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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- DANIEL BOONE, Defendant	CR. No. 10-XXXXX MOTION TO DISMISS FELON IN POSSESSION CHARGE

The Defendant, DANIEL CARL BOONE, through counsel Terri Wood, moves this Court for entry of its Order dismissing any count charging a violation of 18 U.S.C. §922(g)(1), upon the grounds that the statute is (1) unconstitutional on its face under Article 1, Section 8, cl. 3, and the Second, Fifth and Tenth Amendments to the United States Constitution; or, as may be established at trial

of this cause, (2) unconstitutional under Article 1, Section 8, cl. 3, and the Second, Fifth and Tenth Amendments to the United States Constitution, as applied to Mr. Boone.

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 26th day of August, 2011.

/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.

A. The Commerce Clause Analysis

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 by the defendant, had traveled in interstate commerce.

Because no firearms are manufactured in Oregon, all firearms possessed here fall within reach of this statute. The sole authority for Congress to enact this law must be found in the Commerce Clause, Article 1, Section 8, cl. 3, which gives Congress the "[p]ower . . . [t]o regulate Commerce . . . among the several States."

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 SCt 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.

At best, possession of a firearm that at some point touched interstate commerce is debatable solely under the third category established by *Lopez*: "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." Id., at 558-59.

Subsequent decisions have further defined conduct that falls into the third category. In *United States v. Morrison*, 529 U.S. 598, 610-13 (2000), 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.

In *Jones v. United States*, 529 U.S. 848, 850-851 (2000), the Court held that a private residence, "notwithstanding its 'use' in the 'activity' of receiving natural gas, a mortgage, or an insurance policy," did not substantially affect interstate commerce, so as to be within the reach of the federal arson statute.

In sum, Congress' authority to prohibit felons from merely possessing firearms cannot be found within the three categories of activities Congress is authorized to regulate under the Commerce Clause, based on current Supreme Court interpretations of Article 1, Section 8. *See, United States v. Patton*, 451 F3d 615, 634-36 (10th Cir. 2006)(so finding in felon in possession of body armor case, but upholding statute based on *Scarborough, infra*); *but see also, United States v. Clark*, 435 F3d 1100 (9th Cir. 2006)(remarking these categories to be a "guide, not a straitjacket," in analyzing a different federal statutory scheme).

However, Mr. Boone recognizes that a facial challenge to §922(g)(1) based on it exceeding Congressional authority under the Commerce Clause appears to 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). *Scarborough* held that Congress intended a felon-in-possession statute to prohibit possession of any firearm that had moved in interstate commerce. Although *Scarborough* decided only a question of statutory interpretation about a previous version of the felon-in-possession statute—not the constitutional challenge raised by Mr. Boone—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., Patton, supra,* 451 F3d at 634-636; *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. 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*).

Most recently, in *United States v. Alderman*, 565 F.3d 641, 643 (9th Cir. 2009), the court considered and upheld the constitutionality 18 U.S.C. §931, the felon in possession of body armor: "[T]he issue is whether the sale of body armor in interstate commerce creates a sufficient nexus between possession of the body armor and commerce to allow for federal regulation under Congress's Commerce Clause authority." The Ninth Circuit found itself bound by *Scarborough* and *Cortes, supra*, and "declined to embrace *Alderman's* challenge." Id., at 648. In so doing, the court did observe that "a jurisdictional hook is not always 'a talisman that wards off constitutional challenges.'" Id. (citation omitted). "At most . . . such an element 'may establish that the enactment is in pursuance of Congress' regulation of interstate commerce,' or that it may 'lend support' to this conclusion." Id.

Thus, while this Court appears bound by *Scarborough* and other Ninth Circuit precedent, for Mr. Boone to raise and preserve the issue is well-founded in law. *See, United States v. Alderman*, 593 F3d 1131 (9th Cir. 2010)(O'Scannlain, Circuit Judge, dissenting from order denying rehearing en

banc); *Alderman v. United States*, 131 SCt 700 (2011)(Mem)(Thomas, J., and Scalia, J., dissenting from denial of certiorari).

