NO._____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN LYNDEL MASSEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U . S.C. § 3006A(d)(7) , KEVIN LYNDEL MASSEY asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court and on appeal to the United States Court of Appeals for the Fifth Circuit.

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QUESTION PRESENTED

1. Whether the Second Amendment forbids the federal government from banning for life and criminalizing any possession of firearms by felons convicted of only state felony crimes, while allowing possession of firearms by non-felons.

2. If the answer to the first question is "yes", the following question is presented: Whether, following the holding in United States v. Lopez , Congress' Commerce Clause power extends to cover state felons such that such state felons may be banned for life from possessing a firearm and may be imprisoned under 922(g)(1) if they are found in possession of a firearm.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Kevin Lyndell Massey respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on April 5, 2017.

OPINION AND ORDER BELOW

On Feb. 22, 2017, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Mr. Massey's conviction and sentence. *United States v. Massey*, 849 F. 3d 262 (5th Cir. 2017). The Court of Appeals relied on its Second Amendment framework adopted in NRA of Am. v. Bureau of Alcohol, 700 F.3d 185, 194 (5th Cir. 2012) and noted that internal court rules precludes consideration of the constitutionality of18 U.S.C. Section 922(g). The Fifth Circuit, in its opinion, reaffirmed the constitutionality of Section 922(g) in both United States v. Anderson, 559 F.3d 348, 352 & n.6 (5th Cir. 2009), and National Rifle Ass'n, 700 F.3d at 194 n.7. The Fifth Circuit also add that it interpreted District of Columbia v. Heller, 554 U.S. 570, 626, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), as t specifically preserving the constitutionality of felon-in-possession statutes.

The Massey's court also upheld his s conviction under Section 922(g)(1) noting that any claim that violates the Commerce Clause in light of *United States*

v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), is also foreclosed under its opinion in *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) and *United States v. de Leon*, 170 F.3d 494, 499 (5th Cir. 1999).

JURISDICTION

On Feb. 22, 2017, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Mr. Massey's conviction and sentence. This petition is filed within 90 days after entry of judgment and is therefore timely. See Sup. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 18 U.S.C. § 922(g). .

CONSTITUTIONAL AND STATUTORY, PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

The Fifth Amendment to the United States Constitution provides, in pertinent part:

A. 18 U.S.C. § 922(g)(1) provides,

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

B. The Commerce Clause, which describes one enumerated power listed in the United States Constitution under Article I, Section 8, Clause 3

The Congress shall have power

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

STATEMENT OF THE CASE

A. District court proceedings.

What brings Petitioner Massey before this court is his participation in an armed non-governmental citizen militia group which was patrolling the border between the United States and Mexico to allegedly deter the entry of illegal aliens. *United States v. Massey*, 849 F. 3d 262, 263 (5th Cir. 2017). See, APP. A, at 3-4. At the time of his arrest, the militiamen were camped near the U.S./Mexico border at the Sabal Palms Sanctuary in extreme South Texas, and south of Brownsville, Texas, on the property of Rusty Monsees. Massey personally, as well as his group, received implied permission from the Sanctuary administrator, who told the group he would not interfere with them if they conducted patrols on Sanctuary property and who believed patrols were coordinated with the Border Patrol. See, APP. A, at 3-4.

The armed citizens group, including Massey, eventually were detected by Border Patrol. During one of these encounters, Border Patrol Agent Danny Cantu advised one of the members of the group to leave the area. While talking with that militiaman, shots rang out. Another Border Patrol Agent, Marcos Gonzales, fired several shots at another armed militiaman, later a co-defendant,

nearby. See, APP. A, at 3-4. Cantu rushed towards the sound of the shots and ran into Massey, who was on Sanctuary property, and who was armed with a Centurion 39 Sporter long rifle. See, APP. A, at 3-4. Border Patrol agents immediately seized the firearms carried by Massey and the other patrolmen; Massey was also carrying a Springfield XDS .45 caliber pistol. Massey temporarily taken into custody. Local state police were there, as well, but did nothing to Massey or any other militiaman. After investigation by Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE"), Massey was later arrested in the parking lot of the motel in which he was staying. He was inside his hotel room and upon request by agents, left his room immediately. Once outside the motel, he informed agents that he was armed and thereafter agents removed a Produkt model XDS .45 caliber handgun from Massey's front pocket. Agents seized another .45 caliber handgun from his hotel room. See, APP. A, at 3-4.

