have three qualifying prior convictions—for a "violent felony" or a "serious drug offense"—that were "committed on occasions different from one another." 18 U.S.C. § 924(e). This involves two separate determinations: (1) whether the prior convictions are violent felonies or serious drug offenses; and (2) whether the prior offenses were committed on different occasions. *Wooden*, 142 S. Ct. at 1070.

For first determining whether a prior conviction is a "violent felony" or a "serious drug offense," this Court has made clear that the judge may consider only "elements" not "non-elemental facts." *Descamps v. United States*, 570 U.S. 254, 261 (2013) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). A judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 579 U.S. at 511–12. The judge may not go beyond identifying a prior conviction to "explore the manner in which the defendant committed that offense." *Descamps*, 570 U.S. at 261 (citing *Shepard v. United States*, 544 U.S. 13, 25 (2005)).

But the second determination for the ACCA, whether the prior convictions were for offenses committed on different occasions, requires "explor[ing] the manner in which the defendant committed" the offenses. *Descamps*, 570 U.S. at 261. That is because the question is not whether the convictions occurred on separate occasions but whether the offenses were committed on separate occasions. See *United States v. Hayes*, 555 U.S. 415, 421 (2009) (concluding that the phrase "an offense … committed" required sentencer to consider non-elemental facts); *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009) (interpreting immigration statute to require a "circumstance-specific,' not a "categorical" interpretation").

This Court has instructed that the different-occasions inquiry requires a "holistic" and "multi-factored" inquiry. *Wooden*, 142 S. Ct. at 1067, 1070–71. This exploration considers the time the offenses took place, any intervening events, the proximity of the locations, and "the character and relationship of the offenses"—such as a "common scheme or purpose." *Id.* at 1071. In *Wooden*, this Court elaborated on some of those factors, including: (1) how close in time the offenses were committed—"Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events"; (2) the locations of the offenses and their proximity to each other—"the further away crimes take place, the less likely they are components of the same criminal event"; (3) whether the offenses share a common scheme or purpose— "[t]he more similar or intertwined the conduct giving rise to the offenses . . . the more apt they are to compose one occasion." *Id.* at 1071. This factual

inquiry, which goes beyond "the simple fact of a prior conviction," *Mathis*, 579 U.S. at 511, does not come within the narrow exception to the *Apprendi* rule.

Any finding of "a fact about a prior conviction," as opposed to the simple fact of a prior conviction, "is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to … *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Shepard*, 544 U.S. at 25. Because the different-occasions inquiry involves nonelemental facts about the prior convictions, the jury—not the judge—must make that determination. *Mathis*, 579 U.S. at 511 ("only a jury, not a judge, may find facts that increase the maximum [and minimum] penalty").

Many federal judges, both before and after *Wooden*, have recognized that the "occasions different from one another" requirement turns on facts beyond the elements of conviction. *See, e.g.*, *United States v. Thompson*, 421 F.3d 278, 294 (4th Cir. 2005) (Wilkins, J., dissenting) (employing *Apprendi* analysis to find that facts "about a crime underlying a prior conviction," including dates, are beyond the "fact of a prior conviction" exception); *United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring) (treatment of different-occasions issue as one for the court "is a departure from fundamental Sixth Amendment principles"); *United States v. Dudley*, 5 F.4th 1249, 1273–78 (11th Cir. 2021) (Newsom, J., concurring) (judicial factfinding of the different-occasions issue violates the Sixth Amendment). *See, e.g.*, *United States v. Brown*, 67 F.4th 200, 215–18 (4th Cir. 2023) (Heytens, J., concurring) (noting that the Fourth Circuit has continued to reject the dictates of the Sixth

Amendment); *United States v. Barrera*, 2022 WL 1239052, *3 (9th Cir. 2022) (Feinerman, J., concurring) (suggesting that, "[g]iven the apparent conflict between circuit law and Supreme Court precedent, this case may be an appropriate candidate for further review" either by the en banc court or the Supreme Court), *cert. denied*, 143 S. Ct. 1043 (2023).

B. Only this Court can resolve this constitutional question.

The courts of appeals cannot resolve the constitutional issue. Before *Wooden*, courts of appeals that addressed the issue held that *Apprendi*'s rule did not apply to the occasions-different question because it fell within the *Almendarez-Torres* exception. See *United States v. Santiago*, 268 F.3d 151, 156–57 (2d Cir. 2001); *United States v. Jurbala*, 198 F. App'x 236, 237 (3d Cir. 2006); *United States v. Thompson*, 421 F.3d 278, 285 (4th Cir. 2005); *United States v. Stone*, 306 F.3d 241, 243 (5th Cir. 2002); *United States v. Burgin*, 388 F.3d 177, 183 (6th Cir. 2004); *United States v. Morris*, 293 F.3d 1010, 1012–13 (7th Cir. 2002); *United States v. Wilson*, 406 F.3d 1074, 1075 (8th Cir. 2005); *United States v. Walker*, 953 F.3d 577, 580 (9th Cir. 2020); *United States v. Michel*, 446 F.3d 112, 1132–33 (11th Cir. 2017).

