

No. _____

In the
Supreme Court of the United States

Andre Demarcus Rubell,

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 *Stinson v. United States* will accurately state the level of deference due to the Commentary of the Federal Sentencing Guidelines?
- II. 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?
- III. Whether 18 U.S.C. § 922(g)(1) comports with the Second Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Andre Demarcus Rubell, 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 A WRIT OF CERTIORARI

Petitioner Andre Demarcus Rubell, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Rubell*, No. 26-10013, 2026 WL 2033178 (5th Cir. July 14, 2026) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on July 14, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STAUTORY AND CONSTITUTIONAL PROVISIONS

Question I

Section 994(a) of Title 28 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 II

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

Question III

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.

LIST OF PROCEEDINGS BELOW

1. *United States v. Andre Demarcus Rubell*, 4:25-CR-205-P, United States District Court for the Northern District of Texas. Judgment and sentence entered on December 22, 2025. (Appendix B).
2. *United States v. Andre Demarcus Rubell*, No. 26-10013, 2026 WL 2033178 (5th Cir. July 14, 2026) (unpublished), Court of Appeals for the Fifth Circuit. Judgment affirmed on July 14, 2026. (Appendix A).

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

On August 13, 2025, a grand jury returned a one-count indictment charging Petitioner Andre Demarcus Rubell with having a prior felony conviction, knowing that he had such a conviction, and possessing a firearm in and affecting commerce, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). ROA.8-9. Mr. Rubell moved to dismiss the indictment, arguing that § 922(g)(1)'s possession prong is unconstitutional under the Second Amendment and exceeds Congress's power under the Commerce Clause. ROA.29-47. The district court denied Mr. Rubell's motion, holding that the Second Amendment argument was foreclosed by binding precedent, citing *United States v. Curry*, 125 F.4th 733 (5th Cir. 2025), in rejecting the Commerce Clause challenge and *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024) to reject Appellant's Second Amendment argument. ROA.48-51.

At a guilty plea hearing on September 3, 2025, the magistrate set forth the elements of the offense consistent with those set forth in Mr. Rubell's signed factual resume, that is, that under 18 U.S.C. § 922(g) the government must prove, *inter alia*, that Mr. Rubell knowingly possessed a firearm, and that "the possession of the firearm affected interstate or foreign commerce, that is, before the defendant possessed the charged firearm, it had traveled at some time from one state to another or between any part of the United States and any other country." ROA.69-70, 146. The magistrate judge recommended accepting the plea, and the district court later did so. ROA.71-72; *see* ROA.188.

The Presentence Report applied an enhanced base offense level of 20 under U.S.S.G. § 2K2.1(a)(4)(B)(i)(I) and (ii)(I), concluding that the firearm, which had an attached 17-round magazine, was capable of accepting a “large capacity magazine,” and that Mr. Rubell was a prohibited person at the time of the instant offense. Presentence Investigation Report (“PSR”) ¶¶ 7, 16, ECF No. 26-1 [sealed].; U.S.S.G. §2K2.1(a)(4). Mr. Rubell 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. Def’s Objs. to the Presentence Report, at 1-6, ECF No. 30 [sealed]. The district court overruled the objection. ROA.190. 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. PSR ¶ 92.

The court sentenced Mr. Rubell to 63 months of imprisonment. ROA.90. It also imposed a mandatory special assessment of \$100, and a three-year term of supervised release. ROA.89-90.

A. Facts and Proceedings in District Court

Petitioner appealed, arguing, *inter alia*, the following three issues. First, 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 Noted 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 from the text, and that when all the tools of statutory construction were employed, the term “large capacity magazine” referred to a magazine larger

than the industry standard. 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 22-28.

Second, Mr. Rubell asserted that the interstate commerce nexus, as interpreted and applied in Section 922(g) exceeds the authority of Congress under the Commerce Clause. *Id.* at 18-22.

Finally, he argued 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. *Id.* at 8-18.

Mr. Rubell acknowledged that each of these issues is foreclosed in the Fifth Circuit. The court of appeals affirmed. *See* Pet. App. A.

REASONS FOR GRANTING THIS PETITION

I. 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.¹

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

¹ As an initial matter, this Petition presents the same issue currently before the Court in *Beaird v. United States*, No. 25-5343, which is scheduled for oral argument on October 13, 2026. Petitioner would ask the Court hold this case pending the decision in *Beaird*.

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* and *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).

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...

USSG §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.

USSG §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 it 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. 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 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). USSG §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* USSG, 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.

