

No. 17-

IN THE
Supreme Court of the United States

DEANTE DIXON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether—in light of intervening authority in *United States v. Lopez*, 514 U.S. 549 (1995)—Congress may rely on *Scarborough v. United States*, 431 U.S. 563 (1977) to criminalize intrastate possession of a firearm on the sole basis that the firearm once moved through interstate commerce.

**PARTIES TO THE PROCEEDING AND RULE
29.6 STATEMENT**

Petitioner is Deante Dixon, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Deante Dixon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 718 F. App'x 924 (11th Cir. 2018) and reprinted in the petition appendix at 1a–7a (“Pet. App.”).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 9, 2018. *Id.* Justice Thomas granted Mr. Dixon’s timely application to extend the time to file to and including May 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I § 8 of the United States Constitution provides that:

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. 1, 3.

18 U.S.C. § 922(g) provides that:

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 com-

merce, 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

Petitioner Deante Dixon's conviction cannot stand, as Congress's enumerated powers do not allow it to criminalize the purely intrastate possession of a firearm simply because it crossed state lines at some time in the past. That is what 18 U.S.C. § 922(g)(1) accomplishes, usurping the states' rightful police power. Section 922(g) has stayed on the books even though nearly every state has enacted restrictions on felons' possession of firearms. Where, as here, the government fails to prove that a defendant either crosses state lines with the firearm or purchased it in another state, § 922(g) cannot constitutionally apply to them.

This Court's modern Commerce Clause cases create important limitations on Congress's commerce power. See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Congress's commerce power is limited to three categories: (1) "channels of interstate commerce," (2) "instrumentalities of interstate commerce," and (3) "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558–59. This Court used that framework to strike down the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which forbade possession of a firearm in a school zone. See *id.* 551–52. Under *Lopez*, the Commerce Clause does not give Congress the "general police power" the states exercise. *Id.* at 567.

The *Lopez* framework is the obvious place to start when analyzing other federal gun possession crimes. But instead, many circuits have affirmed § 922(g)(1)

under a much older precedent that construed § 922(g)(1)'s predecessor. *Scarborough v. United States*, 431 U.S. 563 (1977).

Contrary to what lower courts often hold, *Scarborough* did not survive *Lopez* and § 922(g)(1) does not pass muster under *Lopez*. The *Scarborough* Court affirmed that a “minimal nexus” between interstate commerce and a firearm in a felon’s possession satisfied the elements of the statute, a standard well below *Lopez*’s substantial effects test. *Id.* at 575, 577. Even though *Scarborough* was decided on non-Constitutional grounds, lower courts have regularly used *Scarborough* to uphold § 922(g)(1) against Commerce Clause challenges. See *id.* at 564 (stating the issue). Neither the opinions nor the Government’s briefs in *Lopez* mentioned *Scarborough*, heightening the confusion. But given its incompatibility with *Lopez*, *Scarborough* is no longer good law. The confusion threatens the “nullification of . . . recent Commerce Clause jurisprudence” that only this Court can prevent. *Alderman v. United States*, 131 S. Ct. 700, 700 (2011) (Thomas, J., dissenting from denial of certiorari). But because the courts of appeals cannot overrule this Court’s precedent, the *Lopez* test will disappear for possession crimes without this Court’s intervention.

This case presents an important question worthy of this Court’s review, as lower courts have acknowledged that the interpretative conflict between *Lopez* and *Scarborough* is for this Court alone to resolve. See, e.g., *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006) (“Any doctrinal inconsistency between *Scarborough* and the Supreme Court’s more recent decisions is not for this Court to remedy.”). Given the frequency of § 922(g) prosecutions, this question affects thousands of defendants every year.

In resolving confusion about *Scarborough*, this Court can also reduce the judicial burden caused by the Armed Career Criminal Act because § 922(g) defendants are routinely subject to sentencing enhancements under that Act. 18 U.S.C. § 924(e). That thousands of individuals have been convicted and have received ACCA enhancements under an unconstitutional statute only heightens the need for guidance from this Court.

