No. _____

In the

Supreme Court of the United States

_____

Kendrick Jarrell Beaird,

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

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

II. Whether *Stinson v. United States* still accurately state the level of deference due to the Commentary of the Federal Sentencing Guidelines?

III. 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?

PARTIES TO THE PROCEEDING

Petitioner is Kendrick Jarrell Beaird, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel Lee Beaird, Jr. seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at *United States v. Beaird*, 2025 WL 1410410 (5th Cir. May 15, 2025)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence entered in *United States v. Beaird*, No. 2:24-cr-00012-1 (Nov. 7, 2024), is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 15, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Question I

Section 922(g) of Title 18 reads:

> 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.

The Second Amendment to the United States 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.

Question II

28 U.S.C. § 994(a) states in relevant part:

> (a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—
>
> (1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—
>
> ***
>
> (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment …

Federal Sentencing Guideline 2K2.1(a) provides in relevant part:

> (a) Base Offense Level (Apply the Greatest)
>
> ***
>
> (4) 20, if--
>
> (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

***

Application Notes

***

<2. Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.--For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.>

Article III of the United States Constitution provides in relevant part:

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

***

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States…to Controversies to which the United States shall be a Party…

Question III

Article I, Section 8 of the United States Constitution provides:

The Congress shall have Power

***

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

Petitioner Kendrick Jarrell Beaird was indicted on a single count of violating 18 U.S.C. § 922(g)(1). He moved to dismiss the indictment, arguing that Section 922(g)(1)'s possession prong is unconstitutional under the Second Amendment. The district court denied Mr. Beaird's motion based on Fifth Circuit precedent. Mr. Beaird pled guilty. The factual basis in support of the plea set forth the elements of the offense, including, as pertinent here, that a firearm, and that "the possession of the firearm was in or affected interstate commerce; that is, that before the defendant possessed the firearm, it had traveled from one state to another." *See Beaird*, No. 24-10764, Record on Appeal ("ROA") at 84-87, 128. The court accepted the plea.

The Presentence Report applied an enhanced base offense level of 22 under U.S.S.G. § 2K2.1(a)(3) in part by counting a 17-round magazine attached to the firearm as a "large capacity magazine." ROA.174-75; U.S.S.G. § 2K2.1(a)(3). Mr. Beaird objected to the enhanced range, arguing that the commentary defining "large capacity magazine" to include any magazine that accepts more than 15 rounds of ammunition improperly expands the scope of the Guideline. ROA.201-02. The district court overruled the objection. ROA.144-45. The final range, after attributing credit for acceptance of responsibility, was 63-78 months imprisonment, the product of a final offense level of 19 and a criminal history category of VI. ROA.195.

II. Appellate Proceedings

Petitioner appealed, arguing, *inter alia*, the following three issues. First, that he had a Second Amendment right to possess arms and that following this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), Section 922(g)(1) violates the Second Amendment.

Second, he argued that the district court erred in applying the enhancement for a large capacity magazine found in U.S.S.G. §2K2.1(a)(4), based on Application Note Two to §2K2.1, which defines every magazine capable of holding at least 15 rounds as a "large capacity magazine." He contended that the application note did not provide the most persuasive reading of the text, and that when all tools of statutory construction were employed, the term "large capacity magazine" referred to a magazine larger than the industry standard, which Petitioner's was not. More specifically, he asserted that this Court's decision in *Kisor v. Wilkie*, 588 U.S. 558, 574–75 (2019), cabined the level of deference courts afford to agency interpretations of their own regulations, including the Federal Sentencing Guidelines commentary. Thus, *Stinson v. United States*, 508 U.S. 36 (1993), is overruled to the extent that it requires courts to adhere to the Commentary unless it actively conflicts with the text of the Guideline. *See* Initial Brief, at 37-41.

Finally, Mr. Beaird asserted that the interstate commerce nexus, as interpreted and applied in Section 922(g), exceeds the authority of Congress under the Commerce Clause.

Mr. Beaird acknowledged that each of the three issues are foreclosed in the Fifth Circuit. The court of appeals affirmed. *See* Pet.App.A.

