NO. _____

In the Supreme Court of the United States

ISAAC JOHN OLIVAS,

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.

Federal law bans the possession of firearms by anyone who has ever been convicted of a crime punishable by more than one year of imprisonment. 18 U.S.C. § 922(g)(1). How should courts decide whether an individual prosecution or conviction under that statute is consistent with the Second Amendment to the Constitution?

2.

Under the prevailing interpretation of the nexus-with-commerce element of the federal possession ban, a former felon possesses "in or affecting commerce" a firearm if the firearm was made in another state. Does Congress have the constitutional authority to enact such a law?

DIRECTLY RELATED PROCEEDINGS

United States v. Olivas, No. 2:23-cr-64 (N.D. Tex.)

United States v. Olivas, No. 24-10268 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Isaac John Olivas asks the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion below was not selected for publication. It can be found at 2025 WL 1514120, and it is reprinted in the Appendix.

JURISDICTION

The Fifth Circuit entered its judgment on May 27, 2025. This petition is timely under S. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

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.

Title 18 of the United States Code, Section 922(g) provides, in pertinent part:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year …
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT

A federal grand jury indicted Petitioner Isaac John Olivas for unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Petitioner moved to dismiss the indictment, arguing that § 922(g)'s possession ban exceeds Congress's authority under the Commerce Clause and the Second Amendment. App., *infra*, 3a–14a. Petitioner then pleaded guilty to the indictment without a plea agreement.

On appeal, Petitioner renewed both contentions. The Fifth Circuit first held that his Commerce Clause challenge was foreclosed by *United States v. Jones*, 88 F.4th 571 (5th Cir. 2023), and his Second Amendment challenge was foreclosed by

United States v. Diaz, 116 F.4th 458 (5th Cir. 2024). App., *infra*, 2a. The Court affirmed his conviction.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE PETITION TO EXPLAIN WHETHER AND WHEN § 922(G)(1) COMPORTS WITH THE SECOND AMENDMENT.

For many years, courts assumed that 18 U.S.C. § 922(g)(1) was constitutional in all its applications—or at least in the vast majority of applications. After *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), that unison devolved into cacophony. Until this Court steps in to address the issue, lower courts will continue to flounder.

A. Before *Bruen*, courts largely deferred to Congress's hasty judgments about felons and firearms.

The federal ban on *possession* of firearms by felons is a product of the late 20th Century. In 1938, Congress banned interstate firearm transactions by people convicted of a few violent felonies. Pub. L. 75-785, 52 Stat. 1250 (1938). Congress expanded the transaction ban to reach all felons in 1961. Pub. L. 87-342, 75 Stat. 757 (1961). The ban on possession first appeared as "a last-minute Senate amendment" to a sprawling 1968 crime bill: "The Amendment was hastily passed, with little discussion, no hearings and no report." *United States v. Bass*, 404 U.S. 336, 344 (1971).

Despite its relative youth, the possession ban has avoided serious constitutional scrutiny. Throughout the 20th century, courts "found no conflict between federal gun laws and the Second Amendment, narrowly construing the latter

to guarantee the right to bear arms as a member of a militia." *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (discussing *United States v. Miller*, 307 U.S. 174, 178–82 (1939), and its progeny). In 1980, this Court went so far as to assert that felon bans "are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Lewis v. United States*, 445 U.S. 55, 65 (1980) (citing *Miller*).

Even as attorneys, scholars, and courts revived the individual rights model of the Second Amendment, most assumed that governments could ban ex-felons from possessing firearms if they wanted to. *See*, e.g., *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) ("[I]t is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms."). This Court's opinion in *District Columbia v. Heller*, 554 U.S. 570 (2008), appeared to embrace that view (albeit in dictum): "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626.

B. Under the *Bruen* methodology, § 922(g)(1) is presumptively unconstitutional.

In *Bruen*, this Court chastised lower courts for their knee-jerk deference to legislatures when it comes to Americans' firearm rights: "while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here." 597 U.S. at 26. Instead of deferring to a legislature's "interest balancing," *Bruen* propounded a new test focused

on the Second Amendment's text and America's historical tradition of firearm regulation: When the "plain text" of the Second Amendment covers an individual's conduct, "the Constitution presumptively protects that conduct." *Id.* at 17. To justify a regulation that burdens presumptively protected conduct, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19.