Since this Court's decision in Wooden, criminal defendants have been raising this issue in federal courts nationwide. And the Government has been conceding constitutional error, as it did here, Government-Appellee's Brief, *United States v. Valencia*, No. 22-50283, 2023 WL 143970 at *5–7 (5th Cir. Jan. 3, 2023), and has been attempting to comply with the Sixth Amendment. See Letter of Appellant United States Under Fed. R. App. P. 28(j), *United States v. Heard*, No. 22-1380 (8th Cir. Oct. 5, 2022); Government-Respondent's Brief in Opposition at 4-8, 10-11, *United States*

v. Daniels, No. 22-5102 (U.S. Nov. 21, 2022); Government's Motion to Withdraw Appeal, *United States v. Brown*, No. 22-2550 (3d Cir. Mar. 12, 2023).

Nine courts of appeals have considered this issue after *Wooden*. Eight of those appellate courts continue to apply their pre-*Wooden* precedent, with at least four denying petitions to reconsider that precedent en banc. *United States v. Golden*, 2023 WL 2446899, *4 (3d Cir. Mar. 10, 2023); Brown, 67 F.4th at 215 (4th Cir. 2023), pet. for reh'g denied, 77 F.4th 301 (2023); *United States v. Valencia*, 66 F.4th 1032, 1032 (5th Cir. 2023) (per curiam), *pet. for reh'g denied*, No. 22-50283 (June 14, 2023) (App. B); *United States v. Belcher*, 40 F.4th 430, 432 (6th Cir. 2022), *pet. for reh'g denied*, 2022 WL 10219852 (2022); *United States v. Erlinger*, 77 F.4th 617, 621–23 (7th Cir. 2023); *Barrera*, 2022 WL 1239052, at *2 (9th Cir. 2022); *United States v. Williams*, 39 F.4th 342, 351 (10th Cir. 2022), *pet. for reh'g denied*, 2022 WL 17409565 (2022), *cert. denied*, 143 S. Ct. 745 (2023); *United States v. Haynes*, 2022 WL 3643740, *5 (11th Cir. Aug. 24, 2022) (per curiam), *cert. denied*, 143 S. Ct. 1009 (2023).

But this important constitutional issue will continue to clog the federal courts until this Court resolves it. Many individuals, including Petitioner, are charged every day with offenses under 18 U.S.C. § 922(g), and many are sentenced by judges under the ACCA. Almost 4,500 defendants received ACCA sentences during the ten-year period from October 2009 to September 2019. U.S. Sent'g Comm'n, Federal Armed Career Criminals: Prevalence, 16 Patterns and Pathways 19, 28 (2021).[1] And the

[1] Available at https://www.ussc.gov/sites/default/files/pdf/researchand-publications/research-publications/2021/2021030_ACCA_Report.pdf.

ACCA dramatically increases their sentences. According to U.S. Sentencing Commission statistics for fiscal year 2022, the average sentence for defendants convicted of § 922(g) and sentenced without the ACCA was 60 months' imprisonment. U.S. Sent'g Comm'n, Quick Facts— Felon in Possession of a Firearm (FY 2022), at 2.[2] For those sentenced under the ACCA, however, the average sentence was 186 months' imprisonment. *Id.* It is untenable that defendants continue to face lengthy, unconstitutional sentences. Only this Court can resolve the important constitutional issue left unresolved by *Wooden*, and it should grant certiorari to do so.

II. This Court should grant certiorari to resolve the tension between *Scarborough v. United States*, 431 U.S. 563 (1963), on the one hand, and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and *Bond v. United States*, 572 U.S. 844 (2014), on the other.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534 ("The Constitution's express conferral of some powers makes clear that it does not grant others.") There is no general federal police power. *See United States v. Morrison*, 529 U.S. 598, 618-619 (2000). Every exercise of Congressional power must be justified by reference to a particular grant of authority. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 535 ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power

[2] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf.

authorizes each of its actions."). A limited central government promotes accountability and "protects the liberty of the individual from arbitrary power." *Bond v. United States*, 572 U.S. 844, 863 (2011).

