No. _____

IN THE
Supreme Court of the United States

JOSEPH EUGENE DIX
DONOVAN T. PHELPS,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

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

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

[1] Question One is presented by Petitioner Dix only.

[2] Question Two is presented by both Petitioners.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Joseph Eugene Dix and Donovan T. Phelps respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit panel's unpublished order and judgment in *United States v. Dix* is available at 2023 WL 5367508 and is included as Appendix A. The Tenth Circuit panel's unpublished order and judgment in *United States v. Phelps* is available at 2023 WL 5527951 and is included as Appendix B. The district court orders appealed from are included as Appendix C (Memorandum and Order denying motion to dismiss in *Dix*); Appendix D (Memorandum and Order rejecting proposed jury instruction in *Dix*); and Appendix E (docket entry denial of motion to dismiss in *Phelps*).

JURISDICTION

The Tenth Circuit's judgment was entered in *Dix* on August 22, 2023, and in *Phelps* on August 28, 2023. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

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

18 U.S.C. § 922(g)(1) provides:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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

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

STATEMENT OF THE CASE

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

Section 922(g)(1) makes it a crime for a person with a prior felony conviction to "possess . . . affecting commerce, any firearm or ammunition." This Court has not previously construed § 922(g)'s "affecting commerce" element. The circuit courts have all concluded that this element requires only a minimal nexus between the person's possession of the firearm and interstate commerce—i.e., that the firearm *itself* previously crossed state lines. The circuit courts consider themselves bound to this construction by this Court's reading of a differently structured predecessor statute in *Scarborough v. United States*, 431 U.S. 563 (1977).

This Court's intervention is necessary to correct the circuit courts' uniform misinterpretation of § 922(g)(1)'s "affecting commerce" element. *Scarborough* is neither controlling nor persuasive when it comes to interpreting § 922(g)(1). Reading today's statute to require proof that the prohibited person's possession contemporaneously affected interstate commerce is required by the text and context

of § 922(g)(1), the statutory history, the need to avoid grave federalism concerns, and the rule of lenity. The meaning of "affecting commerce" is important to the millions of people who live with prior felony convictions, and even more so to the increasingly large number of those people who are convicted of violating § 922(g)(1) each year. Construing the "affecting commerce" element according to its plain text would allow the government to continue enforcing the ban whenever a prohibited person's possession contemporaneously affects interstate commerce or occurs *in* interstate commerce.[3] This reading will properly leave any more general policing of felons-in-possession to the States, all of which have their own laws limiting firearms rights after criminal convictions. This Court should grant this petition and decide the reach of § 922(g)(1).

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

The circuit courts have uniformly rejected Commerce Clause challenges to § 922(g)(1), again in reliance on *Scarborough*. But *Scarborough* did not decide this question, and the circuit court decisions conflict with this Court's actual Commerce

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

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

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

1. Legal background

a. Congress first banned felons from possessing firearms in the Omnibus Crime Control and Safe Streets Act of 1968. PL 90-351 (June 19, 1968). Two separate titles of that Act (Titles IV and VII) addressed the receipt, transport, and possession of firearms by felons.

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

Title VII created the felon-in-possession ban, which was codified in a wholly separate chapter, at 18 U.S.C. § 1202(a)(1). PL 90-351, Sec. 1202 (June 19, 1968)

(amended slightly by PL 90-618, Sec. 301 (Oct. 22, 1968)).[4] The ban contained alternative jurisdictional hooks making it unlawful for a felon to "possess[ ] . . . in commerce or affecting commerce . . . any firearm." 18 U.S.C. § 1202(a)(1) (1968).

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

This Court rejected the argument in light of the differences in the legislative history of the two provisions. Title IV was "carefully constructed," and "[i]t is obvious that the tenses used throughout Title IV were chosen with care." *Id*. at 570. Title VII, in contrast, "was a last-minute amendment to the Omnibus Crime Control Act enacted hastily with little discussion and no hearings." *Id*. at 569. This Court found the language of Title VII "ambiguous at best." *Id*. at 570. This Court therefore relied on Congress's intent (as expressed through a single legislator) to "keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Id*. at 572 (citation omitted).

