APPLICATION EXHIBITS

EXHIBIT 1

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 24, 2022
Lyle W. Cayce
Clerk

No. 21-10556

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSHUA SEEKINS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:19-CR-563

Before STEWART, ELROD, and GRAVES, *Circuit Judges*.

PER CURIAM:*

Joshua Seekins was convicted by a jury of being a felon in possession of ammunition, in violation of 18 U.S.C. § 921(g)(1), for possessing two shotgun shells which he claims he found. He was sentenced to 70 months' imprisonment after the district court concluded that a flare gun, modified to accept shotgun shells, counted as a "firearm" for the purposes of U.S.S.G.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

§ 2K2.1(a)(4)(B)(II)(ii)(I). Seekins challenges the sufficiency of the evidence supporting his conviction, the constitutionality of § 921(g)(1)'s application to his conduct, and the conclusions underlying the § 2K2.1 firearm enhancement. We AFFIRM.

I.

We first address Seekins' arguments that the government failed to prove each element of his conviction offense and that § 922(g)(1) is unconstitutional as applied to his conduct in this case. Where, as here, a defendant preserved a general sufficiency-of-the-evidence challenge by moving for acquittal under rule 29 at the close of the government's case-in-chief and at the close of all of the evidence, we review de novo a denial of a motion for judgment of acquittal. *United States v. Myers*, 104 F.3d 76, 78 (5th Cir. 1997). The jury's verdict will be affirmed "if a reasonable trier of fact could conclude from the evidence that the elements of the offense were established beyond a reasonable doubt." *Id.* In assessing evidentiary sufficiency, we do "not evaluate the weight of the evidence or the credibility of the witnesses, but view the evidence in the light most favorable to the verdict, drawing all reasonable inferences to support the verdict." *United States v. Girod*, 646 F.3d 304, 313 (5th Cir. 2011).

To convict under 18 U.S.C. § 922(g)(1), the government must prove four elements: (i) Seekins was a felon; (ii) Seekins knew he was a felon; (iii) Seekins knowingly possessed ammunition; and (iv) the ammunition traveled in interstate commerce. *Rehaif v. United States*, 139 S. Ct. 2191, 2195-96 (2019); *United States v. Huntsberry*, 956 F.3d 270, 281 (5th Cir. 2020). Seekins challenges the third and fourth elements.

A.

Seekins first contends that the "district court erred in denying the defendant's motions for judgment of acquittal because the government failed

to prove that [he] knew his bullets were ammunition rather than flare shells." The government conceded below that flare shells are not ammunition under § 922(g), and thus the jury was instructed that "a safety flare" was not ammunition. Despite that instruction, the jury concluded that Seekins knew that he held shotgun shells and not flare cartridges.

The district court did not err in concluding that a jury could reasonably find that the government proved Seekins' knowledge. On the one hand, as Seekins notes, flare shells and shotgun shells are quite similar in appearance. They are alike in size and color. On the other hand, several witnesses testified that a shotgun shell is "significantly heavier than a flare cartridge." The jury also learned that Seekins had previously possessed several 12-gauge shotguns, and therefore it could reasonably infer that Seekins was familiar with shotgun ammunition. Further, Seekins' arresting officer described asking Seekins why he had a shotgun shell, and Seekins simply responded that he had found it and did not express surprise at the officer's description of the ammunition. Finally, Seekins had a flare gun that was visibly modified to accept shotgun shells. Although there is no evidence that Seekins modified the flare launcher himself, the jury could reasonably infer that Seekins must have known he held shotgun shells, as modification would have been unnecessary if he held mere flare cartridges. Viewing the evidence in the light most favorable to the verdict and drawing all reasonable inferences to support the verdict, *see Girod*, 646 F.3d at 313, this was enough to support the jury's conclusion that Seekins knew he possessed shotgun shells and not flare cartridges.

B.

