No. 22-6853

IN THE
Supreme Court of the United States

JOSHUA SEEKINS,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

If the federal government can imprison a homeless person for almost six years for possessing two shotgun shells he found in a dumpster—just because they "once traveled across state lines at some point"—then it has "all but plenary power over our nation." Pet. App. 17a (rehearing denial dissent). That is not the constitutional design. "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." *Id.*

The government ignores these consequences of its position, instead falling back on *Scarborough*. But that statutory ruling did not resolve the constitutional question here. In any event, *Scarborough* clashes with this Court's later decision in *Lopez*. Yet even as many circuit judges have recognized this tension, the courts of appeals generally feel bound by *Scarborough*. Only this Court can resolve this conflict and "restore the proper constitutional balance between our national needs and our commitment to federalism." *Id.* at 22a.

The Court should also review whether a district judge can inoculate any Guidelines error from appellate review with boilerplate disclaimers. The circuits are split on this question—not just in how they articulate the standard, but in how they apply it. Most circuits require a detailed explanation for an alternative sentence, sufficient to sustain the sentence in relation to the *correct* Guidelines range. The Fifth Circuit merely takes the district court at its word, requiring no explanation at all. So most circuits would have vacated Mr. Seekins's sentence and remanded for resentencing, but the Fifth Circuit accepted a conclusory disclaimer and thus never decided the Guideline issue.

The Fifth Circuit's approach disregards this Court's repeated instruction that sentencing must begin with a correct Guidelines calculation.

ARGUMENT

I. The Court should review whether the federal government can criminalize the mere possession of any object that once traveled in interstate commerce.

"It's hard to imagine a more local crime" than Mr. Seekins's. Pet. App. 18a (rehearing denial dissent). Yet the Fifth Circuit upheld his conviction under the commerce power merely because "the manufacturer of shells that match the items possessed by Seekins manufactured those shells in another state." *Id.* That approach "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." *Id.* at 19a. After all, the commerce power applies no differently to felons or firearms than to anyone or anything else. Thus, allowing Congress to criminalize Mr. Seekins's mere possession of ammunition "would mean that the federal government can regulate virtually every tangible item anywhere in the United States," all but erasing the boundaries between federal and state power. *Id.*; Pet. 15–17. "Congress arguably could outlaw the theft of a Hershey kiss from a corner store in Youngstown, Ohio, by a neighborhood juvenile on the basis that the candy once traveled to the store from Hershey, Pennsylvania." *Alderman* v. *United States*, 131 S. Ct. 700, 702–03 (2011) (Thomas, J., dissenting from the denial of the petition for writ of certiorari) (cleaned up).

The government does not and cannot dispute that "permit[ting] Congress to regulate or ban possession of any item that has ever … crossed state lines" would be

"[s]uch an expansion of federal authority" as to "trespass on traditional state police powers." *Id.* at 703. Instead, it says merely that *Scarborough* "forecloses" any requirement that "the government … prove more." Opp. 9–10. But "the Court's holding in *Scarborough* was statutory, not constitutional." Pet. App. 20a (rehearing denial dissent). "No party alleged that the statute exceeded Congress' authority, and the Court did not hold that the statute was constitutional." *Alderman*, 131 S. Ct. at 701 (Thomas, J., dissenting from denial of certiorari).

But that fact has not stopped the courts of appeals from mistakenly treating *Scarborough* as decisive, and thus creating "a tension between *Scarborough* and *Lopez*" that only "guidance from this Court" can resolve. See *id.* at 702. The government responds that the lower courts have "uniformly" upheld "Section 922(g)'s prohibition against possessing a firearm that has previously moved in interstate commerce." Opp. 10, 13. But that is precisely the problem. The courts of appeals feel bound to reject Commerce Clause challenges in these cases, despite their misgivings about the "vitality of *Scarborough*" after *Lopez*. *E.g.*, *United States* v. *Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir. 2002); see Pet. 12–14. Because the lower courts believe the "considerable tension" between *Scarborough* and more recent cases "is not for [them] to remedy," this Court should break the log-jam. See *United States* v. *Patton*, 451 F.3d 615, 636 (10th Cir. 2006).

