

No. _____

In the
Supreme Court of the United States

TJ Aguilar,

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

Jason D. Hawkins
Federal Public Defender

Christy Martin
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 South Griffin Street, Suite 629
Dallas, Texas 75202
(214) 767-2746
Christy_martin@fd.org

QUESTIONS PRESENTED

I. Petitioner asks that the Court should hold this petition pending a decision in *Beaird v. United States*, No. 25-5343, and alternatively asks whether *Stinson v. United States* still correctly states the rule for deference that courts must give the commentary of the Federal Sentencing Guidelines?

II. Whether the Court should grant, vacate, and remand for reconsideration because of an intervening circuit decision that may invalidate precedent on which the panel opinion below relies.

III. May Congress criminalize intrastate firearm receipt based solely on the fact that the firearm crossed state lines at some indefinite point before the defendant received it?

IV. Whether 18 U.S.C. § 922(n) comports with the Second Amendment.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

- *United States v. Aguilar*, No. 5:25-cr-00081-H, U.S. District Court for the Northern District of Texas. Judgment entered on January 22, 2026.
- *United States v. Aguilar*, No. 26-10076, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on July 23, 2026.

TABLE OF CONTENTS

Questions Presented	i
Parties to the Proceeding	ii
Related Proceedings.....	ii
Appendices	iv
Table of Authorities	v
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Provisions Involved.....	1
Statement of the Case	3
Reasons for Granting this Petition	5
I.a. The Court should hold this petition pending a decision in <i>Beaird v. United States</i> , No. 25-5343.	5
I.b. The district court erred in deferring to Guideline commentary to find that a 31-round magazine is a “large capacity magazine[s]” in applying an enhanced base offense level under U.S.S.G. § 2K2.1(a)(4)(B).	5
II. This Court should grant, vacate, and remand for reconsideration after the en banc Fifth Circuit decides <i>United States v. Squire</i> , No. 25-30324 (5th Cir. reh’g en banc granted July 20, 2026).	10
III. This Court should delineate the boundaries of federal authority under the Commerce Clause in the firearm context.	12
IV. Section 922(n) cannot withstand Second Amendment scrutiny.	18
Conclusion	22

APPENDICES

Appendix A Opinion, *United States v. Aguilar*, No. 26-10076, 2026 WL 2126855 (5th Cir. Jul. 23, 2026)

Appendix B Judgment and Sentence, *United States v. Aguilar*, No. 5:25-cr-00081-H (N.D. Tex. Jan. 22, 2026)

Appendix C Factual Resume, *United States v. Aguilar*, No. 5:25-cr-00081-H (N.D. Tex. Sept. 22, 2025), ECF 22.

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935)	17
<i>Alderman v. United States</i> , 562 U.S. 1163 (2011)	15, 18
<i>Beaird v. United States</i> , No. 25-5343 (cert. granted Apr. 20, 2026)	5, 10
<i>Bowles v. Seminole Rock & Sand Co.</i> , 325 U.S. 410 (1945)	6
<i>Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.</i> , 467 U.S. 837 (1984)	7
<i>Duncan v. Becerra</i> , 970 F.3d 1133 (9th Cir. 2020)	9
<i>Kisor v. Wilkie</i> , 588 U.S. 558 (2019)	6, 7
<i>Lawrence on Behalf of Lawrence v. Chater</i> , 516 U.S. 163 (1996)	11, 21
<i>Loper Bright Enterprises v. Raimondo</i> , 603 U.S. 369 (2024)	7
<i>Nat’l Fed’n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012)	18
<i>New York State Rifle & Pistol Association, Inc. v. Bruen</i> , 597 U.S. 1 (2022)	19, 20
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	5
<i>Scarborough v. United States</i> , 431 U.S. 563 (1977)	11, 12
<i>Stinson v. United States</i> , 508 U. S. 36 (1993)	5, 6, 7, 8

