No. 22-

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**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

(1) Whether Congress may criminalize intrastate possession of ammunition solely because it crossed state lines at some point before it came into the defendant's possession.

(2) Whether a district court's boilerplate statement that an alternate guidelines range would not affect its sentencing decision makes any Guidelines calculation error *per se* harmless on appeal.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Joshua Seekins, petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the plaintiff-appellee below.

No party is a corporation.

## RULE 14.1(B)(III) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

*United States* v. *Seekins*, No. 21-10556 (Aug. 24, 2022)

*United States* v. *Seekins*, No. 3:19-CR-00563-M (May 25, 2021)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua Seekins seeks a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

## OPINIONS AND ORDERS BELOW

The Fifth Circuit's unpublished opinion is available at No. 21-10556, 2022 WL 3644185 (5th Cir. Aug. 24, 2022).

## JURISDICTION

The Fifth Circuit entered judgment on August 24, 2022. It denied rehearing on November 11, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

U.S. Const. art. I § 8 cl. 1, 3.

18 U.S.C. § 922(g) 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.

Section 3553(a) of Title 18 reads as follows:

> (a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made

to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar

conduct; and

(7) the need to provide restitution to any victims of the offense.

Section 3742 of Title 18 provides in relevant part:

(f) Decision and Disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

## INTRODUCTION

Mr. Seekins was sentenced to 70 months of incarceration under 18 U.S.C. § 922(g)(1) for the possession of two shotgun shells which he had scavenged from a dumpster. Pursuant to congressional commerce powers, § 922(g)(1) makes it a federal crime for anyone previously convicted of a felony to "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." Mr. Seekins had not purchased these two shells, nor traveled across state lines with them—yet the Fifth Circuit held that his mere possession of them was enough to sentence him to almost six years in prison. Pet. App. 1a–2a. The government was not required to prove that Mr. Seekins had any connection with these shells' travel in interstate commerce because the Fifth Circuit determined that the government only had to show a *possibility* that they had been manufactured in a different state than the one in which they were found. *Id.* at 4a.

The application of § 922(g)(1) to Mr. Seekins on these facts is an unconstitutional extension of Congress' Commerce Clause powers. Three Fifth Circuit judges, dissenting from denial of rehearing, emphasized the unconstitutional implications of applying § 922(g)(1) here. Pet. App. 18a–21a. But they and four of their colleagues on the Fifth Circuit were outvoted—by only two votes—and the Circuit Court denied rehearing on this critical issue. *Id.* at 15a.

Only this Court can make clear what limits are placed on modern commerce power. Under the predecessor to § 922(g), 18 U.S.C. § 1201(a) (repealed 1986), this Court held that the government could satisfy the interstate commerce element by demonstrating that the firearm traveled across state lines at any point. *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977). *Scarborough* was primarily concerned with the statutory interpretation of § 1201(a), and did not linger on the constitutional implications of a minimal nexus requirement under the Commerce Clause. See, *e.g., United States* v. *Johnson*, 42 F.4th 743, 750 (7th Cir. 2022) (noting that the decision in *Scarborough* "was one of statutory interpretation"); Pet. App. 20a (Ho, J., dissenting from denial of rehearing) ("[T]he Court's holding in *Scarborough* was statutory, not constitutional").

More recently, however, this Court held that, under the Commerce Clause, Congress can only regulate conduct that "substantially affects" interstate commerce or has another "evident commercial nexus" to interstate commerce. *United States* v. *Lopez*, 514 U.S. 549, 593, 580 (1995); see also *United States* v. *Morrison*, 529 U.S. 598, 611 (2000); *Jones* v. *United States*, 529 U.S. 848, 854–55 (2000). This led to the statute at issue in *Lopez*, 18 U.S.C. § 922(q), being declared an unconstitutional extension of the Commerce Clause.

In the wake of these decisions, several courts of appeals have misinterpreted *Scarborough* to be a constitutional holding, leading to extensive confusion as to how *Scarborough* and *Lopez* can co-exist. This confusion has led to serious concerns about whether § 922(g) is consistent with the limits placed upon the exercise of congressional power under the Commerce Clause under one, both, or neither of these standards.

This case calls into question the limits on congressional commerce power and highlights how far congressional powers have extended since *Lopez* was decided in 2000. Under its commerce power as it now stands after the Fifth Circuit's holding in *Seekins*, Congress has the power to imprison someone for 70 months for finding two shotgun shells in a dumpster. This interpretation has expanded commerce power into police power.