B. 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. Ressam*, 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.*

The Supreme Court followed this approach in *Jones v. United States,* 529 U.S. 848, 850-51 (2000). In *Jones*, the Court narrowly interpreted the jurisdictional element in the federal arson statute, 18 U.S.C. §844(i), to avoid the "grave and doubtful constitutional questions" that would arise "were we to read §844(i) to render the 'traditionally local criminal conduct' in which petitioner Jones engaged 'a matter for federal enforcement.'" *Id.* at 857-58. In particular, the Court expressed concern with the government's view that the home was "used in . . . activities affecting commerce" because the homeowner had mortgaged and insured the property through out-of-state entities, and the home received natural gas from interstate sources. *Id.* at 855 (quotation marks and brackets omitted). To read the statute as the government argued would have the constitutionally dubious result of "mak[ing] virtually every arson in the country a federal offense." *Id.* at 859.

Jones held that an owner-occupied residence not used for any commercial purpose did not qualify as "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" within the meaning of the federal arson statute. The Court's narrow construction of the jurisdictional element ensured that only arson crimes substantially affecting interstate commerce could be prosecuted under the statute. *Id.* at 858-59. The doctrine

of constitutional avoidance also favors an interpretation of 922(g)(1) that requires 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).

Section 922(g)(1) applies to every felon in the country who possess any type of firearm or ammunition that ever travelled across state lines. Because the statute punishes simple possession, it is by definition local criminal conduct. The States have laws that criminalize the same type of conduct, without any nexus to interstate commerce. To avoid constitutional doubt, Section 922(g)(1) should be narrowed to acts of possession in or affecting interstate commerce, such as possessing a gun during a store or bank robbery, or possessing a gun as part of a sale or trade of the gun, or possessing a gun while travelling in a vehicle. If so construed, possession of firearms inside a private home, when neither the home nor the firearms are used for any commercial purpose, would not violate the federal statute.

II. Section 922(g)(1) Violates The Tenth Amendment To The Constitution By Usurping The States' Police Powers And The Individual's Liberty Interest Ensured By State Sovereignty.

This June, in *Bond v. United States*, 131 SCt 2355 (2011), a unanimous Court held that a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress not only exceeded its powers under Article 1 of the Constitution, but also intruded upon

the sovereignty of the States in violation of the Tenth Amendment. In so holding, *Bond* rested on the rationale that a primary purpose of State sovereignty embodied in the Tenth Amendment is to protect individual freedom from a remote central power:

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. . . . [T]he individual liberty secured by federalism is not simply derivative of the rights of the States. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. Id., at 2364.

The Supreme Court rejected the Government's position that Bond's challenge under the Tenth Amendment was limited to an enumerated powers claim, i.e., that Congress exceeded its Article 1 authority by enacting the law. Id., at 2366. While noting the "principles of limited national powers and state sovereignty are intertwined," the Court treated them as distinct interests, violation of which "can cause concomitant injury to persons in individual cases." Id.

Bond contended that her conduct was "local in nature" and "should be left to local authorities to prosecute," and that congressional regulation of that conduct signaled "a massive and unjustifiable expansion of federal law enforcement into state-regulated domain." She argued that under state law, the expected maximum term of imprisonment she could have received for the same

conduct was barely more than a third of her 6-year federal sentence. Id., at 2366.

Mr. Boone contends that his alleged conduct in possessing two unloaded firearms within the confines of his private dwelling was local in nature and should be left to the local authorities to prosecute. Indeed, local charges were originally filed in Lane County Circuit Court, Case No. 20-10-19436, for two counts of Felon in Possession of Firearm, in violation of ORS 166.270. Under Oregon law, he faced a presumptive term of 10-12 months imprisonment under the mandatory sentencing guidelines, aggravated from presumptive probation due to his criminal history. The statutory maximum is 5 years imprisonment. Court records show dismissal of the state charges about a month later, based on indictment in federal court. Here, through application of the Armed Career Criminal Enhancement based on the same criminal history, Mr. Boone faces a minimum mandatory 15-year sentence, and a maximum of life. Thus, federal prosecution presents a drastic deprivation of his liberty interests, compared to what the citizens of his State have authorized for the same conduct.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This text draws no distinction between State sovereignty, or its ultimate beneficiaries, the people who populate the State. This amendment was included in the Bill of Rights to quell concerns that the Constitution conferred general police powers of Congress

or, through provisions like the Necessary and Proper Clause, "opened the door to dangerous (if erroneous) interpretations of enumerated federal authority." Kurt Lash, *The Original Meaning of an Omission*, 83 Notre Dame L. Rev. 1889, 1915 (2008).

The Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez, supra*, 514 US at 566. "[P]reventing and dealing with crime is much more the business of the States than it is of the Federal government." *Patterson v. New* York, 432 U.S. 197, 201 (1977). Under the system "devised by our founders and maintained until recently, federal prosecutors [did] not s[eek] to displace the state systems of criminal justice in routine cases." *United States v. Crawford*, 982 F2d 199, 205 (6th Cir. 1993)(Merritt, C.J., concurring). The American Bar Association reported in 1998 that approximately 40 percent of the thousands of federal crimes were created after 1979. *See* ABA, Report on the Federalization of Criminal Law (1998); *see also,* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997). Federal laws notably extend to routine drug and firearm offenses, reaching conduct that is simultaneously subject to prosecution under state laws that have been on the books for years.

The Judicial Conference of the United States, Long Range Plan for the Federal Courts (1995), reprinted in 166 F.R.D. 49, 83 (1995), set forth five types of crimes appropriate for federal enforcement: (1) offenses against the

federal government or its inherent interests; (2) criminal activity with substantial multi-state or international aspects; (3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; (4) serious high-level or widespread state or local government corruption; and (5) criminal cases raising highly sensitive local issues viewed as more objectively prosecuted in the federal system. Id., at 84-85. Mr. Boone' case is a routine, non-violent, relatively small-scale marijuana grow and felon in possession of unloaded firearms case, and does not arguably fit into any of these categories.

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)); *United States v. Morrison,* 529 U.S. 598, 615-17 (2000)("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).

Section 922(g)(1) 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)). The overlap of federal and state criminal laws promotes sentencing disparities among defendant and abuses of prosecutorial discretion. “If convicted, a federally prosecuted defendant is likely to receive a longer sentence and to serve far more of that sentence than he would if sentenced in state court. . . . [Disparities] are most striking in cases involving frequently charged duplicative federal statutes, like drug and firearms prosecutions.” Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 647-48 & 668 (1997).

Mr. Boone’ case is a clear example of the gross disparity between local and federal prosecution. Conduct that would merit a modest sentence under Oregon law instead starts at no less than a Draconian minimum mandatory 15 years imprisonment. Mr. Boone is a non-violent offender with a history of marijuana offenses, yet federal law indiscriminately pegs him as an “Armed Career Criminal.” In terms of the threat to society that he represents, utilizing federal resources to prosecute and punish him is akin to going after a gnat with

a sledge hammer.[1]

Bond recognizes that an individual suffers cognizable harm when the federal government encroaches upon the police powers traditionally reserved to the States. Admittedly, *Bond* addressed only the issue of standing and not the merits of a Tenth Amendment claim. Nonetheless, *Bond* should require a heightened level of scrutiny for federal criminal statutes whose only claim to legitimacy is a tenuous—if not downright implausible—link to Congress' authority to regulate commerce. The inquiry no longer is solely whether the challenged statute exceeds the enumerated Commerce Clause powers of Congress. The court must also determine whether the challenged statute usurps police powers historically reserved to the States. In other words, when a criminal statute's validity turns on the reach of the Commerce Clause, Congress should be due no greater deference than State sovereignty and the individual's corresponding liberty interest in being prosecuted under state criminal laws.

The defense acknowledges that the Ninth Circuit has upheld 922(g)(1) against a Tenth Amendment violation claim. *United States v. Andaverde*, 64 F.3d 1305, 1310 (9th Cir. 1995); *United States v. Collins*, 61 F3d 1379, 1383-84

[1] The government may contend that Boone had the firearms to protect his marijuana grow and thus represented a genuine threat to society. When Boone was being lodged at the jail on the state firearm charges, he allegedly asked the officer, "What am I supposed to do for protection? There's a lot of elk up there. How am I supposed to feed my family?" See Government Discovery, Bates #55. The defense disagrees that the alleged statements establish Boone intended to use the firearms, once he got them loaded, to shoot trespassers to the marijuana garden.

(9th Cir. 1995). However, Mr. Boone submits those cases are not controlling because the defendants there made no assertion of their individual liberty interest protected by the Tenth Amendment, and the court disposed of their Tenth Amendment claim by stating Congress had the power to regulate possession of firearms, i.e., resolving only an "enumerated powers" claim. E.g., *Collins* ("Because the statute is a valid exercise of Congress' commerce authority, we conclude that the statute does not violate the Tenth Amendment.")

