**NO. _____**

**IN THE**
# SUPREME COURT OF THE UNITED STATES

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**TIMOTHY JOE EMERSON,**

*Petitioner,*

*v.*

**THE UNITED STATES OF AMERICA,**

*Respondent.*

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

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does prosecution of Dr. Emerson violate his rights to due process under U.S. CONST. AMEND. V through the principles of entrapment-by-estoppel as well as other due process concerns?

2. Did Congress exceed its Commerce Clause powers in enacting 18 U.S.C. § 922(g)(8)?

3. Does 18 U.S.C. § 922(g)(8) unconstitutionally deprive Dr. Emerson of his rights under U.S. CONST. AMEND. II?

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## OPINIONS BELOW

The judgment of the district court adjudging Dr. Emerson guilty of violations of 18 U.S.C. 922(g)(8) (Cummings, J.), attached hereto (Appendix pp. 1-4), is unpublished. The court of appeals' opinion (Per curiam, Appendix pp. 5-11) affirming the judgment of the district court is also unpublished.

In prior proceedings, the district court's original opinion (Cummings, J.) dismissing the indictment in this case (not included in this petition) is published at 46 F.Supp.2d 598. The court of appeals' first opinion in this case (Garwood, J., also not included in this petition) reversing the district court is published at 270 F.3d 203. The court of appeals' order denying rehearing and rehearing en banc of that opinion are not otherwise published. Also, this Court's opinion denying a Petition for Writ of Certiorari of that first opinion of the Court of Appeals is published at 536 U.S. 907, 122 S.Ct. 2362.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion on January 28, 2004. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

U.S. CONST., ART. I, § 8, provides, in relevant part:

"The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

U.S. CONST. AMEND. II provides:

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

U.S. CONST. AMEND. V provides, in relevant part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The provisions of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322 (1994) relevant to this petition, codified at 18 U.S.C. § 922(g)(8), provide as follows:

"(g) It shall be unlawful for any person –

(8) who is subject to a court order that –

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; . . .

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."

## STATEMENT OF THE CASE

### a. Statement of Facts

On August 28, 1998, Dr. Timothy Joe Emerson was sued for divorce by his wife, Sacha, in a state district court in Texas. At that time, Dr. Emerson was the lawful owner of approximately 30 firearms of varying types. The petition for divorce contained a standard request for temporary orders. Following a hearing at which Dr. Emerson appeared *pro se*, the state district court did in fact issue the requested temporary orders on September 14, 1998, which included orders that restrained Dr. Emerson from the following relevant acts:

> "2. Threatening Petitioner [Mrs. Emerson] in person, by telephone, or in writing to take unlawful action against any person. . . .
> "4. Intentionally, knowingly, or recklessly causing bodily injury to petitioner or to a child of either party.
> "5. Threatening Petitioner or a child of either party with imminent bodily injury.
> "6. Intentionally, knowingly, or recklessly destroying, removing, concealing, encumbering, transferring, or otherwise harming or reducing the value of the property of the parties, or either of them. . . .
> "11. Selling, transferring, assigning, mortgaging, encumbering, or in any other manner alienating any of the property of Petitioner or Respondent, whether personalty or realty, and whether separate or community, except as specifically authorized by order of this Court, or as necessary for ordinary business or living expenses."

Neither the order nor the state judge informed Dr. Emerson of the federal consequences of that state order. Unbeknownst to Dr. Emerson at that time, the state court's order made him immediately subject to the criminal penalties of 18 U.S.C. § 922(g)(8).

On November 16, 1998, Sacha Emerson decided to pay a visit to her husband at his medical office. After being told to leave the premises, she refused and followed Dr. Emerson from the front waiting area back to Dr. Emerson's private office. Mrs. Emerson continued to refuse to leave the premises, and in response to her continued refusal to leave as well as her belligerent nature, Dr. Emerson withdrew a 9mm Beretta pistol from his desk drawer, again telling her to leave. Mrs. Emerson then left the premises, although by way of the back door of

the office, rather than the way she had come[1]. Mrs. Emerson then contacted San Angelo law enforcement officials, alleging that Dr. Emerson had pointed the weapon at her and the Emersons' daughter. Dr. Emerson was arrested, his firearms collection was seized, and he was charged both with the instant 18 U.S.C. § 922(g)(8) violation and with aggravated assault and endangerment of a child under Texas law[2].

