No. _____

In the

Supreme Court of the United States

_____

Devontae Nykel Racliff,

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

_____

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 922(g)(1) violates the Second Amendment under *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

2. Whether Congress may criminalize intrastate possession of a firearm solely because the firearm crossed state lines at some point before the defendant came to possess it.

3. Whether this Court should grant certiorari, vacate the judgment below, and remand for the Fifth Circuit to reconsider precedent defining the enumerated offense of "robbery" under U.S. SENT'G COMM'N, GUIDELINES MANUAL §4B1.2 (Nov. 2021) ("USSG") contrary to Amendment 822's definition.

PARTIES TO THE PROCEEDING

Petitioner is Devontae Nykel Racliff, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RELATED PROCEEDINGS

- *United States v. Racliff*, No. 3:20-cr-00417-X, U.S. District Court for the Northern District of Texas. Judgment entered on April 14, 2022.

- *United States v. Racliff*, No. 22-10409, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on September 14, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Devontae Nykel Racliff seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unpublished opinion is available at *United States v. Racliff*, No. 22-10409, 2023 WL 5972049 (5th Cir. Sept. 14, 2023). It appears in pages 1a–3a of the Appendix.

JURISDICTION

The Fifth Circuit entered judgment on September 14, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution:

> 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, § 8, cl. 3.

The Second Amendment to the United States Constitution:

> 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.

Section 922(g)(1) of Title 18 provides 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.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

Devontae Nykel Racliff pleaded guilty to one count of violating 18 U.S.C. § 922(g)(1) and received a 51-month imprisonment sentence. ROA.9, 61, 124, 145. As part of his guilty plea, Racliff executed a joint stipulation of facts where he admitted that the firearm he possessed "was not manufactured in the State of Texas." ROA.47; *see also* ROA.43-47, 122-23. Thus, Racliff stipulated that "by virtue of its presence in Texas," the firearm "traveled in or affected interstate or foreign commerce, within the definition of 18 U.S.C. § 921(a)(2)." ROA.47. The parties' written stipulation did not specify when the firearm traveled in commerce, or whether Racliff's conduct or a commercial transaction caused the firearm's movement in commerce.

The district court adopted the guideline calculations that the probation department put forth in the Presentence Investigation Report ("PSR") and PSR Addendum: Offense Level 19, Criminal History Category V, and an advisory guideline range of 57–71 months' imprisonment. ROA. 137-41, 194. The report reflected that prior to possessing the firearm, Racliff received a three-year imprisonment sentence for robbery and assault, and a 180-day sentence for two convictions of evading arrest/detention. ROA.182-83, 185-86. The court downward varied to 51 months' imprisonment and imposed three years of supervised release to follow. ROA.61-62, 145-47.

II. Appellate Proceedings

Racliff appealed and put forth three challenges to his conviction and sentence. First, Racliff argued that Congress exceeded its commerce power when it enacted the 18 U.S.C. § 922(g)(1). Second, Racliff maintained that the district court plainly erred under *Bruen* because § 922(g)(1) did not pass constitutional muster. Third, Racliff urged that contrary to precedent, Texas's robbery-by-injury offense is not a "crime of violence" under USSG §4B1.2 because precedent wrongly defined the enumerated offense as containing no presence requirement for the person from whom property was taken or a nexus between the assaultive conduct and the theft. The Fifth Circuit affirmed in an unpublished opinion. *United States v. Racliff*, No. 22-10409, 2023 WL 5972049 (5th Cir. Sept. 14, 2023) (reprinted at App. 1a–3a). It held that precedent foreclosed the first and third challenges, and that Racliff could not show plain or obvious error on the second challenge. App. 2a–3a.

After the Fifth Circuit issued its opinion, a guideline amendment became effective that defined "robbery" as in pertinent part as "the unlawful taking or obtaining of personal property ***from the person or in the presence of another***, against his will, ***by means of*** actual or threatened force, or violence, or fear of injury…." USSG App. C, amend. 822 (emphasis added). The amendment also stated: "The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance." *Id.* In its reason for amendment, the United States Sentencing Commission explained that "[t]he amendment ***clarifies*** that 'actual or threatened force' for purposes of the new 'robbery' definition is 'force sufficient to overcome a victim's resistance.'" *Id.* (emphasis added).