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

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 invalidates 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).

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 in each prosecution that the firearm

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

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. 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." *United States v. Maxwell,* 446 F.3d 1210, 1218 (11th Cir. 2006)(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 defense expects the government at trial to premise federal jurisdiction solely on the fact that the guns that Mr. Boone allegedly possessed once traveled *in* commerce. However, *Lopez*, *Morrison*, and *Jones* reject the view 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. Boone' case, the jurisdictional hook is fairly meaningless, as it applies to every firearm possessed in the District of Oregon.

The Court should examine the facts established at trial of Mr. Boone' case to assess the constitutionality of §922(g)(1) as applied to intrastate possession of two common, unloaded firearms within the confines of a private home that is not commercial or economic in character. *See Jones* (a private residence is not normally within the scope of the Commerce Clause for Congress to regulate). Although guns can be bought and sold in interstate commerce, Mr. Boone' alleged possession of a rifle and pistol within the home to hunt for food and protect himself was purely non-commercial. The defense expects no evidence at

trial that possession of these firearms under these circumstances substantially affected interstate commerce.

Thus, §922(g)(1) as applied to Mr. Boone' alleged intrastate possession of these firearms does not regulate activity that is economic or commercial in nature.

Application of 922(g) and the Armed Career Criminal Act, 18 U.S.C. §924(c), to the facts of Mr. Boone' case also violate the Tenth Amendment. The "suppression of violent crime and vindication of its victims" is a power "which the Founders denied the National Government and reposed in the States," *Morrison*, 529 U.S. at 618. The Indictment in the case at bar alleges a violent crime—possession of a firearm by an Armed Career Criminal—although the evidence at trial will show Mr. Boone is a peaceful, non-violent individual.

Oregon has its own statute regulating intrastate firearm possession by a convicted felon. Or. Rev. Stat. §166.270 (2008). Mr. Boone was originally charged under that statute. Oregon also has clearly asserted its sovereign authority to exercise police powers regulating purely intrastate firearm activities. See ORS 166.170(1), "Authority to Regulate Firearms, State Preemption," providing: "Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Authority." By usurping State sovereignty through this federal

prosecution of Mr. Boone, he faces a deprivation of liberty far in excess of 15 years imprisonment upon conviction. That the State agreed to dismiss its felon in possession charges against Mr. Boone does not diminish his Tenth Amendment claim in federal court. *See Bond*, 131 S.Ct. at 2364.

IV. 18 U.S.C. §922(g)(1) Violates The Second Amendment As Applied To The Facts In Mr. Boone' Case.

In addition to the doubtful constitutionality of §922(g)(1) under the Commerce Clause and Tenth Amendment, 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.

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. See also, *McDonald v. City of Chicago,* 130 S.Ct. 3020, 3044 (2010)("Second Amendment protects a personal right to keep and bear arms for lawful purposes").

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.

In *United States v. Vongxay,* 594 F.3d 1111, 1115 (9th Cir. 2010) the Ninth Circuit panel cited this dicta as controlling precedent that the Second Amendment has no bearing on the validity of federal firearm offenses. The Court found "there appears to be a consensus that, even given the Second Amendment's individual right to bear arms, felons' Second Amendment rights can be reasonably restricted." Id., at 1117. See, e.g., *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *United States v. Anderson*, 559 F.3d 348, 352 & n.6 (5th Cir. 2009). *Vongxay* addressed an "as applied" challenge, but only as

to the broad issue of whether 922(g) violated "the Second Amendment as applied to Vongxay, a convicted felon."

On the broad issue of whether the Second Amendment as applied to felons does not invalidate dispossession statutes, two points made by the concurring opinion in *McCane*, *supra*, 573 F.3d at 1047-49 (Tymkovich, C.J., concurring) are incorporated as arguments on Mr. Boone' 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. See also *United States v. Chester,* 628 F3d 673, 679-681 (4th Cir.

2010)(noting federal felon dispossession statutes were not on the books until the 20th century, and the historical evidence on whether felons were protected by the Second Amendment when it was ratified is inconclusive "at best").

(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.