**b. Course of Proceedings and Disposition Below**

Dr. Emerson was charged on December 8, 1998 in a five-count Indictment alleging that he violated 18 U.S.C. § 922(g)(8) by unlawfully possessing "in and affecting interstate commerce" the above mentioned Beretta pistol while subject to the September 14, 1998 order. Dr. Emerson filed Motions to Dismiss on the grounds that Congress exceeded its Commerce Clause powers in enacting the statute and that the statute violates Dr. Emerson's rights under the U.S. CONST., AMENDS. II, V, and X. Following an evidentiary hearing, the district court granted Emerson's motion and dismissed the indictment[3], finding that 18 U.S.C. § 922(g)(8) runs afoul of U.S. CONST., AMENDS. II and V. The Government subsequently appealed, and the U.S. Court of Appeals for the Fifth Circuit, Garwood, J., reversed and remanded for trial. Dr. Emerson timely filed a Petition for Panel Rehearing and a Petition for Rehearing En Banc, which were both denied by the Court of Appeals on November 30, 2001. This Court denied Dr. Emerson's first Petition for Writ of Certiorari on June 10, 2002.

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[1] To leave by the back door rather than the front, Mrs. Emerson had to pass by Dr. Emerson, which is hardly behavior one would expect from a spouse frightened of a domestic assault.

[2] Following a jury trial, Dr. Emerson was acquitted of all charges in the Texas prosecution. *State v. Emerson*, Cause No. A-00-0011-S, in the 51st District Court of Tom Green County, Texas (unreported).

[3] The Government itself moved to dismiss counts 2 through 5 of the indictment, which motion was granted, leaving Dr. Emerson's possession of his Beretta pistol on November 16, 1998 as the sole remaining count of the indictment.

Following remand, the Government amended the original indictment to add two additional counts alleging further violations of 18 U.S.C. § 922(g)(8). Specifically, while the original count of the indictment alleged Dr. Emerson's active possession of a Beretta pistol (during the incident at his office, described *supra*), the additional counts charged Dr. Emerson with possession of weapons found at his home and in his office on the day he was arrested in December, 1998. Following trial of this case, Dr. Emerson was convicted by a jury of all three counts of the final superceding indictment and was sentenced to thirty months imprisonment. The Court of Appeals, in a *per curiam* order, affirmed the judgment of the district court on January 28, 2004.

## REASONS FOR GRANTING THE WRIT

### II. 18 U.S.C. § 922(g)(8) VIOLATES PETITIONER'S RIGHTS TO DUE PROCESS OF LAW UNDER THE U.S. CONST. AMEND. V

A. Entrapment by Estoppel & Dr. Emerson's No-Win Scenario

This Court has recognized that when the government attempts to prosecute a citizen who was advised by a government official that his actions were legal, principles of due process give rise to the defense of entrapment-by-estoppel. *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476 (1965); *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257 (1959). In short, to assert the defense of entrapment-by-estoppel, a defendant must show that a governmental official advised him that his proposed conduct was not illegal, and that the defendant thereupon reasonably relied upon that advice. *Id.* In *Cox*, for example, the defendant was arrested for picketing near a courthouse after he had been advised by local police that he could picket across the street from the courthouse; this Court held it a violation of the Fifth Amendment's Due Process Clause to uphold a conviction under such circumstances. 379 U.S. 559, 85 S.Ct. 476. Similarly, in *Raley*, a defendant was convicted for refusing to testify before an investigatory board after he had been advised that he had the right to refuse, and the conviction was held to violate the Fifth Amendment. 360 U.S. 423, 79 S.Ct. 1257. In both cases, the rationale underlying this Court's decision has been the due process notion that it is fundamentally unfair to punish a citizen for conduct which a government official has sanctioned. *Raley*, 360 U.S. at 438, 85 S.Ct. at 1266.