REASONS FOR GRANTING THIS PETITION

I. Lower courts require guidance on how to apply *Bruen*.

A. A circuit split has emerged over the constitutionality of 18 U.S.C. § 922(g)(1).

The Second Amendment guarantees "the right of the people to keep and bear arms." U.S. Const. amend. II. 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. Despite the conflict between the statutory and constitutional text, the courts of appeals historically and uniformly rejected Second Amendment challenges. *See United States v. Moore*, 666 F.3d 313, 316–17 (4th Cir. 2012) (collecting authorities).

"Enter [*New York State Rifle & Pistol Association, Inc. v.] Bruen*." *United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023) (citing *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022)). "When the Second Amendment's plain text covers an individual's conduct," *Bruen* held that the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. No longer may the government defend a regulation by showing that it is narrowly tailored to achieve an important or even compelling state interest. *Id.* at 17–24.

In *Bruen*'s wake, courts of appeals have split as to whether 18 U.S.C. §922(g)(1) infringes on rights protected by the Second Amendment. The Third Circuit sustained the Second Amendment challenge of a man previously convicted of making a false statement to obtain food stamps, notwithstanding that the crime was punishable by

imprisonment for a term exceeding one year. *See Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3d 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, 506 (8th Cir. 2023) (citing *United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023)). The Seventh Circuit considered a more robust development of the historical record necessary at the trial court and remanded the issue accordingly. *See Atkinson v. Garland*, 70 F.4th 1018, 1022–24 (7th Cir. 2023). The Tenth Circuit stands alone in declining to even venture into the historical justifications for § 922(g)(1) — it decided that *Bruen* did not abrogate precedent upholding § 922(g)(1) based on a head count of votes from *Bruen*'s concurring and dissenting opinions and its footnote concerning "shall-issue" regimes. *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023).

B. This issue is of exceptional importance.

Bruen's application to § 922(g)(1) will continue to plague lower courts until this Court provides guidance. The Court's much anticipated decision in *United States v. Rahimi*, No. 22-915, which will decide the constitutionality of 18 U.S.C. § 922(g)(8), may provide some. But the Solicitor General appears to agree that more is needed. The government has requested this Court's review in *Garland v. Range*, No. 23-374, which squarely presents the question of § 922(g)(1)'s constitutionality under the Second Amendment; and in *United States v. Daniels*, Case No. 23-376, which presents the related question of § 922(g)(3)'s constitutionality under the Second Amendment.

Moreover, the issue before the Court implicates the prosecution and incarceration of thousands. As of December 7, 2023, the Bureau of Prisons reported that it

imprisons 157,740 people.[1] And as of December 2, 2023, 21.9% of inmates (32,163) were incarcerated for "Weapons, Explosives, [and] Arson" offenses, the second largest category of offenses within the federal prison population.[2] "For more than 25 years" in fact, firearm crimes have been one of the "four crime types" that "have comprised the majority of federal felonies and Class A misdemeanors[.]"[3] In fiscal year 2021, "[c]rimes involving firearms were the third most common federal crimes[.]"[4] Of the 57,287 individuals sentenced, 8,151 were firearm cases—a 14.2% share.[5] This represents an 8.1% increase from the year before, despite the number of cases reported to the U.S. Sentencing Commission declining by 11.3% and hitting an all-time low since fiscal year 1999.[6]

These figures only capture the tail end of the criminal process at the district court. The scope of prosecutions looms larger. "The Department of Justice filed firearms-related charges in upwards of 13,000 criminal cases during the 2021 fiscal year." *United States v. Kelly*, No. 3:22-CR-00037, 2022 WL 17336578, at *3 (M.D. Tenn. Nov. 16, 2022) (citing Executive Office for United States Attorneys, U.S. Dept.

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[1] *Statistics*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Dec. 11, 2023).
[2] *Statistics – Inmate Offenses*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Dec. 11, 2023).
[3] *Fiscal Year 2021 Overview of Federal Criminal Cases* at 4, U.S. SENTENCING COMM'N (April 2022), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf.
[4] *Id.* at 19.
[5] *Id.* at 1, 5.
[6] *Id.* at 2.

of Justice, Annual Statistical Report Fiscal Year 2021 at 15 (Table 3C), available at https://www.justice.gov/usao/page/file/1476856/download). The scale of the question presented warrants this Court's attention.