The Constitution grants Congress a power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. But this power "must be read carefully to avoid creating a general federal authority akin to the police power." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 536

Notwithstanding these limitations, and the text of Article I, Section 8, this Court has held that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," and includes a power to regulate activities that "have a substantial effect on interstate commerce." *United States v. Darby*, 312 U.S. 100, 118-119 (1941). Relying on this expansive vision of Congressional power, this Court held in *Scarborough v. United States*, 431 U.S. 563 (1963), that a predecessor statute to 18 U.S.C. § 922(g) reached every case in which a felon possessed firearms that had once moved in interstate commerce. It turned away concerns of lenity and federalism, finding that Congress had intended the interstate nexus requirement only as a means to insure the constitutionality of the statute. *See Scarborough*, 431 U.S. at 577.

It is difficult to square *Scarborough*, and the expansive concept of the commerce power upon which it relies, with more recent holdings of the Court in this area. In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), five members of this Court found that the individual mandate component of the Affordable Care Act

could not be justified by reference to the Commerce Clause. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 557-558 (Roberts., C.J. concurring). Although this Court recognized that the failure to purchase health insurance affects interstate commerce, five Justices did not think that the constitutional phrase "regulate Commerce ... among the several States," could reasonably be construed to include enactments that compelled individuals to engage in commerce. *See id.* at 550 (Roberts., C.J. concurring). Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *See id.* (Roberts., C.J. concurring).

The majority of this Court in *NFIB* thus required more than a demonstrable effect on commerce: the majority required that the challenged enactment itself *be* a regulation of commerce – that it affect the legality of pre-existing commercial activity. Possession of firearms, like the refusal to purchase health insurance, may "substantially affect commerce." But such possession is not, without more, a commercial act.

To be sure, *NFIB* does not explicitly repudiate the "substantial effects" test. Indeed, the Chief Justice's opinion quotes *Darby*'s statement that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states..." *Nat'l Fed'n of Indep. Bus.,* 567 U.S. at 549 (Roberts., C.J. concurring); *see also id.* at 552-553 (Roberts., C.J. concurring)(distinguishing *Wickard v. Filburn*, 317 U.S. 111 (1942)). It is therefore perhaps possible to read *NFIB* narrowly: as an isolated prohibition on affirmatively compelling persons to engage in

commerce. But it is difficult to understand how this reading of the case would be at all consistent with *NFIB*'s textual reasoning.

This is so because the text of the Commerce Clause does not distinguish between Congress's power to affect commerce by regulating non-commercial activity (like possessing a firearm), and its power to affect commerce by compelling people to join a commercial market (like health insurance). Rather it simply says that Congress may "regulate ... commerce between the several states." And that phrase either is or is not limited to laws that affect the legality of commercial activity. Five justices in *NFIB* took the text of the Clause seriously and permitted Congress to enact only those laws that were, themselves, regulations of commerce. *NFIB* thus allows Congress only the power "to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 196, 9 Wheat. 1 (1824).

And indeed, much of the Chief Justice's language in *NFIB* is consistent with this view. This opinion rejects the government's argument that the uninsured were "active in the market for health care" because they were "not currently engaged in any *commercial* activity involving health care..." *id*. at 556 (Roberts., C.J. concurring) (emphasis added). The Chief Justice significantly observed that "[t]he individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing *commercial* activity." *Id*. (Roberts., C.J. concurring)(emphasis added). He reiterated that "[i]f the individual mandate is targeted at a class, it is a class whose *commercial* inactivity rather than activity is its defining feature." *Id*. (Roberts., C.J. concurring)(emphasis added). He agreed that "Congress can anticipate

the effects on commerce of an *economic* activity," but did not say that it could anticipate a *non-economic* activity. *Id.* (Roberts., C.J. concurring)(emphasis added). And he finally said that Congress could not anticipate a future activity "in order to regulate individuals not currently engaged *in commerce*." *Id.* (Roberts., C.J. concurring)(emphasis added). Accordingly, *NFIB* provides substantial support for the proposition that enactments under the Commerce Clause must regulate commercial or economic activity, not merely activity that affects commerce.

Here, the factual resume does not state that Petitioner's possession of the gun was an economic activity. *See* [Appx. C]. Under the reasoning of *NFIB*, this should have been fatal to the conviction. As explained by *NFIB*, the Commerce Clause permits Congress to regulate only activities, *i.e.*, the active participation in a market. But 18 U.S.C. § 922(g)(1) criminalizes all possession, *without* reference to economic activity. Accordingly, it sweeps too broadly.