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 to forever bar possession of a firearm under any circumstances, including possession solely within the citizen's home. *See, e.g., United States v. Duckett*, 406 Fed.Appx. 185, 187, 2010 WL 5211465 (9th Cir. 2010)(unpublished)(Ikuta, C.J., concurring)(questioning whether, notwithstanding the dicta in *Heller*, "the government has a substantial interest in limiting a non-violent felon's constitutional right to bear arms"); *United States v. Williams*, 616 F3d 685, 693

(7th Cir. 2010)(recognizing that 922(g)(1) "may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent.").

While §922(g)(1) may be facially valid under the Second Amendment, there is no reason Mr. Boone, whose felony convictions are all non-violent marijuana crimes, and others similarly situated, should be barred from raising the constitutional right to possession of common firearms within the curtilage of their homes for the feeding and protecting of their family, as a defense against that charge. *See, United States v. Barton,* 633 F.3d 168, 172-173 (3rd Cir. 2011)(Government conceded that *Heller's* dicta did not foreclose an as-applied challenge to 922(g)(1); by describing the felon disarmament ban as presumptively lawful, the Supreme Court implied that the presumption may be rebutted); *United States v. Williams*, 616 F3d 685, 692 (7th Cir. 2010)(same; "putting the government through its paces in proving the constitutionality of §922(g)(1) [in an "as applied" challenge] is only proper."); *see also, United States v. Chester,* 628 F3d at 679-680 (surveying other circuits' views on the meaning of "presumptively lawful," and concluding "as applied" challenges are not barred)(§922(g)(9) case).

As explained by *Barton:*

> To raise a successful as-applied challenge, Barton must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor, non-violent crime might show that he is no more

> dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society. The North Carolina Supreme Court did just that in *Britt v. State,* 363 N.C. 546, 681 S.E.2d 320 (2009), finding that a felon convicted in 1979 of one count of possession of a controlled substance with intent to distribute had a constitutional right to keep and bear arms, at least as that right is understood under the North Carolina Constitution. 633 F.3d at 174.

The courts must enforce the Second Amendment, and nothing in *Heller* excludes felons from asserting the core right to possess a firearm for self-defense within the confines of their own homes in an "as applied" challenge to the presumptively valid ban of 922(g)(1). The final issue is what level of scrutiny to apply. *Heller* did not establish a standard, but did state that rational-basis scrutiny would be inappropriate to apply to deprivation of this constitutional right. Id., at 2817-18 & n. 27; see also *McDonald, supra*, 130 S.Ct. at 3044 (specifically rejecting suggestion that the Second Amendment should receive less protection than the rest of the Bill of Rights).

Because 922(g)(1) disarms an entire category of persons, the issue is whether a person, rather than his conduct, is unprotected by the Second Amendment. *See, Chester*, 638 F3d at 680. After conducting a survey of sister circuits and in-depth analysis of the issue, the Fourth Circuit adopted an intermediate level of scrutiny to be applied when the individual claims the core right to possess firearms in the home for self-defense, and by virtue of his prior record as a domestic violence misdemeanant. *Chester*, at 682-83. This test requires "the asserted governmental end to be more than just legitimate, either

'significant,' 'substantial,' or 'important' . . . [and] require the fit between the challenged regulation and the asserted objective be reasonable, not perfect."). Significantly, intermediate scrutiny places the burden of establishing the required fit squarely upon the government." Id. At 683 (citation omitted). The reasoning of *Chester*, which likened the inquiry under 922(g)(9) to the inquiry under 922(g)(1), should apply to Mr. Boone's case. *See, Williams, supra,* 616 F3d at 692-693 (applying intermediate scrutiny in §922(g)(1) case, but noting "Williams, as a violent felon, is not the ideal candidate" for the challenge); *see also, Nordyke v. King,* __F3d__, 2011 WL 1632963 (9th Cir. May 2, 2011)(holding that only regulations which substantially burden the right to keep and to bear arms in self-defense trigger heightened scrutiny, but declining to decided "precisely what type of heightened scrutiny applies").

Conclusion

For the reasons aforesaid, this Court should dismiss the charges against Mr. Boone under §922(g)(1), finding the statute either unconstitutional on its face, or, upon the record to be developed at trial, unconstitutional as applied.

RESPECTFULLY SUBMITTED this 26th day of August, 2011.

/s/Terri Wood
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