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

“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). Powers outside those explicitly enumerated by the

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

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

Notwithstanding these limitations, and the text of Article I, Section 8, this Court has held that “[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states,” and includes a power to regulate activities that “have a substantial effect on interstate commerce.” *United States v. Darby*, 312 U.S. 100, 118-119 (1941). Relying on this expansive vision of Congressional power, this Court held in *Scarborough v. United States*, 431 U.S. 563 (1963), that a predecessor statute to 18 U.S.C. § 922(g) reached every case in which a felon possessed firearms that had once moved in interstate commerce. It turned away

concerns of lenity and federalism, finding that Congress had intended the interstate nexus requirement only as a means to insure the constitutionality of the statute. *See Scarborough*, 431 U.S. at 577.

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

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

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

This is so because the text of the Commerce Clause does not distinguish between Congress’s power to affect commerce by regulating non-commercial activity (like possessing a firearm), and its power to affect commerce by compelling people to join a commercial market (like health insurance). Rather it simply says that Congress may “regulate ... commerce between the several states.” And that phrase either is or is not limited to laws that affect the legality of commercial activity. Five justices in *NFIB* took the text of the Clause seriously and permitted Congress to enact only those laws that were, themselves, regulations of commerce. *NFIB* thus allows Congress only the power “to prescribe the rule by which commerce is to be governed.” *Gibbons v. Ogden*, 22 U.S. 1, 196, 9 Wheat. 1 (1824).

And indeed, much of the Chief Justice’s language in *NFIB* is consistent with this view. This opinion rejects the government’s argument that the uninsured were “active in the market for health care” because they were “not currently engaged in

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

Here, the factual resume does not state that Petitioner’s possession of the gun was an economic activity. *See* ROA.69-70. Under the reasoning of *NFIB*, this should have been fatal to the conviction. As explained by *NFIB*, the Commerce Clause permits Congress to regulate only activities, *i.e.*, the active participation in a market. But 18 U.S.C. § 922(g)(1) criminalizes all possession, *without* reference to economic activity. Accordingly, it sweeps too broadly.

Further, the factual resume fails to show that Petitioner was engaged in the relevant market at the time of the regulated conduct. *See* ROA.69-70. The Chief Justice has noted that Congress cannot regulate a person’s activity under the Commerce Clause unless the person affected is “currently engaged” in the relevant market. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 557. 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). As such, *NFIB* brought into serious question the long-standing notion that a firearm which has previously and remotely passed through interstate commerce should be considered to indefinitely affect commerce without “concern for when the [initial] nexus with commerce occurred.” *Scarborough*, 431 U.S. at 577.

Scarborough stands in even more direct tension with *Bond v. United States*, 572 U.S. 844 (2014), which shows that § 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. *See id.* This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.*

at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 859-862.

Notably, § 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). Further, it criminalized the use or possession of “any” such weapon, not of a named subset. 18 U.S.C. § 229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

The Government’s reading of section 229 would “alter sensitive federal-state relationships,” convert an astonishing amount of “traditionally local criminal conduct” into “a matter for federal enforcement,” and “involve a substantial extension of federal police resources.” [*United States v.]Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 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.

III. The courts of appeals have divided as to the constitutionality of 18 U.S.C. § 922(g)(1).

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

After *Bruen*, the courts of appeals have split as to whether 18 U.S.C. § 922(g)(1) trenches on rights protected by the Second Amendment. The Third Circuit previously sustained the Second Amendment challenge of a man convicted of making a false statement to obtain food stamps, notwithstanding the felony status of that offense. *See Range v. Attorney General of the United States*, 69 F.4th 96 (3d Cir. 2023), *vacated sub nom. Garland v. Range*, No. 23-374, ___ U.S. ___, ___ S.Ct. ___, 2024 WL 3259661 (July 2, 2024). . By contrast, the Eighth Circuit has held that § 922(g)(1) is constitutional in all instances, at least against Second Amendment attack. *See United*

States v. Cunningham, 70 F.4th 502 (8th Cir. 2023), *vacated sub nom. Cunningham v. United States*, No. 23-6602, ___ U.S. ___, ___ S.Ct. ___, 2024 WL 3259687 (July 2, 2024) . And the Seventh Circuit thought that the issue could be decided only after robust development of the historical record, remanding to consider such historical materials as the parties could muster. *See Atkinson v. Garland*, 70 F.4th 1018, 1023-1024 (7th Cir. 2023).

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

² See United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 20, Federal Offenders Sentenced under Each Chapter Two Guideline, p.2 (FY 2022) (showing that 9,367 people were sentenced under USSG § 2K2.1 in FY 2022, which governs prosecutions under 18 U.S.C. § 922(g)), available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table20.pdf>, last visited October 3, 2023.

CONCLUSION

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

Respectfully submitted this 8th day of October, 2026.

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