Massey was charged with four counts of possession of a firearm by a convicted felon under *18 U.S.C. § 922(g)*. He moved to dismiss on the grounds that he was complying with Texas's felon-in-possession statute and that *Section 922(g)* is unconstitutional as applied to him. He also claimed that the government could not satisfy the jurisdictional element of *Section 922(g)*, as applied to him, because, among numerous other things, the firearms had not traveled in interstate

commerce. See, APP. A, at 3-4.

That motion was denied, when, prior to trial, Judge Andrew S. Hanen, in response to the last of Massey's Motions to Dismiss, held that Massey was subject to prosecution under 18 U.S.C. 922(g)(1) .See, APP. B., *United States of America v. Kevin Lyndel Massey*, Southern District 1:14-CR-876-1, Memorandum and Order (S. D. Tex. June 5, 2015).

In its June 5, 2015 Memorandum and Opinion, the District Court followed the two-step inquiry enunciated in *NRA of Am. v. Bureau of Alcohol*, 700 F.3d 185 (5th Cir. 2012)–analyzing whether the denial, under 18 U.S.C. §§ 922(b)(l), (c)(l). of the right of 18-to-20-year-old-adults to keep and bear arms violated the Second Amendment prohibition. See, APP. B, at 4-6. Under this two-step inquiry, which the District court referred to, courts must first determine whether "the conduct at issue falls within the scope of the Second Amendment right." Id. Following the two step analysis under NRA of Am., Judge Hanen held that he did not need to address the second inquiry and apply an appropriate level of means-end scrutiny because, it was clear, following *Heller*, that the Second Amendment, at its core, protects only "law-abiding" citizens. Heller, 554 U.S. at 635. The court noted that convicted felons are not such citizens and thus fall outside of the 2nd Amendment's protection. See, APP. B, at 4-6. As such, there was no need to

move on to the second inquiry because Section 922(g)(l) does not burden conduct falling within the scope of the Second Amendment. See *NRA of Am.*, 700 F.3d at 195. In doing this, however, the District Court recognized this circuit's admission of its uncertainty as to where exactly the Heller Court's "presumptively lawful regulatory measures" (including felon-in possession laws) fall onto the two-step analysis. Id. NRA of Am., 700 F.3d at 196. See, APP. B, at 4-6. The district court also, tacitly recognized that this"for now" approach, bound the district court, thus requiring the court to deny Massey's request to dismiss. See, APP. B, at 4-6.

The case was tried before United States District Court Judge Andrew S. Hanen, who, at the request of Massey, conducted a bench trial. At Massey's bench trial, evidence came in that all of the firearms Massey possessed were manufactured in Vermont or Croatia. APP. A., at 3-4. The government also provided proof that Massey had a 1988 Texas year old conviction of burglary of a habitation for which he was sentenced to five years. After Massey moved for a directed verdict based on his interstate-commerce theory, the district court denied the motion and found Massey guilty on all counts. Two of the four counts were dismissed on the government's motion, and judgment was entered against Massey on the remaining two. He was sentenced, within the guideline range, to 41 months' imprisonment and three years of supervised release. APP. A., at 3-4.

B. Appellate proceedings.

On Feb. 22, 2017, the United States Court of Appeals for the Fifth Circuit upheld Massey's conviction and sentence, and, relying on the Second Amendment framework adopted in *NRA of Am. v. Bureau of Alcohol*, 700 F.3d 185, 194 (5th Cir. 2012), reaffirmed the constitutionality of 18 U.S.C. Section 922(g)(1). APP. A., at 3-4. The Fifth Circuit also held that *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) specifically preserved the constitutionality of felon-in-possession statutes based on Heller's presumptively lawful dicta. Relying on its opinion in *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) *and United States v. de Leon*, 170 F.3d 494, 499 (5th Cir. 1999)., the court also did not find any violation of the Commerce Clause in light of *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). See, APP. A., at 3-4.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 922(g)(1).