On the merits, the government defends Mr. Seekins's conviction essentially as a prophylactic measure. It says "Section 922(g)(1) regulates goods in interstate commerce … by addressing a particular, harmful segment of the interstate market in those goods: the acquisition by felons of firearms and ammunition." Opp. 11–12. But this lays bare the problem: The two shells

Mr. Seekins scavenged were not "in interstate commerce" while he possessed them, and he did not "acqui[re]" them through any form of "commerce"—he found them in a dumpster. He did not "participat[e] in [this] market" at all. Contra *id.* at 12.

Put differently, Mr. Seekins's "purely local" conduct was not "part of an economic 'class of activities' that have a substantial effect on interstate commerce." See *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). Unlike the *Gonzales* respondents, who affected "an established, albeit illegal, interstate market" by "cultivating . . . a fungible commodity" sold in that market, Mr. Seekins's conduct could not "affect price and market conditions." See *id.* at 18–19.

The government also makes a pragmatic argument: Congress may criminalize purely "intrastate possession" to avoid the "enforcement problems" federal prosecutors would encounter "establish[ing] the precise circumstances under which a particular felon acquired his firearm or ammunition." Opp. 13. But Mr. Seekins did not merely acquire the shells in an intrastate transaction; there was *no* commercial transaction. Regardless, the challenge of proving that particular conduct falls within Congress's power does not justify expanding that power beyond its proper bounds. "Any possible benefit from eliminating this [enforcement challenge] would be at the expense of the Constitution's system of enumerated powers." *United States* v. *Lopez*, 514 U.S. 549, 566 (1995).[1] In any event, limits

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[1] The Petition (at 15–16) inadvertently quoted a later version of the statute at issue in *Lopez*. The language in effect when *Lopez* was decided "made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" 514 U.S. at 551 (quoting 18 U.S.C. § 922(q)(1)(A) (1988)).

on congressional power over non-commercial intrastate conduct need not create enforcement gaps. States may bar felons from possessing firearms, and most already do.

Because Congress lacks the power to imprison Mr. Seekins for scavenging in a dumpster—and because the lower courts have punted to this Court to resolve the conflict in this area—this Court should review and reverse the decision below.

II. The Court should review whether a district court's boilerplate disclaimer makes any Guidelines error *per se* harmless.

A. The government says no "meaningful substantive disagreement" exists about "harmless-error review of guidelines-calculation errors." Opp. 18–19. That is wrong. Most circuits require a district judge to explain a sentence in sufficient detail to sustain it in relation to the *correct* Guidelines range, disclaimers notwithstanding. Pet. 18–22. Other circuits, like the court below, accept Guideline disclaimers at face value, no matter how perfunctory. *Id.* at 22–24. The distinction is not just "formal," Opp. 19; it goes to whether the circuits require a sufficiently "specific[]" and detailed explanation to show true harmlessness. See, *e.g., United States* v. *Seabrook,* 968 F.3d 224, 235 (2d Cir. 2020). In turn, the split dictates whether defendants receive "meaningful appellate review." *Gall* v. *United States*, 552 U.S. 38, 50 (2007).

The government does not really dispute that the circuits apply different rules. Nor could it. The Fifth Circuit "take[s] the district court at its clear and plain word" that it "would have imposed the same sentence regardless of … [any] error." *United States* v. *Castro-Alfonso*, 841 F.3d 292, 298 (5th Cir. 2016); accord *United States* v. *Reyna-Aragon*, 992 F.3d 381, 389 (5th

Cir.), *cert. denied*, 142 S. Ct. 369 (2021). Most other circuits hold that such a "generic disclaimer of all possible errors will not do." *E.g.*, *United States* v. *Asbury*, 27 F.4th 576, 581 (7th Cir. 2022); see Pet. 18–22. This difference is not just semantic. Faced with a disclaimer, the Fifth Circuit will not even *"consider[]* whether the court was improperly influenced by an erroneous Sentencing Guidelines range." *Castro-Alfonso*, 841 F.3d at 298 (emphasis added). Other circuits hold that a district court "cannot insulate its sentence" this way. *Seabrook*, 968 F.3d at 233. And in the Fifth Circuit, the district court need not even "expressly state[] its consideration of the [correct] guidelines range," Pet. App. 6a, while elsewhere, the court "must explain its reasons for imposing the sentence under either Guidelines range," *United States* v. *Zabielski*, 711 F.3d 381, 389 (3d Cir. 2013).