<i>United States v. Aguilar</i> , No. 26-10076, 2026 WL 2126855 (5th Cir. Jul. 23, 2026)	4
<i>United States v. Bishop</i> , 66 F.3d 569 (3d Cir. 1995)	16
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	5
<i>United States v. Castillo</i> , 69 F.4th 648 (9th Cir. 2023)	7
<i>United States v. Chesney</i> , 86 F.3d 564 (6th Cir. 1996)	17
<i>United States v. Cortes</i> , 299 F.3d 1030 (9th Cir. 2002)	16
<i>United States v. Crump</i> , 120 F.3d 462 (4th Cir. 1997)	16
<i>United States v. Dorris</i> , 236 F.3d 582 (10th Cir. 2000)	16
<i>United States v. Dupree</i> , 57 F.4th 1269 (11th Cir. 2023)	7
<i>United States v. Gateward</i> , 84 F.3d 670 (3d Cir. 1996)	16
<i>United States v. Hanna</i> , 55 F.3d 1456 (9th Cir. 1995)	16
<i>United States v. Hunter</i> , No. 25-10732, 2026 WL 1805105 (5th Cir. June 23, 2026)	4
<i>United States v. Johnson</i> , 42 F.4th 743 (7th Cir. 2022)	12
<i>United States v. Kirk</i> , 105 F.3d 997 (5th Cir. 1997)	15
<i>United States v. Kuban</i> , 94 F.3d 971 (5th Cir. 1996)	15
<i>United States v. Lemons</i> , 302 F.3d 769 (7th Cir. 2002)	16

<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	11, 13, 14, 17, 18
<i>United States v. Maloid</i> , 71 F.4th 795 (10th Cir. 2023).....	7
<i>United States v. Martin</i> , 119 F.4th 410 (5 th Cir. 2024)	8
<i>United States v. Morrison</i> , 529 U.S. 598 (2000)	14, 17, 18
<i>United States v. Moses</i> , 23 F.4th 347 (4th Cir. 2022).....	7
<i>United States v. Nasir</i> , 17 F.4th 459 (3d Cir. 2021)	7
<i>United States v. Patterson</i> , 853 F.3d 298 (6th Cir. 2017)	15
<i>United States v. Patton</i> , 451 F.3d 615 (10th Cir. 2006)	16
<i>United States v. Quiroz</i> , 629 F. Supp. 3d 511 (W.D. Tex. 2022)	20, 21
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024)	14, 19, 20
<i>United States v. Rawls</i> , 85 F.3d 240 (5th Cir. 1996)	15, 16
<i>United States v. Riccardi</i> , 989 F.3d 476 (6th Cir. 2021)	7
<i>United States v. Santiago</i> , 238 F.3d 213 (2d Cir. 2001)	16
<i>United States v. Seekins</i> , 52 F.4th 988 (5th Cir. 2022).....	12, 17
<i>United States v. Shelton</i> , 66 F.3d 991 (8th Cir. 1995)	16
<i>United States v. Smith</i> , 101 F.3d 202 (1st Cir. 1996).....	16

<i>United States v. Squire</i> , No. 25-30324 (5th Cir.) (reh’g en banc granted July 20, 2026)	10, 11, 12
<i>United States v. Vargas</i> , 74 F.4th 673 (5th Cir. 2023)	7
<i>United States v. Waldman</i> , No. 21-10637, 2021 WL 6101365 (5th Cir. Dec. 21, 2021)	12
<i>United States v. White</i> , 97 F.4th 532 (7th Cir. 2024)	7
<i>United States v. Wright</i> , 607 F.3d 708 (11th Cir. 2010)	16

Federal Statutes

18 U.S.C. § 921(a)(30)	9
18 U.S.C. § 921(a)(30)(1995)	9
18 U.S.C. § 922(g)	12
18 U.S.C. § 922(g)(1)	3, 11, 12
18 U.S.C. § 922(g)(8)(C)(i)	19
18 U.S.C. § 922(n)	3, 4, 12, 18, 20
18 U.S.C. § 922(q)	13
26 U.S.C. § 5845(a)	9, 10
28 U.S.C. § 994(a)(2)	6
28 U.S.C. § 1254(1)	1
Gun Control Act of 1968	20
Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90- 351, § 1202, 82 Stat. 197	12

