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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,  
Plaintiff,

-VS-

JAMES BUSH,  
Defendant

CR. No. 09-XXXX-AA

MOTION TO DISMISS

The Defendant, JAMES BUSH, through counsel Terri Wood, moves this Court for entry of its Order dismissing all counts charging a violation of 18 U.S.C. §922(g), upon the grounds that the statute is (1) unconstitutional on its face; or, as may be established at trial of this cause, (2) unconstitutional as applied to Mr. Bush.

This Motion is well-founded in law and not made for the purpose of delay. It is supported by the Memorandum of Law that follows, and by such other grounds and authorities as may be offered through supplemental memoranda or at hearing on this Motion.

DATED this                    day of August, 2009.

\_\_\_\_\_  
/s/Terri Wood  
TERRI WOOD, OSB #88332  
ATTORNEY FOR DEFENDANT

#### MEMORANDUM OF LAW

- I. 18 U.S.C. Section 922(g)(1) is unconstitutional because it exceeds Congress' power under the Commerce Clause of the United States Constitution, Article I, Section 8.

18 U.S.C. §922(g)(1) makes it a crime, punishable by up to 10 years imprisonment, for every person “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; to . . . possess in or affecting commerce, any firearm or ammunition.” Thus far, the “in or affecting commerce” element is satisfied by proof that the firearm or ammunition at any time prior to possession, had traveled in interstate commerce. Because no firearms are manufactured in Oregon, all firearms within this state fall within reach of this statute.

The Supreme Court has articulated "three general categories of regulation in which Congress is authorized to engage under its commerce power." *Gonzales*

*v. Raich*, 545 US 1, 125 S Ct 2195, 2205 (2005). These are "the channels of interstate commerce"; "the instrumentalities of interstate commerce, and persons or things in interstate commerce"; and "activities that substantially affect interstate commerce." *Id.*; see also *United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *Perez v. United States*, 402 U.S. 146, 150, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971). The statute prohibiting possession of firearm or ammunition by a felon does not fit within any of the three categories.

First, Congress may regulate the "channels of interstate commerce." *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624; *Raich*, 125 S.Ct. at 2205. Under this category, Congress regulates interstate commerce itself, barring from the channels of interstate commerce a class of goods or people. See *United States v. Rybar*, 103 F.3d 273, 288-89 (3d Cir.1996) (Alito, J., dissenting) (describing the first category as concerning "Congress's power to regulate, for economic or social purposes, the passage in interstate commerce of either people or goods"). For example, Congress may ban the interstate shipment of stolen goods or kidnapped persons, *Perez*, 402 U.S. at 150, 91 S.Ct. 1357; or the interstate shipment of goods produced without minimum-wage and maximum-hour protections, *United States v. Darby*, 312 U.S. 100, 112-14, 61 S.Ct. 451, 85 L.Ed. 609 (1941). Congress "is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare." *Darby*, 312 U.S. at 114, 61

S.Ct. 451. But this category is confined to statutes that regulate interstate transportation itself, not possession of goods after shipment.

Section 922(g)(1) cannot fit within the first category because it is not directed at the movement of firearms or ammunition through the channels of interstate commerce. Section 922(g) prohibits the stationary and entirely intrastate act of possession of those items. A prohibition on the mere intrastate possession of firearms or ammunition cannot be upheld under Congress's power to regulate the channels of interstate commerce.

Under the second category, Congress may regulate and protect "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624; *see also Raich*, 125 S.Ct. at 2205. The "instrumentalities" are the means of interstate commerce, such as ships and railroads, and the "persons or things in interstate commerce" are the persons or things transported by the instrumentalities among the states. *See, e.g., Lopez*, 514 U.S. at 558, 115 S.Ct. 1624; *Perez*, 402 U.S. at 150, 91 S.Ct. 1357.