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

Consistent with that objective, this Court interpreted "affecting commerce" as requiring nothing more than the "minimal nexus" that the firearm "at some time" crossed state lines. *Id*. at 572, 575. This Court did not decide whether Title VII, so construed, passed Commerce Clause muster.

b. Congress passed the Firearms Owners' Protection Act in 1986. PL 99-308 (May 19, 1986). With this Act, Congress combined the Title IV (receipt/transport) and Title VII (possession) offenses into a single provision at 18 U.S.C. § 922(g) and repealed Title VII of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 1201, et seq.). PL 99-308 Sec. 104(b). Two key features of the 1986 Act's felon-in-possession ban distinguished it from the 1968 Omnibus Act's ban. First, the 1986 bill was "thoroughly scrutinized" and "8 years in the coming." 132 Cong. Rec. S5350-01 (Statement of Senator Hatch). And second, Congress moved the felon-in-possession ban from its own separate chapter into not just the same chapter but the same *sentence* as the receipt and transport bans, where the contrasting requirements ("possess in or affecting commerce" versus "receive any firearm or ammunition which has been shipped or transported" in commerce) would be pellucid to any reader. Despite this new context, the Tenth Circuit, like other circuit courts, has continued to interpret "affecting commerce" as it appears in § 922(g)(1) the same way that *Scarborough* interpreted the phrase as it appeared in § 1202(a)(1) (1968). Pet. App. 1a-6a.

c. In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that the Gun-Free Schools Act, which criminalized the non-economic activity of possessing firearms

in school zones, did not pass Commerce Clause muster. *Lopez* both crystalized this Court's modern Commerce Clause precedents and confirmed that Congress's Commerce Clause power "is subject to outer limits" that this Court "has ample power to enforce." *Id.* at 557 (citations omitted). As this Court explained, Congress may rely on its Commerce Clause power to regulate three things: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities having a substantial relation to interstate commerce," that is, activities that "substantially affect[ ]" interstate commerce. *Id.* at 558-59.

Because the third category involves activities that "are not themselves part of interstate commerce," Congress may only act in this category when doing so is necessary and proper for carrying its Commerce Clause authority into execution. *Gonzales v. Raich*, 545 U.S. 1, 34-35 (2005) (Scalia, J., concurring). Under this category, Congress may regulate *economic* activities if it has a rational basis for believing that the activities, taken in the aggregate, substantially affect interstate commerce. *Lopez*, 514 U.S. at 557; *Morrison*, 529 U.S. at 611; *Raich*, 541 U.S. at 22. But when it comes to *non-economic* activities like the possession of firearms, this Court has never relied on this aggregation principle. *Morrison*, 529 U.S. at 611, 613 n.5; *Raich*, 541 U.S. at 23-26. Rather, Congress may regulate non-economic activities that are not themselves part of interstate commerce through laws that Congress has a rational basis for believing are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate

activity were regulated." *Lopez*, 514 U.S. at 561; *see also United States v. Darby*, 312 U.S. 100, 121 (1941). The possession statute at issue in *Lopez* was not an essential part of any such larger scheme. 514 U.S. at 561. Upholding the statute would have required "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

d. In the decades since this Court decided *Lopez*, circuit courts have wrung their hands over what they view as tension between *Scarborough* and *Lopez* while nonetheless consistently reading *Scarborough* as foreclosing Commerce Clause challenges to § 922(g)(1). The Tenth Circuit has even gone so far as to rely on *Scarborough* to uphold the federal felon-in-possession-of-body-armor statute (18 U.S.C. § 931) over a Commerce Clause challenge, *despite* finding that the statute "cannot be justified" under any of this Court's three Commerce Clause categories. *Patton*, 451 F.3d at 636; *see also* Pet. App. 2a, 3a, 6a (citing *Patton* as binding precedent).

2. Factual and procedural history

a. In 2021, a Kansas federal grand jury indicted **Joseph Dix** with violating 18 U.S.C. § 922(g)(1) by possessing a firearm and ammunition "in and affecting interstate commerce" while knowing that he had previously been convicted of a felony. R1.9-10. According to the indictment, the firearm and ammunition Mr. Dix possessed had "been shipped and transported in interstate and foreign commerce." R1.10.

Mr. Dix moved to dismiss the indictment. R1.13. He anticipated that the evidence would show that he came into possession of the firearm days before his arrest, and that he never personally transported the firearm or the ammunition across state lines or caused either to be so transported. R1.14. He argued that, if a firearm possession can "affect commerce" via the mere fact that the firearm once crossed state lines, then Congress exceeded its Commerce Clause power when it passed § 922(g)(1). R1.15-30. The district court denied the motion on grounds that it was "bound by precedent to conclude that § 922(g) represents a valid exercise of Congress's power under the Commerce Clause." Pet. App. 10a.

b. Mr. Dix thereafter requested a jury instruction that would have obligated any jury on his case to find that his "possession of the firearm or ammunition contemporaneously affected interstate commerce." R1.43. The district court rejected Mr. Dix's proposed instruction "as required by Tenth Circuit precedent." Pet. App. 11-12.