REASONS FOR GRANTING THE PETITION

I. This Court should decide the constitutionality of 18 U.S.C. §922(g)(1) under the Second Amendment. It should hold the instant Petition pending resolution of any merits cases presenting that issue.

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 convicted of a crime punishable by a year or more. Despite this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges to the statute 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 (2022), and then *United States v. Rahimi*, 602 U.S. 680 (2024). But Circuit Courts of Appeals applying *Bruen* and *Rahimi* have adopted different approaches to testing 18 U.S.C. § 922(g)(1) against Second Amendment challenges. A few have interpreted the Second Amendment to allow Congress to disarm those considered dangerous based on historical analogues to laws disarming armed rebels and suspected traitors. For its part, the Fifth Circuit has interpreted the Second Amendment as constitutional when applied to a defendant whose disqualifying conviction would have faced capital punishment or forfeiture of estate in or around the Founding Era. The Court needs to clarify the Second Amendment's relationship to § 922(g)(1).

a. The legal framework of *Bruen* and *Rahimi*

In *Bruen,* the Court held that where the text of the Second Amendment covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation's historical tradition of gun regulation. 597 U.S. at 17. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *Id.* The opinion began with a comparison between the Second Amendment's text and the challenged law. The State of New York criminalized the unlicensed possession of a firearm in the home and on the street, and any New Yorker who wanted to obtain a license to carry a firearm outside the home needed to make a showing of "proper cause." *Id.* at 1 (quoting N.Y. Penal Law Ann. § 400.00(2)(f)). This Court began by finding a conflict between this law and the Second Amendment's plain text. The right to bear arms, this Court explained, "refers to the right to wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 32 (*quoting District of Columbia v. Heller*, 554 U.S. 570, 584 (2008)). Since the "definition of 'bear' naturally encompasses public carry," the Second Amendment "presumptively guarantee[d]" the petitioner's "right to 'bear' arms in public for self-defense." *Id.* at 32-33.

The Court then turned to history. The plain-text analysis established a conflict between New York's licensing regime and the Second Amendment, so the burden shifted to the State of New York to establish the challenged law's consistency with historical firearm regulations. On this topic, the Court began with a word of caution:

"[N]ot all history is created equal." *Id.* at 34. "Constitutional rights are," after all, "enshrined with the scope they were understood to have when the people adopted them." *Id.* at 34 (quoting Heller, 554 U.S. at 634-35). Given that reality, "historical evidence that long predates" the Second Amendment's enactment "may not illuminate the scope of the right[s]" at issue "if linguistic or legal conventions changed in the intervening years." *Id.* This Court similarly cautioned "against giving postenactment history more weight than it can rightly bear." *Id.* at 35. "[T]o the extent later history contradicts what the text says, the text controls." *Id.* at 36.

With those rules in mind, this Court surveyed "the Anglo-American history of public carry" and ultimately declared New York's proper-cause licensing regime unconstitutional. *Id.* at 70. Sure enough, various laws "limited the intent for which one could carry arms, the manner by which one carried arms, [and] the exceptional circumstances under which one could not carry arms," but the historical evidence established no tradition of "prohibit[ing] the public carry of commonly used firearms for personal defense." *Id.* New York's argument from history failed, and this Court held the challenged licensing regime to be an unconstitutional infringement on the right to bear arms. *Id.* at 70-71.

In *Rahimi*, this Court held that 18 U.S.C. §922(g)(8)(C)(i), which prohibits possession of a firearm based on the existence of a restraining order issued after a state court has found one poses "a credible threat to the physical safety" of another person, comports with the Second Amendment. 602 U.S. at 690. The Court resolved Mr. Rahimi's claim by comparing "the tradition the surety and going armed laws

represent" to § 922(g)(8)(C)(i). *Id*. at 699. All three, this Court explained, "restrict[] gun use to mitigate demonstrated threats of physical violence." *Id.* All three "involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* All three were also temporary. *Id*. at 698. The Court emphasized its limited holding, which was "only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id*. at 702.