Section 922(g)(1) does not fall within the second category. Neither firearms nor ammunition are an instrumentality, or means, of interstate commerce, and the statute does not protect these goods while moving in interstate shipment. Nor is the statute directed at the use of firearms in ways that threaten or injure the instrumentalities of interstate commerce. The statute prohibits the bare possession of a firearm or ammunition by a felon, wherever it

occurs, and without regard to its use or effect. Accordingly, it exceeds congressional authority to protect the instrumentalities of, and persons or things in, interstate commerce. *See also Lopez*, 514 U.S. at 559, 115 S.Ct. 1624 (rejecting the idea that the prohibition on possessing firearms near schools could "be justified as a regulation by which Congress has sought to protect . . . a thing in interstate commerce"); *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir.2000)(rejecting the notion that past movement across state lines could mark something forever as "a 'thing' in interstate commerce" and noting that category two did not apply in *Lopez* "despite the fact that the regulated guns likely traveled through interstate commerce").

Under the third category, Congress may regulate "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59, 115 S.Ct. 1624; *Raich*, 125 S.Ct. at 2205. Under the first two categories Congress may regulate or protect actual interstate commerce; the third allows Congress to regulate intrastate noncommercial activity, based on its effects on interstate commerce. However, the Supreme Court has warned against a definition under which "any activity can be looked upon as commercial," since this would obliterate the intended limits on federal power. *Lopez*, 514 U.S. at 565, 115 S.Ct. 1624.

In *Lopez*, the Court held that possession of firearms, in itself, is not commercial or economic. 514 U.S. at 560, 115 S.Ct. 1624 (concluding that the prohibition on firearm possession near a school "by its terms has nothing to do

with 'commerce' or any sort of economic enterprise"). The *Lopez* Court's conclusion on this point was restated and reaffirmed in *Raich*, 125 S.Ct. at 2211, and it should therefore be regarded as settled.

Moreover, Section 922(g)(1) falls primarily within an area of traditional regulation by the states, namely protecting "police officers and ordinary citizens" from violent crime. See *Lopez*, 514 U.S. at 561 n. 3, 115 S.Ct. 1624 (noting the "primary authority" of the states for creating the criminal law (internal quotation marks omitted)); *Morrison*, 529 U.S. at 615-17, 120 S.Ct. 1740 (noting areas of traditional state concern and "reject[ing] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"). In this area, the Supreme Court has emphasized the prerogatives of the states. See, e.g., *Morrison*, 529 U.S. at 618, 120 S.Ct. 1740 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 5 L.Ed. 257 (1821) (Marshall, C.J.)(concluding that Congress has "no general right to punish murder committed within any of the States. This statute not only intrudes on an area of traditional state concern but also potentially conflicts with the widespread state regulation that already exists. Cf. *Lopez*, 514 U.S. at 561 n. 3, 115 S.Ct. 1624 ("When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state

criminal jurisdiction." (internal quotation marks omitted)).

Mr. Bush recognizes that a facial challenge to §922(g)(1) based on the Commerce Clause may be controlled, at the lower court levels, by the pre-*Lopez* precedent of *Scarborough v. United States*, 431 U.S. 563, 575, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977), which held that Congress intended a felon-in-possession statute to prohibit possession of any firearm that had moved in interstate commerce. *Scarborough* decided only a question of statutory interpretation about a previous version of the felon-in-possession statute, but the decision assumed that Congress could constitutionally regulate the possession of firearms solely because they had previously moved across state lines. See Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez*, 3 J.App. Practice & Process 671, 674 (2001).