ARGUMENT

A. The Court should grant certiorari in this case to decide whether Congress may, after *Heller vs. District of Columbia*, completely infringe on the right of state felons, convicted only of state crimes, to possess a firearm.

1. THE DISTRICT COURT ERRONEOUSLY HELD THAT FELONS ARE NOT PERSONS SUBJECT TO THE PROTECTIONS PROVIDED UNDER THE SECOND AMENDMENT.

The District Court felt that, after Heller, federal courts were left without a framework in which to analyze Second Amendment claims. APP. B., at 3-4. However, it found a vehicle for addressing the issues here in this circuit's recent two-step inquiry enunciated in NRA of Am. v. Bureau of Alcohol, 700 F.3d 185 (5th Cir. 2012). In that case, the NRA, as plaintiff, challenged the constitutionality of certain federal laws (18 U.S.C. §§ 922(b)(l), (c)(l)) prohibiting licensed firearms dealers from selling handguns to individuals under the age of 21. The NRA argued that the federal laws were unconstitutional because they infringed on the right of 18-to-20-year-old-adults to keep and bear arms under the Second Amendment and denied those individuals equal protection under the Fifth Amendment.

Under this two-step inquiry, which the District court referred to, courts must first determine whether "the conduct at issue falls within the scope of the

Second Amendment right." Id. This requires looking to "whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." Id. If the contested law burdens conduct that falls outside the scope of the Second Amendment, the law passes constitutional muster, and courts need not address the second inquiry. Id. at 195. On the other hand, if the challenged law burdens conduct that falls within the Second Amendment's scope, courts proceed to the second inquiry and apply an "appropriate level of means-end scrutiny." What degree of scrutiny applies in this second step "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." Id., quoting United States v. Chester, 628 F.3d 673 (4th Cir. 2010).

In line with Heller's reasoning, any regulatory measure that imposes a "substantial burden upon the core right of self-defense" that the Supreme Court identified as being protected by the Second Amendment must have a "strong justification," whereas a law imposing a less substantial burden should be "proportionately easier to justify." Id. (quoting Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011). As a general guideline, the Fifth Circuit noted

that any law threatening the right of a "law-abiding, responsible adult to possess and use a handgun to defend his or her home and family" is one that threatens a right at the core of the Second Amendment, thereby triggering the highest level of scrutiny. Id.

The district court noted that the Second Amendment, at its core, protects "law-abiding" citizens. Heller, 554 U.S. at 635, (emphasis added). APP. B., at 4-6. The court noted that convicted felons are not such citizens and thus fall outside of the 2nd Amendment's protection. As such, there was no need to move on to the second inquiry because Section 922(g)(l) does not burden conduct falling within thescope of the Second Amendment. See Nat 'l Rifle Ass 'n., 700 F.3d at 195. In doing this, however, the District Court recognized the Fifth Circuit's admission of its uncertainty as to where exactly the Heller Court's "presumptively lawful regulatory measures" (including felon-in possession laws) fall onto the two-step analysis. Id. Nat 'l Rifle Ass 'n, 700 F.3d at 196. In following NRA of Am., the district court also, implicitly recognized that this"for now" approach, bound the district court, thus requiring the court to deny Massey's request to dismiss. Id. NRA of Am., 700 F.3d at 196. See, also, APP. B., at 4-6.

2. HELLER'S PRESUMPTIVELY LAWFUL INTIMATIONS CONCERNING TRADITIONAL BASES FOR DEPRIVING SECOND AMENDMENT RIGHTS HAS RESULTED IN INCONSISTENT INTERPRETATIONS AS TO WHO MAY BE DENIED THEIR SECOND AMENDMENT RIGHTS.

Under 18 U.S.C. Section 922(g)(1), the Gun Control Act makes it is a criminal offense for a felon to possess a firearm. Under the statute, a felon is a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). After *Heller,* most federal circuit courts have concluded that Section 922(g)(1) does not violate the Second Amendment, although not for the same reasons. However, Heller's implicit approval of various historical limitations on gun possession, most of which are not at issue in the case, has perplexed the lower courts and their response to these historical, and presumptively lawful infringements on what is now a sacred right has resulted in the issuing of varied and inconsistent interpretations of how to uphold a restriction on the right to keep and bear arms. See, cf. *United States v. Moore*, 666 F.3d 313, 316-318 (4th Cir. 2012)(holding "presumptively lawful" denial of felon's right to bear arms precludes any facial challenge to 922(g)(1); *Schrader v. Holder*, 704 F.3d 980, 991 (D.C. Cir. 2013) (leaving open the possibility of an as applied challenge), with *Binderup v. Holder*, 836 F. 3d 336, 355-56 (3rd Cir. 2016) (setting up an as applied challenge framework).