That rationale raises serious questions about the constitutionality of 18 U.S.C. §922(g)(1). Section (g)(1) imposes a permanent, not a temporary, firearm disability. And that disability can arise from all manner of criminal convictions that do not involve a judicial finding of future physical dangerousness.

b. The circuit courts' inconsistent application to § 922(g)(1)

There is no circuit-court consensus on how to judge § 922(g)(1)'s constitutionality. In *United States v. Diaz*, the Fifth Circuit recognized the possibility of as-applied relief and asked whether the defendant's disqualifying conviction (or a conviction for a crime like it) would have faced capital punishment or forfeiture of estate at some point in or around the Founding Era. 116 F.4th 458, 468-69 (5th Cir. 2024). This test turns on the nature of the disqualifying convictions and places the burden of persuasion on the government. *Id.* at 467. The court held § 922(g)(1) to be constitutional as applied to a defendant with a disqualifying conviction for felony theft. *Id*. at 470-71 & n.4. The Fifth Circuit premised this holding on the historical existence of harsh penalties for theft, which included capital punishment and

forfeiture of estate. *Id.* at 469. "[I]f capital punishment was permissible to respond to theft," the Fifth Circuit reasoned, "then the lesser restriction of permanent disarmament that § 922(g)(1) imposes is also permissible." *Id.* The Fifth Circuit's as-applied holding resolved the defendant's facial challenge in the government's favor. *Id*. at 471-72.

More recently, the Fifth Circuit held that a defendant's felony aggravated battery conviction was a "crime of violence" indicating that "he poses a threat to public safety and the orderly functioning of society[,]" and therefore, disarming him "is consistent with this Nation's historical tradition of firearm regulation and punishment of people who have been convicted of violent offenses." *United States v. Schnur*, 132 F.4th 863, 870 (5th Cir. 2025) (citations omitted) (cleaned up). Then, in yet another case, the court looked to the facts of the defendant's felony aggravated assault convictions—in which he disregarded a red light, drove at 107 miles per hour, caused a major crash and seriously injured two people—and determined that he could be disarmed pursuant to *Schnur* because he "poses a threat to public safety." *United States v. Betancourt*, 139 F.4th 480, 484 (5th Cir. 2025) (quoting *Schnur*, 132 F.4th at 870) (internal quotation marks omitted).

The Sixth Circuit upheld § 922(g)(1)'s as-applied constitutionality against a defendant with a series of violent criminal convictions after analogizing § 922(g)(1)'s application to that defendant with a broad array of historical laws from both England and America disarming those considered simply "dangerous." *United States v. Williams*, 113 F.4th 637, 662-63 (6th Cir. 2024). The Sixth Circuit's as-applied test

turns on a defendant's entire criminal record rather than the disqualifying offense and asks whether that record reveals the defendant to be "dangerous." *Williams*, 113 F.4th at 657. The Seventh Circuit has also embraced a similar approach of inquiring of *any reason* an individual could constitutionally be disarmed. *United States v. Gay*, 98 F.4th 843, 847 (7th Cir. 2024), *reh'g denied*, 2024 WL 3816648 (7th Cir. Aug. 14, 2024) (rejecting challenge from defendant previously convicted of 22 felonies and presently on supervision).

The Eighth Circuit rejected the availability of as-applied challenges and declared the statute facially constitutional based on historical laws disarming either those "unwilling to obey the law" or "those deemed more dangerous than a typical law-abiding citizen." *United States v. Jackson*, 110 F.4th 1120, 1125, 1126-29 (8th Cir. 2024). Those analogues, the Eighth Circuit concluded, would authorize modern-day laws disarming "persons who deviated from legal norms [and] persons who presented an unacceptable risk of dangerousness," *Id*. at 1129, in other words, any felon. The Ninth Circuit has joined this camp. *United States v. Duarte*, No. 22-50048, 2025 WL 1352411, at *14 (9th Cir. May 9, 2025) ("§ 922(g)(1)'s permanent and categorical disarmament of felons is consistent with this Nation's historical tradition of firearm regulations").