II. This Court should delineate the boundaries of federal authority under the Commerce Clause in the firearm context.

A predecessor to 18 U.S.C. § 922(g), the Omnibus Crime Control and Safe Streets Act of 1968 prohibited "[a]ny person who…has been convicted by a court of the United States or of a State…of a felony" from receiving, possessing, or transporting "in commerce or affecting commerce any firearm." Pub. L. No. 90-351, § 1202, 82 Stat. 197. *Scarborough v. United States* addressed "whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the *statutorily* required nexus between the possession of a firearm by a convicted felon and commerce." *Scarborough v. United States*, 431 U.S. 563, 564 (1977) (emphasis added). *Scarborough* answered this question "yes," but the Court did not linger on the constitutional implications of its statutory construction. *See id.* at 577; *see also United States v. Johnson*, 42 F.4th 743, 750 (7th Cir. 2022) (noting that the decision in *Scarborough* "was one of statutory interpretation"); *United States v. Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc). ("[T]he Court's holding in *Scarborough* was statutory, not constitutional.").

By contrast, this Court *did* examine the constitutional question presented by 18 U.S.C. § 922(q) in *United States v. Lopez*, 514 U.S. 549 (1995). The statute "made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Id.* at 551

(quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)). The district court held that the act constituted a valid exercise of Congress's commerce power, but the appellate court reversed. *Id.* at 551–52. This Court affirmed the appellate court's ruling that the statute lay "beyond the power of Congress under the Commerce Clause." *Id.* at 552. In so doing, the Court cabined Congress's commerce power to "three broad categories of activity" subject to regulation: (1) "the use of the channels of interstate commerce"; (2) activities, even if intrastate, that threaten "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id.* at 558–59 (internal citations omitted). The Court quickly disposed of any justification for § 922(q) under the first two categories, focusing its inquiry on the third. *Id.* at 559. It noted that § 922(q) was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise," elaborating in a footnote that "States possess primary authority for defining and enforcing the criminal law" and that federal criminalization of "conduct already denounced as criminal by the States…effects a change in the sensitive relation between federal and state criminal jurisdiction." *Id.* at 561 & n.3. The Court also expressed deep concern that the government's arguments for why possession of a firearm in a local school zone substantially affected commerce lent themselves to no limiting principle, opening the door to a "a general federal police power." *Id.* at 563–66. Ultimately, the Court concluded that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially

affect any sort of interstate commerce." *Id.* at 567. "Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce." *Id.*

Scarborough and *Lopez* stand in tension, and lower courts have grappled with reconciling them for years. But "whether" intrastate possession of a firearm that crossed state lines long before the regulated possession "affect[s] interstate commerce sufficiently to come under the constitutional power of Congress to regulate" per *Lopez* "is ultimately a judicial…question…[that] can be settled finally only by this Court." *United States v. Morrison*, 529 U.S. 598, 614 (2000) (cleaned up).

A. Federal appellate courts differ on the relationship between *Scarborough* and *Lopez*.

Federal courts have "cried out for guidance from this Court" on this issue for decades. *Alderman v. United States*, 562 U.S. 1163, 131 S. Ct. 700, 702 (2011) (Thomas, J., dissenting from denial of certiorari). Simply put, "*Scarborough* is in fundamental and irreconcilable conflict with the rationale of the United States Supreme Court in [*Lopez*]." *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting). Still, the Fifth Circuit "continue[s] to enforce § 922(g)(1)" because it is "not at liberty to question the Supreme Court's approval of the predecessor statute to [§ 922(g)(1)]." *United States v. Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (per curiam). *See also United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (per curiam) (Garwood, J., concurring) ("one might well wonder how it could rationally be

concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce," but concluding that *Scarborough*'s "implication of constitutionality" "bind[s] us, as an inferior court,…whether or not the Supreme Court will ultimately regard it as a controlling holding in that particular respect.").