The constitutional understanding implicit in *Scarborough*--that Congress may regulate any firearm that has ever traversed state lines--has been repeatedly adopted for felon-in-possession statutes by every Circuit, though some have expressed doubts about its continuing validity *post-Lopez*.. See, e.g., *United States v. Weems*, 322 F.3d 18, 26 (1st Cir.2003)(considering *Scarborough* to be unaltered by *Jones* ); *United States v. Lemons*, 302 F.3d 769, 773 (7th Cir.2002)(noting "ample Seventh Circuit precedent" upholding §922(g)(1) because of its jurisdictional hook and suggesting that if *Lopez* undercuts this approach, "it is for the Supreme Court to so hold"); *United States v. Cortes*, 299 F.3d 1030, 1037 n. 2 (9th Cir.2002)(noting that doubts have

been raised but choosing, "[u]ntil the Supreme Court tells us otherwise," to "follow *Scarborough* unwaveringly"); *United States v. Kirk*, 105 F.3d 997, 1004 (5th Cir.1997)(evenly divided court *en banc*)(Higginbotham, J.)(upholding §922(o), the ban on possession of machine guns, but relying on the third *Lopez* category instead of the more expansive approach in *United States v. Bass*, 404 U.S. 336, 350, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), a predecessor case to *Scarborough*, and noting that "[i]t is not for us to say that *Bass* cannot survive *Lopez* "); *id.* at 1016 n. 25 (Jones, J.)(finding the statute unconstitutional under the three *Lopez* categories yet noting that "[w]e are not at liberty to question" *Scarborough*, despite its "tension" with *Lopez* ); *United States v. Smith*, 101 F.3d 202, 215 (1st Cir.1996)(holding that *Scarborough*, not *Lopez*, applies to statutes with a jurisdictional hook); *United States v. Kuban*, 94 F.3d 971, 973 n. 4 (5th Cir.1996)(noting the "powerful argument" against the constitutionality of §922(g)(1) but regarding *Scarborough* "as barring the way" for an "inferior federal court"); *id.* at 976-78 (DeMoss, J., dissenting in part)(distinguishing the statute in *Scarborough* and finding its holding "in fundamental and irreconcilable conflict with the rationale" of *Lopez* ); *United States v. Chesney*, 86 F.3d 564, 571 (6th Cir.1996)(following *Scarborough* ); *id.* at 577-82, 97 S.Ct. 1963 (Batchelder, J., concurring)(distinguishing *Scarborough* because it did not reach the constitutional question, concluding that despite its jurisdictional hook §922(g)(1) fits none of the *Lopez* categories, but nevertheless concurring because of prior Sixth Circuit precedent); *United States v. Shelton*, 66 F.3d 991,

992 (8th Cir.1995)(per curiam)(following *Scarborough* ); *United States v. Bishop*, 66 F.3d 569, 587-88 & n. 28 (3d Cir.1995)(upholding 18 U.S.C. §2119, a carjacking statute, because of its jurisdictional hook and 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"); *id.* at 593-97 & n. 13 (Becker, J., concurring in part and dissenting in part)(criticizing the majority for relying on *Scarborough*, which "was devoid of any Commerce Clause analysis," and insisting that a jurisdictional hook could make an application of a statute constitutional only if it also fell within one of the three *Lopez* categories); *but see United States v. Luna*, 165 F.3d 316, 321 n. 16 (5th Cir.1999)(noting "the uncertainty surrounding the application of *Scarborough* " and instead basing its holding on the *Lopez* categories).

Thus, while this Court appears bound by *Scarborough*, for Mr. Bush to raise and preserve the issue is well-founded in law. *See, United States v. Patton*, 451 F.3d 615, 636 (6<sup>th</sup> Cir. 2006)("Any doctrinal inconsistency between *Scarborough* and the Supreme Court's more recent decisions is not for this Court to remedy. We suspect the Supreme Court will revisit this issue in an appropriate case--maybe even this one.")(felon in possession of body armor statute).

- II. A “plain language” interpretation of 18 U.S.C. Section 922(g)(1) to require the possession be temporally “in and affecting commerce” could save the statute from constitutional doubt.

