

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARY GONZALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

LEAH D. YAFFE
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTIONS PRESENTED

1. Whether Congress may criminalize intrastate possession of a firearm or ammunition solely because they crossed state lines at some point before they came into the defendant's possession.

(This question is already pending before this Court in *Seekins v. United States*, Case No. 22-6853. Ms. Gonzales requests that the Court hold this portion of her petition pending the disposition in *Seekins*.)

2. Whether, as a statutory matter, 18 U.S.C. § 922(g)(1) prohibits a person's present intrastate possession of a firearm or ammunition for the sole reason that the firearm or ammunition previously crossed state lines.

RELATED PROCEEDINGS

U.S. District Court:

On August 20, 2021, judgment was entered against Petitioner Mary Gonzales in *United States v. Gonzales*, No. 1:19-CR-00240-KWR-1, Dkt. 190 (D.N.M. Aug. 20, 2021). App. A1-A8.

U.S. Court of Appeals:

On December 16, 2022, the Tenth Circuit affirmed Ms. Gonzales's convictions, including the constitutionality of her conviction under 18 U.S.C. § 922(g)(1), in an unpublished decision, *United States v. Gonzales*, No. 21-2099, 2022 WL 17725388, *6 (10th Cir. Dec. 16, 2022). App. A9-A24.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RELATED PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	8
APPENDIX	
Judgment in a Criminal Case (Dkt. 190), Filed August 20, 2021 District of New Mexico, Case No. 1:19-cr-00240-KWR	A1
Decision of the Tenth Circuit Court of Appeals	A9
Order Granting Extension to File Petition for Certiorari	A25

TABLE OF AUTHORITIES

	Page
Cases	
<i>Jones v. United States</i> , 529 U.S. 848 (2000)	6
<i>Nielsen v. Preap</i> , 139 S. Ct. 954 (2019)	6
<i>Scarborough v. United States</i> , 431 U.S. 563 (1977).....	3, 5
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	3, 5
<i>United States v. Patton</i> , 451 F.3d 615 (10th Cir. 2006)	4
Statutes	
18 U.S.C. § 3231	1
18 U.S.C. § 3742	1
18 U.S.C. § 921(a)(17)(A).....	4
18 U.S.C. § 921(a)(20)	2, 4
18 U.S.C. § 921(a)(3)	4
18 U.S.C. § 922(g)(1)	2-7
18 U.S.C. § 922(j).....	7
18 U.S.C. § 922(k).....	7
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1291	1
Other Authorities	
Cert. Petition, <i>Seekins v. United States</i> , Case No. 22-6853 (U.S. Feb. 21, 2023)	3, 4
Constitutional Provisions	
U.S. CONST. art. I, § 8, cl. 3.....	2

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mary Gonzales, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on December 16, 2022.

OPINION BELOW

The Tenth Circuit's unreported opinion in Ms. Gonzales's case is available at 2022 WL 17725388, at *1 (10th Cir. Dec. 16, 2022), and is in the Appendix at A9.

JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and issued its decision on December 16, 2022. (Appendix at A9.) On March 8, 2023, this Court extended the time within which to file a petition for a writ of certiorari until April 17, 2023. (Appendix at A25.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, provides:

The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. § 922(g)(1) 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.

18 U.S.C. § 921(a)(20) provides:

The term “crime punishable by imprisonment for a term exceeding one year” does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

STATEMENT OF THE CASE

a. In *Seekins v. United States*, Case No. 22-6853, the petitioner, Mr. Seekins, argues that Congress exceeded its Commerce Clause authority in enacting the portion of 18 U.S.C. § 922(g)(1) that makes it a federal crime for somebody with a qualifying prior conviction to “possess in or affecting commerce, any firearm or ammunition.”¹

As the *Seekins* petition explains, since *Scarborough v. United States*, 431 U.S. 563 (1977), federal felon-in-possession statutes have been understood by circuit courts to require only proof that the firearm or ammunition in question moved across state lines—even if they did so before the person became a felon or possessed the firearm. *See id.* at 577. Such a minimal nexus with interstate commerce is too attenuated to justify the enactment of Section 922(g)(1) under the Commerce Clause, which, while broad, is still “subject to outer limits” and is not a grant of federal police power. *United States v. Lopez*, 514 U.S. 549, 556-557 (1995). Indeed, the jurisdictional hook of Section 922(g)(1) is so broad that “it does not seriously limit the reach of the statute,” as essentially all firearms will satisfy the test, and “there is no reason to think that possession of [a firearm] that satisfies the jurisdictional hook has any greater effect on interstate commerce than possession of any other [firearms].” *United States v. Patton*,

¹ Mr. Seekins also raises a second question in his petition for certiorari that is not relevant to Ms. Gonzales’s petition in this case.

451 F.3d 615, 633 (10th Cir. 2006) (addressing statute prohibiting felons from possessing body armor); *see* 18 U.S.C. §§ 921(a)(3), 921(a)(17)(A), 921(a)(20).