The Fifth Circuit is not alone. *See, e.g.*, *United States v. Patterson*, 853 F.3d 298, 301–02 (6th Cir. 2017) ("If the *Lopez* framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent," i.e., *Scarborough*, "that does not squarely address the constitutional issue." (quoting *Alderman v. United States*, 562 U.S. 1163, 131 S. Ct. at 703 (Thomas, J., dissenting from denial of certiorari))); *United States v. Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir. 2002) (although "[t]he vitality of *Scarborough* engenders significant debate," committing to "follow *Scarborough* unwaveringly" "[u]ntil the Supreme Court tells us otherwise"); *United States v. Bishop*, 66 F.3d 569, 587–88, 588 n.28 (3d Cir. 1995) (noting that, until the Supreme Court is more explicit on the relationship between *Lopez* and *Scarborough*, a lower court is "not at liberty to overrule existing Supreme Court precedent"); *United States v. Patton*, 451 F.3d 615, 634–35 (10th Cir. 2006) (collecting cases).

Nine courts of appeals have upheld § 922(g)(1) based solely on the *Scarborough* minimal nexus test. *See United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216–17 (2d Cir. 2001) (per curiam); *United*

States v. Gateward, 84 F.3d 670, 671–72 (3d Cir. 1996); *Rawls*, 85 F.3d at 242–43; *United States v. Lemons*, 302 F.3d 769, 771–73 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam); *United States v. Hanna*, 55 F.3d 1456, 1461–62, 1462 n.2 (9th Cir. 1995); *United States v. Dorris*, 236 F.3d 582, 584–86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). Only two courts of appeals have engaged in *Lopez*'s substantial-effects test and reasoned that § 922(g)(1) is constitutional under it. *See United States v. Crump*, 120 F.3d 462, 466 & n.2 (4th Cir. 1997) (citing *United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995) (en banc), *abrogated on other grounds by Rehaif v. United States*, 139 S. Ct. 2191 (2019)); *United States v. Chesney*, 86 F.3d 564, 568–70 (6th Cir. 1996). Because courts often fail to apply the *Lopez* test to these firearm possession cases at all, defendants across the country lack the constitutional protection from congressional overreach provided by *Lopez*. To avoid unconstitutionality, *Lopez* demands that § 922(g)'s "possess in or affecting commerce" element 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. But *Scarborough* continues to control the outcome in a large majority of circuit, leaving the "empty, formalistic" requirement of a jurisdictional provision as the only check on Congress' power to criminalize this kind of intrastate activity. *Chesney*, 86 F.3d at 580 (Batchelder, J., concurring).

B. An unchecked Commerce power would significantly expand Congress's reach into state affairs.

The federal government's enumerated powers are "few and defined," while the powers which remain in the state governments are "numerous and indefinite." *Lopez*, 514 U.S. at 552 (citing The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961)). One such enumerated power is "[t]o regulate Commerce . . . among the several States[.]" U.S. Const. art. I, § 8, cl. 3. But without limits on federal regulatory power, our nationwide regulation would become "for all practical purposes . . . completely centralized" in a federal government. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935). And "constitutional limits on governmental power do not enforce themselves;" instead, "[t]hey require vigilant—and diligent—enforcement." *Seekins*, 52 F.4th at 989 (Ho, J., dissenting from denial of rehearing en banc).

"Congress may conclude that a particular activity substantially affects interstate commerce" to regulate the activity, but Congress's mere act of legislating "does not necessarily make it so." *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557 n.2) (cleaned up). Here, inserting the phrase "which has been shipped or transported in interstate or foreign commerce" after any object connected to intrastate activities that Congress may want to police cannot fulfill the constitutional requirement. *See Alderman*, 131 S. Ct. at 702 (Thomas, J., dissenting from the denial of certiorari) ("*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook."). A judicial blessing of constitutional magnitude for this minimal nexus would "effectually obliterate the distinction between what is national and what is

local and create a completely centralized government." *Lopez*, 514 U.S. at 557 (quoting *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). The Commerce Clause power would be reduced to a rubber stamp, opening the door to a federal police power in direct contravention of the federal government the Constitution enshrines. *See Morrison*, 529 U.S. at 618 ("the Founders denied the National Government" "the police power," "reposed in the States"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (the Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power").

III. This Court should grant certiorari to address the constitutional issues in another case and hold the instant petition pending the outcome.

Devontae Nykel Racliff did not challenge the constitutionality of the statute at the district court. This probably presents an insurmountable vehicle problem for a plenary grant in the present case. Nonetheless, the questions presented are worthy of certiorari, and the Court has other opportunities to review them.

