No. _____

In the

Supreme Court of the United States

_____

Eric Michael Lujan,

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) permits conviction for the possession of any firearm that has ever crossed state lines at any time in the indefinite past, and, if so, if it is facially unconstitutional?

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

3. Subsidiary Question: Whether this Court should hold the instant Petition pending *United States v. Rahimi,* cert. granted, 143 S. Ct. 2688 (No. 22-915) (oral argument heard Nov. 7, 2023), given the government's concession in its Petition for Certiorari in *Garland v. Range*, (No. 23-374) that *Rahimi* presents "closely related Second Amendment issues" with respect to constitutional challenges to 18 U.S.C. § 922(g)(1), and urges this Court to "hold the petition for a writ of certiorari" in *Range* "pending its decision *Rahimi[?]*"[1]

[1] *See* Petition for Certiorari, *Garland v. Range*, (No. 23-374), at 7 (Filed October 5, 2023), available at https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830_Range%20Pet%2010.5.pdf.

PARTIES TO THE PROCEEDING

Petitioner is Eric Michael Lujan, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Rules

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric Michael Lujan seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Lujan*, No. 23-10145, 2023 WL 8184816 (5th Cir. Nov. 27, 2023). It is attached as Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B. The Factual Resume is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on November 27, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

STATUTORY PROVISIONS INVOLVED

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

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year

***

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

18 U.S.C. § 922(g)(1).

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Eric Michael Lujan pleaded guilty to a single count of violating 18 U.S.C. § 922(g), by possessing a firearm after a felony conviction. *See* [Appendix C]. He entered a plea agreement that did not contain any language waiving his right to appeal. The factual resume stated that the firearm had moved from one state to another or between any part of the United States and any other country, but alleged no more robust connection to interstate commerce. *See* [Appendix C]. The court imposed a sentence of 120 months imprisonment. *See* [Appendix B].

B. Appellate Proceedings

Petitioner raised several unsuccessful claims on appeal. Relevant here, he argued that 18 U.S.C. § 922(g)(1) is unconstitutional on two grounds. First, he argued the statute exceeds Congress's enumerated powers under the Commerce Clause. Petitioner conceded that the Fifth Circuit had previously ruled against him on this claim and the court of appeals agreed. [Appx. A, at 1]; *United States v. Lujan*, No. 23-10145, 2023 WL 8184816 at *3 (5th Cir. Nov. 27, 2023) (citing *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020); *United States v. De Leon*, 170 F.3d 494, 499 (5th Cir. 1999); *United States v. Smith*, No. 22-10795, 2023 WL 5814936, at *2 (5th Cir. Sept. 8, 2023) (unpublished)).

Second, he argued that in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111 (2022), the statute violates the Second Amendment. The court of appeals rejected this claim on plain error review "[b]ecause there is no

binding precedent holding § 922(g)(1) unconstitutional and because it is not clear that *Bruen* dictates such a result[.]" [Appendix A]; *United States v. Lujan*, No. 23-10145, 2023 WL 8184816 at *3 (5th Cir. Nov. 27, 2023) (citing *United States v. Rodriguez-Parra*, 581 F.3d 227, 230-31 (5th Cir. 2009); *United States v. Racliff*, No. 22-10409, 2023 WL 5972049, at *1 (5th Cir. Sept. 14, 2023) (unpublished)).

REASONS FOR GRANTING THE PETITION

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

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534 ("The Constitution's express conferral of some powers makes clear that it does not grant others.") There is no general federal police power. *See United States v. Morrison*, 529 U.S. 598, 618-619 (2000). Every exercise of Congressional power must be justified by reference to a particular grant of authority. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 535 ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions."). A limited central government promotes accountability and "protects the liberty of the individual from arbitrary power." *Bond v. United States*, 572 U.S. 844, 863 (2011).

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

Notwithstanding these limitations, and the text of Article I, Section 8, this Court has held that "[t]he power of Congress over interstate commerce is not confined

to the regulation of commerce among the states," and includes a power to regulate activities that "have a substantial effect on interstate commerce." *United States v. Darby*, 312 U.S. 100, 118-119 (1941). Relying on this expansive vision of Congressional power, this Court held in *Scarborough v. United States*, 431 U.S. 563 (1963), that a predecessor statute to 18 U.S.C. § 922(g) reached every case in which a felon possessed firearms that had once moved in interstate commerce. It dismissed concerns of lenity and federalism, finding that Congress had intended the interstate nexus requirement only as a means to insure the constitutionality of the statute. *See Scarborough*, 431 U.S. at 577.