Most circuits, including the circuit below, have adopted a "two-step" test.

New York State Rifle & Pistol Ass'n, 804 F.3d 242, 254 n.49 (2nd Cir. 2015)--listing cases from the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, that, like itself, have applied a "two-step" test). Under this test, most courts purport to examine whether the challenged restriction burdens the Second Amendment right; and, if it does burden the Second Amendment right, the courts then choose various level of means-end scrutiny to apply. *See, e.g., United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011). Some courts, such in Ezell, require the government to prove that the challenged restriction does not burden the right to keep and bear arms. *See, e.g., Ezell*, 651 F.3d at 702-03. Others fail to precisely articulate the scope of the right, and use a less restricted standard to insure that the challenged restriction survives the level of scrutiny they choose to apply. *See Heller II*, 670 F.3d at 1261 ("We need not resolve th[e] [first] question, however, because even assuming [the challenged restrictions] do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard."); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (assuming that the right to keep and bear arms applies outside the home "because the [challenged law] passes constitutional muster under . . . the applicable standard – intermediate

scrutiny").

At step two, the lower courts generally choose intermediate scrutiny. Some courts try to justify their choice by finding that the challenged restriction does not substantially burden the Second Amendment right.8 *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014) (applying a form of intermediate scrutiny to a firearms restriction nearly identical to a restriction struck down in *Heller* because it did "not impose a substantial burden on conduct protected by the Second Amendment"). *See, e.g., United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (domestic assault and battery case under 922(g)(9) and requiring the Government to show a reasonable fit between the important object of reducing domestic gun violence and § 922(g)(9)'s permanent disarmament of all domestic-violence misdemeanants.); *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011) (concerning the city of Chicago's regulation of firing ranges, finding that because Chicago required training at a range to receive a gun permit that the Second Amendment was implicated, but otherwise suggesting that historical analysis of presumptively lawful infringement of second Amendment right was likely enough not to go to any intermediate scrutiny.).

In upholding Section 922(g)(1), some courts have relied on the passage in *Heller* in which the Supreme Court announced that "nothing in our opinion should

be taken to cast doubt on the longstanding possession of firearms by felons." *Moore,* 666 F. at 318. Moore quickly foreclosed any as applied or facial challenge to the validity of § 922(g)(1) simply because of what it felt was the clear declaration in *Heller* that such a felon in possession laws are a presumptively lawful regulatory measure resolves. *See, e.g., United States v. Barton*, 633 F.3d 168, 171-72 (3d Cir. 2011)(overruled in Binderup, but relevant because it led to Binderup; *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010) (noting that statutory restrictions of firearm possession, such as § 922(g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people who, by virtue of his felony conviction, falls within such a class); *United States v. Vongxay,* 594 F.3d 1111, 1115 (9th Cir. 2010).

Similar to Ezell and Rozier, in *United States v. Vongxay* 594 F. 3d 1111 (9th Cir. 2010), the Ninth Circuit rejected the argument that the presumptively lawful proclamation in *Heller* was dicta whi h the court did not have to follow, thus upholding the challenged provision as constitutional. *Vongxay*, 594 F.3d at 1115. Other courts , however, have intimated that while the Supreme Court's 'presumptively lawful' felon disarmament ban meant might foreclose a facial challenge to 922(g)(1), they also assume that the presumption could be rebutted in an as-applied challenge. See also, *Barton*, 633 F.3d at 172-73; *Binderup*_ 836 F.

3d at 355-56. An as-applied challenge "argues that a law is unconstitutional as enforced against the plaintiffs before the court," as opposed to a facial challenge to a law's constitutionality, which is "an effort to invalidate the law in each of its applications, to take the law off the books completely." See, *Speet v. Schuette*, 726 F.3d 867, 871-72 (6th Cir. 2013).

