No. _____

In the

Supreme Court of the United States

_____

Gary Von Bennett,

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

_____

Stephanie Eileen Inman
900 S. Preston Rd.
Suite 50 - #165
Prosper, Texas 75078
(469) 278-0298
stephanie@stephanieinmanlaw.com

Counsel for Mr. Bennett

QUESTION PRESENTED

Whether 18 U.S.C. §922(g) should be construed to require a more substantial connection to interstate commerce than the mere passage of a firearm across state lines in an unspecified way, and if not, whether it exceeds Congress's power to enact?

PARTIES TO THE PROCEEDING

Petitioner is Gary Von Bennett, 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. Bennett*, No. 3:21-cr-00427-S, U.S. District Court for the Northern District of Texas. Judgment entered on January 23, 2023.
- *United States v. Bennett*, No. 23-10081, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on October 18, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Von Bennett 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The Fifth Circuit's unpublished opinion is available at *United States v. Bennett*, No. 23-10081, 2023 U.S. App. LEXIS 27713 (5th Cir. Oct. 18, 2023). It is reprinted in Appendix A to this Petition. The district court's judgment is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on October 18, 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 provides that:

> 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.

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

> (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

Petitioner Gary Von Bennett pleaded guilty to one count of violating 18 U.S.C. § 922(g)(1) and received a 108-month imprisonment sentence. As part of his guilty plea, Bennett admitted that prior to possessing the charged firearm, "it had traveled from one state to another." While recognizing the Fifth Circuit has previously ruled to the contrary, Mr. Bennett preserved for further review the argument that possession "in or affecting commerce" requires a more robust connection to interstate commerce than mere passage across state lines at some unknown point in the past.

II. Appellate Proceedings

Bennett appealed, challenging his sentence as exceeding Congress's commerce power. The Fifth Circuit affirmed in an unpublished opinion. *United States v. Bennett*, No. 23-10081, 2023 U.S. App. LEXIS 27713 (5th Cir. Oct. 18, 2023) (reprinted in Appendix A).

REASONS FOR GRANTING THIS PETITION

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

The Omnibus Crime Control and Safe Streets Act of 1968, a predecessor to 18 U.S.C. §922(g), made it a crime for a convicted felon to possess "in commerce or affecting commerce… any firearm." Pub. L. No. 90-351, § 1202, 82 Stat. 197. *Scarborough v. United States* addressed whether under that statute "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). Focusing on the statutory construction and Congress's intent in enacting the statue, *Scarborough* answered this question in the affirmative, but did not address 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.").

Nearly two decades later, this Court examined the related *constitutional* question presented by 18 U.S.C. § 922(q) in *United States v. Lopez*, 514 U.S. 549 (1995). That 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)). This Court affirmed that the statute lay "beyond the power of Congress under the Commerce Clause." *Id.* at 552.

In *Lopez*, the Court laid out the three categories of activity subject to Congress's commerce power: (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). Because the Court readily concluded § 922(q) could not be justified under the first two categories, its

inquiry focused on whether §922(q) regulated an activity that substantially affected interstate commerce. *Id.* at 559.

The Court noted that "States possess primary authority for defining and enforcing the criminal law" and that laws like §922(q), which federally criminalize "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 worried 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.

A. The Court of Appeals differ on the relationship between *Scarborough* and *Lopez*.

In the decades since *Lopez* was decided, federal courts have "cried out for guidance from this Court" on the discord between *Scarborough* and *Lopez*. *Alderman v. United States*, 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). Absent further guidance from this Court, 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*, 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)(1)'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 circuits, leaving the "empty, formalistic" requirement of a jurisdictional provision as the only check on Congress' power to criminalize this particular 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. "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). "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *United States v. Morrison*, 529 U.S. 598, 614 (2000) (quoting *Lopez*, 514 U.S. at 557 n.2).

Merely including the phrase "which has been shipped or transported in interstate or foreign commerce" in a statute does not act as magic words to 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."). 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").

CONCLUSION

Petitioner Gary Von Bennett 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 January 2024.

/s/ *Stephanie Eileen Inman*
Stephanie Eileen Inman
900 S. Preston Rd.
Suite 50 - #165
Prosper, Texas 75078
(469) 278-0298
stephanie@stephanieinmanlaw.com

Attorney for Petitioner
Gary Von Bennett