

No. _____

IN THE
Supreme Court of the United States

XAVIER SIMS,
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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FEBRUARY 21, 2023

QUESTION PRESENTED

Whether—in light of intervening authority in *United States v. Lopez*, 514 U.S. 549 (1995)—Congress may rely on *Scarborough v. United States*, 431 U.S. 563 (1977), to criminalize intrastate possession of a firearm on the sole basis that the firearm once moved through interstate commerce.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Xavier Sims, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Xavier Sims, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The United States District Court for the Middle District of Florida, Ocala Division, adjudicated Mr. Sims guilty of one count of possession of a firearm by a convicted felon and sentenced him to 115 months of imprisonment (Appendix A). Mr. Sims appealed his judgment and sentence to the Eleventh Circuit Court of Appeals, and it affirmed the district court in its opinion which was reported at *United States v. Xavier Sims*, 2022 WL 17088478 (11th Cir. 2022) (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The opinion of the Eleventh Circuit Court of Appeals was issued on November 21, 2022 (Appendix B).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I § 8 of the United States Constitution provides that:

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

U.S. CONST. art. I § 8 cl. 3.

18 U.S.C. § 922(g)(1) provides that:

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

In May 2021, Mr. Sims was convicted of possession of a firearm by a convicted felon in the Middle District of Florida. *See* Appendix A. The firearm in question happened to be manufactured out of state. *See* Appendix B. Satisfied that the jurisdictional requirements of 18 U.S.C. § 922(g) were met, the United States charged Mr. Sims with possessing a firearm while a convicted felon. *Id.* After a jury trial, he was found guilty of this charge. *Id.*

The United States District Court for the Middle District of Florida sentenced Mr. Sims to 115 months in prison and three years of supervised release. *See* Appendix B.

The United States Court of Appeals for the Eleventh Circuit affirmed Mr. Sims's conviction and sentence. *See* Appendix B. The Eleventh Circuit applied circuit precedent to hold that § 922(g) is constitutional under the Commerce Clause. *Sims*, 2022 WL 27088478 * 4–5. (citing *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017), and *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996)). The Eleventh Circuit held:

[T]his Court has “clearly held that § 922(g) is constitutional under the Commerce Clause.” *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017) (citing *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996)).

This Court has also rejected as-applied challenges to § 922(g), holding that the government proves a “minimal nexus” to interstate commerce where it demonstrates that the firearms were manufactured outside of the state in which the offense took place and thus, necessarily traveled in interstate commerce. *United States v. Wright*, 607 F.3d 708, 715–16 (11th Cir. 2010). We have rejected *Lopez*

challenges to § 922(g), concluding that “[n]othing in *Lopez* suggest[ed] that the minimal nexus test should be changed.” *McAllister*, 77 F.3d at 390 (quotation marks omitted).

In light of *McAllister* and *Wright*, Sims’s constitutionality arguments regarding § 922(g) lack merit and thus do not establish error, much less plain error. Here, the government presented evidence, . . ., showing that the firearm and ammunition that Sims possessed had traveled in interstate commerce, and therefore, satisfied the minimal nexus requirement.

Id.

The Eleventh Circuit thus rejected Mr. Sims’s facial and as applied challenges to the statute of his conviction. *See* Appendix A. Mr. Sims’s conviction was affirmed, like many defendants before him, based upon the “minimal nexus” test set forth in *Scarborough*. *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant review to determine whether 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.

Mr. Sims’s conviction cannot stand, as Congress’s enumerated powers do not allow it to criminalize the purely intrastate possession of a firearm simply because the firearm 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; see also U.S. Const. art. I § 8. 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*, a much older precedent that construed § 922(g)(1)’s

predecessor. *See* 431 U.S. at 563. Contrary to what lower courts often hold, *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); *see id.* at 564, 577; *see also 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, the *Lopez* test will disappear for intrastate possession crimes without this Court’s intervention.

Thousands of defendants are convicted under § 922(g) every year. In Mr. Sims’s case, his federal conviction rests on the purely local activity of possessing a firearm in Florida. The only connection between the firearm and

interstate commerce occurred before Mr. Sims's possession: the firearm had been manufactured outside of Florida and therefore would have crossed state lines at some point in the past. Mr. Sims's case thus squarely presents the issue of whether Congress may criminalize intrastate activity—possession—based on the historical connection between the firearm and interstate commerce.

Because the federal government's authority to prosecute such cases raises an important and recurring question, Mr. Sims, like other petitioners, respectfully seeks this Court's review.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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