

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8578
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN GUTIERREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CR-51)

(March 16, 1994)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Martin Gutierrez entered a plea of guilty to unlawful possession of a firearm in a school zone, 18 U.S.C. § 922(q), and was sentenced to six months imprisonment, two years of supervised release, and a \$50 assessment. Following his conviction, we held

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

in **United States v. Lopez**¹ that section 922(q), the operative provision of the Gun Free School Zones Act, was "invalid as beyond the power of Congress under the Commerce Clause."² The government seeks to preserve its position by maintaining that section 922(q) was a valid exercise of the commerce power;³ both parties acknowledge, however, that the instant case is identical to **Lopez** in all relevant respects. Consistent with our prior decision, we hold that 18 U.S.C. § 922(q) is invalid because it exceeds the boundaries of the Commerce Clause. The conviction, therefore, cannot be sustained.

The conviction is VACATED and the indictment is, accordingly, DISMISSED.

¹ 2 F.3d 1342 (5th Cir. 1993).

² **Id.** at 1367-68.

³ The constitutionality of the Gun Free School Zones Act presents a likely subject for review by the Supreme Court. The government advises that the Solicitor General is actively considering a petition for certiorari in **Lopez**. Additionally, since our decision in **Lopez**, our colleagues in the Ninth Circuit have upheld the constitutionality of the act. **United States v. Edwards**, 1993 WL 524446 (9th Cir. Dec. 21, 1993). A circuit conflict now exists.