The bulk of Seekins' argument on appeal addresses the interstate commerce element, whether in the form of an "as-applied constitutional

challenge"[1] or as a sufficiency-of-the-evidence argument. We address each argument in turn, though we note that the two arguments are functionally identical. *See, e.g.*, *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (holding, in rejecting an as-applied Commerce Clause challenge to a § 922(g) conviction, that the "*evidence* [wa]s sufficient to establish a past connection between the firearm and interstate commerce" (emphasis added)); *United States v. Crenshaw*, 359 F.3d 977, 984 (8th Cir. 2004) ("We first note that the 'as applied' constitutional challenge [to a VICAR conviction under the Commerce Clause] is really not a constitutional objection at all, but is a challenge to the sufficiency of the evidence supporting the jury verdict.").

First, the government introduced enough evidence that Seekins' shotgun shells traveled in interstate commerce, and that is all our caselaw requires to satisfy the interstate commerce element. That element is satisfied where the government demonstrates that the ammunition was manufactured out of state. *See United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005). The district court therefore correctly instructed the jury that it had to be convinced beyond a reasonable doubt that "the ammunition possessed traveled in interstate or foreign commerce; that is, before the defendant possessed the ammunition, it had traveled at some time from one state to another or between any part of the United States." *See* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL) § 2.43D. With ample testimony that Seekins' shotgun shells were manufactured in Illinois, the evidence was sufficient to show that they had traveled in interstate commerce. Though Seekins points to contrary but speculative testimony, the

[1] Seekins also mounts a brief facial challenge to § 922(g)'s constitutionality. But Seekins concedes that this argument is foreclosed under our precedent. *E.g.*, *United States v. Willingham*, 310 F.3d 367, 373 (5th Cir. 2002).

jury was entitled to choose among any reasonable construction of the evidence, *see United States v. Mitchell*, 484 F.3d 762, 768 (5th Cir. 2007), and the resolution of conflicts in the evidence was solely within the jury's domain, *see United States v. Sanchez*, 961 F.2d 1169, 1173 (5th Cir. 1992). The district court therefore did not err in denying Seekins' motion for judgment of acquittal.

Seekins' second argument—that § 922(g)(1) cannot constitutionally be applied to found ammunition—fails under our caselaw. We have long held that § 922(g) can be constitutionally applied where the "in or affecting commerce" element is proved by showing the *firearm* had previously traveled across state lines without regard to the defendant's conduct. *E.g.*, *United States v. Kuban*, 94 F.3d 971, 973 (5th Cir. 1996); *Rawls*, 85 F.3d at 242; *United States v. Pierson*, 139 F.3d 501, 503 (5th Cir. 1998); *United States v. De Leon*, 170 F.3d 494, 499 (5th Cir. 1999). "There is no additional requirement that, to apply the law constitutionally, the Government must prove some economic activity beyond the interstate movement of the weapon." *United States v. Collins*, 573 F. App'x 374, 375 (5th Cir. 2014) (citing *United States v. Meza*, 701 F.3d 411, 418 (5th Cir. 2012)). That Seekins purportedly found the shotgun shells is thus of no moment. We therefore affirm the district court's denial of Seekins' motions to dismiss and for acquittal.

II.

Seekins next argues that the district court "miscalculated" the guidelines imprisonment range for his offense. He challenges the district court's conclusion that Seekins' modified flare gun constitutes a "firearm" under 26 U.S.C. § 5845(a). *See* U.S.S.G. § 2K2.1(a)(4)(B)(i)(II). We need not resolve this novel question of whether a modified flare gun amounts to a

firearm under § 5845(a), because any error in the district court's conclusion is harmless.

As relevant here, harmlessness can be shown if the district court considers both the incorrect and correct ranges and explains that it would have given the same sentence in either case. *United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017). The district court expressly stated that it would impose the same sentence even without the enhancement, opining that a 70-month sentence "is an appropriate, fair and reasonable sentence, taking into account all the factors under 18 [U.S.C. §] 3553(a)." Seekins argues that the district court should have expressly stated its consideration of the lower guidelines range, but we do not "demand 'magic words' or 'robotic incantations' from district judges." *United States v. Vega-Garcia*, 893 F.3d 326, 328 (5th Cir. 2018). Instead, "when a district court entertains arguments as to the proper guidelines range and explicitly states that it would have given the same sentence it did regardless, any error in the range calculation is harmless." *United States v. Nanda*, 867 F.3d 522, 531 (5th Cir. 2017) (citations omitted); *see United States v. Medel-Guadalupe*, 987 F.3d 424, 429 (5th Cir.), *cert. denied*, 141 S. Ct. 2545 (2021) ("[T]he district court was aware of the guidelines range absent the enhancements because Medel-Guadalupe advised the court of this range in his written PSR objections."). Here, Seekins twice requested the alternative guidelines range of 37-46 months. Nonetheless, the district court determined that a 70-month sentence was fair and reasonable even absent the § 2K2.1(a)(4)(B)(II)(ii)(I) enhancement. The district court's statements at sentencing, taken in their totality, are sufficient to support application of the harmless error doctrine. *Vega-Garcia*, 893 F.3d at 327-28.