Federal Sentencing Guidelines

U.S.S.G. § 2K2.1	5
U.S.S.G. § 2K2.1(a)(4)	8

U.S.S.G. § 2K2.1(a)(4)(B).....	4, 5, 9, 10
U.S.S.G. § 2K2.1, Comment	8
USSG, Appendix C, Amendment 691 (Nov. 1, 2006)	9

Constitutional Provisions

U.S. Const. Amend. II.....	2, 18, 20
U.S. Const. Article I, § 8, cl. 3	2, 17, 18

Other Authorities

Pet. for Reh'g En Banc, <i>United States v. Squire</i> , No. 25-30324 (5th Cir. Jun. 16, 2026), ECF No. 75	11
---	----

PETITION FOR A WRIT OF CERTIORARI

TJ Aguilar seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unpublished opinion is available at *United States v. Aguilar*, No. 26-10076, 2026 WL 2126855 (5th Cir. Jul. 23, 2026). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence in *United States v. Aguilar*, No. 5:25-cr-00081-H (N.D. Tex. Jan. 22, 2026), is reprinted in Appendix B.

JURISDICTION

The Fifth Circuit entered judgment on July 23, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

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—

(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 I, Section 8 of the United States Constitution states:

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

U.S. Const. art. I, § 8, cl. 3.

The Second Amendment to the United States Constitution states:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

Section 922(n) of Title 18 provides:

It shall be unlawful for any person who is under indictment . . . [to] receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(n).

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

TJ Aguilar pled guilty to a violation of 18 U.S.C. § 922(n). Section 922(n) makes it “unlawful for any person who is under indictment . . . [to] receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” At his plea hearing, the magistrate advised Mr. Aguilar that § 922(n) required the government to prove, among other things, that he willingly received a firearm, and that “the firearm received was shipped or transported in interstate or foreign commerce, that is, before the defendant received the firearm, it had traveled at some time from one state to another or between any part of the United States and any other country.” Tr. Rearraignment at 9, Aguilar, No. 5:25-cr-00081-H (N.D. Tex. Jan. 22, 2026). As stated in his factual resume, Mr. Aguilar agreed that the firearm “was not manufactured in Texas and, therefore, must have traveled in foreign or interstate commerce before Aguilar received it.” Pet. App’x C at 4. The factual resume further agreed that the charged firearm contained a 31 round Glock extended magazine. Pet. App’x C at 4.

The case proceeded to sentencing. The PSR calculated a Guidelines range of 37 to 46 months based on Total Offense Level 19 and Criminal History Category

III. The Guidelines range applied U.S.S.G. § 2K2.1(a)(4)(B), which provides an enhanced Base Offense Level of 20 where the charged firearm is capable of accepting a “large capacity magazine.” The district court imposed a Guidelines range sentence of 46 months to be followed by 3 years of supervised release. Pet. App’x B at 1-3.

II. Appellate Proceedings

On appeal, Mr. Aguilar raised three unpreserved challenges. First, he maintained that his § 922(n) conviction could not pass constitutional muster under the Second Amendment and his conviction should be vacated. Second, he argued that Section 922(n) requires only receipt of a firearm “which has been shipped or transported in interstate or foreign commerce.” This language punishes noncommercial receipt of a firearm, no matter when or how the firearm crossed state or international boundaries. Absent some link to commercial activity, the statute exceeds Congress’s commerce authority. Finally, he argued that the district court erred in deferring to Sentencing Guidelines commentary that defines large capacity magazine for purposes of an enhanced base offense level under U.S.S.G. § 2K2.1(a)(4)(B).

