

No. _____

IN THE
Supreme Court of the United States

GIOVANNI ELLIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1) is facially unconstitutional because it exceeds Congress's authority under the Commerce Clause, and is unconstitutional as applied to the intrastate possession of a firearm and ammunition?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Giovanni Ellis, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, No. 18-10794, 739 F. App'x 598 (11th Cir. 2018), is provided in the petition appendix at A-1 ("Pet. App.").

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 10, 2018. *Id.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3 of the U.S. Constitution provides:

Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. § 922(g) provides:

It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

A local law enforcement officer in Winter Park, Florida, conducted a traffic stop on Mr. Ellis's vehicle for traveling without headlights or taillights. Doc. 26 (Presentence Report, "PSR") ¶ 5. Upon searching the vehicle, the officer found a firearm and ammunition. *Id.* Mr. Ellis admitted to local law enforcement that he had another firearm and additional ammunition in a hotel room in Orlando, Florida. PSR ¶ 8. The State of Florida arrested Mr. Ellis and charged him in Orange

County Circuit Court with two counts of possession of a firearm by a convicted felon and one count of possession of cannabis with intent to sell or deliver. PSR ¶ 41. More than three months later, the State of Florida dismissed all three counts in lieu of federal prosecution. *Id.*

Almost two months after the State of Florida dismissed the charges, a federal grand jury returned a one-count indictment charging Mr. Ellis in federal court with possession of firearms and ammunition “in and affecting interstate and foreign commerce,” after being convicted of felony offenses, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Doc. 1. Petitioner entered a guilty plea, without a plea agreement. Doc. 40. As the factual basis for the plea, the commerce element was based on the manufacture of the firearm and ammunition outside of Florida and their interstate travel to Florida prior to Petitioner’s possession. *Id.* at 8. But the interstate commerce connection to the firearms and ammunition ended well before Petitioner’s criminal activity—his possession of the firearms and ammunition in his vehicle in Winter Park and his hotel room in Orlando, Florida. *Id.* at 7-8. The court accepted the plea, adjudicated him guilty, and sentenced him to 84 months’ imprisonment. Doc. 32.

On appeal, Petitioner challenged the constitutionality of § 922(g)(1) facially and as applied. The Eleventh Circuit affirmed Petitioner’s conviction based on binding circuit precedent. *See Ellis*, 739 F. App’x at 599-600 (citing *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011); *United States v. Scott*, 263 F.3d 1270, 1273 (11th Cir. 2001); *United States v. Dupree*, 258 F.3d 1258, 1259-60 (11th Cir. 2001); *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996)). These precedents uphold § 922(g)(1) convictions resting on a “minimal nexus” to interstate commerce, including the manufacture of the firearm outside of Florida before its intrastate possession (the criminal activity) by the defendant. *See Jordan*, 635 F.3d at 1189; *Scott*, 263 F.3d at 1274; *Dupree*, 258 F.3d at 1260; *McAllister*, 77 F.3d at 390.

REASONS FOR GRANTING THE WRIT

The Felon-in-Possession Statute, 18 U.S.C. § 922(g)(1), is Unconstitutional Because it Does Not Require that the Criminal Activity—Possession—Substantially Affect Interstate Commerce.

Petitioner Ellis's conviction cannot stand, as Congress's enumerated powers do not allow it to criminalize the purely intrastate possession of firearms and ammunition simply because the firearms and ammunition crossed state lines at some time in the past. That is what 18 U.S.C. § 922(g)(1) accomplishes, usurping the states' rightful police power.

This Court's modern Commerce Clause cases create important limitations on Congress's commerce power. *See United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Congress's commerce power is limited to three categories: (1) "channels of interstate commerce," (2) "instrumentalities of interstate commerce," and (3) "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. This Court used that framework to strike down the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which forbade possession of a firearm in a school zone. *See id.* at 551-52. Under *Lopez*, the Commerce Clause does not give Congress the "general police power" the states exercise. *Id.* at 567.

The *Lopez* framework is thus the obvious place to start when analyzing the constitutionality of other federal gun possession statutes. But instead, many circuits (including the Eleventh Circuit) have affirmed § 922(g)(1) under *Scarborough v. United States*, 431 U.S. 563 (1977), a much older precedent that construed § 922(g)(1)'s predecessor.¹ Contrary to what lower courts often hold,

¹ See, e.g., *United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992-93 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d 1456, 1461-62 & n.2 (9th Cir. 1995); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

Scarborough did not survive *Lopez*, and § 922(g)(1) does not pass muster under *Lopez*. The *Scarborough* Court decided, as a matter of statutory interpretation, that Congress did not intend “to require any more than the *minimal* nexus that the firearm have been, at some time, in interstate commerce”—a standard well below *Lopez*’s *substantial* effects test. *Scarborough*, 431 U.S. at 575 (emphasis added); *id.* at 564, 577; *Lopez*, 514 U.S. at 559. Given its incompatibility with *Lopez*, *Scarborough* is no longer good law.

This petition presents an issue only this Court can resolve—how to reconcile the statutory interpretation decision in *Scarborough* with the constitutional decision in *Lopez*. *See Alderman v. United States*, 131 S. Ct. 700, 703 (2011) (Thomas, Scalia, JJ., dissenting from the denial of certiorari) (“If the *Lopez* [constitutional] framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent [*Scarborough*] that does not squarely address the constitutional issue.”). Because the courts of appeals cannot overrule this Court’s precedent in *Scarborough*, the *Lopez* test will disappear for intrastate possession crimes without this Court’s intervention and guidance.

Thousands of defendants are convicted under § 922(g) every year.² The consequences for such a conviction are stark; defendants receive up to ten years in prison or a mandatory-minimum term of 15 years if the Armed Career Criminal Act (ACCA) applies. *See* 18 U.S.C. § 924(a)(2),(e); *see, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2555 (2015). In Petitioner Ellis’s case, his federal conviction and 7-year sentence rest on his purely local activity of possessing the firearms and ammunition in his vehicle and hotel room in Florida. The only connection between the firearms

² *See* U.S. Sentencing Comm’n, *Quick Facts: Felon in Possession of a Firearm* (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf

and ammunition and interstate commerce occurred *before* Mr. Ellis's possession; the firearms and ammunition had been manufactured outside of the State of Florida and therefore must have crossed state lines at some point in the past. Mr. Ellis's case thus squarely presents the issue of whether Congress may criminalize intrastate activity—possession—based on the historical connection between the firearms and ammunition and interstate commerce. Because the federal government's authority to prosecute such cases raises an important and recurring question, Mr. Ellis respectfully seeks this Court's review.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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