The Courts of Appeals have caused this expansion by applying the lower *Scarborough* standard in cases involving the federal government's power to criminalize possession of a firearm, despite its conflict with this Court's subsequent decision in *Lopez*. This debate has created an entrenched split between circuit courts about the impact of *Scarborough* on modern Commerce Clause legislation that can only be resolved by this Court's intervention and clarification.

This case also presents the question of how courts of appeals should address a district court's sentence range calculation error in situations in which the district court has asserted that it would have opted for the same sentence irrespective of the Sentencing Guidelines. Courts of Appeals do not agree about how to approach this common situation. Five circuits have held that these Guidelines disclaimers must be supported by a clear explanation of the sentencing court's decision, while five other circuits, including the Fifth

Circuit, take a deferential approach to such statements.

This Court's decision in *Gall* v. *United States* instructs that district courts must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." 552 U.S. 38, 49 (2007). Courts of appeals reviewing a sentence must "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . or failing to adequately explain the chosen sentence . . . ." *Id.* at 51.

Despite this clear instruction, there is an established circuit split over whether the improper calculation of the Guidelines range is *per se* harmless if the district court states that the Guidelines were not important to the sentencing decision. In the present case, in line with Fifth Circuit precedent, the court of appeals held that, because the sentencing court would have imposed the same sentence regardless of the Guidelines, any Guidelines calculation error was harmless. Pet. App. 6a. See, *e.g., United States* v. *Castro-Alfonso,* 841 F.3d 292, 298–99 (5th Cir. 2016) ("The district judge was firm, plain, and clear in expressing the court's reasoning, and we take him at his word."). The First, Fourth, Eighth, and Eleventh Circuits dispose of sentencing appeals similarly. See, *e.g., United States* v. *Ouellette*, 985 F.3d 107, 110 (1st Cir. 2021); *United States* v. *Mills*, 917 F.3d 324, 330 (4th Cir. 2019); *United States* v. *Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021); *United States* v. *Irons*, No. 21-2750, 2022 WL 852853 (8th Cir. Mar. 23, 2022) (per curiam), *cert. denied*, 143 S. Ct. 566 (2023) (mem.).

Had Mr. Seekins been sentenced in the Second, Third, Sixth, Seventh, Ninth, or Tenth Circuits, however, the Court of Appeals would have additionally required the sentencing court to explain its rationale for

imposing the same sentence in alternative circumstances

This question recurs frequently and is important given the centrality of the Guidelines in sentencing. Mr. Seekins' case is an ideal vehicle to settle the issue because it was squarely presented and addressed below. This Court's review is warranted to restore uniformity to federal sentencing law.

## FACTUAL BACKGROUND

Mr. Seekins was detained on suspicion of stealing a U-Haul truck on June 17, 2019, in Grand Prairie, Texas. ROA.184. Mr. Seekins was homeless at the time of his arrest. ROA.621. He survived by collecting things that others had thrown away. *Id.* He stored these scavenged items in the U-Haul truck in which he slept. ROA.590.

When the police searched Mr. Seekins, they found on his person multiple flashlights, cell phones, a lighter, a spyglass, and one orange twelve-gauge shotgun shell. Pet. App. 32a. When asked why he had the shotgun shell, he said he found it. *Id.* at 3a. The shell in Mr. Seekins' possession looked almost identical to a flare shell—to the point that officers at the scene initially identified it as such. *Id.*

Among all of the clutter in the U-Haul truck's cab, including wrenches, tools for a diesel truck, a jump box, and clothing for both men and women, police also found a flare launcher. Pet. App. 25a–26a, 33a. The barrel had been modified to accept a shotgun shell, and it was loaded with one red twelve-gauge shotgun shell, of a different brand than the first. *Id.* at 28a–29a. Mr. Seekins identified it as a flare launcher than he had found in a dumpster. *Id.* at 18a.

When they searched the U-Haul truck's cargo box, police found a washer-dryer, scrap metal, a baby crib, wiring, and a great deal more. Pet. App. 28a, 33a. Mr. Seekins said these were all the products of his scrapping, found after being discarded by houses or industrial companies. ROA.390. The police found no other weapons or ammunition, and none of their searches uncovered evidence that Mr. Seekins had himself modified the flare launcher or purchased the ammunition. Pet. App. 3a.

