No. 21-6768

IN THE

Supreme Court of the United States

EMANUEL E. GOINES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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February 07, 2022

QUESTION PRESENTED

Federal law makes it a crime for a person with a prior felony conviction to "possess . . . in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). Is it consistent with this Court's modern Commerce Clause jurisprudence to interpret Section 922(g)(1) such that Congress has permanent authority to regulate any firearm once it has been a part of interstate commerce?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because it concerns the structural limits on Congress's constitutional authority, which are fundamental to protecting individual liberty.

SUMMARY OF ARGUMENT

As this Court has repeatedly held, the Constitution creates a federal government of delegated, enumerated, and thus limited powers. Relevant here, Congress has the limited authority "regulate Commerce . . . among the states," U.S. Const. art. I, § 8, cl. 3. But in interpreting 18 U.S.C. § 922(g)(1), the Tenth Circuit (as well as all the federal courts of appeals) has issued expansive rulings that threaten, as James Madison warned, to grant Congress "an indefinite supremacy over all persons and things[.]" Federalist No. 39 (James Madison).

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[1] Rule 37 statement: All parties were timely notified of and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

Section 922(g)(1) makes it unlawful for a felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition[.]" 18 U.S.C. § 922(g)(1). The Tenth Circuit says that it is within Congress's authority to regulate "any firearm that has ever traversed state lines." *United States v. Patton*, 451 F.3d 615, 634 (10th Cir. 2006). It could be twenty years since a firearm traveled in interstate commerce, and yet, according to the Tenth Circuit, Congress may continue to regulate that firearm under the commerce power. "Commerce" here is more akin to an ineradicable virus, like chicken pox, that, once acquired, is carried by the victim forever.

As a result, Emmanuel Goines was convicted under Section 922(g)(1) of being a felon in possession of a firearm, even though the only connection to interstate commerce was that the firearm "was manufactured in the country of Austria," "imported to the United States through the State of Georgia," and "recovered in the State of Kansas." There was no evidence Mr. Goines's possession of the firearm was in any way connected to interstate commerce. Pet. Br. at 10–11.

Yet it is the possessing of the firearm by a felon that is the act Congress is supposedly regulating pursuant to the commerce power. Otherwise, it would be quite a disruption to our constitutional order to say that Congress has a general power over all guns and everything anyone does with them, or that Congress has a general power over all felons and everything they do. But if those are the powers the government is *de facto* arguing for then, at the very least, the

people should be notified that their Constitution has been *sub rosa* amended so significantly.

Perhaps, theoretically, someone could mine the materials for a gun entirely intrastate and forge a novel firearm constructed from unique schematics that have never been used before in interstate commerce. To be extra careful, this hypothetical manufacturer would probably have to ensure that he personally had never traveled interstate, nor had any of the tools used to manufacture the weapon moved in interstate commerce. Then, just maybe, a felon could possess that weapon outside of the court-construed ambit of Congress's commerce power jurisdiction.[2]

That we even must consider such fanciful hypotheticals underscores how far this Court's decisions have expanded Congress's commerce power jurisdiction. And unless the government concedes it's possible that such a purely intrastate-fabricated gun could avoid congressional jurisdiction, then the government is in fact arguing that the power to "regulate Commerce . . . among the states" gives Congress power over every gun in the country and anything anyone does with one.

Several of the lower courts correctly agree that it is irrational to characterize a firearm that once traveled through interstate commerce as forever an object of or in interstate commerce. *See e.g., Patton*, 451 F.3d at 621–22; *United States v. Alderman*, 565

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[2] The hypothetical interstate-commerce-avoiding felon would of course likely be subject to numerous charges under state law. This case is not about whether it is a good idea to prohibit felons from having guns, but which governing body has the authority to do so.

F.3d 641, 647 n.4 (9th Cir. 2009). But, by erroneously relying on *Scarborough v. United States*, 431 U.S. 563 (1977)—a case decided well before the revolutionary decisions in *United States v. Lopez*, *United States v. Morrison*, and *Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*)—those lower courts have held that Congress's authority can still reach such objects.