I. FACTUAL BACKGROUND

In June 2015, authorities found Mr. Dixon in possession of a firearm and ammunition in Florida. Pet. App. at 2a. Both the firearm and the ammunition happened to be manufactured out of state.¹ *Id.* Satisfied that the jurisdictional requirements of 18 U.S.C. § 922(g) were met, the United States charged Mr. Dixon, a convicted felon, with possessing the firearm and ammunition. He pled guilty to this charge in November 2015. *Id.*

The United States Court of Appeals for the Eleventh Circuit affirmed Mr. Dixon’s conviction, applying circuit precedent and holding that “it is well-settled that Section 922(g) ‘is not constitutionally invalid under the Commerce Clause.’” *Id.* at 6a (quoting *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010)). This circuit precedent relies upon the “minimal nexus” test set forth in *Scarborough*, and upholds convictions under § 922(g) where the defendant’s criminal activity consisted of the intrastate possession of the firearm or ammunition. For these federal prosecutions, the only connection to interstate commerce was the manufacture of the firearm or ammu-

¹ The record does not establish how Mr. Dixon acquired the firearm. See Pet. App. at 22a–23a.

dition outside of the state of possession (here, Florida) and the inference that the firearm or ammunition had crossed state lines – at some point in time – prior to the defendant’s possession. See, *e.g.*, *United States v. McAllister*, 77 F.3d 387, 389-91 (11th Cir. 1996); *Wright*, 607 F.3d at 715–16.

The Eleventh Circuit thus rejected Mr. Dixon’s facial and as-applied challenges to the statute of his conviction, including his argument that § 922(g) unconstitutionally regulates “possession—a non-economic activity.” Pet. App. at 6a. That the Mr. Dixon had not challenged the constitutionality of the statute of his conviction before the district court did not affect the court’s decision. Indeed, the standard of review was not discussed in or dispositive to the opinion. *Id.* at 1a–7a. Mr. Dixon’s conviction was affirmed, like many defendants before him, based upon the “minimal nexus” test set forth in *Scarborough*.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS HAVE STRUGGLED TO RECONCILE SCARBOROUGH WITH LOPEZ.

A. There Is Widespread Doubt About Whether *Scarborough* Survived *Lopez*.

Two Justices of this Court have observed that “*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.” *Alderman*, 131 S. Ct. at 702 (Thomas, J., dissenting from denial of certiorari, joined by Scalia, J.). Their concerns in *Alderman* about 18 U.S.C. § 931, the felon in possession of body armor statute, apply with full force to the possession of a firearm. Across the felon-in-possession statutes,

“lower courts have cried out for guidance from this Court” on whether *Scarborough* survived *Lopez*. *Id.* But because the courts of appeals cannot overrule this Court’s precedent, *Scarborough* has prevented the lower courts from holding § 922(g)(1) unconstitutional. See, e.g., *United States v. Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (per curiam) (Jones, J.) (“We are not at liberty to question the Supreme Court’s approval of the predecessor statute to [§ 922(g)(1)] . . . [a]s this broad reading of the Commerce Clause has Supreme Court imprimatur [sic], albeit pre-*Lopez*, we can only note the tension between the two decisions and will continue to enforce § 922(g)(1).”).

Lower courts began to question § 922(g)(1) after *Lopez*, however—and the question has since grown more pressing. See, e.g., *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting) (“*Scarborough* is in fundamental and irreconcilable conflict with the rationale of the United States Supreme Court in [*Lopez*].”); *United States v. Chesney*, 86 F.3d 564, 581–82 (6th Cir. 1996) (Batchelder, J., concurring) (opining that *Scarborough* no longer has constitutional force). Representing this trend, a Fifth Circuit panel declared that the statute would be unconstitutional under *Lopez* as a matter of first impression yet *Scarborough* bound it “as an inferior court . . . whether or not the Supreme Court will ultimately regard it as a controlling holding in that particular respect.” *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (per curiam) (Garwood, J., concurring). And just last year, the Sixth Circuit pointed out widespread uncertainty about *Scarborough*’s status after *Lopez*. See *United States v. Patterson*, 853 F.3d 298, 301–02 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 273 (2017).

This uncertainty extends beyond the possession of firearms. Lower court opinions have noted this same tension concerning 18 U.S.C. § 922(o), the felon in possession of a machine gun statute. See *Kirk*, 105 F.3d at 1015 n.25 (Jones, J.); *id.* at 1005 (Higginbotham, J.). And they have noted this tension concerning 18 U.S.C. § 931, the felon in possession of body armor statute. See *Patton*, 451 F.3d at 618–19 (“Deciding this question requires us to choose between following an older precedent of the Supreme Court and applying the Court’s current three-part test for determining the reach of the Commerce Clause.”); *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.”).