c. After the district court denied his motion to dismiss and rejected his proposed jury instruction, Mr. Dix entered a conditional guilty plea under Fed. R. Crim. P. 11(a)(2) to being a convicted felon in possession of a firearm and ammunition, reserving the right to appeal from the district court's adverse findings respecting Mr. Dix's motion to dismiss and proposed jury instruction. R1.62 ¶ 5(c). The parties agreed that the facts constituting the offense included the fact that the firearm and ammunition "had been shipped and transported in interstate or foreign commerce." R1.60. The facts agreed to did *not* include any statement that *Mr. Dix* had possessed

or shipped or transported the firearm or ammunition in interstate or foreign commerce. R1.160. The district court accepted Mr. Dix's guilty plea and found him guilty as charged. R1.58. The district court sentenced Mr. Dix to 27 months of imprisonment followed by 2 years of supervised release. R1.71-72.

d. Mr. Dix appealed to the Tenth Circuit. He argued (1) that the phrase "affecting commerce" in 18 U.S.C. § 922(g)(1) requires proof that the accused's own possession of the firearm contemporaneously affected commerce and the district court erred in rejecting his proposed jury instruction; and, alternatively, (2) that if "affecting commerce" means no more than that the firearm independently crossed state lines at some time, then Congress exceeded its Commerce Clause power when it enacted § 922(g)(1), and the district court erred in denying his motion to dismiss. A panel of the Tenth Circuit affirmed in a short unpublished order. Pet. App. 1a-3a. The panel held that it was bound to reject both arguments by *Scarborough* and *Patton* and other circuit precedent. Pet. App. 1a-3a. The panel "decline[d] Dix's invitation 'to weigh in on the merits in anticipation of further review.'" Pet. App. 3a.

e. In 2021, a Kansas federal grand jury indicted **Donovan Phelps** with violating 18 U.S.C. § 922(g)(1) by possessing a firearm "in and affecting interstate commerce" while knowing that he had previously been convicted of a felony. R1.10. According to the indictment, the firearm Mr. Phelps possessed had "been shipped and transported in interstate and foreign commerce." R1.11.

Mr. Phelps moved to dismiss the indictment. R1.14. He noted that the evidence received in discovery showed that the firearm at issue had been manufactured outside

of Kansas and sold in Kansas more than five years before his alleged possession. R1.14-15. He then argued that, if a firearm possession can "affect commerce" via the mere fact that the firearm once crossed state lines, then Congress exceeded its Commerce Clause power when it passed § 922(g)(1). R1.14-34. He conceded that the Tenth Circuit Court had previously foreclosed this argument. R1.17. The district court denied Mr. Phelps's motion in a docket entry "[f]or the reasons set forth by Mr. Phelps." Pet. App. 14-15.

f. Mr. Phelps thereafter pleaded guilty as charged without a plea agreement. At the plea hearing, the government recited the underlying facts it would prove if the case went to trial. The government stated that Mr. Phelps had possessed a firearm in Kansas, "the firearm having been" (past tense) "shipped and transported in interstate commerce." R2.24. The government did not state that Mr. Phelps had ever personally possessed or shipped or transported the firearm in interstate commerce or had ever caused the firearm to be so shipped or transported. R2.23-24. Rather, the government stated merely that the firearm "was manufactured outside the State of Kansas and had to travel across state lines in order to reach the State of Kansas." R2.24. Mr. Phelps agreed that he possessed the firearm. R2.25-26. On this factual basis, the district court accepted Mr. Phelps's guilty plea and adjudged him guilty as charged. R2.28. The district court sentenced Mr. Phelps to 46 months of imprisonment followed by 2 years of supervised release. R1.51-52.

g. Mr. Phelps appealed to the Tenth Circuit. He argued if "affecting commerce" means no more than that the firearm at issue independently crossed state lines at

some time, then Congress exceeded its Commerce Clause power when it enacted § 922(g)(1), and the district court erred in denying his motion to dismiss. A panel of the Tenth Circuit (made up of three different judges than were on the *Dix* panel) affirmed in a short unpublished order. Pet. App. 4a-6a. The panel held that it was bound to reject Mr. Phelps's argument by *Scarborough* and *Patton* and other circuit precedent. *Id*.

REASONS FOR GRANTING THE WRIT

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

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

1. The text of § 922(g) tells us two things. First, it is the prohibited person's *possession*, not the firearm, that must have an effect on commerce. And second, that effect must be contemporaneous with any intrastate possession. In other words, the statute does not reach firearms possessions just because the firearms themselves previously crossed state lines.

Section 922(g)(1) makes it a federal crime "for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" . . .

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

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

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

Verb tense also matters. "Consistent with normal usage," this Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States*, 560 U.S. 438, 448 (2010). The Dictionary Act states that "words used in the present tense include the future as well as the present." 1 U.S.C. § 1. The implication is "that the present tense generally does not include the past." *Carr*, 560 U.S. at 448. "[A]ffecting commerce" is an adverbial present-participle phrase. As the Seventh Circuit has explained, a present participle "means presently and continuously. It does not include something in the past that has ended or something yet to come." *Shell v. Burlington Northern Santa Fe Railway Company*, 941 F.3d 331, 336 (7th Cir. 2019) (discussing present participle "having"). Congress's use of the present-participle phrase "affecting commerce" is unambiguous. It cannot be read to embrace past effects on commerce caused by some other actor's manufacture or movement of the firearm. It requires instead that any intrastate possession contemporaneously affect commerce.