This interpretation of Congress's power is incompatible with this Court's modern Commerce Clause jurisprudence, threatening to undo any limitations that this Court has recognized on Congress's authority. This Court has the opportunity here to reinforce that there are real, judicially administrable limitations to the commerce power by interpreting Section 922(g)(1) to require a felon's possession of a firearm to contemporaneously affect interstate commerce. Pet. Br. at 3–4.

ARGUMENT

I. *LOPEZ*, *MORRISON*, AND *NFIB* ESTABLISHED JUDICIALLY ADMINISTERABLE BOUNDARIES TO THE COMMERCE POWER THAT LIMIT CONGRESS'S POWER OVER FIREARMS

Among the "defined and limited" powers of Congress, *Marbury v. Madison*, 5 U.S. 137, 176 (1803), is the power to "regulate Commerce . . . among the states." U.S. Const. art. I, § 8, cl. 3. While the power to "regulate Commerce"—"to prescribe the rule by which commerce is to be governed"—may be "complete in itself [and] may be exercised to its utmost extent," it does not "comprehend" commerce that is "carried on between man and man in a State,

or between different parts of the same State, and which does not extend to or affect other States." *Gibbons v. Ogden*, 22 U.S. 1, 194–97 (1824). Thus, there are two broad categories that Congress may regulate under the Commerce Clause itself: first, the channels of interstate commerce; and second, the instrumentalities of, objects in, and persons engaged in interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

The Commerce Clause may be both expanded and limited when joined with the Necessary and Proper Clause. *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring). The Necessary and Proper Clause allows Congress leeway to execute its other powers. This Court has recognized a third category of activities that Congress has the power to regulate as incidental to the Commerce Clause: activities that have substantial effects on interstate commerce. *Id.* at 33 (Scalia, J., concurring); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 585–86 (1985) (O'Connor, J., dissenting); Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 618 (2002).

Yet the Necessary and Proper Clause also limits Congress's power. Unlike when Congress acts exclusively within the scope of an enumerated power, an exercise of incidental power pursuant to the Necessary and Proper Clause is constrained by both its necessity and its propriety. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *Raich*, 545 U.S. at

39 (Scalia, J., concurring);[3] *NFIB v. Sebelius*, 567 U.S. 519, 560–61 (2012) (making "propriety" the restraint that kept the Affordable Care Act's individual mandate from being upheld as necessary and proper to the regulation of interstate commerce); *see also Knowlton v. Moore*, 178 U.S. 41, 87 (1900) (noting an "elementary canon of construction which requires that effects be given to each word of the constitution"). To facilitate the vitality of these limits, the Court has drawn practicable, judicially administrable lines beyond which Congress cannot go when choosing "necessary" means to execute its authority to regulate commerce. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 600 (2011); *see also Lopez*, 514 U.S. at 574–75, 580–83 (1995) (Kennedy, J. concurring) (noting how the "Court has participated in maintaining the federal balance through judicial exposition of doctrines"); *NFIB*, 567 U.S. at 560–61 (making it clear that the Necessary and Proper Clause creates strong limits on the implied powers of Congress). This Court, in *Lopez*, *Morrison*, and *NFIB* did just that. The mere fact that a purely intrastate, noneconomic activity

[3] Chief Justice Marshall parsed the clause as follows: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. at 421. In his *Raich* concurrence, Justice Scalia wrote that "even when the end is constitutional and legitimate, the means must be 'appropriate' and 'plainly adapted' to that end. Moreover, they may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" 545 U.S. at 39 (Scalia, J., concurring).

might have a substantial effect on interstate commerce is not a sufficient basis for Congress to regulate it, even under the combination of the Commerce Clause and Necessary and Proper Clause. 514 U.S. at 560; *United States v. Morrison*, 529 U.S. 598, 613 (2000); *but see Raich*, 545 U.S. at 26.[4]

In *Lopez*, the Court held that Congress lacked the power to make 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." 514 U.S., at 551, 558–59. Because simply possessing a firearm could not reasonably be characterized as a "channel" or "instrumentality" of interstate commerce, the Court analyzed the law as regulating an activity that substantially affects interstate commerce. *Id.* at. 559. Although not explicitly stated in such terms in *Lopez*, the Court scrutinized the necessity and propriety of the law.