Interestingly, the Third Circuit in *United States v. Barton* suggested that the presumption potentially could be rebutted if a felon convicted of a relatively minor, non-violent offense shows that (1) he is not more dangerous than a typical, law-abiding citizen or (2) sufficient time has passed since the felony conviction such that he no longer poses a threat to society. *Barton*, 633 F.3d at 174. The test in Barton of whether a prior felony was a serious crime was overruled in Binderup r, 836 F. 3d at 355-56. Even if the crime were not serious, the Barton court was reluctant to consider the result because, in looking at Barton's behavior Barton could not show that he was outside the category of felons who ought not be trusted to possess a fire arm. Id. Because had earned his status as a felon for drug trafficking and receiving stolen weapons, and then upon his release tried to sell a firearm with an obliterated serial number to a police informant, the court rejected his as applied challenge to Section 922(g)(1). As noted, art of the Barton holding was overruled in *Binderup v. Holder,* 836 F. 3d 336, 355-56 (3rd Cir. 2016). See

also, *United States v. Moore*, 666 F.3d 313, 319-20 (4th Cir. 2012) (rejecting as-applied challenge to § 922(g)(1) because the defendant's three prior felony convictions for robbery and two other prior convictions for assaulting a government official with a deadly weapon "clearly demonstrate that he is far from a law-abiding, responsible citizen" to come with the scope of the Second Amendment's protections).

The Seventh Circuit in *United States v Williams* noted that *Heller* deemed felon disarmament bans presumptively lawful, but required the government to provide "some form of strong showing" to justify Section 922(g)(1)'s firearm ban. United States v. Williams, 616 F.3d 685, 691-92 (7th Cir. 2010). After applying intermediate scrutiny, the court concluded that the firearm ban was constitutional as applied to the defendant, who had a violent past, because the ban was substantially related to the government's objective of keeping firearms out of the hand of violent felons. Id. at 692-93 .

Three circuits, including the Fifth Circuit which ruled in this case, presume that *any* "longstanding" firearm restriction does not burden the right to keep and bear arms. Heller v. District of Columbia, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("*Heller II*") ("[A] regulation that is "longstanding," which necessarily means it has long been accepted by the public, is not likely to burden a

constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment."); *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (New Jersey's "longstanding" requirement that residents demonstrate a "justifiable need" to publicly carry a handgun for self-defense "does not burden conduct within the scope of the Second Amendment's guarantee."); NRA of Am. v. Bureau of Alcohol, 700 F.3d 185, 196 (5th Cir. 2012) ("a longstanding, presumptively lawful regulatory measure – whether or not it is specified on *Heller*'s illustrative list – would likely fall outside the ambit of the Second Amendment").

In contrast, four circuits recognize that *Heller*'s "presumptively lawful regulatory measures" burden conduct protected by the Second Amendment because they have entertained as-applied challenges to those measures. For example, as to 18 U.S.C. § 922(g)(1), which generally bars most felons from possessing firearms (and which likely prompted the inclusion of "prohibitions on the possession of firearms by felons" on the list of "presumptively lawful regulatory measures"), the Seventh Circuit explained: *Heller* referred to felon disarmament ban only as "presumptively lawful," which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge. Therefore, putting the government through its

paces in proving the constitutionality of § 922(g)(1) is only proper. *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010). The First and Fourth Circuits have also recognized that 18 U.S.C. § 922(g)(1) burdens the right to keep and bear arms by entertaining as-applied challenges. *United States v. Torres-Rosario*, 658 F.3d 110, 112-13 (1st Cir. 2011) (entertaining, but rejecting, an as-applied challenge to 18 U.S.C. § 922(g)(1)); *United States v. Moore*, 666 F.3d 313, 319-20 (4th Cir. 2012) (same). Interestingly, by describing the felon disarmament ban as "presumptively" lawful . . . , the Supreme Court implied that the presumption may be rebutted. *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011)–suggesting that the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes, overruled by Binderup v. Holder, 836 F. 3d 336, 355-56 (3rd Cir. 2016), finding § 922(g)(1) is unconstitutional as applied to two dependants, upholding *Binderup v. Holder*, No. 13- cv-06750, 2014 WL 4764424, at **22-33 (E.D. Pa. 2014) (holding 18 U.S.C. § 922(g)(1) unconstitutional as applied).