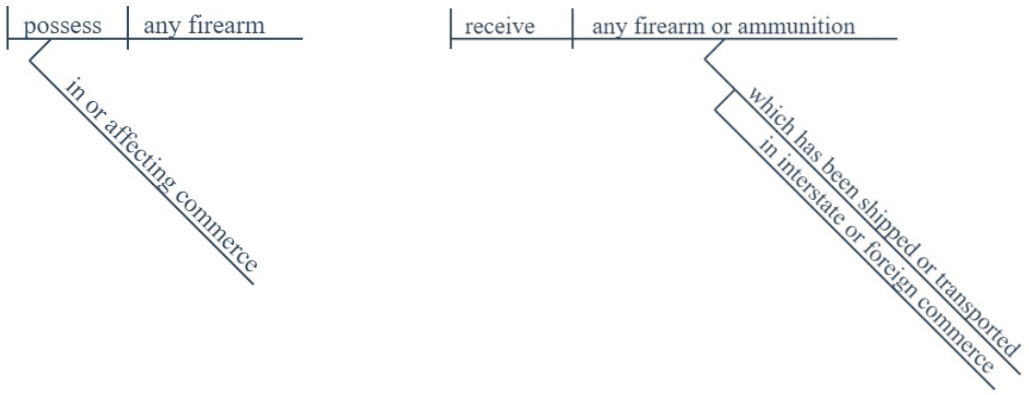
2. This is the only sensible way to read the possession ban in context. Section 922(g) makes it unlawful for a person with a prior felony conviction to engage in any

of three different acts. Each of those acts has its own unique jurisdictional hook. For two acts (transport and possess), the jurisdictional element is an adverbial phrase modifying *the act*, not the firearm. For the third act (receive), the jurisdictional element is an adjective clause modifying the *firearm*. Here again is the statutory language:

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

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

Very roughly diagrammed, the difference between possession and receipt looks like this:



Comparing the provisions shows us that it is only unlawful to *receive* a firearm that has previously "been shipped or transported" in commerce. If this were all it took to prove an unlawful *possession*, then Congress would have said so in the possession provision. And indeed it did say so with respect to *other* possessions within the statute. *See, e.g.,* § 922(j) (unlawful to possess any stolen firearm "which has been shipped or transported in, interstate or foreign commerce, either before or after it was

stolen"); § 922(k) (unlawful to possess any firearm that has an obliterated serial number and "has, at any time, been shipped or transported in interstate or foreign commerce"). "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Republic of Sudan v. Harrison*, 139 S.Ct. 1048, 1058 (2019) (citation omitted); *see also Shular v. United States*, 140 S.Ct. 779, 785 (2020) (contrasting language in one provision of firearms statute with language in a neighboring provision to determine that first provision meant something different). Congress's retention of different language in these neighboring provisions "reflects its choice that these different [provisions] warrant different treatment." *Pereida v. Wilkinson*, 141 S. Ct. 754, 761 (2021).

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

Scarborough grounded its reading of § 1202(a)(1) in the fact that its felon-in-possession ban was *not* then part of § 922. 431 U.S. at 569. The tenses in the original § 922 provisions ("shipped or transported in"—past tense) were "chosen with care," whereas § 1202(a)(1) ("affecting"—present participle) was "enacted hastily." *Id*. This Court consequently found any comparison between the tenses "not very meaningful."

Id. But when Congress consolidated all of the felon-related provisions into § 922(g)(1), it placed them side-by-side in a "painstakingly" constructed statute. Congress corrected *Scarborough*'s perception that the differences didn't matter by creating "something new." *SAS Institute, Inc. v. Iancu*, 138 S.Ct. 1348, 1356 (2018) (Congress's "choice to try something new must be given effect rather than disregarded in favor of the comfort of what came before."); *see also United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (Demoss, C.J., dissenting in part) ("It seems critically important that we note the clear differences between the current statute (§ 922(g)(1)) . . . and the old statute (18 U.S.C.App. § 1202(a)(1)) which was construed in *Scarborough*."). By *Scarborough*'s own terms, Congress rendered the contrast between the tenses "very meaningful" by moving the felon-in-possession ban into § 922(g)(1).