Section 922(g)(1) bans the very same conduct protected by the plain text of the Second Amendment—the keeping of arms. And before the 20th Century, there was no comparable tradition of banning millions of Americans from even possessing firearms based on Congress's say-so. "Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009); *see also* Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 Hastings L.J. 1371, 1374 (2009) ("Indeed, so far as I can determine, no colonial or state law in eighteenth-century America formally restricted the ability of felons to own firearms.").

C. Lower courts have made irreconcilable (and unpersuasive) attempts to reconcile *Heller*'s assurance that felon bans are constitutional with *Bruen*'s text-and-tradition test.

In *Heller*, this Court promised there would be "time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." 554 U.S. at 635. Without that guidance, lower courts are

struggling. They remain largely deferential to Congress's judgment. They have adopted various irreconcilable rules for deciding when Congress's preference for disarming felons exceeds its constitutional authority.

According to the Fifth Circuit, each § 922(g)(1) prosecution should be evaluated based on the "prior convictions that are 'punishable by imprisonment for a term exceeding one year.'" *United States v. Diaz*, 116 F.4th 458, 467 (5th Cir. 2024), *cert. denied*, No. 24-6625, 2025 WL 1727419 (U.S. June 23, 2025); *see also United States v. Kimble*, 142 F.4th 308, 315 (5th Cir. 2025) (quoting *Diaz*, 116 F.4th at 469) ("Although Congress can label certain classes of people—such as felons—dangerous, courts cannot grant those determinations blanket deference because the 'shifting benchmark' of felony status 'should not define the limits of the Second Amendment.'").

In *Diaz*, the Fifth Circuit held that § 922(g)(1) could constitutionally be applied against someone previously convicted of stealing a car, because "those convicted of horse theft—likely the closest colonial-era analogue to vehicle theft—were often subject to the death penalty." 116 F.4th at 468. The court relied on *Diaz* to affirm Petitioner's conviction here. App., *infra*, 2a.

According to the Sixth Circuit, a former felon bears the burden of proving "that he is not dangerous," and a court must evaluate dangerousness "considering the individual's entire criminal record—not just the predicate offense for purposes of § 922(g)(1)." *United States v. Williams*, 113 F.4th 637, 657–58 (6th Cir. 2024). Channeling Justice Stewart's concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), the Sixth Circuit expressed confidence in district courts' ability to assess

which predicate offenses are dangerous enough to warrant lifelong disarmament and which are not. *Williams*, 113 F.4th at 660 ("We are therefore confident that the dangerousness inquiry is workable for resolving as-applied challenges to § 922(g)(1).").

The Eighth Circuit disagreed: "we conclude that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024), *reh'g denied*, 121 F.4th 656, *cert. denied*, No. 24-6517, 2025 WL 1426707 (U.S. May 19, 2025).

None of these approaches is entirely satisfactory. Perhaps recognizing this, Respondent recently decided to revive the relief-from-disability procedure under 18 U.S.C. § 925(c). *See generally* Pet. for Certiorari 21, *United States v. Hemani*, No. 24-1234 (filed June 2, 2025). That mechanism was unavailable to Petitioner when he possessed the firearms at issue here.

II. THE COURT SHOULD GRANT THE PETITION AND ADDRESS WHETHER A FIREARM'S PRIOR MOVEMENT ACROSS STATE LINES MEETS THE MINIMUM STATUTORY AND CONSTITUTIONAL REQUIREMENTS FOR PROVING A NEXUS WITH COMMERCE.

When the Founders decided to form a stronger national government, they had to overcome objections that Congress would eventually utilize its power to disarm disfavored citizens. Federalists believed that the enumeration of limited and specific powers would keep Congress from disarming anyone. *Heller*, 554 U.S. at 599. Antifederalists worried that those limits might not hold, and the Government would later disarm citizens in favor of a standing army or organized militia. The Second

Amendment was designed to allay those fears. *Id.* at 598–600. After ratification of the Bill of Rights, Americans understood that their right to keep arms had twofold protection: "No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. … But if in any blind pursuit of inordinate power," Congress *did* attempt it, "this amendment may be appealed to as a restraint." William Rawle, *A View of the Constitution of the United States* 125–26 (2d ed. 1829). A nationwide Congressional ban on keeping arms would have scandalized the founding generation. Nothing like it existed during the first 180 years of our nation's existence.