In applying the principles which this Court expounded upon in *Cox* and *Raley*, the lower federal courts have come to some variations on the application of entrapment-by-estoppel to a federal prosecution. The Fifth Circuit, for example, has held that the defense may only be properly raised when the advice is given by an official with the actual (not apparent) authority to administer or enforce the provision in question. *United States v. Spires*, 79 F.3d 464 (1996).

Some of the other circuits agree, with the express implication that to serve as a defense to a federal prosecution, the advice must be given by a federal officer or agent. *See United States v. Gil*, 297 F.3d 93 (2nd Cir. 2002); *United States v. Ormsby*, 252 F.3d 844 (6th Cir. 2001); *United States v. Benning*, 248 F.3d 772 (8th Cir. 2001); *United States v. Hancock*, 231 F.3d 557 (9th Cir. 2000); *United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987); *United States v. Funches*, 135 F.3d 1045 (11th Cir. 1998); *United States v. Bruscantini*, 761 F.2d 640 (11th Cir. 1985). The rationale for this rule is that it is somehow unfair to the Government to deprive it of the ability to prosecute a citizen because of advice given by an employee of a different, albeit subservient, sovereign. *Bruscantini* at 642. Some other courts have disagreed, however, with one case in particular with respect to state judges holding that such judges have a constitutional duty to interpret and apply federal law. *United States v. Brady*, 710 F.Supp. 290 (D.Col. 1989) (state judges have a constitutional duty to interpret and apply federal law, therefore defendants should be allowed to rely on their representations); *United States v. Conley*, 859 F.Supp. 909 (W.D. Pa. 1994). These courts have held that the proper perspective is to determine whether a defendant exercised legitimate, reasonable reliance on the advice or interpretation of an official with apparent authority, taking into account the totality of the circumstances; if so, then traditional notions of fairness preclude conviction. *Brady*, 710 F.Supp. at 294.

The facts of this case, however, have an important distinction from the prior cases that presents a question of apparent first impression of particular importance to the state judiciary. Generally, in each of the prior cases, the defendant received advice from a judge or an executive official which sanctioned the conduct of the defendant. In the instant case, however, Dr. Emerson did not simply receive advice sanctioning his conduct; instead, he was given an affirmative order by the state district judge hearing his divorce case not to transfer, sell, or

alienate any property of the marital estate, with no exception made for his firearms. The very order that triggered the firearms possession disability of 18 U.S.C. § 922(g)(8) thus also restrained Dr. Emerson from ridding himself of his firearms. Dr. Emerson also testified that he was not given any notice that he could no longer possess a firearm while the temporary orders were pending. (R., V, 107). Given that he had no knowledge of the existence of 18 U.S.C. § 922(g)(8), and given that he was under an express order to keep all property of the marital estate, it is fundamentally unfair to punish Dr. Emerson for following a course of conduct which he was ordered to follow. To hold otherwise is to hold that Dr. Emerson should be charged with a superior knowledge of the law than the state trial judge, and that Dr. Emerson should have ignored the temporary order and divested himself of his firearms as soon as possible. Such a requirement undermines the authority of judges as the arbiters of law and erodes the confidence of the public in the decisions of the judiciary[4]. Given that the judicial power depends entirely upon the respect of the parties before it to obtain compliance with its decisions and orders, this Court should ensure the power and independence of the judicial branch, including the state judiciary, by holding that in limited circumstances such as those currently before the Court, the defense of entrapment-by-estoppel is available. The Court should therefore grant *certiorari* in this case and reverse the judgment of the Court of Appeals.

A. Lack of Notice to Dr. Emerson

It is a long-established tenet of Anglo-American law that, in ordinary circumstances, ignorance of the law is no excuse for criminal conduct. However, it is also a fundamental principle of American law that prior to a deprivation of rights, a citizen is entitled to fair notice and a hearing, which includes not only notice of the hearing, but notice of its nature and the

[4] As the Third Circuit held in *United States v. Mancuso*, while all persons are presumed to know the law, laymen are not expected to know more law than judges. 139 F.2d 90, 92 (3rd Cir. 1943).

possible attendant consequences. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950); *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724 (1956); *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200 (1956). In the case at bar, 18 U.S.C. § 922(g)(8) allows for prosecution of individuals based upon the outcome of a hearing at which the potential defendant is never advised as to the possible collateral consequences. Specifically, an individual who appears before a state judge in a state family law hearing may be deprived of his rights to possess firearms, and may become subject to criminal proceedings, without any notice whatsoever as to the possible consequences of the outcome of that family law hearing. In the case at bar, it was established that Dr. Emerson certainly received no notice from the state court as to the potential consequences of the hearing which resulted in the issuance of the protective order giving rise to this case. Such an outcome offends the traditional notions of "fair play and substantial justice" which the Due Process Clause of U.S. CONST. AMEND. V is meant to guarantee.