In summary, we AFFIRM the district court's judgment and sentence.

EXHIBIT 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA	§	**JUDGMENT IN A CRIMINAL CASE**
	§	
v.	§	
	§	Case Number: **3:19-CR-00563-M(1)**
JOSHUA SEEKINS	§	USM Number: **11982-084**
Defendant.	§	**Erin Leigh Brennan**
	§	Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**Count 1 of the Superseding Indictment, filed June 23, 2020.**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2) Possession of Ammunition by a Convicted Felon	06/17/2019	1s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ The Original Indictment is dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 25, 2021
Date of Imposition of Judgment

Signature of Judge

BARBARA M. G. LYNN
CHIEF UNITED STATES DISTRICT JUDGE
Name and Title of Judge

May 25, 2021
Date

DEFENDANT: JOSHUA SEEKINS
CASE NUMBER: 3:19-CR-00563-M(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

SEVENTY (70) MONTHS.

This sentence shall run concurrently with any sentence imposed in Case Nos. F-1930896 and F-1930967, pending in the Dallas County Criminal District Court 4, as they are related to the instant offense.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOSHUA SEEKINS
CASE NUMBER: 3:19-CR-00563-M(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **THREE (3) YEARS.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. You must notify the Court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: JOSHUA SEEKINS
CASE NUMBER: 3:19-CR-00563-M(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: JOSHUA SEEKINS
CASE NUMBER: 3:19-CR-00563-M(1)

SPECIAL CONDITIONS OF SUPERVISION

You must provide the probation officer with access to any requested financial information and authorize the release of any financial information.

DEFENDANT: JOSHUA SEEKINS
CASE NUMBER: 3:19-CR-00563-M(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100.00	$.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015. Pub. L. No. 114-22
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JOSHUA SEEKINS
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 1s, which shall be paid immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

EXHIBIT 3

United States Court of Appeals for the Fifth Circuit

No. 21-10556

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSHUA SEEKINS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CR-563-1

ON PETITION FOR REHEARING EN BANC

Before STEWART, ELROD, and GRAVES, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, seven judges voted in favor of rehearing (Jones, Smith, Willett, Ho, Duncan, Engelhardt, and Oldham), and nine voted against rehearing (Richman, Stewart, Dennis, Elrod, Southwick, Haynes, Graves, Higginson, and Wilson).

JAMES C. HO, *Circuit Judge*, joined by SMITH and ENGELHARDT, *Circuit Judges*, dissenting from denial of rehearing en banc:

In a country populated by well over 300 million people, we're bound to vociferously disagree on a wide range of issues. Indeed, the Anti-Federalists opposed the proposed United States Constitution and the creation of our national government for that very reason.

As the Anti-Federalists explained, "[h]istory furnishes no example of a free republic, any thing like the extent of the United States." BRUTUS I (Oct. 18, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 368 (Herbert J. Storing ed. 1981). That's because, they cautioned, "a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, . . . as that of the whole United States." *Id.* They warned that "[t]he laws and customs of the several states are, in many respects, very diverse, and in some opposite." *Id.* at 370. They feared that the proposed United States "would not only be too numerous to act with any care or decision, but would be composed of such heterogenous and discordant principles, as would constantly be contending with each other." *Id.* They worried that republics could prosper only if "the manners, sentiments, and interests of the people should be similar," as would only exist if the republic were "confined to a single city" or over a "small" territory. *Id.* at 369.