Further, the factual resume fails to show that Petitioner was engaged in the relevant market at the time of the regulated conduct. *See* [Appx. C]. The Chief Justice has noted that Congress cannot regulate a person's activity under the Commerce Clause unless the person affected is "currently engaged" in the relevant market. *Id.* at 557. As an illustration, the Chief Justice provided the following example: "An individual who bought a car *two years ago* and may buy another in the future is not 'active in the car market' in any pertinent sense." *Id.* at 556 (emphasis added). As such, *NFIB* brought into serious question the long-standing notion that a firearm which has previously and remotely passed through interstate commerce should be

considered to indefinitely affect commerce without "concern for when the [initial] nexus with commerce occurred." *Scarborough*, 431 U.S. at 577.

Scarborough stands in even more direct tension with *Bond v. United States*, 572 U.S. 844 (2014), which shows that § 922(g) ought not be construed to reach the possession by felons of every firearm that has ever crossed state lines. Bond was convicted of violating 18 U.S.C. § 229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond*, 572 U.S. at 853; 18 U.S.C. § 229(a). She placed toxic chemicals – an arsenic compound and potassium dichromate – on the doorknob of a romantic rival. *See id.* This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 859-862.

Notably, § 229 defined the critical term "chemical weapon" broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. § 229F(8)(A). Further, it criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. § 229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." [*United States v.*]*Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones* [*v. United States*], 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 572 U.S. at 863

As in *Bond*, it is possible to read § 922(g) to reach the conduct admitted here: possession of an object that once moved across state lines, without proof that the defendant's conduct caused the object to move across state lines, nor even proof that it moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, nor to the interstate movement of commodities.

The better reading of the phrase "possess in or affecting commerce"—which appears in § 922(g)—therefore requires a meaningful connection to interstate commerce. Such a reading would require either: (1) proof that the defendant's offense caused the firearm to move in interstate commerce, or, at least, (2) proof that the firearm moved in interstate commerce at a time reasonably near the offense.

Petitioner did not challenge either the sufficiency of his Factual Resume or the constitutionality of the statute in district court. This probably presents an insurmountable vehicle problem for a plenary grant in the present case. Nonetheless, the issue is worthy of certiorari, as discussed above, and the Court has no shortage of cases presenting it.

III. The courts of appeals have divided as to the constitutionality of 18 U.S.C. § 922(g)(1). Further, this Court has granted certiorari and heard arguments in a case that will decide the constitutionality of a related statute.

The Second Amendment guarantees "the right of the people to keep and bear arms." Yet 18 U.S.C. § 922(g)(1) denies that right, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. In spite of this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges for many years. *See United States v. Moore*, 666 F.3d 313, 316-317 (4tth Cir. 2012)(collecting cases). This changed, however, following *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, __U.S.__, 142 S. Ct. 2111 (2022). *Bruen* held that where the text of Second Amendment plainly covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation's historical tradition of gun regulation. *See Bruen*, 142 S. Ct. at 2129-2130. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id*. at 2127-2128.

After *Bruen*, the courts of appeals have split as to whether 18 U.S.C. § 922(g)(1) trenches on rights protected by the Second Amendment. The Third Circuit has

sustained the Second Amendment challenge of a man previously convicted of making a false statement to obtain food stamps, notwithstanding the felony status of that offense. *See Range v. Attorney General of the United States*, 69 F.4th 96 (3rd Cir. 2023). By contrast, the Eighth Circuit has held that § 922(g)(1) is constitutional in all instances, at least against Second Amendment attack. *See United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023). And the Seventh Circuit thought that the issue could be decided only after robust development of the historical record, remanding to consider such historical materials as the parties could muster. *See Atkinson v. Garland*, 70 F.4th 1018, 1023-1024 (7th Cir. 2023).

This circuit split plainly merits certiorari. It involves a direct conflict between the federal courts of appeals as to the constitutionality of a criminal statute. The statute in question is a staple of federal prosecution.[3] It criminalizes primary conduct in civil society—it does not merely set forth standards or procedures for adjudicating a legal dispute. A felon living in a neighborhood beset by crime deserves to know whether he or she may defend himself against violence by possessing a handgun, or whether such self-defense is undertaken only on pain of 15 years imprisonment.