This uncertainty about how *Scarborough* fits with *Lopez* has undermined the modern Commerce Clause framework. Justices Scalia and Thomas reasoned, “[i]f 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 that does not squarely address the constitutional issue.” *Alderman*, 131 S. Ct. at 703 (Thomas, J., dissenting from denial of certiorari, joined by Scalia, J.). Lower court opinions have pressed the same concern. See, e.g., *Alderman*, 565 F.3d at 648 (Paez, J., dissenting) (“We should not overlook these substantial failings and nevertheless affirm . . . by enlarging the pre-*United States v. Lopez* precedent of [*Scarborough*] . . .”). So have academic commentators. See Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez*, 3 J. App. Prac. & Process 671, 683–84 (2001).

**B. The Circuits Have Split on Whether the
Lopez Test or the *Scarborough* Test Ap-
plies to § 922(g)(1).**

Nine courts of appeals have upheld § 922(g)(1) based solely on the *Scarborough* minimal nexus test.² If not for *Scarborough*, those courts might have invalidated the statute. See, e.g., *Rawls*, 85 F.3d at 243 (Garwood, J., concurring). Two courts of appeals have concluded that § 922(g)(1) is constitutional independent of *Scarborough*. One of these courts upheld § 922(g)(1) within the *Lopez* framework while the other concluded that the statute is constitutional outside of *Lopez* and *Scarborough*.³ The lower courts have thus split on whether § 922(g)(1) can survive *Lopez* without the crutch of *Scarborough*.

Outside of the Fourth and Sixth Circuits, *Scarborough* controls the outcome, leaving the “empty, formalistic” requirement of a jurisdictional provision as the only check on Congress’s power to criminalize intrastate activity. See *Chesney*, 86 F.3d at 580 (Batchelder, J., concurring). The Fifth Circuit’s opinion in *Rawls* exemplifies the way most circuits approach *Scarborough*. In a concurrence explaining a

² *Scarborough* does not stand for the proposition that courts read it for and does not purport to address the constitutionality of the predecessor statute against a Commerce Clause challenge. 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; *United States v. Lemons*, 302 F.3d 769, 772–73 (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); *Wright*, 607 F.3d at 715.

³ See *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001); *Chesney*, 86 F.3d at 570.

short per curiam opinion, the panel judges said that while they thought § 922(g)(1) failed under *Lopez*, “the opinion in [*Scarborough*] dealing with the predecessor to section 922(g) requires us to affirm denial of relief here.” *Rawls*, 240 F.3d at 243 (Garwood, J., concurring).

Several circuits have followed that lead, holding that *Scarborough* at least implicitly ruled the predecessor to § 922(g) constitutional, compelling the same result despite *Lopez*. See, e.g., *Lemons*, 302 F.3d at 772–73 (stating that the constitutional issue “was not far from the Court’s mind”); *Gateward*, 84 F.3d at 671 (“We do not understand *Lopez* to undercut the *Bass / Scarborough* proposition that the jurisdictional element . . . keeps the felon firearm law well inside the constitutional fringes of the Commerce Clause.”). That line of reasoning—in which courts fail to apply the *Lopez* test in the first place—is what makes this issue critical.

Moreover, which test applies can determine the outcome. If *Scarborough* applies and a jurisdictional element is enough to satisfy the Commerce Clause, then § 922(g) is almost certain to survive. See, e.g., *Hanna*, 55 F.3d at 1461–62, 1462 n.2 (18 U.S.C. § 922(g)(1)); cf. *Patton*, 451 F.3d at 618–19 (18 U.S.C. § 931); *United States v. Knutson*, 113 F.3d 27, 29–30 (5th Cir. 1997) (per curiam) (18 U.S.C. § 922(o)). But if the proper three-part *Lopez* test applies, then § 922(g)(1) does not pass constitutional muster. See, e.g., *Rawls*, 85 F.3d at 243–44 (Garwood, J., concurring). The division over the vitality of *Scarborough*, along with the misapplication of *Lopez*, makes all the difference to Mr. Dixon and similarly situated defendants.