Because he had prior felony convictions, Mr. Seekins was initially charged with possession of a firearm under 18 U.S.C. § 922(g). Pet. App. 2a. But after the defense gave notice of proposed expert testimony to show that the modified flare launcher did not meet the definition of "firearm," the government obtained a superseding indictment which abandoned allegations related to the flare launcher. *Id.* at 5a. Mr. Seekins was instead charged with one count of being a felon in possession of ammunition, in violation of § 922(g). *Id.* at 7a.

The record contains no evidence that there was a commercial transaction of any kind involving these two shells, nor does it show any evidence that Mr. Seekins has anything to do with their movement across state lines. The government made no effort to prove that Mr. Seekins stole, bought, or planned to sell this pair of shells. And it made no effort to show when, where, or how they crossed state lines. The government presented a witness only to show that the company that manufactured the shells, most likely did so in Illinois; even so, there was still a "very slim chance" that the shells had been manufactured somewhere else. Pet. App. 4a, 36a.

Over a defense objection, the jury was instructed that they could find that the ammunition possessed

was in commerce if it had "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." Pet. App. 4a.

The jury found Mr. Seekins guilty of possessing ammunition after a felony conviction in violation of § 922(g). Pet. App. 7a. His Presentence Report (PSR) calculated a Guidelines range of 70–87 months based on a six-level enhancement to the base offense level because the district court categorized the modified flare launcher as a firearm under 26 U.S.C. § 5845(a). ROA.617, ROA.932. The defense objected, as the flare launcher could not actually fire a live shell without self-destructing and therefore did not constitute a firearm under § 5845(a). *Id.* The district court ultimately sentenced Mr. Seekins to 70 months. *Id.* at 1a. It said it would have imposed the same sentence irrespective of the objection "under any and all circumstances, . . . taking into account all the factors under 18 [U.S.C. § ]3553(a)." *Id.* at 40a.

The Fifth Circuit affirmed. Pet. App. 1a–2a. It rejected Mr. Seekins' as-applied challenge to § 922(g) and held that the statute can constitutionally apply to found ammunition. *Id.* at 5a. Fifth Circuit caselaw therefore merely requires that the shotgun shells traveled in interstate commerce at some point prior to being in Mr. Seekins' possession, without regard to his conduct. The Circuit furthermore concluded that any error in the district court's sentencing conclusions was harmless because the district court had inoculated the sentence by saying it would have given the same sentence even without the enhancement. *Id.* at 6a.

Mr. Seekins petitioned the Fifth Circuit for rehearing en banc. Pet. App. 14a. The judges split on whether

to grant rehearing—seven to nine—and ultimately denied Mr. Seekins' motion. *Id.* at 14a–15a. Judges Ho, Smith, and Engelhardt dissented from the denial of rehearing and emphasized that the Fifth Circuit's "mistaken circuit precedent" on this issue should be reconsidered because it "has allowed the federal government to assume all but plenary power over our nation." *Id.* at 14a (Ho, J., dissenting from denial of rehearing).

## REASONS FOR GRANTING THE PETITION

### I. THE COURT SHOULD DELINEATE THE BOUNDARIES OF FEDERAL AUTHORITY UNDER THE COMMERCE CLAUSE IN THE FIREARM CONTEXT.

There are two precedents related to the nexus required between interstate commerce and a firearm that stand in tension. *Scarborough* was a statutory decision interpreting the Omnibus Crime Control and Safe Streets Act of 1968. 431 U.S. 563. *Lopez* was a constitutional decision striking down the Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C. § 922(q)(1)(A), for exceeding the limits of permissible legislative power under the Commerce Clause. 514 U.S. 549.

Lower courts—as a result of misreading *Scarborough* as a constitutional, rather than statutory, decision—have been unable to reconcile these two cases when it comes to determining the constitutionality of § 922(g)(1). This misreading has resulted in a 28-year-long, deeply-entrenched circuit split that necessitates this Court's intervention. *Morrison*, 529 U.S. at 614 (citing *Lopez*, 514 U.S. at 557 ) (the tension between these cases "can be settled finally only by this Court.")