The excessive reach of the statute is apparent from the facts of the *Seekins* case. According to his petition, Mr. Seekins, who was homeless at the time of his arrest, found shotgun shells in a dumpster. There was no record evidence that Mr. Seekins purchased the shells from anyone or that he was in any way involved with the movement of the shells across state lines. *Seekins v. United States*, Case No. 22-6853, Petition at 4, 9. He was sentenced to 70 months of incarceration under Section 922(g)(1) for possessing ammunition. *Id.* at 4.

Mr. Seekins objected to a relevant jury instruction in his district court proceedings, and he brought an as-applied constitutional challenge to Section 922(g)(1) in the Fifth Circuit. *Id.* at 9-10. The Fifth Circuit affirmed his conviction. The Fifth Circuit judges then split on whether to permit rehearing, ultimately declining to do so. Three judges dissented from that denial. *Id.* at 10-11.

This Court has directed the United States to respond to Mr. Seekins' petition.

b. As relevant here, the petitioner in this case, Ms. Gonzales, was also convicted under 18 U.S.C. § 922(g)(1), for possessing a firearm and ammunition. The firearm and ammunition were found in her purse when she was stopped by law enforcement in New Mexico, where she and her family live. As in the *Seekins* case, nothing in the record in Ms. Gonzales's case explains when or how those items

arrived in New Mexico. There is no indication that Ms. Gonzales was involved in the firearm or ammunition moving across state lines.

On appeal, Ms. Gonzales raised two interrelated claims relevant to this petition. First, she raised the same argument as the *Seekins* petition—that Congress exceeded its Commerce Clause authority when it enacted the relevant portion of 18 U.S.C.

§ 922(g)(1). Second, Ms. Gonzales raised the additional argument that, as a matter of statutory interpretation, 18 U.S.C. § 922(g)(1) must be understood as applying only when a defendant’s *own* possession of a firearm or ammunition affected commerce *at the time* the defendant possessed it. The Tenth Circuit, pursuant to binding circuit precedent interpreting this Court’s decision in *Scarborough v. United States*, 431 U.S. 563 (1977), affirmed Ms. Gonzales’s conviction under Section 922(g)(1).

REASONS FOR GRANTING THE WRIT

a. This Court should grant the *Seekins* petition for certiorari with respect to the Commerce Clause question presented within it; resolve that question in *Seekins* in favor of the petitioner; and then grant this petition, vacate the underlying judgments, and remand to the Tenth Circuit Court of Appeals. It should do so because the petition raises an important constitutional question regarding the scope of the Commerce Clause that circuit courts have understood in a way that conflicts with *United States v. Lopez*, 514 U.S. 549 (1995). Granting the petition is thus necessary to avoid grave federalism concerns.

b. In addition, this Court should also grant Ms. Gonzales’s petition for certiorari on her alternative argument that the text of Section 922(g)(1) requires more than a minimal nexus to interstate commerce. This is so for several reasons.

First, the text of Section 922(g)(1) makes clear that it is the prohibited person’s possession, and not the firearm or ammunition, that must affect commerce, and that effect must be contemporaneous with any intrastate possession. The fact that the firearm was previously shipped or transported in interstate or foreign commerce is not enough to satisfy this requirement.

Indeed, this conclusion follows from the plain language of the statute. For example, the adverbial phrase “in or affecting commerce” directly follows—and clearly modifies—the verb “possess”; it does not—and cannot—modify the nouns “firearm or ammunition.” *Cf. Nielsen v. Preap*, 139 S. Ct. 954, 964 (2019) (reasoning that, because “an adverb cannot modify a noun,” an adverbial phrase cannot be read to modify a noun). Thus, it is the defendant’s act of *possession* that must be “in or affecting commerce.” *Cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (holding that federal arson statute criminalized the arson of buildings *used* in interstate commerce).

The conclusion that it is the defendant’s *possession* that must affect interstate commerce is reinforced by the present-participle phrase “affecting commerce,” which indicates that the effect on interstate commerce must occur at the same time as the possession to fall within the ambit of Section 922(g)(1). That forecloses any reading of

the statute to concern possession of a firearm that occurs only *after* the conduct affecting interstate commerce has been completed.

Second, interpreting Section 922(g)(1)’s prohibition of *possession* of firearms to require a contemporaneous effect on interstate commerce makes sense when the statute is read as a whole. If Congress wanted to make it a crime for a felon to possess a firearm that had previously “been shipped or transported in interstate or foreign commerce,” it would have said so—as it did with respect to the receipt portion of the statute. *See* 18 U.S.C. § 922(g)(1) (also making it a crime for a felon “to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce”); *see also* 18 U.S.C. §§ 922(j), 922(k).

Third, the meaning of “affecting commerce” is important to the millions of people who live with prior felony convictions, and especially to the large number of those people who are convicted of violating Section 922(g)(1) each year.

CONCLUSION

The Court should grant the petition in *Seekins* and grant the petitioner's relief. Thereafter, it should grant this petition for a writ of certiorari, vacate the underlying judgment, and remand for reconsideration in light of the resolution of that petition. The Court should also grant Ms. Gonzales's petition on the second question presented within.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Leah D. Yaffe
LEAH D. YAFFE
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

April 17, 2023