The Fourth Circuit differs from each in having held that *Bruen* "did not disturb" prior Fourth Circuit "holdings about whether a given situation is outside the ambit of the individual right to keep and bear arms," thus the law does not regulate protected Second Amendment activity because "people who have been convicted of

felonies are outside the group of law-abiding responsible citizens" that the Second Amendment protects. *United States v. Hunt*, 123 F.4th 697, 704 (4th Cir. 2024) (internal quotations omitted). The Tenth and Eleventh Circuits seems to agree. *See Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025) (relying on pre-*Rahimi* precedent that resolved the matter citing *Heller* and observing that the prohibition on felon firearm possession is "presumptively lawful"); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, No. 24-5744, 2025 WL 76413 (U.S. Jan. 13, 2025) (holding that Bruen did not abrogate circuit precedent foreclosing such challenges).

The Third Circuit resolved an appeal from a defendant on supervised release without considering the defendant's record at all. *United States v. Moore*, 111 F.4th 266, 272-73 (3d Cir. 2024). The court instead declared the existence of Founding Era laws authorizing temporary forfeiture for those convicted of some crimes as analogous to a modern-day defendant's disarmament while serving a term of supervised release. *Id.* at 271-72. Thereafter, the Third Circuit upheld an as applied challenge by a petitioner with a decades-old food stamp fraud conviction, holding that the government could not show a historical tradition of depriving people such as petitioner of his Second Amendment right to possess a firearm. *Range v. Att'y Gen. U.S.*, 124 F.4th 218, 232 (3d Cir. 2024).

So, as it stands, the circuit courts of appeals have staked out different approaches to this important question, but each approach is unconvincing. The Fifth Circuit's as-applied test, initially categorical but evolving toward an ill-defined

violence test, will create impossible line-drawing exercises for each defendant. The analysis from the Sixth, Eighth, Ninth, and Tenth Circuits, in turn, are varied and too general, and depend on "vague" principles implicitly rejected by this Court in *Rahimi*. *See* 602 U.S. at 701. The Fourth Circuit disagrees as to whether felons are among those protected by Second Amendment at all.

This Court should accordingly grant certiorari to decide this momentous issue, and, if it does so in another case, should hold the instant Petition pending the outcome. *See Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting)("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.").

II. The courts of appeals have divided as to the effect that *Kisor v. Wilkie* has on the validity of *Stinson v. United States*. That question affects the outcome of this case.

Section 994(a)(1) of Title 28 authorizes the Sentencing Commission to promulgate Guidelines for the sentencing of federal offenders. This Court has held that those Guidelines are advisory but has also held that district courts must correctly calculate them. *See United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 551 U.S. 338 (2007). Section 944 also calls for "general policy statements regarding application of the guidelines…" 28 U.S.C. §994(a)(2). The Commission has produced Application Notes or Commentary construing every Guideline it has promulgated.

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that courts construing a Guideline must follow the Commentary unless "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other…" *Stinson*, 508 U.S. at 43. It described this circumstance as one of "flat inconsistency." *Id*. In doing so, it applied its prior holding in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which governs an agency's interpretations of its own legislative rule. Under *Seminole Rock*, "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson*, 508 U.S. at 43.

Kisor v. Wilkie, 588 U.S. 558 (2019), however, emphasized important limitations in *Seminole Rock*, casting doubt on *Stinson*. *See Kisor*, 588 U.S. at 568, n. 3 (citing *Stinson Seminole Rock*)(plurality op.). *Kisor* holds that an agency's interpretation of its own regulation is not entitled to deference until a reviewing court has "exhaust(ed) all the 'traditional tools' of construction," and only if the regulation thereafter remains "genuinely ambiguous." *Kisor*, 588 U.S. at 574-575. The "court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id*. at 575.

Following *Kisor*, the circuits have reached opposite conclusions as to whether *Kisor* upended *Stinson*. ***Compare*** *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023)(en banc)(*Kisor* requires reevaluation of *Stinson*); *United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021)(same); *United States v. Riccardi*, 989 F.3d 476, 479

(6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648, 656 (9th Cir. 2023)(same) ***with*** *United States v. Vargas*, 74 F.4th 673, 683 (5th Cir. 2023) (en banc)(*Stinson* unaffected); *United States v. Moses*, 23 F.4th 347, 357 (4th Cir. 2022)(same); *United States v. White*, 97 F.4th 532, 539 (7th Cir. 2024)(same); *United States v. Maloid*, 71 F.4th 795, 806 (10th Cir. 2023)(same).