In *Hamilton v. Pallozzi*, 848 F. 3d 614, 626 (4th Cir. 2017), the court rejected the "seriousness" test elucidated in *Binderup* at step one of the *Chester* inquiry, and instead held that conviction of a felony necessarily removes one from the class of "law-abiding, responsible citizens" for the purposes of the Second Amendment, absent the narrow

exceptions mentioned below. The court added that where the sovereign has labeled the crime a felony, it represents the sovereign's determination that the crime reflects "grave misjudgment and maladjustment". The c court opined that felon simply cannot be returned to the category of "law-abiding, responsible citizens" for the purposes of the Second Amendment and so cannot succeed at step one of the *Chester* inquiry, unless the felony conviction is pardoned or the law defining the crime of conviction is found unconstitutional or otherwise unlawful. Id., at 626, referring to *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

The analysis is also further complicated because four circuits treat *Heller*'s "presumptively lawful regulatory measures" as categorical exceptions to the Second Amendment. New York State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 258 n.76 (2d Cir. 2015) ("we think it likely that the *Heller* majority identified these 'presumptively lawful' measures in an attempt to clarify the scope of the Second Amendment's reach"); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) ("felons are categorically different from the individuals who have a fundamental right to bear arms"); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam) (*Heller* "suggests that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment.").

Similarly, the Fifth Circuit, in this case, evaded the examination of the issues involved by holding that the Second Amendment framework adopted in *NRA of Am. v. Bureau of Alcohol,* 700 F.3d 185, 194 (5th Cir. 2012), which thus precluded the court from reexamining the constitutionality of Section 922(g). It found refuge to avoid any further examination of this case solely based on the fact that in *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), the Court specifically preserved the constitutionality of felon-in-possession statutes: "[N]othing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." The court reaffirmed the constitutionality of Section 922(g). *United States v. Anderson*, 559 F.3d 348, 352 & n.6 (5th Cir. 2009), and *NRA of Am.*, 700 F.3d at 194 n.7. It buried the issue within its rule of orderliness which does not permit a panel to revisit those holdings. Id., *NRA of Am.*, 700 F.3d at 194, referring to *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

The tensions between the different forms of analysis among the different circuits results in some allowing as applied changes and others denying any challenges to "presumptively lawful regulatory measures" because the Second Amendment is not implicated. See , e.g., *United States v. McCane*, 573 F.3d 1037,

1047 (10th Cir. 2009) (summarily rejecting a challenge to 18 U.S.C. § 922(g)(1), in light of *Heller*'s "presumptively lawful regulatory measures"); *See, cf., Id.* Heller II, at 1047-50 (Tymkovich, J., concurring) (explaining how summarily rejecting challenges to *Heller*'s "presumptively lawful regulatory measures" stymies constitutional scrutiny of those measures).

The net result of these conflicting interpretations of *Heller*'s statement regarding "presumptively lawful regulatory measures" is that the right to keep and bear arms varies from circuit to circuit. The ability to exercise a fundamental right should not depend on where an individual lives. *See McDonald*, 561 U.S. at 805-58 (Thomas, J., concurring in part and concurring in judgment). Accordingly, this Court's review is warranted to clear up the confusion in the circuits surrounding *Heller*'s statement regarding "presumptively lawful regulatory measures" and to bring nationwide uniformity to the scope of the fundamental right to keep and bear arms.

3. THE FIFTH CIRCUITS DECISION IS INCORRECT, AS THE PRESUMPTION OF LAWFULNESS SHOULD NOT BE APPLICABLE TO A FELON IN POSSESSION, AS APPLIED TO MASSEY, AS STRICT SCRUTINY IS THE ONLY ANALYSIS WHICH IS APPROPRIATE WHEN A CONSTITUTIONAL RIGHT IS AT RISK.

This Court , generally applies strict scrutiny when any constitutional right is at stake. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339-40 (2010) (principal opinion); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (strict scrutiny applies to "fundamental" liberty interests); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) ("[E]nactment[s] involv[ing] . . .fundamental aspect[s] of 'liberty' . . . [are] subjec[t] to 'strict scrutiny.' ").