Additionally, with increasing numbers of statutes regulating an ever-wider myriad of activities, however, this Court has recognized that in some circumstances, criminal punishments are a violation of a citizen's rights to due process of law under the U.S. CONST. AMEND. V. *See Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957).

In the case at bar, the Government seeks to punish Petitioner for his conduct in possessing firearms that were legally possessed until a circumstance beyond his control, the entry of a restraining order by a state district court, intervened. *Lambert* implicitly set forth four criteria for determining whether a criminal prosecution violates principles of due process: (1) whether the activity concerned is passive or active; (2) whether the nature of the activity is one which would ordinarily be considered blameworthy by a member of the community; (3) whether

the defendant was aware of the prohibition on his activity; and (4) whether circumstances were present which should have prompted a defendant to inquire as to the legality of his conduct. 355 U.S. at 228-229, 78 S.Ct. at 243.

In this case before the Court, Petitioner was unaware of any prohibition against his possession of firearms after the entry of the September 14, 1998 order. Neither the order nor the judge who entered it admonished Dr. Emerson as to its collateral effects. Furthermore, Dr. Emerson's continuing possession of his firearms collection (possession of which was the subject of Counts 2 and 3 of the Superceding Indictment) was a passive activity; that is, with the exception of the limited circumstances in which Dr. Emerson brandished a firearm (and for which conduct he was acquitted by a San Angelo, Texas jury), the evidence shows that the firearms remained in storage and nothing indicates that Dr. Emerson held or actively used any of the firearms[5]. Firearms ownership, as noted by the Court of Appeals and by the district court in their first treatment of this case, is a legal activity that has no attachment of opprobrium. In fact, "there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples v. United States*, 511 U.S. 600, 610, 114 S.Ct. 1793, 1799, 128 L.Ed.2d 608 (1994). The entry of a restraining order, unlike a felony conviction (or even a criminal conviction in general) does not effect a change in legal status that would put one on notice that one's prior, legal possession of firearms may no longer be so. The entry of a restraining order does not even effect a change in legal status akin to being under indictment, yet it is perfectly acceptable for one under indictment to continue to possess arms owned lawfully prior to the indictment. 18 U.S.C. § 922(n). Finally, there was no indication to Dr. Emerson that would

[5] The Court of Appeals, relying on an opinion arising after that court's first treatment of the case at bar, held that all firearms possession is active, regardless as to whether the defendant's firearm is in his hand or in a gun safe ten miles away. This holding essentially renders all conduct

have prompted his inquiry into whether his continuing possession of firearms might not be legal. The September 14, 1998 order made no mention of Dr. Emerson's possession of firearms and, in fact, specifically restrained Dr. Emerson from divesting or otherwise disposing of any property of the marital estate. As such, Dr. Emerson was perfectly justified in believing that his continued possession of firearms was not only legal, but required by the restraining order of September 14, 1998. This Court's *Lambert* criteria are therefore satisfied by the facts of this case, and this Petition should therefore be granted to review the contrary holding of the Court of Appeals.

B. Dr. Emerson's No-Win Scenario

Once the state district judge entered the order of September 14, 1998, Dr. Emerson was placed in a position where his conduct could not be reconciled with the requirements of the law. On the one hand, under 18 U.S.C. § 922(g)(8), Dr. Emerson's continued possession of firearms, constituted a criminal offense. On the other hand, Dr. Emerson would have been subject to the additional penalties of criminal contempt in the state district court for violating the terms of the September 14, 1998 order restraining him from divesting or disposing of any property of the marital estate. Under such circumstances, the fundamental notions of justice embodied in the Fifth Amendment's Due Process Clause mandate that the statute cannot stand, either facially or as applied to Dr. Emerson. For the Court of Appeals to hold otherwise is to so far depart from the normal course of judicial proceedings as to warrant this Court's intervention, and this Petition should therefore be granted.