### A. The Courts of Appeals Differ on the Relationship Between *Scarborough* and *Lopez*.

Federal courts have "cried out for guidance from this Court" on this issue for decades. *Alderman* v. *United States*, 562 U.S. 1163, 1166 (2011) (Thomas, J., dissenting from denial of certiorari). The Fifth Circuit explicitly stated that "*Scarborough* is in fundamental and irreconcilable conflict with the rationale of the United States Supreme Court in [*Lopez*]." *United States* v. *Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting). But the Circuit Court has felt compelled to "continue to enforce § 922(g)(1)" because it is "not at liberty to question the Supreme Court's approval of the predecessor statute to [§ 922(g)(1)]."*United States* v. *Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (per curiam). See also *United States* v. *Rawls,* 85 F.3d 240, 243 (5th Cir. 1996) (per curiam) (Garwood, J., concurring) (declaring that the statute would be unconstitutional under *Lopez* as a matter of first impression, yet *Scarborough* bound it "as an inferior court . . . whether or not the Supreme Court will ultimately regard it as a controlling holding in that particular respect").

The Fifth Circuit is not alone. See, *e.g., United States* v. *Patterson*, 853 F.3d 298, 301–02 (6th Cir. 2017) (pointing out the continued and widespread uncertainty about *Scarborough*'s status after *Lopez*); *United States* v. *Cortes,* 299 F.3d 1030, 1037 n.2 (9th Cir. 2002) (noting that doubts have been raised but choosing, "[u]ntil the Supreme Court tells us otherwise," to "follow *Scarborough* unwaveringly"); *United States* v. *Bishop*, 66 F.3d 569, 587–88, 588 n.28 (3d Cir. 1995) (noting that, until the Supreme Court is more explicit on the relationship between *Lopez* and *Scarborough*, a

lower court is "not at liberty to overrule existing Supreme Court precedent"); *United States* v. *Patton*, 451 F.3d 615, 634 (10th Cir. 2006) (collecting cases).

Nine courts of appeals have upheld § 922(g)(1) based solely on the *Scarborough* minimal nexus test. See *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) (per curiam); *United States* v. *Gateward*, 84 F.3d 670, 671–72 (3d Cir. 1996); *Rawls*, 85 F.3d at 242–43; *United States* v. *Lemons*, 302 F.3d 769, 771–72 (7th Cir. 2002); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam); *United States* v. *Hanna*, 55 F.3d 1456, 1461–62, 1462 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).

In these circuits, *Scarborough* controls the outcome, leaving the "empty, formalistic" requirement of a jurisdictional provision as the only check on Congress' power to criminalize this intrastate activity. See *United States* v. *Chesney*, 86 F.3d 564, 580 (6th Cir. 1996) (Batchelder, J., concurring). The Fifth Circuit's opinion in *Rawls* exemplifies the bind courts find themselves in when confronting the precedent of *Scarborough*. In a concurrence explaining a short per curiam opinion, the panel judges said that while they thought § 922(g)(1) failed under *Lopez*, "the opinion in [*Scarborough*] dealing with the predecessor to section 922(g), requires us to affirm denial of relief here." *Rawls*, 240 F.3d at 243 (Garwood, J., concurring).

Two courts of appeals have concluded that § 922(g)(1) is constitutional independent of *Scarborough*. See *United States* v. *Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001); *Chesney*, 86 F.3d at 570. The Fourth Circuit upheld § 922(g)(1) within the *Lopez* framework, while the Sixth concluded that the statute

is constitutional outside of *Lopez* and *Scarborough*. The lower courts have thus split on whether § 922(g)(1) can survive the more exacting test from *Lopez* rather than the minimal nexus test of *Scarborough*.

Further complicating the field, some circuits have held that *Scarborough* at least implicitly ruled the predecessor to § 922(g) constitutional, compelling the same result despite *Lopez*. See, *e.g., Gateward*, 84 F.3d at 671 ("We do not understand *Lopez* to undercut the *Bass*/*Scarborough* proposition that the jurisdictional element . . . keeps the felon firearm law well inside the constitutional fringes of the Commerce Clause."). Because courts often fail to apply the *Lopez* test to these firearm possession cases at all, defendants across the country lack the constitutional protection from congressional overreach provided by *Lopez*.