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), this Court relied on the statute's reorganization to interpret § 922(g)(1) contrary to pre-1986 constructions of the possession provision. This Court held that in order to prove a violation of § 922(g), the government "must prove that a defendant knows of his status as a person barred from possessing a firearm." 139 S.Ct. at 2195. The government, arguing against this reading, pointed to what it claimed was a pre-1986 consensus among the circuit courts "that the law did not require the Government to prove scienter regarding a defendant's status." *Id*. at 2199. This Court rejected that argument on grounds that "[a]ny pre-1986 consensus involved the statute as it read prior to 1986." *Id*. This Court pointed out that the Firearms Owners' Protection Act "reorganized the prohibition on firearm possession and added the language providing that only those who violate the

prohibition 'knowingly' may be held criminally liable." *Id.* This statutory history made it "all but impossible to draw any inference that Congress intended to ratify a pre-existing consensus when, in 1986, it amended the statute." *Id.*

The same may be said about *Scarborough* and the circuit court cases relying on it. *Scarborough* cannot control the meaning of § 922(g)(1) for the simple reason that it interpreted a different (and differently structured) statute—the 1968 felon-in-possession ban codified at 18 U.S.C. § 1202(a)(1). Congress did not ratify *Scarborough* when it adopted § 922(g)(1). If anything, when Congress "reorganized the prohibition on firearm possession," *Rehaif*, 139 S.Ct. at 2199, it repudiated *Scarborough*'s interpretation of "affecting commerce."

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

conduct' in which petitioner Jones engaged 'a matter for federal enforcement'" (citation omitted)). That task is made easy by the plain text of the statute.

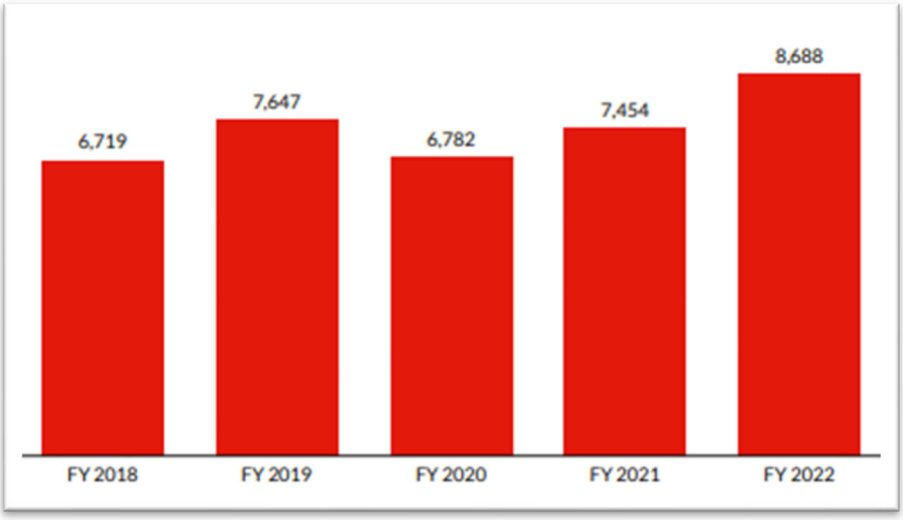
e. Finally, to the extent that the phrase "affecting commerce" appears ambiguous, this Court should apply the rule of lenity and adopt our reading of the statute. The *Scarborough* Court found the language of Title VII "ambiguous at best." 431 U.S. at 570. The Court therefore relied on Congress's intent—as stated by a single Senator promoting the bill—when it interpreted "affecting commerce" broadly to cover the possession of a firearm that previously crossed state lines. *Id*. It declined to apply the rule of lenity on grounds that "the intent of Congress is clear." *Id*. at 577.

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

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

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

Settling the reach of § 922(g)(1) is exceptionally important in light of the fact that millions of people in our country live with prior felony convictions. Nicholas Eberstadt, *America's Invisible Felon Population: A Blind Spot in US National Statistics, Statement before the Joint Economic Committee on the Economic Impacts of the 2020 Census and Business Uses of Federal Data* 3-4 (May 22, 2019) (discussing limits on available data and concluding that "[r]ough calculations suggest that the total population with a felony in America today (2019) might equal or exceed 24 million").[5] Every (non-pandemic) year, an increasingly large number of these people are convicted under § 922(g)(1), as this Sentencing



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

Commission graphic illustrates. QUICK FACTS: FELON IN POSSESSION OF A FIREARM (USSC May 2021).[6]

The vast majority of people convicted in 2022 were sentenced to prison (97.4%), with an average term of 63 months. *Id.* The maximum statutory penalty for a § 922(g)(1) violation is 10 years' imprisonment—unless the person has three qualifying prior convictions, in which case the *minimum* statutory penalty is 15 years' imprisonment. 18 U.S.C. § 924(a)(2); *see Rehaif*, 139 S.Ct. at 2197 (describing § 922(g) penalty as "harsh"). Both the frequency of § 922(g)(1) prosecutions and the severity of § 922(g)(1) sentences render the questions presented here exceptionally important.