No constitutional right is "less 'fundamental' than" others. As such, there is no principled basis to exclude all state felons from exercising their Second Amendment rights, which is what the first prong of NRA of Am. V. Bureau of Alcohol suggests. Very simply, such an analysis of categories of citizens who have been found historically unworthy to exercise a fundamental right goes against the of constitutional values inherent in our jurisprudence. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Skinner v. Oklahoma, Ex. Rel. Williamson*, 316 U.S. 535, 552 (1942)--overruling Oklahoma's Habitual Criminal Sterilization Act.

That being the case, the analysis has no problem proceeding from there on, except that Massey, as asserted below, argues that the last step in the analysis should determine whether Congress can use any section of Sec. 922(g) to deprive anyone of their Second Amendment rights.

B. Where a court finds that a state felon is subject to having his right to bear arms infringed upon, whether, in light of United States v. Lopez, there is a sufficient compelling federal interest which justifies Congress's infringing upon those rights.

The various two part analyses undertaken are simply incomplete unless one final step is taken. Whether there is a compelling federal interest in prohibiting felons for possessing a firearm, and incarcerating them if they possess a firearm, (or in examining any section of 18 U.S.C. 922(g) should be the final question asked in the analysis. At trial, and on appeal, Massey argued that United States v. Lopez precludes the federal government from criminalizing his possession of a firearm. Understandably, based on Fifth Circuit precedent, the court was bound by its prior holdings and rejected this claim. Because the question was raised below, however, the issue is now ripe for consideration.

The Fifth Circuit court rejected Massey's Commerce Clause violation claim based on its prior holding in United States v. Rawls, 85 F.3d 240, 242 (5th Cir. 1996). In Rawls, the Fifth Circuit found that there is no additional requirement that, to apply § 922(g)(1) constitutionally, the Government must prove some economic activity beyond the interstate movement of the weapon. The "in or affecting commerce" element can be satisfied if the firearm possessed by a convicted felon had previously traveled in interstate commerce. Id. At 242-243, referring to United States v. Fitzhugh 984 F.2d 143, 146 (5th Cir. 2001)and Scarborough v. United States, 431 U.S. 563, 575 (1977) (concluding Congress did not intend to require any more than the minimal nexus that, at some time, the

firearm had been in interstate commerce). U.S. Const. Art. I, Sec. 8, Cl. 3

Because United States v. Lopez requires a substantial nexus, however, the there is a tension between Lopez and Scarborough such that either Lopez must be ignored, or Scarborough lacks the force it once had. United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624 (1995). Because of this tension, the felon-in-possession statute does not fall within any of the categories identified in Lopez, taking the thunder out of Scarborough, essentially undercutting all minimal nexus cases.

The Lopez decision was the first case since 1937 where the Supreme Court struck down a federal statute purely based on a finding that Congress had exceeded its powers under the Commerce Clause. The court found that Gun-Free School Zones Act of 1990 was unconstitutional because it exceeded Congress's authority under the Commerce Clause to regulate firearms. P.L. 101-647 (1990). The School Zones Act had made it a federal offense for "any individual to knowingly possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. §922(q) (1988 ed. Supp. V). In analyzing the Gun-Free School Zones Act of 1990, the Supreme Court re-examined the scope of the Commerce Clause and clarified the judiciary's traditional approach to Commerce Clause analysis, identified three broad categories of activity that Congress may regulate under its commerce power.

These are:

1. the channels of commerce;

2. the instrumentalities of commerce in interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and

3. activities which "substantially affect" interstate commerce.

Lopez, 514 U.S. at 558-59.

In examining the School Zones Act, the Court concluded that possession of a gun in a school zone was neither a regulation of the channels nor the instrumentalities of interstate commerce. Lopez, 514 U.S. at 561. Because the conduct regulated was considered to be a wholly intrastate activity, the Court concluded that Congress could only regulate the activity if it fell within the third category and "substantially affects" interstate commerce. The Court struck down the School Zones Act, declaring that the intrastate activity—possession of a handgun near a school—was not part of a larger economic firearms regulatory scheme. Id. Moreover, the act did not require that interstate commerce be affected, such as by requiring the gun to be transported in interstate commerce. Id. at 561-62. The Court found it significant that that the act "contains no jurisdictional element which would ensure, through a case-by-case inquiry, that

the firearm possession in questions affects interstate commerce." A jurisdictional element would also "limit [the statute's] reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce." Id. at 562.