The Fifth Circuit affirmed in an unpublished opinion. *United States v. Aguilar*, No. 26-10076, 2026 WL 2126855 (5th Cir. Jul. 23, 2026) (reprinted at Pet. App’x A). The panel held that precedent foreclosed all claims. *Id.*

REASONS FOR GRANTING THIS PETITION

I.a. The Court should hold this petition pending a decision in *Beaird v. United States*, No. 25-5343

On October 13, 2026, the Court heard argument in *Beaird v. United States*, No. 25-5343. The question presented in *Beaird* is “[w]hether *Stinson v. United States*, 508 U. S. 36 (1993), still correctly states the rule for the deference that courts must give the commentary to the Sentencing Guidelines.” The commentary at issue in *Beaird* is the same at issue here – Commentary Note 2 to U.S.S.G. § 2K2.1, which defines “large capacity magazine” in U.S.S.G. § 2K2.1(a)(4)(B) to mean a firearm with a “a magazine or similar device that could accept more than 15 rounds of ammunition.” Deferring to the commentary, both the district court and the Fifth Circuit held that the firearm in Mr. Beaird’s case was “capable of accepting a large capacity magazine,” thereby enhancing his base offense level and sentence.

Because the decision in *Beaird* will directly impact the issue, set out in I.b. *infra.*, Mr. Aguilar asks that his petition be held pending that decision.

I.b. The district court erred in deferring to Guideline commentary to find that a 31-round magazine is a “large capacity magazine[s]” in applying an enhanced base offense level under U.S.S.G. § 2K2.1(a)(4)(B)

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* 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).

Later still, in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Court categorically rejected deference to administrative agencies’ interpretations of the statutes they administer, *id.* at 411-412, overruling the deference doctrine set forth in *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984). *Loper Bright* not only reinforces that reflexive deference is not appropriate with respect to Guidelines commentary but suggests that no deference to the Guidelines commentary is ever appropriate.

Whether to give deference and level of deference paid to the Guidelines is likely dispositive here, which turns on whether a 31-bullet magazine is a “large capacity magazine.” Guideline 2K2.1 provides for an enhanced base offense level:

if--

(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 it has also 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 an 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,” that used 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.

Accordingly, this case should be held pending the decision in *Beaird*.

II. This Court should grant, vacate, and remand for reconsideration after the en banc Fifth Circuit decides *United States v. Squire*, No. 25-30324 (5th Cir. reh’g en banc granted July 20, 2026).

In *Squire*, the en banc Fifth Circuit will reconsider whether its precedent “is based on an erroneous reading of *Scarborough v. United States*, 431 U.S. 563 (1977),” and finally may “apply the [*United States v.*] *Lopez*[,514 U.S. 549 (1995)]

framework to § 922(g)(1)” and “bring” the Fifth Circuit’s “precedent into conformity with Supreme Court precedent and the Constitution.” Pet. for Reh’g En Banc iv, *United States v. Squire*, No. 25-30324 (5th Cir. Jun. 16, 2026), ECF 75. Section 922(n) relies on a constitutional nexus similar to Section 922(g)(1), in that it forbids receipt of any firearm “which has been shipped or transported in interstate or foreign commerce.”

“Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.” *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). These intervening events “may include a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general.” *Lawrence*, 516 U.S. at 166–67 (internal citations omitted) (citing cases). The upcoming decision in *Squire*, a controlling and likely material decision of a lower court, falls comfortably within this framework. Thus, this Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Squire*.

III. This Court should delineate the boundaries of federal authority under the Commerce Clause in the firearm context

A predecessor to 18 U.S.C. § 922(g), the Omnibus Crime Control and Safe Streets Act of 1968 prohibited “[a]ny person who...has been convicted by a court of the United States or of a State...of a felony” from receiving, possessing, or transporting “in commerce or affecting commerce any firearm.” Pub. L. No. 90-351, § 1202, 82 Stat. 197. Section 922(n) relies on a constitutional nexus similar to Section 922(g)(1), in that it forbids receipt of any firearm “which has been shipped or transported in interstate or foreign commerce.” Cases upholding the constitutional validity of Section 922(n) rely on the reasoning set forth in the Section 922(g) cases. *See, e.g., United States v. Waldman*, No. 21-10637, 2021 WL 6101365, at *1 (5th Cir. Dec. 21, 2021). Thus, cases addressing the constitutionality of § 922(g)(1) logically apply to the validity of § 922(n).