## II. CONGRESS EXCEEDED ITS COMMERCE CLAUSE POWERS IN ENACTING 18 U.S.C. § 922(g)(8)

On September 13, 1994, the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. 103-322, became effective. Section 110401(c) of that act, entitled "PROHIBITION

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active, regardless as to its actual nature, and as such is itself a departure from the ordinary and

AGAINST RECEIPT OF FIREARMS," added 18 U.S.C. § 922(g)(8), which makes it a crime for a person subject to certain restraining orders 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." Despite the title, the statutory language added by § 110401(c) criminalizes not only the receipt, but also the possession of firearms by persons subject to certain types of restraining orders. When this measure was being debated, the conference committee overseeing this legislation noted "that Congress finds with respect to this provision that domestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44; firearms are used by the abuser in 7 percent of domestic violence incidents and produces an adverse effect on interstate commerce; and individuals with a history of domestic abuse should not have easy access to firearms." H.R. Conf. Rep. 103-711, p. 391 (1994), U.S. Code Cong. & Admin. News 1994, p. 1839. Congress therefore clearly enacted this statute with the intent to reduce domestic violence offenses, an area of control normally within purview of the states.

*Scarborough v. United States* has been a controlling influence on what is required as a nexus between possession of a firearm and commerce in order to come within Congress' regulatory powers under U.S. CONST., ART. I, § 8 (the "Commerce Clause"). 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977). *Scarborough* dictated that the Government must merely prove that the firearm has traveled in interstate commerce at some time in order to satisfy the nexus requirement. 431 U.S. at 577, 97 S.Ct. at 1970. This holding arose from a felon in possession of a firearm case in which the Court, in reviewing the legislative history of the statute in question in that case, concluded that "Congress sought to reach possessions [of firearms] broadly, with little concern for when the nexus with commerce occurred." *Id.* Despite this

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accepted course of judicial proceedings warranting this Court's intervention.

holding, two recent cases from this Court, *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 146 L.Ed.2d 658 (1995), and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 131 L.Ed.2d 626 (2000), cast doubt on whether a firearm's mere passage through interstate commerce provides a sufficient nexus to bring possession of that firearm within the realm of Congressional regulation.

As this Court has noted, despite the expansive latitude given to Congress under this Court's modern interpretation of the Commerce Clause, "Congress' regulatory authority is not without effective bounds." *Morrison*, 529 U.S. at 608, 120 S.Ct. at 1748 (2000) (citing *Lopez*, 514 U.S. at 557, 115 S.Ct. at 1629). "[T]he scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Lopez* at 557, 115 S.Ct. at 1628-1628, (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893 (1937)). As outlined in this Court's decisions in *Morrison* and *Lopez*, Congress may use the commerce power to regulate in three broad ways. "First, Congress may regulate the use of the channels of interstate commerce." *Lopez* at 558, 115 S.Ct. at 1629, 131 L.Ed.2d 626 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) and *United States v. Darby*, 312 U.S. 100, 114, 61 S.Ct. 451, 85 L.Ed. 609 (1941)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities." *Id.* (citing *Shreveport Rate Cases*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914), *Southern R. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911), and *Perez v. United States*, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686

(1971)). Third, "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." *Lopez* at 558-559, 115 S.Ct. at 1629-1630 (citing *Jones & Laughlin Steel*, *supra*).