A “plain language” interpretation of the statute, reading “to possess in or affecting commerce” in the present tense, to require a contemporaneous nexus between the act of a defendant’s firearm possession and interstate commerce, appears similarly foreclosed by *Scarborough*. However, more recent decisions of the Supreme Court in cases involving other federal firearm offenses favor the plain language approach. See, e.g., *Watson v. United States*, 442 U.S. 74 (2007); *Smith v. United States*, 508 U.S. 223 (1993); *Bailey v. United States*, 516 U.S. 137 (1995). Furthermore, the Supreme Court has recognized that statutory language can require proof of a temporal link between elements of a crime. See, e.g., *United States v. Ressaam*, 128 S.Ct. 1858 (2008)(crime committed by carrying explosives during commission of underlying felony, 18 U.S.C. §844(h)(2), requires proof of temporal link).

In this case, the plain statement rule draws additional reinforcement from other canons of statutory construction. First, as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, there should be a clear indication that Congress intended that result. See, *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). Second, if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is “fairly possible,” the courts are obligated to construe the statute to avoid such problems. *Id.*

In addition to the doubtful constitutionality of §922(g) under the Commerce Clause, the Supreme Court's recent interpretation of the Second Amendment's right to bear arms as an individual right must not be overlooked as a source of concern—particularly in an “as applied” challenge. See, *District of Columbia v. Heller*, 128 S.Ct, 2783 (2008).

In *Heller*, the Supreme Court invalidated two District of Columbia laws: the first banned all handguns, even those possessed within the home, and the second required that all long guns be kept inoperative, either through disassembly or through a trigger lock. 128 S.Ct. at 2821-22. In striking down those laws, the Court held that the Second Amendment protected a long-standing individual right to keep and bear arms. *Id.*, at 2797-98. According to the Supreme Court, the constitutional protection of that right was intended to protect a well-regulated militia, but the right itself was a well-established right to self- and home-preservation and defense. *Id.*, at 2798. Moreover, the *Heller* Court described that the right as a fundamental right, although not an unlimited one. *Id.*, at 2798-99.

Relevant to the present case, the *Heller* Court also indicated that certain existing restrictions on Second Amendment rights were presumptively lawful. “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places

such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.*, at 2816-17. Without any analysis, a panel of the Ninth Circuit in *United States v. Gilbert*, 286 Fed. Appx. 383, 2008 WL 2740453 (9<sup>th</sup> Cir. 2008), cited this dicta as controlling precedent that the Second Amendment has no bearing on the validity of federal firearm offenses, which seems to be the current consensus of the lower courts. See, e.g., *United States v. McCane*, \_\_\_\_ F.3d \_\_\_\_, 2009 WL 2231658 (10<sup>th</sup> Cir. 2009); *United States v. Anderson*, 559 F.3d 348, 352 & n.6 (5<sup>th</sup> Cir. 2009).

There is a marked difference between dicta that leaves §922(g)(1) cloaked in a presumption of constitutionality under the Second Amendment, and a conclusion that a right the founders deemed so fundamental that it came second only to the First Amendment in our Bill of Rights has no application to any citizen who has ever suffered any type felony conviction. While §922(g)(1) may be facially valid under the Second Amendment, there is no reason Mr. Bush, whose two felony convictions are nearly 20 years old, and others similarly situated, should be barred from raising the constitutional right to joint possession of a single handgun for protection of their family within the confines of their home. *Heller* concluded the right “to keep and bear arms” is a corollary to the individual right of self-defense. *E.g., id.* at 2817 (“[T]he inherent right of self-defense has been central to the Second Amendment right.”). At the “core” of the Second Amendment right, the Court found, is self-defense in the home. *Id.* at 2818. Compare, *United States v. Engstrum*, 609 F. Supp.2d 1227 (D. Utah

2009)(applying “strict scrutiny” test to facial challenge of §922(g)(9) under the Second Amendment, upon finding the statute had been narrowed by case law to reach only those defendants who posed a prospective risk of violence to an intimate partner or child, including those within their home).