The Court took special notice of the Gun-Free School Zone Act's distance from any economic activity. *Id.* at 561. Not only was this consistent with the Court's previous decisions, but it also served both as

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[4] In *Raich*, the Court upheld Congress's authority over "'the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician.'" 545 U.S. at 26. It did so, in part, because that "narrower 'class of activities" was regulated under a broader economic regulation of "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* This decision may water down the rule of *Lopez* and *Morrison* by blurring the lines between economic and noneconomic activity. *Id.* at 49 (O'Connor, J., dissenting). But this Court should seek to give that distinction substance and not turn it into a mere formality.

an epistemic tool to judge necessity and a means to preserve constitutional values of federalism. Federal laws regulating local economic activity may sometimes be necessary to regulate interstate commerce. But laws regulating wholly intrastate non-economic activity are simply less likely to be necessary to regulating interstate commerce. *See Raich*, 545 U.S. at 35–36 (Scalia, J., concurring); *Morrison*, 529 U.S. at 612 (noting that *Lopez* was partly premised on the observation "that the link between gun possession and a substantial effect on interstate commerce was attenuated"). Moreover, "'in the light of our dual system of government,'" the economic-noneconomic distinction helps prevent obliterating "'the distinction between what is national and what is local and create a completely centralized government.'" *Lopez*, 514 U.S. at 557 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

A few years later in *Morrison*, in rejecting the proposition that gender-motivated violence is economic activity, the Court clarified that the economic-noneconomic distinction for purely intrastate activity was meant to be a clear line beyond which Congress could not regulate. 529 U.S. at 613. The Court developed the rule in *Lopez* by insisting that empirical demonstrations (at least perfunctory ones) that a specific intrastate noneconomic activity substantially affects interstate commerce does not permit Congress to evade the rule created in *Lopez*. *Id.* at 614–15. In other words, Congress's regulatory authority extends only to certain types of activity, and not just to any activity that passes some threshold degree of effect on interstate commerce.

Unlike this case, the laws at issue in *Lopez* and *Morrison* did not require any actual nexus with interstate commerce. 514 U.S. at 561–62; 529 U.S. at 613. Section 922(g)(1) says that its scope is limited to "interstate or foreign commerce" or possession "affecting commerce," but, in reality, these boilerplate phrases highlight the need for this Court's clarification. Is merely intoning the words "commerce" enough for this Court to rubberstamp everything Congress does? Does the scope of congressional power come down to a drafting problem, where legislative drafters simply must remember to copy and paste the words "interstate commerce"? Does Congress acquire power over all guns and everything anyone does with them if the words "interstate commerce" are recited?

We are perilously close to the answer to all these questions being "yes." But, as *Lopez*, *Morrison*, and *NFIB* show, constitutional limits cannot be easily defeated by ritually intoning "commerce."

To date, this Court has not confirmed what constitutes a sufficient jurisdictional nexus to place something within Congress's power to regulate. But it has suggested, through the canon of constitutional avoidance, that the rote recitation of a "jurisdictional element" will not do. In *Jones v. United States*, for example, decided post-*Lopez*, the Court refused to interpret a federal arson statute as "mak[ing] virtually every arson in the country a federal offense." 529 U.S. 848, 859 (2000). There, the government argued that basically every structure in the country was part of "interstate commerce" and thus federal prosecution for arson was always available. *Id.* at 857 ("Were we to adopt the Government's expansive

interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain.") With § 922(g)(1), the government has often argued the same thing regarding guns.

The government should be asked which type of jurisdiction it asserts, for there are only three reasonable options. First, is it that Congress has power over everything anyone does with a gun anywhere in the country? That view was rejected in both *Lopez* and, implicitly, in *Jones*. Or, second, perhaps the government asserts jurisdiction over the person him- or herself, here a felon, maybe as some sort of object or instrumentality of interstate commerce or someone that "substantially affects" interstate commerce. That would be an extraordinary assertion of a sort of *in personam* jurisdiction over felons, who are generally defined as a function of state law. Finally, it could be the act of a felon possessing a gun that purportedly is part of interstate commerce or substantially affects interstate commerce. That would call for a *Lopez*-type analysis, which here the statute is likely to fail.