The Federalists, of course, prevailed. They predicted that we would be better off if we could come together as a single, unified country—that enormous diplomatic, military, economic, and other benefits would inevitably flow from scale. *See*, *e.g.*, THE FEDERALIST No. 14, at 99 (James Madison) (Clinton Rossiter ed., 1961) ("We have seen the necessity of the Union, as our bulwark against foreign danger, as the conservator of peace among ourselves, as the guardian of our commerce and other common interests."). And they promised that we would come together, and that Anti-

Federalist fears would not become reality, because our new national government would be one of limited powers—one that would respect our great diversity of viewpoints, by preserving community differences and local rules. *See*, *e.g.*, *id.* at 102 ("[T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other subjects which can be separately provided for, will retain their due authority and activity.").

But constitutional limits on governmental power do not enforce themselves. They require vigilant—and diligent—enforcement.

For too long, our circuit precedent has allowed the federal government to assume all but plenary power over our nation. In particular, our circuit precedent licenses the federal government to regulate the mere possession of virtually every physical item in our nation—even if it's undisputed that the possession of the item will have zero impact on any other state in the union. The federal government just has to demonstrate that the item once traveled across state lines at some point in its lifetime, no matter how distant or remote in time. *See United States v. Rawls*, 85 F.3d 240, 242–43 (5th Cir. 1996).

That is no limit at all. If the only thing limiting federal power is our ability to document (or merely speculate about) the provenance of a particular item, the Founders' assurance of a limited national government is nothing more than a parchment promise.

Rehearing this case en banc would have given us an ideal vehicle and welcome opportunity to reconsider our mistaken circuit precedent. I dissent from the denial of rehearing en banc.

* * *

The Constitution creates a federal government of enumerated powers. *See* U.S. CONST. art. I, § 8. And those powers are "few and defined." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)). *See also Marbury v. Madison*, 1 Cranch 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). This enumeration ensures "a healthy balance of power between the States and the Federal Government [and] reduce[s] the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 552 (cleaned up).

But now consider the facts presented in this case: The federal government seeks to incarcerate a homeless man (and previously convicted felon) for possessing two shotgun shells that he found in a dumpster.

It's hard to imagine a more local crime than this. There's no record evidence that his possession of these items will have any impact on any other state. There's no record evidence of any commercial transaction of any kind involving the shells—or even that the shells traveled across state lines at any particular moment in time. All that's here is testimony that the manufacturer of shells that match the items possessed by Seekins manufactured those shells in another state.

A panel of this court was duty-bound to uphold the conviction as a matter of circuit precedent. *United States v. Seekins*, 2022 WL 3644185, *2 (5th Cir. 2022). Accordingly, Seekins argues that *Rawls* and its progeny warrant en banc review because they are "premised on serious error" and are contrary to structural limits on the federal government's power under the Commerce Clause.

I agree. There must be *some* limit on federal power under the Commerce Clause. But our circuit precedent fails to recognize this. Our precedent on felon-in-possession statutes allows the federal government to regulate any item so long as it was manufactured out-of-state—without any regard to when, why, or by whom the item was transported across state lines. But that would mean that the federal government can regulate virtually every tangible item anywhere in the United States. After all, it's hard to imagine any physical item that has not traveled across state lines at *some* point in its existence, either in whole or in part.

The Supreme Court has repeatedly warned us that the Commerce Clause power "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012). Yet our circuit precedent would allow just that. If it's enough that some object (or component of an object) at some unknown (and perhaps unknowable) point in time traveled across state lines to confer federal jurisdiction, it's hard to imagine anything that would remain outside the federal government's commerce power. There is no plausible reading of the Commerce Clause, as originally understood by our Founders, that could possibly give the federal government such reach. *See, e.g.*, *Lopez*, 514 U.S. at 585–587 (Thomas, J., concurring) (discussing the original meaning of the Commerce Clause). *See also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001) ("The most persuasive evidence of original meaning . . . strongly supports Justice Thomas's and the Progressive Era Supreme Court's narrow interpretation of the Congress's power [under the Commerce Clause]."); William J. Seidleck, *Originalism and the General Concurrence: How Originalists Can Accommodate Entrenched Precedents While Reining in Commerce Clause Doctrine*, 3 U. PA. J. L. & PUB. AFFS. 263, 269 (2018) ("The founding generation understood the term 'commerce' to mean only 'trade or exchange

of goods.' . . . The writings of the framers and the purpose behind the creation of the Commerce Clause also confirm its intended narrow scope.").