Several points made by the concurring opinion in *McCane, supra*, are incorporated as arguments on Mr. Bush’s behalf:

- (1) The felon dispossession dictum may lack the “longstanding” historical basis that *Heller* ascribes to it. Indeed, the scope of what *Heller* describes as “longstanding prohibitions on the possession of firearms by felons,” 128 S.Ct. at 2816-17, is far from clear. Recent commentary has specifically argued such laws did not exist and have questioned the sources relied upon by the earlier authorities. *See, e.g.*, C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 709-10, 714 (2009) (challenging the evidence cited by earlier scholars and asserting that the weight of historical evidence suggests felon dispossession laws are creatures of the twentieth-rather than the eighteenth-century, *id.*, at 698-713 (comprehensively reviewing the history of state and federal dispossession laws)); Adam Winkler, *Heller's Catch 22*, 56 UCLA L.Rev. 1551, 1561, 1563 (2009) (same). Together these authorities cast doubt on the “longstanding” nature of felon dispossession laws.

(2) By cursorily dismissing Second Amendment claims by convicted felons based on the *Heller* dicta, the courts foreclose the possibility of a more sophisticated interpretation of the scope of §922(g)(1). The broad scope of this statute, which permanently disqualifies all felons from possession of firearms regardless of the circumstances, conflicts with the core self-defense right embodied in the Second Amendment.

The courts must enforce the Second Amendment, and nothing in *Heller* excludes felons from asserting the core right to self-defense within the confines of their own homes. The doctrine of constitutional avoidance would favor an interpretation of 922(g)(1) that required a temporal link between possession of the firearm being either “in or affecting (interstate) commerce,” which in most cases would not be satisfied by otherwise lawful possession within the confines of one’s home. *See, Jones, supra* (insufficient interstate commerce nexus to private, owner-occupied home).

- III. 18 U.S.C. Section 922(g)(1) is unconstitutional as applied to the otherwise lawful possession of a handgun within the confines of a citizen’s home for purposes of self-defense, both under the Commerce Clause, and the Second Amendment to the United States Constitution.

The Ninth Circuit has relied on *Scarborough* to uphold the constitutionality of 18 U.S.C. §922(g)(1) under the Commerce Clause, both facially and as applied, because the statute contains an “express jurisdictional element” requiring the government to show the firearm has, at some time,

traveled in interstate commerce. *See, e.g., United States v. Rousseau*, 257 F.3d 925, 933 (9<sup>th</sup> Cir. 2001); *United States v. Hanna*, 55 F.3d 1456, 1462 (9<sup>th</sup> Cir. 1995).

In *Scarborough*, 431 U.S. at 569-77, the Supreme Court held that a conviction under the statutory predecessor of §922(g) only required proof that a particular firearm was manufactured outside the state in which a felon possessed it in order to satisfy the jurisdictional interstate commerce element. The Court rejected the defendant's argument that something more than a past connection with interstate commerce, however remote in time, was required. *Id.* The *Scarborough* holding reflects the judicial attitude "during the era when the Supreme Court was broadly interpreting Congress's authority to outlaw criminal conduct pursuant to interstate commerce regulatory power" under the Commerce Clause. Newton, 3 J. App. Prac. & Process at 674.

The Ninth Circuit relied on *Scarborough* in upholding a facial and as-applied challenge to §922(g)(1) in *Hanna*, 55 F.3d 1456. Hanna was convicted under §922(g)(1) of unlawful possession of a firearm and argued on appeal that §922(g)(1) was unconstitutional on its face and as applied. The court rejected both arguments. Relying on *Scarborough*, the court noted that the predecessor law of §922(g) required only "the minimal nexus that the firearm [has] been, at some time, in interstate commerce." *Hanna*, 55 F.3d at 1462 (quoting *Scarborough*, 481 U.S. at 575). The court held that "minimal nexus standard" also applies to §922(g), and that "a past connection is enough." *Id.* The court

said that *Lopez* did not alter its analysis because the Supreme Court distinguished §922(q) from the predecessor law to §922(g), stating, “§922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” *Hanna*, 55 F.3d at 1462 (quoting *Lopez*, 514 U.S. at 549). Thus, the Court held that §922(g)’s requirement that a firearm “have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause.” *Hanna*, 55 F.3d at 1462.