It is difficult to square *Scarborough*, and the expansive concept of the commerce power upon which it relies, with more recent holdings of the Court in this area. In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), five members of this Court found that the individual mandate component of the Affordable Care Act could not be justified by reference to the Commerce Clause. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 557-558 (Roberts., C.J. concurring). Although this Court recognized that the failure to purchase health insurance affects interstate commerce, five Justices did not think that the constitutional phrase "regulate Commerce ... among the several States," could reasonably be construed to include enactments that compelled individuals to engage in commerce. *See id.* at 550 (Roberts., C.J. concurring). Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *See id.* (Roberts., C.J. concurring).

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

To be sure, *NFIB* does not explicitly repudiate the "substantial effects" test. Indeed, the Chief Justice's opinion quotes *Darby*'s statement that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states..." *Nat'l Fed'n of Indep. Bus.,* 567 U.S. at 549 (Roberts., C.J. concurring) (quoting *Darby*, 312 U.S. at 118-119); *see also id.* at 552-553 (Roberts., C.J. concurring) (distinguishing *Wickard v. Filburn*, 317 U.S. 111 (1942)). It is therefore perhaps possible to read *NFIB* narrowly: as an isolated prohibition on affirmatively compelling persons to engage in commerce. But it is difficult to understand how this reading of the case would be at all consistent with *NFIB*'s textual reasoning.

This is so because the text of the Commerce Clause does not distinguish between Congress's power to affect commerce by regulating non-commercial activity (like possessing a firearm), and its power to affect commerce by compelling people to join a commercial market (like health insurance). Rather it simply says that Congress may "regulate ... commerce between the several states." And that phrase either is or is not limited to laws that affect the legality of commercial activity. Five justices in

NFIB took the text of the Clause seriously and permitted Congress to enact only those laws that were, themselves, regulations of commerce. *NFIB* thus allows Congress only the power "to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).

And indeed, much of the Chief Justice's language in *NFIB* is consistent with this view. This opinion rejects the government's argument that the uninsured were "active in the market for health care" because they were "not currently engaged in any *commercial* activity involving health care..." *Nat'l Fed'n of Indep. Bus.,* 567 U.S. at 556 (Roberts., C.J. concurring)(emphasis added). The Chief Justice significantly observed that "[t]he individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing *commercial* activity." *Id.* (Roberts., C.J. concurring)(emphasis added). He reiterated that "[i]f the individual mandate is targeted at a class, it is a class whose *commercial* inactivity rather than activity is its defining feature." *Id.* (Roberts., C.J. concurring)(emphasis added). He agreed that "Congress can anticipate the effects on commerce of an *economic* activity," but did not say that it could anticipate a *non-economic* activity. *Id.* at 557 (Roberts., C.J. concurring)(emphasis added). And he finally said that Congress could not anticipate a future activity "in order to regulate individuals not currently engaged *in commerce*." *Id.* (Roberts., C.J. concurring)(emphasis added). Accordingly, *NFIB* provides substantial support for the proposition that enactments under the Commerce Clause must regulate commercial or economic activity, not merely activity that affects commerce.

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

Further, the factual resume fails to show that Petitioner was engaged in the relevant market at the time of the regulated conduct. *See* [Appx. C]. The Chief Justice has noted that Congress cannot regulate a person's activity under the Commerce Clause unless the person affected is "currently engaged" in the relevant market. *Nat'l Fed'n of Indep. Bus.,* 567 U.S. at 557 (Roberts., C.J. concurring). As an illustration, the Chief Justice provided the following example: "An individual who bought a car *two years ago* and may buy another in the future is not 'active in the car market' in any pertinent sense." *Id.* at 556 (Roberts., C.J. concurring)(emphasis added). As such, *NFIB* brought into serious question the long-standing notion that a firearm which has previously and remotely passed through interstate commerce should be considered to indefinitely affect commerce without "concern for when the [initial] nexus with commerce occurred." *Scarborough*, 431 U.S. at 577.

Scarborough stands in even more direct tension with *Bond v. United States*, 572 U.S. 844 (2014), which shows that Section 922(g) ought not be construed to reach the possession by felons of every firearm that has ever crossed state lines. Bond was convicted of violating 18 U.S.C. § 229, a statute that criminalized the knowing

possession or use of "any chemical weapon." *Bond*, 572 U.S. at 853; 18 U.S.C. § 229(a). She placed toxic chemicals – an arsenic compound and potassium dichromate – on the car door, mailbox, and door knob of a romantic rival. *See id.* at 852. This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 859-862.

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

> The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." [*United States v.*] *Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones* [*v. United States*], 529 U.S. [848,] 857,

> 120 S. Ct. 1904 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 572 U.S. at 863.

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

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

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

If this Court grants certiorari to address this issue, it should hold the instant Petition pending the outcome. In the event that the constitutionality of Section 922(g) is called into question, or that its scope is limited, it should 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, 167 (1996).