This difference is often outcome-determinative. For example, the Second Circuit found in *Seabrook* that because "[t]he district court 'returned multiple times' to the Guidelines" and "repeatedly acknowledged [their] importance," the sentence was potentially anchored by the wrong Guidelines range—even though the district judge "comment[ed] that the Guidelines range made no difference." 968 F.3d at 233–34. To avoid a remand in the Second Circuit, it must be "clear from th[e] record that the miscalculation had no influence." *Id.* at 234 (cleaned up).

The same reasoning would dictate resentencing here. As in *Seabrook*, the district judge repeatedly pointed to the wrong Guidelines range, *e.g.* C.A. ROA 617, 618, 622, 624, stating "I am to consider [the Guidelines range], and I am doing so," *id.* at 622. And as in *Seabrook*, Mr. Seekins's sentence is "conspicuous for its position as the lowest sentence within what the District Court believed to be the applicable

range." 968 F.3d at 234. The court explicitly found "that the guideline range is a reasonable range that the Court will consider" and imposed a "sentence at the bottom of the guideline range which is 70 months." Pet. App. 39a. Nothing else in the record suggested a 70-month sentence. The court did not rely on a co-defendant's sentence, a prior sentence, or a statutory limit. While the court said the § 3553(a) factors supported its sentence, that explanation is equally consistent with a range of sentences. Because "the district court's error may well have anchored its thinking as to what an appropriate sentence would be," the Second Circuit would not find harmless error here. *Seabrook*, 968 F.3d at 234 (cleaned up).

The government similarly fails to distinguish *United States* v. *Smalley*, 517 F.3d 208 (3d Cir. 2008). Just as the district judge here said "the guideline range is a reasonable range," Pet. App. 39a, the judge in *Smalley* said "I do think a Guideline sentence is called for in this case," 517 F.3d at 215 n.10. And just as the judge here said "[f]or the record, this is the sentence that the Court would have imposed under any and all circumstances," Pet. App. 40a, the judge in *Smalley* declared that he "would have imposed the same sentence" despite any error, 517 F.3d at 214 n.8. Even so, the Third Circuit held that he "committed procedural error because the alternative sentence is a bare statement devoid of any justification for deviating eight months above the upper-end of the properly calculated Guidelines range." *Id.* at 215. So too here: The record contains no explanation for the sentence *as an upward variance*.

Nor can the government distinguish the Seventh Circuit's *Asbury* decision. It notes the district court there neither "specified which potential guidelines errors it had in mind" nor "connect[ed] its alternative

sentence to specific Section 3553(a) factors." Opp. 21. But in *Asbury*, as here, the court never "explain[ed] why it would have given exactly the same sentence" starting from a different Guidelines range, providing no "specific explanation of a parallel result." 27 F.4th at 582–83. Especially given the Seventh Circuit's view that only "rare" cases will provide "the necessary confidence that [a] guideline error … was harmless," *id.* at 582, that court would have vacated here.

So too the Ninth and Tenth Circuits. The government admits both courts have repeatedly rejected harmless-error arguments absent a specific explanation for the sentence in relation to "the correct Guidelines range." Opp. 21–22. The same problem exists here. As in those cases, Mr. Seekins's 70-month sentence is a "substantial upward variance from the correct guidelines range" of 37–46 months, "and the court failed to support such a variance with a sufficient explanation." See *id.* at 21.