The Ninth Circuit has since relied on *Hanna* to uphold §922(g) against as-applied challenges, even after *Lopez*, *Morrison* and *Jones*. See, e.g., *Rousseau*, 257 F.3d 925 (a firearm’s past connection to interstate commerce is sufficient). Although defendants convicted under §922(g) in the Ninth Circuit and other federal courts have raised numerous constitutional attacks, no federal court of appeals yet has ruled that *Morrison* trumps *Scarborough*. Newton, 3 J. App. Prac. & Process at 681. The Ninth Circuit has stated, “Until the Supreme Court tells us otherwise . . . we follow *Scarborough* unwaveringly.” *Cortes*, 299 F.3d at 1037 n.2.

Thus far, the Ninth Circuit has not re-evaluated the constitutionality of the statute under the more recent Supreme Court decisions defining the outer limits of Congress’ authority under the Commerce Clause. Although this Court appears bound by Ninth Circuit precedent to the contrary, Mr. Bush raises an “as applied” challenge to the constitutionality of §922(g)(1), under both the

Commerce Clause and the Second Amendment to the United States Constitution. The precise facts upon which this challenge is based must await trial.

When a litigant claims that a statute is unconstitutional as applied to him, and the statute is in fact unconstitutional as applied, the court normally invalidate the statute only as applied to the litigant in question, rather than strike down the statute on its face. In the typical case, “we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants.” *United States v. Treasury Employees*, 513 U.S. 454, 478, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

Although no Circuit Court of Appeals has, thus far, been willing to defy *Scarborough’s* holding, a growing number of federal judges contend that it does not logically survive more recent Supreme Court decisions. See Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez*, 3 J. App. Prac. & Process 671, 676-77 (2001)(citing *United States v. Kirk*, 105 F.3d 997, 1004 (5<sup>th</sup> Cir. 1997)(Higginbotham, J., concurring); *id.* at 1005-16 (Jones, J., dissenting); *United States v. Kuban*, 94 F.3d 971, 976-79 (5<sup>th</sup> Cir. 1996)(DeMoss, J., dissenting in part); *United States v. Chesney*, 86 F.3d 564, 574-82 (6<sup>th</sup> Cir. 1996)(Batchelder, J., concurring); *United States v. Rawls*, 85 F.3d 240, 243 (5<sup>th</sup> Cir. 1996)(Garwood, J., specially concurring)). But the Ninth Circuit has stated, “Until the Supreme Court tells us otherwise . . . we follow *Scarborough* unwaveringly.” *United States v. Cortes*, 299 F.3d 1030, 1037 n.2

(9th Cir. 2002). Nonetheless, the lower courts must eventually confront the contradiction between the *Lopez/Morrison/McCoy* line of cases and the outdated *Scarborough* holding that firearms possession “substantially affects” interstate commerce merely because the gun crossed state lines at some time in the past.