The Sixth Circuit stands alone in holding § 922(g)(1) valid under the *Lopez* test. The Sixth Cir-

cuit has characterized the statute as part of a comprehensive regulatory framework that regulates felons' possession of firearms, and in turn, the economic market for interstate gun trafficking. See *Chesney*, 86 F.3d at 570 (citing *Lopez*, 514 U.S. at 561). This expansive interpretation of Congress's Commerce Clause authority muddles the static act of possession with gun trafficking. Moreover, as this Court noted in *United States v. Bass*, 404 U.S. 336, 350 (1971), which involved § 922(g)(1)'s predecessor statute, such an expansive interpretation of Congress's regulatory power "dramatically intrudes upon traditional state criminal jurisdiction" and flouts states' ability to regulate gun trafficking. Notwithstanding the Sixth Circuit's upholding of § 922(g)(1) under *Lopez*, like the nine other circuits that rely on *Scarborough* to uphold the provision, it has held that the existence of a jurisdictional element makes § 922(g)(1) constitutionally valid, except it comes to this conclusion by way of *Lopez*. See *Chesney*, 86 F.3d at 570 (noting that the existence of a jurisdictional nexus is significant under the substantial effects category of *Lopez*).

The Fourth Circuit has also found the presence of a jurisdictional element to be determinative but does not use the *Lopez* framework. It has held that the existence of a jurisdictional element that requires the government to demonstrate a nexus between the firearm and interstate commerce distinguishes post-*Lopez* § 922(g)(1) and satisfies the minimal nexus required for the Commerce Clause. *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996). In the Fourth Circuit's approach to § 922(g)(1) challenges, it focuses on where the firearm was manufactured and the place of possession. See *Gallimore*, 247 F.3d at 138. ("Under existing circuit precedent, the Government may establish the requisite interstate commerce nex-

us by showing that a firearm was manufactured outside the state where the defendant possessed it.”). This approach to § 922(g)(1) gives Congress the regulatory reign that *Lopez* sought to limit.

C. Several Circuits Have Called on This Court to Address the *Scarborough–Lopez* Conflict.

The Fifth Circuit, for example, contended that “were the matter *res nova* a powerful argument could be made for a contrary result; however, this inferior federal court must regard [*Scarborough*] as barring the way.” *Kuban*, 94 F.3d at 973 n.4. After upholding the statute, the Seventh Circuit 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.” *Lemons*, 302 F.3d at 773. And the Ninth Circuit held that it “lack[ed] authority to accept [the] contention” that *Lopez* had overruled *Scarborough* but hinted that the case would turn out differently if *Lopez* did overrule it. *United States v. Ernst*, 623 F. App’x 333, 334–35 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2426 (2016).

The lower courts have had the same reaction to related statutes. Both opinions in a Fifth Circuit en banc case on 18 U.S.C. § 922(o) expressed the same sentiment. See *Kirk*, 105 F.3d at 1005 (Higinbotham, J.) (“It is not for us to say that *Bass* cannot survive *Lopez*. We would not embrace it, however, to support a rejection of a less intrusive inquiry.”); see also *id.* at 1015 n.25 (Jones, J.). Addressing 18 U.S.C. § 931, the Ninth Circuit felt bound by *Scarborough* “absent the Supreme Court . . . telling us otherwise.” *Alderman*, 565 F.3d at 643. And concerning 18 U.S.C. § 2119, the federal carjacking statute, the Ninth Circuit argued that while “[t]he vitality of *Scarborough* engenders significant debate,” it would “follow *Scar-*

borough unwaveringly” until this Court clarified the law. *United States v. Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir. 2002); see also *United States v. Bishop*, 66 F.3d 569, 588 n.28 (3d Cir. 1995) (“[W]e are not at liberty to overrule existing Supreme Court precedent.”).

II. THE QUESTION PRESENTED IS BOTH IMPORTANT AND RECURRING

In *Lopez*, this Court recognized that, even with the expansive definition of “commerce” recognized by this Court’s jurisprudence, such definition cannot be limitless given that “[t]he enumeration [of limited powers] presupposes something not enumerated.” *Lopez*, 514 U.S. at 553 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)). This case provides the opportunity for this Court to clarify the precise contours of that power. In doing so, this Court can ensure that Congress is not granted the kind of “unlimited license to regulate” on all areas of criminal law that this Court has consistently rejected. *Morrison*, 529 U.S. at 618 n.8; see also *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (“A criminal act committed wholly within a State ‘cannot be made an offence against the United States, unless it ha[s] some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.’” (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878))).