In *Scarborough v. United States*, this Court addressed “whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the *statutorily* required nexus between the possession of a firearm by a convicted felon and commerce.” 431 U.S. at 564 (emphasis added). *Scarborough* answered this question “yes,” but the Court did not linger on the constitutional implications of its statutory construction. *See id.* at 577; *see also United States v. Johnson*, 42 F.4th 743, 750 (7th Cir. 2022) (noting that the decision in *Scarborough* “was one of statutory interpretation”); *United States v. Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc) (“[T]he Court’s holding in *Scarborough* was statutory, not constitutional.”).

This Court *did* examine the constitutional question presented by 18 U.S.C. § 922(q) in *United States v. Lopez*, 514 U.S. 549 (1995). The statute “made it a federal offense ‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.’” *Id.* at 551 (quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)). The district court held that the act constituted a valid exercise of Congress’s commerce power, but the appellate court reversed. *Id.* at 551–52. This Court affirmed the appellate court’s ruling that the statute lay “beyond the power of Congress under the Commerce Clause.” *Id.* at 552.

In so doing, the Court cabined Congress’s commerce power to “three broad categories of activity” subject to regulation: (1) “the use of the channels of interstate commerce”; (2) activities, even if intrastate, that threaten “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” *Id.* at 558–59 (internal citations omitted). The Court quickly disposed of any justification for § 922(q) under the first two categories, focusing its inquiry on the third. *Id.* at 559. It noted that § 922(q) was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise,” elaborating in a footnote that “States possess primary authority for defining and enforcing the criminal law” and that federal criminalization of “conduct already denounced as criminal by the States...effects a change in the sensitive relation between federal and state criminal jurisdiction.” *Id.* at 561 & n.3. The

Court also expressed deep concern that the government’s arguments for why possession of a firearm in a local school zone substantially affected commerce lent themselves to no limiting principle, opening the door to a “a general federal police power.” *Id.* at 563–66. Ultimately, the Court concluded that “possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.* at 567. “Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.” *Id.*

Given *Lopez*, it is “doubt[ful] that § 922(g)(8)” — and by extension § 922(n) — “is a proper exercise of Congress’s power under the Commerce Clause.” *Rahimi*, 602 U.S. at 765 n.6 (2024) (citing *Lopez*, 514 U.S. at 585 (Thomas, J., concurring)) (Thomas, J., dissenting). But lower courts cannot conclusively resolve the tension between *Scarborough* and *Lopez*. The ultimate question posed by *Lopez* — “whether” intrastate possession (or receipt) of a firearm that crossed state lines long before the regulated possession (or receipt) “affect[s] interstate commerce sufficiently to come under the constitutional power of Congress to regulate” — “can be settled finally only by this Court.” *United States v. Morrison*, 529 U.S. 598, 614 (2000) (cleaned up).

A. Federal appellate courts differ on the relationship between *Scarborough* and *Lopez*

Federal courts have “cried out for guidance from this Court” on this issue for decades. *Alderman v. United States*, 562 U.S. 1163, 131 S. Ct. 700, 702 (2011)

(Thomas, J., dissenting from denial of certiorari). Simply put, “*Scarborough* is in fundamental and irreconcilable conflict with the rationale of the United States Supreme Court in [*Lopez*].” *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting). Until recently, the Fifth Circuit has appeared committed to “continue to enforce § 922(g)(1)” unquestioningly because it considered itself “not at liberty to question the Supreme Court’s approval of the predecessor statute to [§ 922(g)(1)].” *United States v. Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (per curiam). See also *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (per curiam) (Garwood, J., concurring) (“one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce,” but concluding that *Scarborough*’s “implication of constitutionality” “bind[s] us, as an inferior court,...whether or not the Supreme Court will ultimately regard it as a controlling holding in that particular respect.”).