It is time for a federal court to consider a factually compelling as-applied challenge to §922(g)(1) in light of the Supreme Court’s narrowing of federal Commerce Clause powers and recognition of an individual’s constitutional right to possess firearms for home protection. In recent years the Supreme Court has reinforced the federalist values of the U.S. Constitution, suggesting a major shift in its view of the power of Congress to criminalize conduct that is almost wholly local. Newton, 3 J. App. Prac. & Process at 671. In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the Supreme Court defined three categories of activity that Congress may regulate under its Commerce Clause powers (discussed *supra*), and determined possession of common firearms debatable solely under the third category: “those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” *Id.*

Subsequent decisions have further defined conduct that falls into the third category. In *Morrison*, 529 U.S. at 610-13, the Court established a four-factor test to determine whether an intrastate activity “substantially affects” commerce: 1) whether the statute regulates commerce “or any sort of

economic enterprise”; 2) whether the statute contains any “express jurisdictional element which might limit its reach to a discrete set” of cases; 3) whether the statute or its legislative history contains “express congressional findings” that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is “attenuated.” *Id.* Applying these factors to a federal civil remedy for victims of gender-motivated violence, the Court concluded that intrastate violence against women does not “substantially affect” interstate commerce. *Id.* at 613. The Court stated, “We . . . reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.” *Id.* at 617-18.

Just after its decision in *Morrison*, the Court narrowed the reach of a federal arson statute as applied to the arson of a private residence. *Jones v. United States*, 529 U.S. 848, 851 (2000). *Jones* involved a petitioner who was convicted of arson under 18 U.S.C. § 844(i). Jones unsuccessfully argued to the district court and the Seventh Circuit that, as applied to the arson of a private residence, §844(i) exceeds the authority vested in Congress under the Commerce Clause. The Supreme Court reversed, holding that §844(i)’s language, “used in . . . any activity affecting . . . commerce,” did not apply to a

private, owner-occupied residence, notwithstanding its “use” in the “activity” of receiving natural gas, a mortgage, or an insurance policy. *Id.* at 850-51.

The Court stated, “Were we to adopt the Government’s expansive interpretation of §844, hardly a building in the land would fall outside the federal statute’s domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce.” *Id.* at 857.

The Court’s decisions in *Lopez* and its progeny indicate that it views Congressional powers under the Commerce Clause to extend only to economic activity that substantially affects interstate commerce, along with activities involving the channels and instrumentalities of interstate commerce. Moving away from the “aggregation principle” employed in decisions such as *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court has rejected the argument that Congress may regulate “non-economic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” *Morrison*, 529 U.S. at 617. “The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. . . . Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime

and vindication of its victims.” *Id.* at 618. Federal courts should apply this rationale to §922(g) when the statute requires that the government prove the firearm was possessed “in or affecting commerce.”

The Court should examine the facts established at trial of Mr. Bush’s case to assess the constitutionality of §922(g)(1) as applied to intrastate possession of a firearm within the confines of a private home that is not commercial or economic in character. The statute does not regulate activity that is economic or commercial in nature. The firearm in Mr. Bush’s case had no immediate connection with or effect on national or international markets. Although guns can be bought and sold in interstate commerce, Mr. Bush’s alleged possession of a pistol within the home for defense of the family was purely non-commercial. The defense expects no evidence at trial that possession of this firearm was likely to stimulate the demand for interstate firearms. Thus, §922(g)(1) as applied to Mr. Bush’s alleged intrastate possession of a firearm does not regulate activity that is economic or commercial in nature.

The relationship between purely intrastate, non-commercial possession and commercial interstate activity is attenuated. The application of §922(g)(1) to Mr. Bush’s circumstances will likely show a highly attenuated relationship between his alleged joint possession of the family handgun kept for defense of the home, and interstate commerce. Oregon has its own statute regulating intrastate firearm possession by a convicted felon. Or. Rev. Stat. §166.270 (2008). The values of federalism limit federal police power to cases that truly

affect interstate commerce. The link between Mr. Bush's alleged intrastate possession of a single handgun and interstate commerce is at best highly attenuated. Thus, as applied to Mr. Bush's case, §922(g)(1) does not show enough of a relationship between intrastate, non-commercial gun possession and interstate commerce to justify the invocation of Congress's Commerce Clause power. Mr. Bush has a compelling argument that the activity regulated by §922(g)(1) in his case—maintaining a single firearm for home protection—did not substantially affect interstate commerce, and was a protected activity under the Second Amendment.