If the Court grants certiorari to decide the constitutionality of § 922(g)(1) in *Garland v. Range*, for instance, it may recognize the unconstitutionality of § 922(g)(1) in a substantial number of cases. Indeed, this Court may well find that the Second Amendment even supports a facial challenge to § 922(g)(1). In dissent, Judge Krause 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 131–32 (Krause, J., dissenting). The Seventh Circuit likewise questioned any dividing line based on "dangerousness." *See Atkinson*, 70 F.4th at 1023. And the South-

ern District of Mississippi has sustained a Second Amendment challenge to a defendant previously convicted of aggravated assault and manslaughter. *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *2–3 (S.D. Miss. June 28, 2023). But even if the Court declines to grant certiorari in *Range*, this Court at minimum should hold the instant petition pending its decision in *Rahimi*. A victory for Rahimi likely will involve a rejection of the government's contention that the Second Amendment is limited to those Congress terms "law abiding." *See Rahimi*, 61 F.4th at 451–53. It will also require the Court to consider and reject historical analogues to § 922(g)(8), including some also offered in support of § 922(g)(1). *Compare Rahimi*, 61 F.4th at 456–57 *with Range*, 69 F.4th at 104–05.

In short, the Court may ultimately grant certiorari to address either question presented. If so, Racliff requests that it hold the instant petition pending the outcome. Should this Court disapprove of § 922(g)'s constitutionality or limit the statute's application, Racliff requests that the Court grant certiorari in the instant case, vacate the judgment below, and remand for reconsideration. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166–67 (1996).

IV. The Court should grant certiorari, vacate the judgment below, and remand for the Fifth Circuit to reconsider precedent defining "robbery" contrary to Amendment 822.

Granting certiorari, vacating the judgment below, and remanding for reconsideration (GVR) is an appropriate remedy when developments following an opinion below "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome

of the litigation…." *Chater*, 516 U.S. at 167. This Court has deemed GVR appropriate "in light of a wide range of developments," including "State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General and state attorneys general." *Id.* at 166–67 (citations omitted). Effective November 1, 2023, the United States Sentencing Commission amended USSG §4B1.2(e)(3) to define "robbery" as Racliff argued below. USSG App. C, amend. 822. In its reason for amendment, the Commission explained that it "clarifie[d] that 'actual or threatened force' for purposes of the new 'robbery' definition is 'force sufficient to overcome a victim's resistance.'" *Id.* "The Commission concludes that such definition, relying on the Supreme Court's decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019), would eliminate potential litigation over the meaning of actual or threatened force in this context…." *Id.*

At least one court of appeals recognizes that an amendment can be both substantive and clarifying. *United States v. Jackson*, 901 F.3d 706, 709 (6th Cir. 2018) (citing USSG §1B1.11(b)(2)). In the Fifth Circuit, moreover, "whether the Commission expressly characterizes the amendment as clarifying" is one factor for "determining whether an amendment to the Guidelines is clarifying or substantive[.]" *United States v. Sanchez-Villarreal*, 857 F.3d 714, 720 (5th Cir. 2017). And this Court previously issued a GVR order to the Fifth Circuit where the Solicitor General agreed that a Commission amendment was clarifying. *See Tax-Garcia v. United States*, 572 U.S. 1112 (2014); Brief for the United States, *Tax-Garcia v. United States*, 572 U.S. 1112

(2014) (No. 13-8627) 2014 WL 2090004, at 8–12. Indeed, the Fifth Circuit eventually concluded that this very clarifying amendment abrogated precedent. *See United States v. Palacios*, 756 F.3d 325, 326 n.1 (5th Cir. 2014). *See also United States v. Anderson*, 5 F.3d 795, 802 (5th Cir. 1993) ("Amendments to the guidelines and their commentary intended only to clarify, rather than effect substantive changes, may be considered [retroactively] even if not effective at the time of the commission of the offense or at the time of sentencing.").

In short, there exists a reasonable probability that the Commission's "robbery" definition — especially given its stated intent to clarify a related part of the definition — is clarifying, and thus retroactive, to the extent that it confirms that Racliff correctly argued that precedent wrongly defined the enumerated robbery offense in §4B1.2. Racliff accordingly requests that the Court grant his petition for certiorari, vacate the judgment below, and remand for reconsideration considering the Commission's adoption of Amendment 822.

CONCLUSION

Petitioner Devontae Nykel Racliff 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 13th day of December, 2023.

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