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

The Second Amendment guarantees "the right of the people to keep and bear arms." Yet 18 U.S.C. § 922(g)(1) denies that right, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. In spite of this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges for many years. *See United States v. Moore*, 666 F.3d 313, 316-317 (4th Cir. 2012) (collecting cases). This changed, however, following *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111 (2022). *Bruen* held that where the text of Second Amendment plainly covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation's historical tradition of gun regulation. *See Bruen*, 142 S. Ct. at 2129-2130. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id*. at 2127-2128.

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

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

This circuit split plainly merits certiorari. It involves a direct conflict between the federal courts of appeals as to the constitutionality of a criminal statute. The statute in question is a staple of federal prosecution.[2] It criminalizes primary conduct in civil society – it does not merely set forth standards or procedures for adjudicating a legal dispute. A felon living in a neighborhood beset by crime deserves to know whether he may defend himself against violence by possessing a handgun, or whether such self-defense is undertaken only on pain of 15 years imprisonment.

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

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[2] *See* United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 20, Federal Offenders Sentenced under Each Chapter Two Guideline, p.2 (FY 2022) (showing that 9,367 people were sentenced under USSG § 2K2.1 in FY 2022, which governs prosecutions under 18 U.S.C. § 922(g)), *available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table20.pdf,* last visited on February 8, 2024.

vacate the judgment below, and remand if the outcome recognizes the unconstitutionality of Section 922(g)(1) in a substantial number of cases. Although Petitioner has previous convictions for assaultive conduct, this Court may well find that the Second Amendment supports a broad or facial challenge to Section 922(g)(1). The dissenters in *Range* expressed serious doubts as to whether the logic of that decision could be contained to those convicted of relatively innocuous felonies. *See, e.g.*, *Range*, 69 F.4th at 131-132 (Krause, J., dissenting). Likewise, the Seventh Circuit has expressed doubt as to whether the Second Amendment distinguishes between violent and non-violent felonies. *See Atkinson*, 70 F.4th at 1023. And the Southern District of Mississippi has sustained a Second Amendment challenge to a defendant previously convicted of aggravated assault and manslaughter. *See United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *2-3 (S.D. Miss. Jun. 28, 2023). In its view, the government's authorities showed a right only to punish those who possessed a firearm after conviction of a death-eligible offense, or after a finding of dangerousness that prospectively disarmed the defendant. *Id.*

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

Second Amendment rights if this Court evaluates the constitutionality of Section 922(g)(1), which it should quickly do. And the obviousness of error may be shown any time before the expiration of direct appeal. *Henderson v. United States*, 568 U.S. 266 (2013). Finally, a finding that the Petitioner has been sentenced to prison for exercising a basic constitutional right would affect the outcome and cast doubt on the fairness of the proceedings, to say the least.

Alternatively, this Court should hold the instant Petition pending the outcome of *United States v. Rahimi*, cert. granted, 143 S. Ct. 2688 (No. 22-915) (oral argument heard Nov. 7, 2023) which will decide the constitutionality of 18 U.S.C. § 922(g)(8). That statute forbids firearm possession by those subject to a domestic violence restraining order.

Of course, if Rahimi prevails in that case, it will tend to support constitutional attacks on other sections of Section 922(g). Likely, a victory for Rahimi will involve a rejection of the government's contention that the Second Amendment is limited to those Congress terms "law abiding." *See United States v. Rahimi*, 61 F.4th 443, 451-453 (5th Cir. 2023) (considering this argument), *cert. granted*, 143 S. Ct. 2688 (2023). It will also require the Court to consider and reject historical analogues to Section 922(g)(8), including some that have been offered in support of Section 922(g)(1). ***Compare*** *Rahimi*, 61 F.4th at 456-457 (considering government's argument that Congress could disarm those subject to restraining orders because some states disarmed enslaved people and Native Americans at founding), ***with*** *Range*, 69 F.4th at 105-106 (considering government's argument that Congress could disarm felons

because some states disarmed enslaved people and Native Americans at founding). But even if Rahimi does not prevail, the opinion may be of significant use to Petitioner. If, for example, this Court were to decide that Rahimi may be stripped of his Second Amendment rights because he is objectively dangerous, Petitioner may argue that his convictions do not mark him as such. In short, the Court has granted certiorari in a closely related issue, and should hold the instant Petition.

Notably, the Solicitor General has affirmatively contended that *Rahimi* and *Garland v. Range* – a case involving a challenge to 18 U.S.C. 922(g)(1) – present "closely related Second Amendment issues." Petition for Certiorari, *Garland v. Range*, (No. 23-374), at 7 (Filed October 5, 2023), *available at https://www.supremecourt.gov/DocketPDF/23/23-374/284273/20231005143445830_Range%20Pet%2010.5.pdf*. Indeed, it has contended that this Court should "hold the petition for a writ of certiorari" in *Range* "pending its decision *Rahimi*." *Id.* It can hardly maintain now that other Petitions raising Second Amendment challenges to Section 922(g)(1) should be disposed.

CONCLUSION

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

Respectfully submitted this 23rd day of February, 2024.

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