In the case before the Court, only the third category of activity is implicated by 18 U.S.C. § 922(g)(8) as applied to the facts of this case. Despite the holding in *Scarborough, supra,* mere possession of a firearm does not use the channels of interstate commerce, nor does it threaten the instrumentalities of interstate commerce[6]. *Lopez* at 559, 115 S.Ct. at 1630. In fact, this Court's opinion in *Jones v. United States* explicitly rejected the argument that merely because building materials and utilities had passed through interstate commerce, the federal arson statute should therefore apply to a private structure that was not otherwise engaged in commerce, either intrastate or interstate. 529 U.S. 848, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000). *Jones* has therefore explicitly rejected the rationale supporting the result in *Scarborough*; however, the Courts of Appeals have refused to regard *Scarborough* as overruled absent an express pronouncement from this Court. Given this Court's recent cases, the question as to whether 922(g)(8)'s reach extends beyond that allowed by the Commerce Clause, as applied to the facts of this case, therefore turns not on whether the firearm possessed passed through interstate commerce at some point in the past, but on whether possession of the firearm substantially affects interstate commerce. In deciding whether a statute is an excessive exercise of the Commerce Clause power, this Court has set forth three criteria to examine, including (1) the nature of the activity being regulated and the statutory means of accomplishing that regulation; (2) whether the statute contains a jurisdictional element which ensures, on a case by case inquiry,

an appropriate nexus between the regulated activity and interstate commerce; and (3) the existence and extent of Congressional findings accompanying passage of the statute. *Morrison*, 529 U.S. at 610-612, 120 S.Ct. 1749-1751; *Lopez*, 514 U.S. at 559-564, 115 S.Ct at 1631-1632.

The statute in question in this case, 18 U.S.C. § 922(g)(8), bears similarities to the statutes in both *Lopez* and *Morrison*. First, § 922(g)(8) as applied to this case is a criminal statute which seeks to regulate noneconomic activity, i.e., firearm possession by one subject to a restraining order. While § 922(g)(8) appears to have some connection to commerce, when read in light of *Scarborough*, it is apparent that the transaction being regulated itself has no connection to commerce. Second, as noted, unlike the statute in *Lopez*, § 922(g)(8) contains a jurisdictional element with respect to a defendant's possession of a firearm that the possession be "in or affecting commerce." Again, however, in light of *Scarborough*, this jurisdictional element allows for the prosecution of activities so attenuated from interstate commerce as to render the jurisdictional element meaningless. This attenuation is precisely what led this Court to invalidate statutes in both *Lopez* and *Morrison* and leads to the conclusion that 18 U.S.C. § 922(g)(8), as applied to the facts of this case, is an unconstitutional exercise of authority by Congress under the Commerce Clause. Finally, while there are congressional findings as noted, *supra*, in the discussion of Congress' enactment of § 922(g)(8), these congressional findings are of the same broad "costs-of-crime" findings that were rejected in *Morrison*. The analysis set forth in *Lopez*, *Morrison*, and *Jones* therefore leads to the conclusion that Congress exceeded its Commerce Clause authority when its enacted 18 U.S.C. § 922(g)(8), and the findings of the Court of Appeals are contrary to these decisions of this Court. This Court should therefore grant this

[6] While it is credible that shipment, transportation, and receipt of a firearm in interstate commerce by definition involves the use of channels of interstate commerce, the indictment in the case before the Court only charged Dr. Emerson's possession of a firearm.

Petition and issue a writ of certiorari to review the judgment of the Court of Appeals with respect to 18 U.S.C. § 922(g)(8)'s constitutionality under the Commerce Clause.

## III. 18 U.S.C. § 922(g)(8) UNCONSTITUTIONALLY DEPRIVES DR. EMERSON OF HIS RIGHT TO POSSESS FIREARMS PURSUANT TO U.S. CONST. AMEND. II.

Both the district court and the Court of Appeals, in their initial treatment of this case, determined that U.S. CONST., AMEND. II ("Second Amendment") guarantees an individual's right to keep and bear arms. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). This is an important question of federal law which has never been settled by this Court, and the decisions of both the district court and the Court of Appeals are in conflict with other circuits with respect to this question. Petitioner, however, does not challenge this holding, but rather its application of the facts of the case at bar. Petitioner believes that the analysis of the district court and the analysis of the Court of Appeals, to the extent that the latter found the Second Amendment to guarantee an individual right, are correct, and Petitioner adopts those analyses. However, Petitioner believes that the analysis of the Court of Appeals with respect to whether 18 U.S.C. § 922(g)(8) infringes upon that Second Amendment right is flawed. Petitioner submits that the analysis of the Court of Appeals continues to apply the incorrect standard for determining whether a statute infringes upon a right of Constitutional magnitude as set forth by this Court. Insofar as no other circuit has even held the Second Amendment to guarantee an individual right, the opinion of the Court of Appeals is in direct conflict with other Courts of Appeals, and this is an important issue of constitutional law that has not been, but should be settled by this Court.