The case is also recurring, as both the question of whether § 922(g)(1) is constitutional and the confusion associated with *Scarborough* have percolated throughout a majority of the courts of appeals since *Lopez*. The question affects defendants across the country, as the United States convicted over 5000 in-

dividuals under § 922(g) in Fiscal Year 2016 alone.⁴ The consequences for such a conviction are stark; defendants receive up to ten years in prison or a mandatory-minimum term of 15 years when the Armed Career Criminal Act (ACCA) applies. See 18 U.S.C. § 924(a)(2),(e); see, *e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2555 (2015). These consequences befall defendants indiscriminately, no matter if a defendant uses another’s rifle for deer hunting, *United States v. Skoien*, 587 F.3d 803, 806 (7th Cir. 2009), or merely keeps “his father’s World War II trophy Luger in his bedroom.” *United States v. Coward*, 151 F. Supp. 2d 544, 549 (E.D. Pa. 2001). “[A]s long as the gun can shoot,” defendants may be sentenced based on the “indelible” fiction that their gun is “in commerce,” no matter how attenuated that possession is from the gun’s purchase. See *id.*

III. SECTION 922(G) IS UNCONSTITUTIONAL FACTUALLY AND AS APPLIED TO PURELY LOCAL POSSESSION IN LIGHT OF *LOPEZ* AND ITS PROGENY

A. The mere possession of a firearm is functionally equivalent to the possession of a firearm near a school zone.

Any difference between § 922(g) and the Gun-Free School Zones Act is one of kind, not of substance. The “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.” *Lopez*, 514 U.S. at 567; see also

⁴ U.S. Sentencing Comm’n, *Quick Facts: Felon in Possession of a Firearm* (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY16.pdf.

Gonzales v. Raich, 545 U.S. 1, 40 (2005) (Scalia, J., concurring) (noting that “simple possession is a noneconomic activity”). Section 922(g)(1) does not transform mere possession of a firearm into economic activity by removing the spatial limitation to schools and specifying that the statute only applies to felons. See *Chesney*, 86 F.3d at 578 (Batchelder, J., concurring) (“The possession of a firearm by a felon (like possession of a firearm in a school zone) is simply not itself commercial activity.”).

Like *Lopez*, “[n]either . . . [§ 922(g)’s text] nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of” possession by felons. 514 U.S. at 562 (citation omitted). The nexus between commercial effects and felon-in-possession statutes is limited to a conclusory statement—repealed in subsequent drafts—that the “receipt, possession, or transportation of a firearm . . . constitutes a burden on commerce or threat affecting the free flow of commerce.” Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, *repealed by* Federal Firearms Law Reform Act of 1986, Pub. L. 99-308, 100 Stat. 459. This statement, without more, echoes the very “cost of violent crime” reasoning that this Court rejected in *Lopez* and *Morrison*. *Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 563–64. Congress’s intent to use such findings to regulate local activity would require this Court to “pile 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.

Moreover, as was true in *Lopez*, the mere possession of a firearm is distinct from any “attempt to prohibit the interstate transportation of a commodity

through the channels of commerce.” *Id.* at 559. As in *Alderman*, the government made “no allegation[] that [petitioner] had purchased the [firearm] from another State or ever carried it across state lines.” *Alderman*, 131 S. Ct. at 700 (Thomas, J., dissenting from denial of certiorari, joined by Scalia, J.).⁵ The text of § 922(g) acknowledges that these activities are distinct from possession; it separately criminalizes both the “transport[ation] [of a firearm] in interstate or foreign commerce” and the receipt of a firearm that “has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g). If the government could constitutionally criminalize mere possession based on the gun’s prior travel across state lines, it would render these statutory phrases superfluous.

B. Contrary to the view of some courts, the *Lopez* Court did not purport to hold that the mere presence of a jurisdictional element renders a scheme constitutional.