II. A BLANKET PROHIBITION ON FELONS POSSESSING FIREARMS IS EVEN FURTHER REMOVED FROM INTERSTATE COMMERCE THAN THE LAW IN *LOPEZ*

The Gun-Free School Zone Act in *Lopez* created a circumscribed area—within 1,000 feet of a school—around which possession of a gun was prohibited. *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). That physical limit gave the statute a more meaningful connection to interstate commerce than the blanket prohibition on felons-in-possession at issue here. As

Justice Breyer noted in his dissent, gun violence around schools is a significant problem, and education "has long been inextricably intertwined with the Nation's economy." *Id.* at 619–20 (Breyer, J., dissenting). This Court did not contest the veracity of Justice Breyer's point, but rather determined that a causal connection to interstate commerce cannot itself be the sole basis for regulating noneconomic intrastate activity. *Id.* at 563–64. When Congress must "pile inference upon inference" to assert that an activity substantially affects interstate commerce, this Court is skeptical of Congress's authority to regulate that activity. *Id.* at 567.

Here, the only evidence of a connection to interstate commerce is that the firearm Mr. Goines "briefly possessed" was connected to interstate commerce at some indeterminate point in the past. Pet. Br. at 11. Without "pil[ing] inference upon inference" it is unclear why a past connection to interstate commerce turns the act of a felon possessing a firearm into something that substantially affects interstate commerce.

At best, if the government chooses to focus its jurisdictional arguments on the act of possession rather than the person or the gun, it should argue that felons in possession of firearms are more likely to commit crimes and that those crimes, whatever they may be, will substantially affect interstate commerce, especially in the aggregate. While conceivable in the abstract, this argument goes too far and transgresses the boundaries on the commerce power established in *Lopez*, *Morrison*, and *NFIB*. First, this framing would allow for general federal criminal statutes of all types, regardless of jurisdictional elements, something this

Court was not willing to endorse in either *Lopez* or *Jones*. Second, in *NFIB* this Court did not—and could not reasonably—deny that the failure to purchase health insurance had significant effects on interstate commerce, especially in the aggregate. *NFIB*, 567 U.S. at 548–51. Yet such obvious effects on interstate commerce were not enough to sustain the individual mandate under the commerce power, any more than the obvious economic effects of crime should sustain the statute here. *Id.* at 552–61. It is the character of the regulated action—inactivity in *NFIB*—that mattered. *Id.*

Here, the character of the law—the blanket prohibition on felons-in-possession—is too akin to a general criminal statute to be sustained under the commerce power.

III. AN EXPANSIVE INTERPRETATION OF THE LAW HERE CANNOT BE JUSTIFIED AS AN ENFORCEMENT MECHANISM FOR A LARGER ECONOMIC REGULATORY SCHEME

A few federal appellate courts have suggested that Congress has the authority to ban felons from possessing a firearm if that firearm is an instrumentality or object of interstate commerce because a total ban of this nature is conducive to limiting "the market for firearms," and discouraging the "shipping, transporting, and receiving firearms in or from interstate commerce." *United States v. Chesney*, 86 F.3d 564, 571–72 (6th Cir. 1996); *see also United States v. Lewis*, 100 F.3d 49, 51, 53 (7th Cir. 1996) ("[I]t would be difficult, if not impossible, to attempt to draw practical distinctions between the

possession of firearms which have moved in interstate commerce recently, and the possession of firearms whose travels are distant in time.”).

But those arguments did not save the law in *Lopez*, which, as mentioned in Part II, was more specific and had a better direct connection to interstate commerce than the general ban on felons-in-possession. The Court characterized the law in *Lopez* as “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Lopez*, 514 U.S. at 561. Nor was it “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Id.*

While there are many federal gun laws regulating the commercial selling and purchasing of guns, this law regulates mere possession. Allowing Congress to reach intrastate, noneconomic activity—such as a felon possessing a gun—because there is a comprehensive scheme on regulating interstate economic activity—the purchasing, selling, and transportation of guns—would, again, eviscerate the meaningful limits on the commerce power established in *Lopez*, *Morrison*, and *NFIB*.