The Fifth Circuit is not alone. See, e.g., *United States v. Patterson*, 853 F.3d 298, 301–02 (6th Cir. 2017) (“If the *Lopez* framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent,” i.e., *Scarborough*, “that does not squarely address the constitutional issue.” (quoting *Alderman v. United States*, 562 U.S. 1163, 131 S. Ct. at 703 (Thomas, J., dissenting from denial of certiorari))); *United States v. Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir.

2002) (although “[t]he vitality of *Scarborough* engenders significant debate,” committing to “follow *Scarborough* unwaveringly” “[u]ntil the Supreme Court tells us otherwise”); *United States v. Bishop*, 66 F.3d 569, 587–88, 588 n.28 (3d Cir. 1995) (noting that, until the Supreme Court is more explicit on the relationship between *Lopez* and *Scarborough*, a lower court is “not at liberty to overrule existing Supreme Court precedent”); *United States v. Patton*, 451 F.3d 615, 634–35 (10th Cir. 2006) (collecting cases).

Thus, nine courts of appeals have upheld § 922(g)(1) based solely on *Scarborough*’s minimal nexus test. See *United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216–17 (2d Cir. 2001) (per curiam); *United States v. Gateward*, 84 F.3d 670, 671–72 (3d Cir. 1996); *Rawls*, 85 F.3d at 242–43; *United States v. Lemons*, 302 F.3d 769, 771–73 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam); *United States v. Hanna*, 55 F.3d 1456, 1461–62, 1462 n.2 (9th Cir. 1995); *United States v. Dorris*, 236 F.3d 582, 584–86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). Only two courts of appeals have engaged in *Lopez*’s substantial-effects test and reasoned that § 922(g)(1) is constitutional under it. See *United States v. Crump*, 120 F.3d 462, 466 & n.2 (4th Cir. 1997) (citing *United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995) (en banc), *abrogated on other grounds by Rehaif v. United States*, 588 U.S. 225 (2019)); *United States v. Chesney*, 86 F.3d 564, 568–70 (6th Cir. 1996).

Because courts often fail to apply the *Lopez* test to firearm possession, or receipt, cases at all, defendants across the country lack the constitutional protection from congressional overreach provided by *Lopez*.

B. An unchecked Commerce power would significantly expand Congress's reach into state affairs

The federal government's enumerated powers are “few and defined,” while the powers which remain in the state governments are “numerous and indefinite.” *Lopez*, 514 U.S. at 552 (citing *The Federalist* No. 45, pp. 292–293 (C. Rossiter ed. 1961)). One such enumerated power is “[t]o regulate Commerce . . . among the several States[.]” U.S. Const. art. I, § 8, cl. 3. But without limits on federal regulatory power, our nationwide regulation would become “for all practical purposes . . . completely centralized” in a federal government. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935). And “constitutional limits on governmental power do not enforce themselves”; instead, “[t]hey require vigilant—and diligent—enforcement.” *Seekins*, 52 F.4th at 989 (Ho, J., dissenting from denial of rehearing en banc).

“Congress may conclude that a particular activity substantially affects interstate commerce” to regulate the activity, but Congress’s mere act of legislating “does not necessarily make it so.” *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557 n.2) (cleaned up). Here, inserting the phrase “which has been shipped or transported in interstate or foreign commerce” after any object connected to intrastate activities that Congress may want to police cannot fulfill the constitutional requirement. See *Alderman*, 131 S. Ct. at 702 (Thomas, J., dissenting from the denial of

certiorari) (“*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook.”). A judicial blessing of constitutional magnitude for this minimal nexus would “effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). The Commerce Clause power would be reduced to a rubber stamp, opening the door to a federal police power in direct contravention of the federal government the Constitution enshrines. See *Morrison*, 529 U.S. at 618 (“the Founders denied the National Government” “the police power,” “reposed in the States”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (the Commerce Clause “must be read carefully to avoid creating a general federal authority akin to the police power”).