This circuit split merits review. It is balanced and widespread, and therefore unlikely to resolve spontaneously. Further, the courts of appeals have themselves acknowledged the conflicts associated with this issue, *see White*, 97 F.4th at 539; *Vargas*, 74 F.4th at 684, and at least one commentator has noted a circuit split. Kevin O. Leske, *A New Split in the Rock: Reflexive Deference under* Stinson *or Cabined Deference under* Kisor, 74 Admin. L. Rev. 761 (Fall 2022)(identifying and discussing split).

Finally, the issue is important and recurrent. The Guideline Manual is replete with Commentary that interprets the Guidelines in ways that the reader would not predict from the text. *See* U.S.S.G. § 2B1.1, comment. (n. (3)(E)(i))("loss" defined to be no less than $500 multiplied by the number of access devices involved in the offense, irrespective of amount defendant steals or intends to steal); U.S.S.G. §2B2.1, comment. (n. (4)(C)(ii))(theft from certain mail containers defined to involve ten victims, irrespective of the number actually affected); U.S.S.G. § 2B3.1, comment. (n. 2)(fake gun defined as "dangerous weapon); U.S.S.G. § 2K2.1, comment. (n. 10)(excluding certain convictions from the term "felony convictions"); U.S.S.G. § 2S1.1, comment. (n. 1)(defining "laundering funds" to include any transaction in ill-

gotten funds, whether or not undertaken with intent to make criminal proceeds appear innocent). Accordingly, the differing views about *Kisor* and *Stinson* can be expected to frustrate the goal of a uniform set of Sentencing Guidelines, and accordingly to frustrate the goal of sentencing uniformity generally. *See Rita*, 551 U.S. at 349.

The level of deference paid to the Guidelines is likely dispositive in this case, which turns on whether a 17-bullet magazine is a "large capacity magazine." Guideline 2K2.1 provides for an enhanced base offense level:

> if--
> (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
> (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting **a large capacity magazine**; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person…

U.S.S.G. § 2K2.1(a)(4)(emphasis added). The text of the Guideline does not expressly define "large capacity magazine," but the Commentary does. Application Note Two says:

> Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.--For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could **accept more than 15 rounds of ammunition**; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This

> definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

U.S.S.G. § 2K2.1, comment. (n.2) (emphasis added). So while the text says only that the enhancement applies to "a large capacity magazine," the Commentary says that it applies if the magazine accepts 15 rounds. The court below has held that the Commentary continues to bind the court in the absence of a flat inconsistency between the Commentary and text of the Guideline, and has further held that the Commentary defining 15 rounds as a "large capacity magazine" does not present such an inconsistency. *See United States v. Martin*, 119 F.4th 410 (5th Cir. 2024).

But in the absence of *Stinson* -- that is, in a framework that required the courts to exhaust tools of statutory construction before deferring to the Commentary -- a 17-bullet magazine would not likely qualify for enhancement as a "large capacity magazine." When the courts' traditional tools of interpretation are exhausted, it becomes clear that a "large capacity magazine" refers to one that is larger than the industry standard. A 15-round magazine (and a 17-round magazine, at issue here) is a perfectly ordinary sized magazine in the contemporary consumer market. *Duncan v. Becerra*, 970 F.3d 1133, 1142 (9th Cir. 2020) ("Notably, [large capacity magazines] are commonly used in many handguns, which the Supreme Court has recognized as the 'quintessential self-defense weapon.'")(quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)), *vacated en banc* 988 F.3d 1209 (9th Cir. 2021*), on rehearing en banc* 19 F.4th 1087 (9th Cir. 2021), *vacated and remanded by* 142 S.Ct. 2895 (2022), *on remand* 49 F.4th 1228, (9th Cir. 2022)(en banc).