Although this Court observed in *Lopez* that the Gun-Free School Zones Act lacked such a jurisdictional element, see 514 U.S. at 561, it went on to fundamentally change the relevant test. This Court merely suggested that such an element is necessary, not sufficient by itself, where the activity regulated is noncommercial. See *Chesney*, 86 F.3d at 578 (Batchelder, J., concurring) (stating that a jurisdictional element “cannot . . . rescue § 922(g)(1) from constitutional attack” because it is neither the “regulation of commercial activity” nor the “regulation of non-economic activity that is essential to a broader regulation of economic activity”). The presence of a

⁵ Mr. Dixon’s guilty plea reflects the paucity of information the government thinks is sufficient to establish a nexus to interstate commerce, as it relies solely upon the gun and ammunition’s manufacture outside of Florida. Pet. App. at 2a, 17a.

jurisdictional element “lend[s] support” to a sufficient nexus to interstate commerce, *Morrison*, 529 U.S. at 613, but it is not dispositive.

If the mere presence of a jurisdictional element were sufficient, Congress could immunize nearly every statute regulating noneconomic activity from constitutional challenge “by dint of clever legislative craftwork.” *Chesney*, 86 F.3d at 579 (Batchelder, J., concurring) (“[a] statute that regulates non-commercial activity cannot be converted into a statute that regulates commercial activity” merely by adding a jurisdictional element). Such a result cannot square with *Lopez*, which does not “permit Congress magically to produce a commercial activity (possession of a firearm ‘in or affecting commerce’) out of a non-commercial one (possession of a firearm) by conferring a jurisdictional credential on the non-commercial activity.” *Id.* at 580; see also *Alderman*, 565 F.3d at 648 (Paez, J., dissenting) (upholding a statute “merely because a jurisdictional element is present” would “permit[] Congress, through the use of a jurisdictional element of any stripe, to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”).

It is no answer to say that a defendant once engaged in interstate commerce by purchasing firearms and ammunition that had been manufactured out of state. Felons are not perpetually engaged in interstate commerce solely based on the firearm’s or ammunition’s *prior activity* in commerce, even if *Scarborough* suggested as much. See *United States v. Vasquez*, 611 F.3d 325, 337 (7th Cir. 2010) (Manion, J., dissenting) (“*Scarborough* created the legal fiction that once a gun has crossed state lines it is forever ‘in or affecting’ commerce and Congress can prohibit fel-

ons from possessing them.”); *Rawls*, 85 F.3d at 243–44 (Garwood, J., concurring) (noting that the fiction continues even if the “the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce”).

This Court has since rejected this fiction. In *Jones v. United States*, for example, this Court unanimously held that noncommercial “owner-occupied residence[s]” were not buildings “used in interstate . . . commerce or in any activity affecting” commerce for purposes of the federal arson statute. 529 U.S. 848, 850–851 (2000). In doing so, this Court rejected the government’s argument that such residences are perpetually “used in” interstate commerce by receiving utilities, since “[p]ractically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce” and is “served by utilities that have an interstate connection.” *Id.* at 857. Thus, homeowners are not perpetually engaged in commerce based on the fact that they once purchased supplies with a nexus to interstate commerce. Cf. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 556 (2012) (plurality opinion) (“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.”).

As in *Jones*, § 922(g)(1)’s jurisdictional element is an illusory check on the statute’s reach given that most firearms have some component that has, at one point, been manufactured out of state from the point of sale or possession. See *United States v. Alderman*, 593 F.3d 1141, 1142 (9th Cir. 2010) (O’Scannlain, J., dissenting from order denying rehearing en banc) (“A purely nominal jurisdictional requirement . . . does nothing to prevent the shifting of the [federal–state]

balance in favor of the federal government [because] virtually all criminal actions in the United States involve the use of some object that has passed through interstate commerce.”) (citation omitted). In short, the jurisdictional element in § 922(g) is a mere formality that the government can easily prove given how often guns travel across state lines before coming into a defendant’s possession.⁶

IV. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THIS IMPORTANT CONSTITUTIONAL QUESTION.

The unconstitutionality of § 922(g)(1) is the dispositive legal issue in this case. The Eleventh Circuit rejected Mr. Dixon’s constitutional arguments based upon its binding precedent; the standard of review was not dispositive. See Pet. App. at 6a (citing *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010); *McAllister*, 77 F.3d at 391).