IV. Section 922(n) cannot withstand Second Amendment scrutiny

The Second Amendment guarantees “the right of the people to keep and bear arms.” U.S. Const. amend. II. Yet 18 U.S.C. § 922(n) denies that right to anyone “who is under indictment.” Without any proper historical analogue, this Court should hold that § 922(n) prosecutions fall outside the Second Amendment’s unqualified command.

“When the Second Amendment’s plain text covers an individual’s conduct,” the government must “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022). The governing “historical inquiry”

requires lower courts to find “a historical regulation” or “analogue” that is “relevantly similar” to a “modern firearm regulation” to establish the constitutionality of the modern law. *Id.* at 28–29 (quoting C. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 773 (1993)). Relevant similarity, as sketched out by *Bruen*, means that the regulations must match on “how and why” the Second Amendment right is burdened. *Id.* at 29. Otherwise stated, “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations....” *Id.* (cleaned up).

United States v. Rahimi, 602 U.S. 680 (2024), applied *Bruen* to a conviction under 18 U.S.C. § 922(g)(8)(C)(i). But *Rahimi* “conclude[d] 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.” *Rahimi*, 602 U.S. at 702 (emphasis added). True, *Rahimi* clarified that “the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition,” *id.* at 692 (citing *Bruen*, 597 U.S. at 26–31) (emphasis added), emphasizing that “a ‘historical twin’ is not required,” *id.* at 701 (quoting *Bruen*, 597 U.S. at 30) (emphasis in *Rahimi*). And it found that “Section 922(g)(8)[’s] ...prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition th[at] surety and going armed laws,” both “founding era regimes,” “represent.” *Id.* at 698.

But *Rahimi*’s reasoning left unresolved whether the government could invoke this tradition to justify a statute like § 922(n), which imposes a firearm receipt ban

regardless of any threat, judicially determined or otherwise, that an individual person may pose.

Under *Bruen*, courts must consider the laws in place at the time of the nation's founding, Section 922(n)'s history does not begin until 1938 with the Federal Firearms Act ("FFA")—150 years after the Constitution was ratified. *See United States v. Quiroz*, 629 F. Supp. 3d 511, 517 (W.D. Tex. 2022), rev'd, *United States v. Quiroz*, 125 F.4th 713 (5th Cir. 2025). This applied only to those charged with a crime of violence. *Id.* A 1961 amendment to the FFA expanded the prohibition to include all persons under indictment for a crime punishable by more than one year. *Id.* at 518. In 1968 the "Gun Control Act of 1968" ("GCA") expanded the prohibition to persons under state felony indictment. *Id.* The government cannot argue that § 922(n) or its direct precursors are themselves a part of the nation's historical tradition of regulating firearms as envisioned by *Bruen*.

Pretrial detention is also not a firearm regulation relevant to the Second Amendment analysis because the government's historical analogues must regulate firearms. Pretrial detention is not a firearm regulation, so it cannot justify § 922(n). This Court's contrary conclusion misapplies *Bruen* and *Rahimi*.

Further, founding era laws that allowed for pretrial detention of an indicted individual—causing a loss of liberty and thus restriction on having firearms—are not analogous to current law prohibiting an indicted individual from possessing a firearm in the community. As the district court in *Quiroz* explained, disarming someone who was out of custody at the founding was "likely unthinkable at the

time—no firearm in the wilderness meant almost certain death.” 629 F. Supp. 3d at 522. That felony bond was rare during the founding era, does not mean that judges would have surrendered an indicted individual’s firearm while awaiting trial out of custody.

This Court should accordingly grant certiorari to decide this important 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.”).

Conclusion

Petitioner Aguilar respectfully submits that this Court should grant certiorari, vacate the judgment of the United States Court of Appeals for the Fifth Circuit, and remand for reconsideration after the en banc Fifth Circuit decides *Squire*. Alternatively, they ask that the case be held pending a decision in *Beaird*.

Respectfully submitted this 21st day of October 2026.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Christy Martin

Christy Martin
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
christy_martin@fd.org

Attorney for Petitioner
TJ Aguilar