When the Ninth Circuit and other courts have upheld §922(g) as constitutional, they have done so based on the express jurisdictional element that serves to limit its application to a discrete set of cases that have a substantial affect on interstate commerce. This “jurisdictional hook” provides the required “nexus” to interstate commerce because the government must show that the firearm(s) at some time crossed state lines. *See Hanna*, 55 F.3d at 1456; *Newton*, 3 J. App. Prac. & Process at 673, 666-68; and the discussion below. However, courts in other circuits have recognized that a jurisdictional hook is not a “a talisman that wards off constitutional challenges.” *United States v. Patton*, 451 F.3d 615, 632. *See United States v. Rodia*, 194 F.3d 465, 472-73 (3d Cir.1999) (rejecting a "hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute"); *United States v. Holston*, 343 F.3d 83, 88 (2d Cir.2003) (finding the

jurisdictional hook factor "superficially met" but not relying on "the mere existence of jurisdictional language purporting to tie criminal conduct to interstate commerce"). As the Eleventh Circuit has recently noted, "where a jurisdictional element is required, a meaningful one, rather than a pretextual incantation evoking the phantasm of commerce, must be offered." *Maxwell*, 446 F.3d at 1217 (internal quotation marks, citations, and alteration omitted). The ultimate inquiry is whether the prohibited activity has a substantial effect on interstate commerce, and the presence of a jurisdictional hook, though certainly helpful, is neither necessary nor sufficient.

The principal practical consequence of a jurisdictional hook is to make a facial constitutional challenge unlikely or impossible, and to direct litigation toward the statutory question of whether, in the particular case, the regulated conduct possesses the requisite connection to interstate commerce. *See Jones*, 529 U.S. at 857, 120 S.Ct. 1904.

The express jurisdictional element of §922(g)(1) is practically useless as a limiting provision. The statute prohibits a felon's firearm possession "in or affecting commerce." However, the language of this "jurisdictional hook," as previously interpreted to delete any temporal element, fails to limit the reach of the statute to any category of cases that have a particular effect on interstate commerce. All firearms possessed in Oregon have at some time traveled in interstate commerce because Oregon has no gun manufacturing facility. This is not the case in just Oregon. Approximately 95 percent of all firearms in the

United States have been transported across state lines. *Newton*, 3 J. App. Prac. & Process at 681.

The defense expects the government at trial to premise federal jurisdiction solely on the fact that the gun that Mr. Bush allegedly jointly possessed once traveled *in* commerce. However, *Lopez*, *Morrison*, and *Jones* reject the view that a that a jurisdictional element, standing alone, serves to shield a statute from constitutional infirmities under the Commerce Clause. While such an element may “lend support” to constitutionality, the jurisdictional hook is not dispositive. In Mr. Bush’s case, the jurisdictional hook is fairly meaningless, as it applies to every firearm possessed in the District of Oregon. It therefore provides no support for the government’s assertion of federal jurisdiction.

Since *Lopez*, the Court has considered whether a particular activity affects interstate commerce to be a “judicial rather than a legislative question.” 514 U.S. at 557 n.2. Legislative history has not played a large role in decisions assessing the constitutionality of § 922(g), except as it pertains to the precise language of the statute’s express jurisdictional element. *See Scarborough*, 431 U.S. at 572-77. *Morrison* instructs that legislative findings, even when compelling, do not necessarily sway judicial opinion about whether a statute regulates activity that substantially affects interstate commerce. *See Morrison*, 527 U.S. at 614.

For the reasons aforesaid, this Court should dismiss the charges against Mr. Bush under §922(g), finding the statute either unconstitutional on its face, or, upon the record to be developed at trial, unconstitutional as applied.

RESPECTFULLY SUBMITTED this                      day of August, 2009.

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/s/Terri Wood  
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ATTORNEY FOR DEFENDANT