Indeed, every member of the panel in *Rawls* recognized this problem. The entire panel specially concurred, noting that "one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce." 85 F.3d at 243 (Garwood, J., specially concurring).

Rawls nevertheless affirmed the constitutionality of the conviction under the Commerce Clause because the panel believed that Supreme Court precedent required them to do so. In *Scarborough v. United States*, 431 U.S. 563 (1977), the Supreme Court held the then-operative felon-in-possession statute was satisfied merely by the firearm's transportation, at some point in time, across state lines. 431 U.S. 563, 577 (1977).

But our reliance on *Scarborough* was erroneous for at least two reasons. First, the Court's holding in *Scarborough* was statutory, not constitutional. *See Scarborough*, 431 U.S. at 567, 569–77. *See also* J. Richard Broughton, *The Ineludible (Constitutional) Politics of Guns*, 46 CONN. L. REV. 1345, 1360 (2014). Second, *Scarborough* pre-dates *Lopez*, where the Court cabined the constitutional power of the federal government under the Commerce Clause. *See* 514 U.S. at 568.

A number of circuit judges nationwide have noted the fundamental inconsistency between *Lopez* and *Scarborough*. *See, e.g.*, *United States v. Kuban*, 94 F.3d 971, 977–78 (5th Cir. 1996) (DeMoss, J., dissenting) ("[T]he precise holding in *Scarborough* is in fundamental and irreconcilable conflict with the rationale of the United States Supreme Court in *United States v. Lopez*[.] . . . The mere fact that a felon possesses a firearm which was

transported in interstate commerce years before the current possession cannot rationally be determined to have a substantial impact on interstate commerce as of the time of current possession.") (quotation omitted); *United States v. Alderman*, 565 F.3d 641, 648–650 (9th Cir. 2009) (Paez, J., dissenting) (arguing the majority's upholding of the felon-in-possession-of-body-armor statute inappropriately extends *Scarborough* beyond the limits imposed by *Lopez*, *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005)).

Moreover, Justice Thomas has criticized the misapplication of *Scarborough* to constitutional challenges under the Commerce Clause: "[Y]ears ago in *Lopez*, [the Supreme Court] took a significant step toward reaffirming th[e] Court's commitment to proper constitutional limits on Congress' commerce power. If the *Lopez* framework is to have any ongoing vitality, it is up to th[e] Court to prevent it from being undermined by a 1977 precedent that does not squarely address the constitutional issue." *Alderman v. United States*, 131 S. Ct. 700, 703 (2011) (Thomas, J., dissenting from the denial of the petition for writ of certiorari). "[P]ermit[ting] Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines" would be "[s]uch an expansion of federal authority" as to "trespass on state police powers." *Id.* at 703.

In sum, our circuit precedent dramatically expands the reach of the federal government under the Commerce Clause. No Supreme Court precedent requires it. And no proper reading of the Commerce Clause permits it. We should have granted en banc rehearing to reconsider circuit precedent that—from its inception—circuit judges across the country have criticized for contravening our Constitution's limits on federal power.

* * *

Americans disagree passionately over a wide range of issues—including a variety of criminal justice issues, such as whether felons should be punished for possessing firearms. *Compare*, *e.g.*, Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1577 (2022), *with* Conor Friedersdorf, *The Anti-gun Laws That Make Progressives Uneasy*, THE ATLANTIC, Feb. 10, 2022 (noting that "recent criminal-justice reform[er]s" seek to "avoid prosecuting people for gun possession unless they were actually involved in violent crime"); Robert Weiss, *Rethinking Prison for Non-Violent Gun Possession*, 112 J. CRIM. L. & CRIMINOLOGY 665 (2022); Zack Thompson, *Is it Fair to Criminalize Possession of Firearms by Ex-Felons?*, 9 WASH. U. JURIS. REV. 150 (2016).

In these sharply divided times, I can think of no better moment to reaffirm our Founders' respect for diverse viewpoints and restore the proper constitutional balance between our national needs and our commitment to federalism.

I dissent from the denial of rehearing en banc.