If the Court grants certiorari to decide the constitutionality of § 922(g)(1), it should hold the instant case pending the outcome, then grant certiorari, vacate the

[3] *See* United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 20, Federal Offenders Sentenced under Each Chapter Two Guideline, p.2 (FY 2022) (showing that 9,367 people were sentenced under USSG § 2K2.1 in FY 2022, which governs prosecutions under 18 U.S.C. § 922(g)), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table20.pdf , *last visited October 3, 2023.*

judgment below, and remand if the outcome recognizes the unconstitutionality of § 922(g)(1) in a substantial number of cases. Although the defendant has previous convictions for assaultive conduct, this Court may well find that the Second Amendment supports a broad or facial challenge to § 922(g)(1). The dissenters in *Range* expressed serious doubts as to whether the logic of that decision could be contained to those convicted of relatively innocuous felonies. *See e.g. Range*, 69 F.4th at 131-132 (Krause, J., dissenting). Likewise, the Seventh Circuit has expressed doubt as to whether the Second Amendment distinguishes between violent and non-violent felonies. *See Atkinson*, 70 F.4th at 1023. And the Southern District of Mississippi has sustained a Second Amendment challenge to a defendant previously convicted of aggravated assault and manslaughter. *See United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *2-3 (S.D. Miss. 2023). In its view, the government's authorities showed a right only to punish those who possessed a firearm after conviction of a death-eligible offense, or after a finding of dangerousness that prospectively disarmed the defendant. *Id.*

It is true that the Second Amendment challenge was not preserved in district court, and that any review will therefore eventually have to occur on the plain error standard. *See* Fed. R. Crim. P. 52(b). This means that to obtain relief Petitioner must show error, that is clear or obvious, that affects substantial rights, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). But as shown above, there is at least a reasonable probability that the Defendant could establish clear or obvious violation

of his Second Amendment rights if this Court evaluates the constitutionality of 9§ 22(g)(1), which it should quickly do. And the obviousness of error may be shown any time before the expiration of direct appeal. *Henderson v. United States*, 568 U.S. 266 (2013). Finally, a finding that the Defendant has been sentenced to prison for exercising a basic constitutional right would affect the outcome and cast doubt on the fairness of the proceedings, to say the least.

It is also true that the Second Amendment was not briefed in the court below. But the court below has considered issues raised for the first time in a certiorari petition, when the case is returned to it via GVR. *See United States v. Ross*, 708 Fed. Appx. 206 (5th Cir. 2018)(unpublished)(remanding after GVR), *see also Appellant's Brief in United States v. Ross*, No. 18-11318, 2019 WL 324502 (5th Cir. Filed Jan. 22, 2019) (showing that the issue giving rise to the GVR was not raised in the first Initial Brief).

Alternatively, this Court should hold the instant Petition pending the outcome of *United States v. Rahimi*, 22-915, __U.S.__, 2023 WL 4278450 (June 30, 2023)(granting cert.), which will decide the constitutionality of 18 U.S.C. § 922(g)(8). That statute forbids firearm possession by those subject to a domestic violence restraining order.

Of course, if Rahimi prevails in that case, it will tend to support constitutional attacks on other sections of § 922(g). Likely, a victory for Rahimi will involve a rejection of the government's contention that the Second Amendment is limited to those Congress terms "law abiding." *See United States v. Rahimi*, 61 F.4th 443, 451-

453 (5th Cir. March 2, 2023)(considering this argument), *cert. granted* 2023 WL 4278450 (June 30, 2023). It will also require the Court to consider and reject historical analogues to § 922(g)(8), including some that have been offered in support of § 922(g)(1). *Compare Rahimi*, 61 F.4th at 456-457 (considering government's argument that Congress could disarm those subject to restraining orders because some states disarmed enslaved people and Native Americans at founding), *with Range*, 69 F.4th at 105-106 (considering government's argument that Congress could disarm felons because some states disarmed enslaved people and Native Americans at founding). But even if Rahimi does not prevail, the opinion may be of significant use to Petitioner. If, for example, this Court were to decide that Rahimi may be stripped of his Second Amendment rights because he is objectively dangerous, Petitioner may argue that his convictions do not mark him as such. In short, the Court has granted certiorari in a closely related issue and should hold the instant Petition.

Notably, the Solicitor General has affirmatively contended that Rahimi and *Garland v. Range* – a case involving a challenge to 18 U.S.C. 922(g)(1) – presents "closely related Second Amendment issues." Government's Petition for Certiorari in *Garland v. Range*, 23-374, at 7 (Filed October 5, 2023), *available at https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830_Range%20Pet%2010.5.pdf , last visited October 20, 2023*. Indeed, it has contended that this Court should "hold the petition for a writ of certiorari" in *Range* "pending its decision *Rahimi*." *Id.* It can hardly maintain now

that other Petitions raising Second Amendment challenges to § 922(g)(1) should be disposed.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 14th day of November, 2023.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Adam Nicholson
Adam Nicholson
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: Adam_Nicholson@fd.org

Attorney for Petitioner