The government’s best response here would seem to be *Raich*, which upheld a prohibition on medical marijuana partially because it was part of a “comprehensive regulatory scheme.” *Raich*, 545 U.S. at 27. Yet that rationale is inapposite. First, the “comprehensive scheme” in *Raich* was a near-complete (except for research purposes) prohibition on marijuana manufacture, sales, and possession by

anyone—an attempt to essentially eradicate the product from the country. The regulatory scheme around guns does not—and cannot per the Second Amendment—seek to eliminate all possession. Second, *Raich* explicitly distinguished the law in *Lopez*—which, again, had a closer connection to interstate commerce than the law here—as a law that was not part of a comprehensive regulatory scheme: "That classification [of marijuana], *unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990*, was merely one of many 'essential part[s] of a larger regulation of economic activity,' in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 24–25 (emphasis added).

Finally, while regulating the purchasing and selling of firearms by felons is likely within current commerce power jurisdiction, that does not mean that all felons-in-possession fall within Congress's domain. A felon attempting to purchase a firearm or possessing a firearm he purchased has a contemporary relationship to interstate commerce. But here—where the government showed only that Mr. Goines briefly possessed and then discarded a firearm and did not show that he owned or purchased the firearm, Pet. Br. at 11—the connection to interstate commerce is attenuated. *Lopez*, *Morrison*, and *NFIB* show that a meaningful line must be drawn between the felon who picks up a gun he found on the ground and one who purchases one in a store. That line, while not always easy to draw, is essential to our constitutional structure.

IV. THIS COURT SHOULD CLARIFY HOW AND WHETHER *SCARBOROUGH* COEXISTS WITH *LOPEZ*, *MORRISON*, AND *NFIB*

Although it is certainly not true in all cases, lower courts have typically applied a surface-level analysis for how *Lopez* and *Morrison* affect the constitutionality of § 922(g)(1). A common formulation is to start with *Scarborough*, 431 U.S. 563, where this Court concluded that "18 U.S.C. app. Sec. 1202(a), the predecessor of Sec. 922(g)(1), required only the minimal nexus that the firearm have been, at some time, in interstate commerce." *United States v. Hanna*, 55 F.3d 1456, 1462 (9th Cir. 1995) (internal quotation marks omitted). The courts then point to the language in *Lopez* about a "jurisdictional element." *United States v. Polanco*, 93 F.3d 555, 563 (9th Cir. 1996). And finally, the courts conclude that they are bound by *Scarborough* to determine that any "minimal nexus" to interstate commerce will do. *United States v. Farnsworth*, 92 F.3d 1001, 1006 (10th Cir. 1996); *see also United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996); *United States v. Wesela*, 223 F.3d 656, 659–60 (7th Cir. 2000); *United States v. Dorris*, 236 F.3d 582, 584–86 (10th Cir. 2000).

But whether the statute in question exceeded Congress's authority was not decided in *Scarborough*. As Justice Thomas wrote in *Alderman*, dissenting from denial of certiorari:

> The question in that case was whether the "statutorily required nexus between the possession of a firearm by a convicted felon and commerce" could be satisfied by evidence that

> the gun had once traveled in interstate commerce. *Ibid.* The Court held that such evidence was sufficient, noting that the legislative history suggested that Congress wished to assert "its full Commerce Clause power." *Id.,* at 571. . . . No party alleged that the statute exceeded Congress' authority, and the Court did not hold that the statute was constitutional. The Ninth Circuit concluded that *Scarborough* had "implicitly assumed the constitutionality of" § 1202(a).

Alderman v. United States, 562 U.S. 1163, 1165 (2011) (Thomas, J., dissenting from denial of certiorari). But more importantly, the lower courts do not generally engage with whether the reasoning of *Lopez* and *Morrison* requires a more substantive connection to interstate commerce for Congress to regulate noneconomic intrastate activity. Given the function of the courts of appeals, a hesitancy to do that is understandable. Yet this pattern of reliance on the uneasy relationship between *Scarborough* and *Lopez* and its progeny suggests that lower courts are in need of guidance from this Court.

CONCLUSION

To ensure that the holdings of *Lopez* and *Morrison* have vitality and reinforce that Congress possesses only defined and limited powers, the Court should grant certiorari.

Respectfully submitted,

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February 07, 2022