One of Congress's "few and defined," powers is the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8. In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that the commerce power does not authorize regulation of a purely local, non-economic activity like "possession of a gun in a school zone." *Id.* at 560. The original version of the Gun-Free School Zones Act ("GFSZA") exceeded Congress's commerce power. *Id.* at 561.

Unlike the original GFSZA, § 922(g)'s possession prong requires proof of a nexus element—that the defendant possessed "in or affecting commerce" a firearm. *Lopez* assumed that this nexus element "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* If that were true, then the element would often present "a complicated legal question" that would

delight "students of constitutional law." *Rehaif v. United States*, 588 U.S. 225, 250, (2019) (Alito, J., dissenting).

But this Court construed the nexus element in a predecessor statute to reach *any* possession of a firearm if the firearm itself previously moved in interstate or foreign commerce. *Scarborough v. United States*, 431 U.S. 563 (1977). The constitutional logic of *Lopez* cannot be reconciled with the statutory holding of *Scarborough*. *See Alderman v. United States*, 562 U.S. 1163 (2011) (Thomas, J., dissenting from denial of certiorari); *see also United States v. Seekins*, 52 F.4th 988, 989 (5th Cir. 2022) (Ho, J., dissenting from denial of reh'g). If Congress had the affirmative power to regulate who could possess a musket if that musket (or any of its components) had ever crossed a state line, then it had the power to disarm the militia.

For most of the 20th Century—even as Congress asserted a more robust role in regulating firearms through its commerce power—this Court and the Government seemed to understand that Congress would not, did not, and could not directly ban *any* Americans from possessing firearms. But in *Scarborough v. United States*, 431 U.S. 563 (1977), this Court considered the first, hastily passed possession ban and found "no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575.

This Court has never considered whether that same interpretation governs the post-1986 version of § 922(g)(1). The defendant in *Scarborough* argued that possession required proof of a *present* connection to commerce, whereas a past

connection would satisfy the nexus element for *receipt*. 431 U.S. at 569. The Court rejected that argument because, at the time, possession was prohibited only in a last-minute addendum, without much care for verb tense, in an entirely separate title. *Id.* at 569–70. But in 1986 Congress combined the prohibitions into a single statute, with three different nexus elements depending on the prohibited activity:

> It shall be unlawful for any [prohibited] person:
>
> 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) (emphases added).

In § 922(g)'s current form, there are two textual distinctions between the nexus elements for "possess" and "receive." First, for possession, the Government must prove a nexus *for the possession itself*; for receipt, the nexus element modifies "firearm" or "ammunition." *Id.* Second, because the phrase "in or affecting commerce" modifies the present-tense verb "possess," the text requires a *present* connection with commerce (even if that connection is unspecified). For receipt, "the proscribed act, 'to receive any firearm,' is in the present tense, the interstate commerce reference is in the present perfect tense, denoting an act that has been completed." *Barrett v. United States*, 423 U.S. 212, 216 (1976).

Whether *Scarborough* correctly or incorrectly interpreted the 1968 possession ban, the principles of statutory interpretation do not allow the Court to disregard these distinctions in the modern form of the crime.

And even if that interpretation of *statutory language* or presumed congressional intent were correct, the statute would exceed Congress's power under the Constitution. The movement of a durable item like a firearm from one state to another may be "commerce," but the item does not remain "in commerce" forever. There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000).

The current version of the possession ban makes up more than 10% of federal prosecutions. *See* Emily Tiry et al., *Prosecution of Federal Firearms Offenses 2000-16* at 4–5, Tables 1 & 2 (Urban Institute Oct. 2021).[1] Despite repeated calls for additional guidance, this Court has never explained how the prevailing interpretation of 18 U.S.C. § 922(g)'s possession-nexus element is consistent with the original understanding of the Constitution.

Under the prevailing interpretation of 18 U.S.C. § 922(g), the statute entirely bans *millions* of Americans from keeping firearms in their homes and automobiles on pain of up to fifteen years in prison. *See* Federal Bureau of Investigation, *Active Records in the NICS Indices* (updated April 30, 2024) (reporting more than 31 million entries of prohibited persons in the national background-check database, including 5 million prohibited under § 922(g)(1)).

[1] Available at https://www.ojp.gov/pdffiles1/bjs/grants/254520.pdf (accessed May 7, 2024).

CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

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