Two "traditional tools of construction" – structure and history – make clear that a "large capacity magazine" must be large in relation to the industry standard. As to history, from 1995 through 2004, the federal government had in force an "assault weapons ban," which ban utilized 18 U.S.C. § 921(a)(30) to define "semiautomatic assault weapon." *See* 18 U.S.C. § 921(a)(30)(1995). From November 1, 2005, through November 1, 2006, Guideline 2K2.1 provided an enhanced base offense level when the defendant possessed either a weapon that was either defined in 26 U.S.C. § 5845(a) or referenced in then-§ 921(a)(30). U.S.S.G. § 2K2.1(a)(4)(B)(1995). Shortly after the expiration of the ban, the Commission promulgated the current language -- "large capacity magazine" -- in place of a reference to the former § 921(a)(30). *See* U.S.S.G., App. C, Amend. 691 (Nov. 1, 2006). The history of the Guideline text thus supports an inference that the enhancement targeted a small class of exceptionally dangerous weapons. That intent is not consistent with a rule that provides extra punishment for mine-run semi-automatic weapons.

Even ignoring the Guideline's history, its structure strongly contravenes an enhancement for magazines that are not large in relation to the most common weapons available for lawful consumer purchase. The current § 2K2.1(a)(4)(B) provides two alternative means to achieve a base offense level of 20: a "large capacity magazine," § 2K2.1(a)(4)(B)(I), and "a firearm that is described in 26 U.S.C. § 5845(a)," § 2K2.1(a)(4)(B)(II). The latter defines a class of exceptionally dangerous weapons such as sawed-off shotguns, explosive devices, silencers, and machineguns.

The Commission's choice to place these two options in parallel positions in the Guideline, generating identical results, suggests that the weapons referenced by the term "large capacity magazines" are similar to those found in § 5845(a). That is to say, the structure suggests an intent to capture only those weapons that are exceptionally dangerous and either inherently illegal, strictly regulated, or skirting the boundaries of illegality. That class does not include industry-standard semi-automatic firearms.

III. 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.

Courts have held for years that the mere travel across state lines at any time is sufficient to find that later possession of a firearm affected interstate commerce. These cases follow from this Court's jurisprudence in *Scarborough v. United States*, 431 U.S. 563, 577 (1963), finding federal commerce authority over items that at any point moved across state lines. These cases stand in tension with more recent precedents on the scope of Commerce Clause authority, that is *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*") and *Bond v. United States*, 572 U.S. 844 (2014).

Because *Scarborough* cannot be reconciled with these more recent precedents this Court should grant review to resolve that tension. "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.*, 567 U.S. at 533 (2012) ("*NFIB*"). Powers outside those explicitly enumerated by the Constitution are denied to the National

Government. *Id.* 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. *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*, 572 U.S. at 863.

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. Despite 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*, 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 turned away concerns of lenity and federalism, finding that Congress had intended

the interstate nexus requirement only to insure the constitutionality of the statute. 431 U.S. at 577.

It is hard to square *Scarborough*, and the expansive concept of the commerce power on which it relies, with more recent holdings of the Court in this area. In *Nat'l Fed'n of Indep. Bus.*, 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. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 557-558 (Roberts., C.J. concurring). Although the Court recognized that the failure to buy 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. *Id.* at 550 (Roberts., C.J. concurring). Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *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 preexisting commercial activity. Possession of firearms, like the refusal to buy 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); *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 hard 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 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, 9 Wheat. 1 (1824).

And indeed, much of the Chief Justice's language in *NFIB* adheres to 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..." *Id.* 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.* (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* supports the proposition that enactments under the Commerce Clause must regulate commercial or economic activity, not merely activity that affects commerce.

Here, the factual basis for the plea did not state that Petitioner's possession of the gun was an economic activity. 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: 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.

The factual basis also did not show that Petitioner was engaged in the relevant market at the time of the regulated conduct. 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. *Id.* at 557. 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 (emphasis added). Thus, 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 also stands in tension with *Bond*, so § 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 doorknob of a romantic rival. *Id.* The Court reversed her conviction, holding that any construction of the statute that can reach such conduct would compromise the chief role of states and localities in the suppression of crime. *Id.* at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *Id.* at 859-862.

Section 229 defined the critical term "chemical weapon" broadly as "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). It also criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. § 229(a). This Court still applied a more

limited construction of the statute, reasoning that statutes should not be read to sweep 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, 30 L. Ed. 2d 488 [(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, 146 L. Ed. 2d 902 [(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 § 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 § 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.

CONCLUSION

Petitioner asks this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, or if it does so in another case to decide the above issues, should hold the instant Petition pending the outcome.

Respectfully submitted this 11th day of August, 2025.

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