For the same reasons identified in Lopez, the Supreme Court subsequently invalidated a part of the Violence Against Women Act (VAWA) in *United States v. Morrison*, 528 U.S. 598. See also, *Printz v. United States*, 521 U.S. 898, 926 (1997) (holding that Congress did not have the authority to pass part of the Brady Handgun Violence Prevention Act, which required state law enforcement officers to conduct background checks on prospective handgun purchasers within five days of an attempted purchase). See also, *United States v. Patton*, 451 F.3d 615, 632 (10th Cir. 2006), analyzed whether Congress had authority to prohibit the intrastate possession by a felon of a bulletproof vest, and concluded that such a provision did not fit within any of the three categories of Lopez, but upheld the provision under pre-Lopez Supreme Court precedent. Id. at 620-634, referring to Scarborough v. United States, which had analyzed the pre-Gun Control Act felon-in-possession statute. Pointing to *United States v. Bass*, 404 U.S. 336 (1971), the Patton court also recognized that the Court in Bass had left open the question of the nexus of interstate commerce that must be shown in individual

ways. Id. at 351, referring to Scarborough at 568-69-- rejecting the argument that possession of the gun have some "contemporaneous connection with commerce at the time of the offense." Applying the principles from Scarborough, the Patton court upheld the constitutional validity of the body armor statute as applied to the defendant's intrastate possession, because the item, at some point, had moved across state lines and therefore such activity could be regulated under Congress's commerce power. Patton, 451 F.3d at 635-36.

Whether that construction can stand up in view of Lopez categorical analysis is still an open question because the tension between Lopez and Scarborough has never been reconciled. What has changed since Lopez is the fact that Heller recognizes that the Second Amendment right is a personal one, similar to the other liberties protected under the bill of rights. The court should also grant certiorari because the Lopez issue is ripe, after Heller, and because a thorough analysis of §922(g), like the Tenth Circuit in Patton did with a similar regulation, should find that mere intrastate possession of a firearm, or any firearms accessory, does not fit under any of the three Lopez categories. The "for now" basis, as the district court acknowledged, should not continue. In examining Scarborough, some members of the Fifth Circuit court expressed serious doubts about Scarborough's continuing validity. For example, in upholding the validity of

§922(g), one justice opined:

> If the matter were res nova, one might well wonder how it could rationally be concluded that because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce. It is also difficult to understand how a statute construed never to require any but such a per se nexus could "ensure, through case- by-case inquiry, that the firearm possession in question affects interstate commerce."

Id., *Rawls*, 85 F.3d at 243 (Garwood, J., concurring).

The regulation of intrastate possession of a firearm or any other firearms accessory should be found to be beyond the reach of Congress. Denying state felons the right to possess a firearm under 922(g)(1) and imprisoning them when they do, may seem like a good thing to do. But, such good intentions do not implicate interstate commerce, nor meet any of the three Lopez categories.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Date: May 23, 2017

Respectfully submitted by,

_____

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN LYNDEL MASSEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

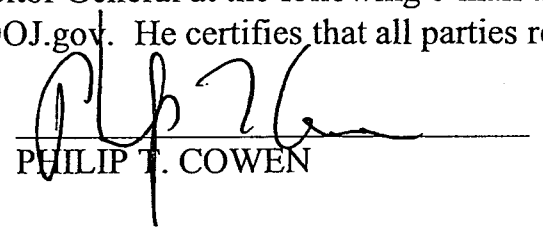
On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

Philip T. Cowen, appointed under the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed In Forma Pauperis on counsel for the Respondent (1) by mailing, on May 23, 2017, a copy of these documents (via first-class United States mail, postage prepaid) to:

Honorable Jeffrey B. Wall
Acting Solicitor General of the United States
950 Pennsylvania Avenue NW, Suite 5614
Washington, DC 20530

and also (2) by sending, on May 23, 2017, the said documents via electronic mail to the Office of the Solicitor General at the following e-mail address: SupremeCtBriefs@USDOJ.gov. He certifies that all parties required to be served have been served.



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