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

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

Even now, despite its facial neutrality, § 922(g)(1) is enforced against a disproportionately high number of Black and Hispanic people. *Compare* QUICK FACTS: FELON IN POSSESSION OF A FIREARM (of persons convicted under § 922(g)(1) in 2022, 73.7% were Black or Hispanic, while only 23.1% were white) *with* U.S. Census Bureau (2022 estimates) (32.7% of U.S. population Black or Hispanic; 58.9% white and not Hispanic or Latino);[7] *see also* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1023 (2020) (noting "highly discretionary" nature of decision to bring felon-in-possession charges in federal, rather than state court). Against this unsettling backdrop, it is exceptionally important that, at the very least, § 922(g)(1)'s reach be fully vetted by this Court.

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

Construing § 922(g)(1)'s "affecting commerce" element according to its plain text will not end federal oversight of felons who possess firearms. Far from it. The government will still be able to enforce the statute whenever a prohibited person's possession either contemporaneously affects interstate commerce or actually occurs *in* interstate commerce. And the government will still be able to prosecute appropriate cases under the transport and receipt provisions of the statute. Construing the statute according to its plain text will simply (and properly) leave more general policing of felons-in-possession to the States. All fifty states have

[7] Available at https://www.census.gov/quickfacts/fact/table/US/PST045222.

exercised their respective general police powers to limit the firearms rights of people convicted of certain crimes.[8] This Court need not worry about enforcement when deciding whether to grant this petition.

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

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

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

This division of legislative authority between federal and state governments is "for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). It rests on the theory that allocating authority between two governments "enhances freedom, first by protecting the integrity of the governments themselves, and second

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

by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). Reserving general police powers to the States secures individual freedom from arbitrary laws because it "allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely on the political processes that control a remote central power." *Id*. Put more plainly, it's easier to participate in state government than in national government. States should be the ones to make criminal laws so that ordinary people whose behavior those laws target can participate in the criminal-law-making process. That is why the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566.

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

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

Ever since this Court decided *Lopez*, judges across the circuits have noted tension between *Scarborough* and *Lopez* even while the circuit courts have continued to read *Scarborough* as controlling both the reach and constitutionality of § 922(g)(1). Most recently, Judge Ho of the Fifth Circuit observed that the Fifth Circuit's reading of *Scarborough* "dramatically expands the reach of the federal government under the Commerce Clause," and that now is the time "to reaffirm our Founders' respect for diverse viewpoints and restore the proper constitutional balance between our national needs and our commitment to federalism." *United States v. Seekins*, 52 F.4th 988, 992 (**5th Cir.** 2022) (Ho, J., joined by Smith, J., and Engelhardt, J., dissenting from denial of rehearing en banc by seven-to-nine vote), *cert. denied*, No. 22-6853 (June 26, 2023); *see also United States v. Bishop*, 66 F.3d 569, 595 n.13 (**3d Cir.** 1995) (Becker, J., concurring in part and dissenting in part) ("the broad application of the statute in *Scarborough* is probably undermined by *Lopez*"); *United States v. Hill*, 927 F.3d 188, 215 n.10 (**4th Cir.** 2019) (Agee, J., dissenting) ("While some tension exists between *Scarborough* and the Supreme Court's decision in *Lopez*, the Supreme Court has not granted certiorari on a case that would provide further guidance . . . and circuit courts have routinely relied on *Scarborough* as a basis for distinguishing *Lopez* in the context of firearms-related offenses."); *United States v. Kirk*, 105 F.3d 997 (**5th Cir.** 1997) (Jones, J., for half of an evenly divided en banc court) ("As [*Scarborough*'s] broad reading of the Commerce Clause has Supreme Court imprimatur, albeit pre-*Lopez*, we can only note the tension between the two decisions and will continue to

enforce § 922(g)(1)."); *United States v. Sarraj*, 665 F.3d 916, 922 n.3 (**7th Cir.** 2012) ("We have relied on *Scarborough* on numerous occasions with the understanding that *Lopez* did not invalidate or call into question the analysis or rule of *Scarborough*, even if the minimal nexus requirement of *Scarborough* might seem to stand in some tension with the substantial-impact framework of *Lopez*."); *United States v. Alderman*, 565 F.3d 641, 646 (**9th Cir.** 2009) ("Other circuits have similarly endorsed the continuing vitality of *Scarborough*, albeit sometimes with skepticism, in decisions dealing with a variety of felon firearm statutes . . . . Although we consider *Scarborough* as the defining case, we cannot ignore the Supreme Court's shifting emphasis in its Commerce Clause jurisprudence over the past decade."); *United States v. Patton*, 451 F.3d 615, 636 (**10th Cir.** 2006) ("Like our sister circuits, we see considerable tension between *Scarborough* and the three-category approach adopted by the Supreme Court in its recent Commerce Clause cases, and like our sister circuits, we conclude that we are bound by *Scarborough*, which was left intact by *Lopez*.").