Nor did the Fifth Circuit find such an explanation here. Contra *id.* at 22. The court below held that "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*," even if the district court never "expressly state[s] its consideration of the lower guidelines range." Pet. App. 6a (emphasis added). The Fifth Circuit thus required *no* explanation in relation to the correct range—directly contrary to the Ninth and Tenth Circuits.

Finally, the government opposes review because the Court's decision here would not "preordain the result … in every possible factual scenario." Opp. 22–23. But few cases would meet that bar. And this Court need only clarify that the district court's existing duty to "adequately explain the chosen sentence," *Gall*, 552

U.S. at 50, requires an explanation that would pass muster if the court started from the correct range. So the question is simply whether the standard already articulated in cases like *Gall* can be "nullif[ied]" by rote disclaimer. *Asbury*, 27 F.4th at 581. This is not a "fact-bound disagreement." Contra Opp. 22.

B. On the merits, the government pretends the issue is whether to "permit[] harmless-error review of guidelines-calculation errors." Opp. 18. But all agree that Guidelines errors *can* be harmless; the issue is whether a disclaimer always establishes harmlessness. It doesn't. "[A]ll sentencing proceedings" must begin with "correctly calculating the applicable Guidelines range." *Gall*, 552 U.S. at 49. So a district judge must explain sentencing decisions that start from *incorrect* calculation clearly enough to enable meaningful appellate review in relation to the *correct* range.

Nothing the government says suggests otherwise. To be sure, calculations errors "do not automatically require a remand for resentencing," Opp. 15, but again, that is not the question—the issue is whether a district court can automatically *avoid* a remand with a boilerplate disclaimer. The government points to *Molina-Martinez* v. *United States*, but this Court made clear there that "[i]n most cases … an incorrect, higher Guidelines range … will suffice for relief." 578 U.S. 189, 200 (2016). A judge's statements *might* "counter any ostensible showing of prejudice," but only if they contain a "detailed explanation" to "make it clear" that the sentence was unaffected. *Id.* at 200–01. As a result, "when a defendant is sentenced under an incorrect Guidelines range … the error itself can, *and most often will*, be sufficient to show a reasonable probability of a different outcome absent the error." *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1907 (2018)

(cleaned up). But the opposite would be true if a district judge could always establish harmlessness just by incanting "[f]or the record" that "this is the sentence that the Court would have imposed under any and all circumstances." Pet. App. 40a.

The Fifth Circuit's rule creates perverse incentives. Some courts in the circuit now include a Guidelines disclaimer in basically every case, see Pet. 28, effectively insulating *all* Guidelines errors from review. The Fifth Circuit's approach thus stunts the law's development. See *Molina-Martinez*, 578 U.S. at 192. Appellate review of Guideline questions is "essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." S. Rep. No. 98-225, at 151 (1983). Appellate decisions can also alert the Sentencing Commission of the need for amendments. None of that is possible if the court of appeals never actually resolves contested Guidelines issues.

C. The government calls this a poor vehicle because the district court supposedly did not err—a question the Fifth Circuit never reached. Opp. 23. But as the government has noted, the "possibility that [petitioner] might ultimately be denied [relief] on another ground would not prevent the Court from addressing [the question presented]. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." Cert. Reply 11, *Astrue* v. *Capato*, 566 U.S. 541 (2012) (No. 11-159); *accord* Cert. Reply 10–11, *Salazar* v. *Patchak*, 567 U.S. 209 (2012) (No. 11-247).

Regardless, the district court erred. A flare gun like Mr. Seekins's is not a firearm under 26 U.S.C. § 5845, which requires that "a shot can be discharged" from

the weapon. The record showed that its plastic frame would self-destruct if a shotgun shell were fired from it. C.A. ROA 946–50. A device does not "discharge[]" a "shot" in any normal or natural sense when it blows up. See Merriam-Webster Dictionary ("discharge" means to "shoot"), https://shorturl.at/gvwRW. The government's contrary evidence showed only that the flare gun would fire *if the gunpowder were removed from the shell*. C.A. ROA 969. But that is not the condition in which Mr. Seekins possessed the flare gun—and it is the gunpowder that makes the device explode when fired.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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