Mr. Dixon’s case thus squarely presents the issue of whether Congress may criminalize purely intrastate activity – possession – based upon the historical connection between the firearm/ammunition and interstate commerce. Because the Eleventh Circuit applies *Scarborough* to uphold such convictions under § 922(g)(1), this Court is Mr. Dixon’s only avenue for relief.

⁶ The Eleventh Circuit has suggested that evidence that a gun is manufactured out of state is dispositive on the question of whether the government has carried its burden on the commerce element. See *Wright*, 607 F.3d at 716. Yet this Court did not so much as mention where the gun was manufactured in *Lopez*. If the fact that the gun was manufactured out of state could have saved the Gun-Free School Zones Act, the Court—or the United States—presumably would have raised the issue.

**V. THIS COURT SHOULD ENJOIN OR SEVER
§ 922(G)(1)'S PROHIBITION ON POSSES-
SION OF FIREARMS.**

When confronted with a constitutional flaw in a statute, the Court limits the solution to the problem and enjoins only the unconstitutional applications of the statute while leaving other applications in force. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006). This Court may also sever the unconstitutional portion of the statute while leaving the remainder intact. Because “[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial, rather than facial, invalidation is the required course.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (citations and internal quotation marks omitted). When considering the severability of an unconstitutional statutory provision, the Court determines whether the truncated statute will operate in the manner Congress intended. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). If so, the Court gives effect to the remaining portion of the statute “so long as it is not evident from the statutory text and context that Congress would have preferred no statute at all.” *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2173 (2014) (internal quotation marks omitted).

Regulation of firearms possession does not fall within Congress’s Commerce Clause authority. *Lopez* held that possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce. Similarly, a felon’s mere possession of a firearm is not commerce, a form of economic enterprise, or connected to a commercial transaction

that substantially affects interstate commerce. “Absent some transactional or commercial context, it seems paradoxical at best that the static condition of holding property can affect ‘commerce’ or be ‘in’ it.” *Coward*, 151 F. Supp. 2d at 548. Accordingly, the Court should sever “possess in or affecting commerce” from § 922(g), or enjoin the statute’s application to intrastate possession.

VI. ALTERNATIVELY, THIS CASE SHOULD BE HELD FOR RESOLUTION IN LIGHT OF *STOKELING*.

Mr. Dixon is serving an enhanced sentence based upon the determination that his prior Florida robbery convictions, in violation of Fla. Stat. § 812.13, constitute a “crime of violence” for purposes of the Sentencing Guidelines. Mr. Dixon objected to the enhancement before the district court and challenged the enhancement on appeal. Pet. App. at 2a–3a. In light of this Court’s grant of certiorari in *Stokeling v. United States*, No. 17-5554, 2018 WL 1568030, at *1 (U.S. Apr. 2, 2018), Mr. Dixon respectfully requests that his case be held pending the resolution of *Stokeling*.

In *Stokeling*, this Court will resolve whether Fla. Stat. § 812.13 “has as an element the use, attempted use, or threatened use of physical force” for purposes of the ACCA, 18 U.S.C § 924(e)(2)(B)(i). The Eleventh Circuit has held that the Florida statute has such a “physical force” element, but it has done so without analyzing state court decisions that make clear that a Florida robbery conviction may rest upon the minimal force that is needed to overcome a victim’s minimal resistance. The Ninth Circuit expressly disagreed with the Eleventh Circuit’s conclusion, after undertaking the analysis based upon Florida court decisions. Compare *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), *United States v. Fritts*,

841 F.3d 937, 942 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2264 (2017), with *United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017).

This Court’s resolution in *Stokeling* may affect the enhancement in Mr. Dixon’s case. The Guidelines’ crime-of-violence definition uses the identical “physical force” clause as the ACCA. See U.S.S.G. § 2K2.1 cmt. n.1; U.S.S.G. § 4B1.2(a)(1). Moreover, this Court’s analysis of the Florida robbery statute, and decisions of the Florida courts addressing that statute, may require the court of appeals to reassess – with a proper view of the Florida offense – whether a Florida robbery conviction qualifies as a crime of violence under the Guidelines’ other definitions. See U.S.S.G. § 4B1.2(a)(2) & cmt. n.1. Accordingly, Mr. Dixon respectfully asks this Court to hold his case pending *Stokeling*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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