The circuit courts have long awaited this Court's guidance. In *Patton*, for instance, the Tenth Circuit stated that "[a]ny doctrinal inconsistency between *Scarborough* and the Supreme Court's more recent [Commerce Clause] decisions is not for this Court to remedy," and predicted that "the Supreme Court will revisit this issue in an appropriate case—maybe even this one." 451 F.3d at 636. The Seventh Circuit has similarly noted that "[i]f, indeed, *Lopez*'s rationale calls into doubt our construction and application of section 922(g)(1), it is for the Supreme Court to so hold." *United*

States v. Lemons, 302 F.3d 769, 773 (7th Cir. 2002). And in *Alderman*, the Ninth Circuit concluded that it would "follow *Scarborough* unwaveringly" "until the Supreme Court tells us otherwise." 565 F.3d at 648. This Court has so far declined to tell the circuit courts whether or not to continue following *Scarborough*, despite the view of at least two members that "*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez*." *Alderman v. United States*, 562 U.S. 1163, 131 S.Ct. 700, 702 (2011) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

It is time for this Court to weigh in by granting this petition.

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

This Court should grant this petition in order to correct the circuit court's continuing reliance on *Scarborough* as a constitutional precedent. "No party [in *Scarborough*] alleged that the statute exceeded Congress' authority, and the Court did not hold that the statute was constitutional." *Alderman v. United States*, 562 U.S. 1163, 131 S.Ct. 700, 701 (2011) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

The circuit courts have nonetheless concluded that *Scarborough* would not have interpreted the predecessor felon-in-possession ban without at least *implicitly* deciding that, as interpreted, that ban was constitutional. *See, e.g., Patton*, 451 F.3d at 634 (relying on "[t]he constitutional understanding implicit in *Scarborough*"); *Alderman*, 565 F.3d at 645 ("although the [*Scarborough*] Court did not address the statute from a constitutional perspective, it implicitly assumed the constitutionality of the 'in commerce' requirement"). They assume that *Scarborough* implicitly created

a Commerce Clause test that this Court has never explicitly articulated: if a possession statute contains a "minimal nexus" element requiring proof that the thing possessed once crossed state lines, the statute need not pass this Court's other (explicit) Commerce Clause tests. *See Patton*, 451 F.3d at 636 ("Because Mr. Patton's bulletproof vest moved across state lines at some point in its existence, Congress may regulate it under *Scarborough*, *even though it does not fall within any of the three categories the Court now recognizes for Commerce Clause authority*.") (emphasis added).

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

Additionally, this Court does not decide important constitutional questions *sub rosa*. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *accord Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (explaining that prior case had no effect on constitutional claim where "the issue was by no means adequately presented to and necessarily decided by this Court"). The circuit courts

are mistaken to assume that *Scarborough* implicitly decided that § 1202(a)(1) passed Commerce Clause muster.

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

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

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

To be clear, we are challenging Congress's exercise of its Commerce Clause authority to enact § 922(g)(1)'s felon-in-possession ban only to the extent that the ban criminalizes possessions "affecting commerce." We are not challenging the alternative "in commerce" element. This Court may, should it reach this issue and find a Commerce Clause violation, invalidate and strike just the challenged element. *See Barr v. American Association of Political Consultants, Inc.*, 140 S.Ct. 2335, 2350 (2020) (discussing "strong presumption" that "an unconstitutional provision in a law

is severable from the remainder of the law or statute").

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

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

2. The statute in *Lopez* contained no jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm possession *in question* affects interstate commerce." 514 U.S. at 562 (emphasis added). Similarly, section 921(g)(1)'s "affecting commerce" element, as interpreted by the circuit courts, "does not seriously limit the reach of the statute." *Patton*, 451 F.3d at 633. To begin with, the universe of possessions "affecting commerce" is on its face broader than the universe of possessions *substantially* affecting commerce. And the "affecting commerce" element, as interpreted, ensures only that the firearm, at some point in the past, crossed state lines; it does nothing to connect the simple intrastate

possession *in question* with any effect on interstate commerce. Congress may not use such a trivial connection to commerce as an excuse for controlling who may possess firearms. *See Lopez*, 514 U.S. at 558.