It has long been the case that when a fundamental right has been trod upon by legislative enactment, either by a State or by Congress, the federal judiciary will subject such an enactment to strict scrutiny, allowing the statute to stand only if: (1) it is narrowly tailored, and (2) serves a

compelling governmental interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (First Amendment); *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (First Amendment); *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001) (First Amendment); *Estiverne v. La. State Bar Ass'n*, 863 F.2d 371 (5th Cir. 1989) (First Amendment); *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (Fifth Amendment); *Collins v. Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (Fifth and Fourteenth Amendments); *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (Fifth Amendment); *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (Fourteenth Amendment). A right is considered to be fundamental when its source, either direct or indirect, is the Constitution. *Plyler v. Doe*, 457 U.S. 202, 217 n. 15, 102 S.Ct. 2382, 2395 n. 15, 72 L.Ed.2d 786 (1982); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 93 S.Ct. 1278, 1296-1297, 36 L.Ed.2d 16 (1978). A fundamental right has also been characterized as one "deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503, 97 S.Ct. at 1937[7]. As noted *supra*, "there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples*, 511 U.S. at 610, 114 S.Ct. at 1799.

In the case at bar, the Court of Appeals properly found that the Second Amendment protects an individual right, but despite the Constitutional origin of the right, did not thereupon subject 18 U.S.C. § 922(g)(8) to strict scrutiny. The Court of Appeals instead applied a "reasonable restriction" standard that appears to be akin to the "rational basis" standard applied

[7] A fundamental right has also been described as one "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 151 (1937). The right of individuals to keep and bear arms has been described as "the true palladium of liberty." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 300 (1803).

to statutes that restrict non-fundamental rights. Appendix at p. 136. As such, the Court of Appeals has applied the incorrect standard of review in direct conflict with prior decisions of this Court.

In this case, 18 U.S.C. § 922 (g)(8) is unsupported by a compelling interest of the Federal government. While this statute appears to be directed to the goal of preventing domestic violence, this is not an area within the Federal government's purview. Domestic relations is an area traditionally left to the States. *Ankenbrandt v. Richards*, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992); *Simms v. Simms*, 175 U.S. 162, 168, 20 S.Ct. 58, 60, 44 L.Ed. 115 (1899). *Lopez*, *supra*, also notes that among the areas of regulation typically left to the states are "family law (including marriage, divorce, and child custody)." 514 U.S. at 564, 115 S.Ct. at 1632. Without a compelling Federal interest supporting 18 U.S.C. § 922(g)(8), it must fail Constitutional muster as an infringement of the Second Amendment.

Even if the prevention of domestic violence is an interest that may compel the Federal government to act, the enactment before the Court is not narrowly tailored to that purpose. 18 U.S.C. § 922 (g)(8) purports to deprive a person made subject to a court order meeting its criteria of that person's Second Amendment rights not only to receive a firearm, but to possess, ship, or transport one as well. If a person finds himself in a state domestic relations dispute in which an order meeting the criteria of § 922(g)(8) could possibly be issued, the only way that person may be sure to avoid criminal liability is to divest himself of any firearms he may possess *before* such a hearing; otherwise, that person becomes a federal felon under § 922(g)(8) as soon as the relevant order is signed. Because of this necessity to rid oneself of all firearms before a domestic relations hearing of this nature, § 922(g)(8) is not narrowly tailored and instead unconstitutionally chills the free exercise of citizens' Second Amendment rights. Petitioner

therefore respectfully submits that the Court, should grant *certiorari* in order to resolve this important issue and in order to resolve the conflict between the Circuits on the underlying issue of the application of U.S. CONST. AMEND. II.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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**NO. _____**

**IN THE**
# SUPREME COURT OF THE UNITED STATES

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**TIMOTHY JOE EMERSON,**

*Petitioner,*

*v.*

**THE UNITED STATES OF AMERICA,**

*Respondent.*

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

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# APPENDIX

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