3. When evaluating whether a statute satisfies the third category of Commerce Clause authority, the question is whether Congress had a rational basis for believing that the federal felon-in-possession ban was essential to Congress's larger effort to regulate and track firearms. *Lopez*, 514 U.S. at 561; *Raich*, 541 U.S. at 24, 27. No such rational basis existed to support § 922(g)(1). To begin with, the federal firearms regulatory scheme does not aim either to prohibit the possession of firearms entirely or to exclude them entirely from interstate commerce.[9] It is thus unlike the scheme at issue in *Raich* to "prohibit entirely" the possession or use of controlled substances, 545 U.S. at 24, and unlike the scheme in *Darby* to "exclud[e] from interstate commerce all goods" that do not conform to specified labor standards, 312 U.S. at 121. Indeed, it is not at all obvious how failing to ban *some* people[10] from possessing *some* firearms[11] would leave a "gaping hole" in the firearms scheme. *Raich*, 545 U.S. at 22.

Indeed, when Congress first added a felon-in-possession ban in 1968, its purpose was not to track firearms in commerce, but to control crime, and it articulated only a weak "costs of crime" connection to commerce. PL 90-351, Title VII, Sec. 1201 (finding

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

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

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

that receipt, possession, or transportation of firearms by felons and others constitutes "a burden on commerce or threat affecting the free flow of commerce"); 114 Cong. Rec. 13868 (1969) (statement of bill's sponsor: "You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you would like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce."). When Congress imported the ban into 922(g)(1), it did not mention commerce at all. PL 99-308 Sec. 1 (1986) (finding only a need to reaffirm the rights of law-abiding citizens to own and use firearms). Fighting crime is not a legitimate congressional end. And neither is a "costs of crime" justification sufficient to sustain a criminal statute under the Commerce Clause. *Lopez*, 514 U.S. at 563-64 (rejecting government's "costs of crime" reasoning); *Morrison*, 529 U.S. at 617 ("We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

4. Allowing § 921(g)(1) to stand as currently interpreted would leave Congress free to regulate "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Lopez*, 514 U.S. at 563-64. Dictating who may possess firearms is an area "where States historically have been sovereign." *Id*. at 564. If "affecting commerce" as used in § 922(g)(1) means what the circuit courts say it means, then Congress exceeded its Commerce Clause power and exercised a traditional state police function when it enacted § 922(g)(1). This Court should grant this petition. And if this Court agrees

that the statute requires no more than a minimal nexus to interstate commerce, this Court should invalidate the statute.

3. This petition is an ideal vehicle for deciding the questions presented.

This Court recently denied a petition for certiorari on the Commerce Clause question in *Seekins v. United States*, No. 22-6853 (cert. denied June 26, 2023). That petition raised *only* the Commerce Clause question in relation to § 922(g)(1), without asking this Court to first determine the reach of the statute. In other words, that petition assumed that *Scarborough*'s interpretation of § 922(g)(1)'s predecessor statute controls today's statute. This petition, in contrast, asks this Court to determine the reach of the statute first, and the Commerce Clause question only if necessary. Additionally, the Tenth Circuit squarely decided both of these questions in *Dix*, and the Commerce Clause question in *Phelps*, and there are no procedural impediments to this Court's review.

The fact that the Tenth Circuit's decisions here were unpublished does not weigh against granting this petition. Because the circuit courts have already uniformly decided the questions presented here in the government's favor, they tend to dispatch them now in unpublished opinions (unless there are other publication-worthy issues in the case). *See, e.g., United States v. Seekins*, 2022 WL 3644185 (5th Cir. 2022); *United States v. Johnson*, 781 Fed. Appx. 370 (5th Cir. 2019); *United States v. Bonet*, 737 Fed. Appx. 988 (11th Cir. 2018); *United States v. Gardner*, 734 Fed. Appx. 311 (5th Cir. 2018); *United States v. Terry*, 726 Fed. Appx. 939 (4th Cir. 2018). And even when circuit courts reject the claims in published decisions, they do so summarily. *See, e.g., United States v. Penn*, 969 F.3d 450, 459-60 (5th Cir. 2020) (summarily

rejecting Commerce Clause challenge: "our precedent forecloses this argument"); *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020) (summarily rejecting challenge to sufficiency of evidence on "affecting commerce" element: "this argument is foreclosed under our caselaw"). Given the state of the law in the circuits, there is no reason to expect a more-deeply-analyzed decision (published or unpublished) to come along.

Moreover, publication has never been a prerequisite to review or a reliable measure of a decision's importance. *See, e.g., Carter v. United States*, 530 U.S. 255 (2000) (reviewing unpublished circuit court decision); *Los Angeles County, California v. Rettele*, 550 U.S. 609 (2007) (same); *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) (same); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (same); *Eastern Assoc. Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57 (2000) (same); *Wisconsin Right to Life, Inc. v. F.E.C.*, 546 U.S. 410 (2006) (reviewing unpublished three-judge district court decision); *Kaupp v. Texas*, 538 U.S. 626 (2003) (reviewing unpublished Texas Court of Appeals decision); *Ewing v. California*, 538 U.S. 11 (2003) (reviewing unpublished California Court of Appeal decision).

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

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

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

CONCLUSION

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

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