Each circuit is stuck in its current interpretation of the relationship between *Scarborough* and *Lopez* without a decision from this Court. Judge Ho pointed out that the Fifth Circuit only affirmed the district court's decision in this case because the panel was "duty-bound to uphold the conviction as a matter of circuit precedent." Pet. App. 18a (Ho, J., dissenting from denial of rehearing). See also *Patton*, 451 F.3d at 636 (citation omitted) (noting that "[a]ny doctrinal inconsistency between *Scarborough* and the Supreme Court's more recent decisions is not for this Court to remedy"); *United States* v. *Moore*, 855 F. App'x 460, 461–62 (10th Cir. 2021), *cert. denied,* 142 S. Ct. 840 (2022) (mem.); *United States* v. *Haile*, 758 F. App'x 835, 837 (11th Cir. 2019) (per curiam) (holding that "because we are bound by a prior panel opinion unless it has been overruled by the Supreme Court or this Court sitting en banc . . . we affirm Haile's conviction under § 922(j).")

### B. The Question Presented Is Important Because an Unchecked Commerce Power Would Significantly Expand Congress' Reach into State Affairs.

The federal government's enumerated powers are "few and defined," while the powers which remain in the state governments are "numerous and indefinite." *Lopez*, 514 U.S. at 552 (citing The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961)). One of these enumerated powers granted to Congress is "[t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. Without limits on federal regulatory power, our nationwide regulation would become "for all practical purposes . . . completely centralized" in a federal government. *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 548 (1935). The dissent in this case emphasized that "constitutional limits on governmental power do not enforce themselves"; instead, "[t]hey require vigilant—and diligent—enforcement." Pet. App. 17a (Ho, J., dissenting from denial of rehearing).

The *Lopez* test is meant to define and enforce these limits. Congress can regulate three general categories of activity with its Commerce power post-*Lopez*: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) "those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558–59 (citations omitted). This Court considered § 922(q) in the *Lopez* decision, which provided that "it shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school

zone." § 922(q)(2)(A). Finding that the first two categories were inapplicable, this Court analyzed § 922(q) under the third category and found it lacking. *Lopez*, 514 U.S. at 558–68.

As in *Lopez*, the first two categories are inapplicable to § 922(g), so the statute can only be sustained if the "economic activity substantially affects interstate commerce." *Id.* at 560. Finding two shotgun shells in a dumpster after they were discarded can hardly be considered "economic activity," especially when the prosecution presented no evidence that Mr. Seekins bought the shells or intended to sell them. And it surely, even in combination with all other shells found in all dumpsters all across the country, does not rise to the level of substantially affecting interstate commerce.

Congress cannot meet the standard that something has a "substantial relation to interstate commerce" by merely inserting the phrase "which has been shipped or transported in interstate or foreign commerce" after any object they strive to regulate. 18 U.S.C. § 922(g)(9). See *Morrison*, 529 U.S. at 614. Allowing this phrase to fulfill the Constitution's requirements would "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 564, 557 (citing *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937)). The Commerce Clause power would become a rubber stamp, allowing congressional overreach into all kinds of activity.

Yet this is essentially what the modern-day application of *Scarborough* allows in this area of the law. The lower courts have upheld § 922(g) when a simple jurisdictional box is checked, which ignores the three categories of permissible regulation from *Lopez*. Justices Thomas and Scalia recognized this when they wrote that "*Scarborough*, as the lower courts have read it,

cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook." *Alderman*, 562 U.S. at 1166.

Treating *Scarborough* as a constitutional decision ignores all of this Court's concerns in *Lopez* that a loose interpretation "would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez,* 514 U.S. at 567. Permitting this loose interpretation would allow Congress to unconstitutionally regulate aspects of criminal law. "[T]he Commerce Clause power 'must be read carefully to avoid creating a general federal authority akin to the police power.'" Pet. App. 19a (Ho, J., dissenting from denial of rehearing) (quoting *NFIB* v. *Sebelius*, 567 U.S. 519, 536 (2012)).

### C. This Case Is an Ideal Vehicle to Resolve This Important Constitutional Question.

The unconstitutionality of § 922(g) as applied to Mr. Seekins is the dispositive legal issue in this case and was properly preserved in each court below.

The unique factual situation—involving just two shotgun shells found in a dumpster—highlights the purely intrastate character of this case and the dramatic consequences of this law's application when compared to previous challenges to § 922(g). "[I]t's hard to imagine a more local crime than this." Pet. App. 18a (Ho, J., dissenting from denial of rehearing).

The facts of Mr. Seekins' case therefore squarely present the issue of whether Congress may criminalize purely intrastate activity—possession—based only upon the distant historical connection between the ammunition and interstate commerce. Allowing Congress to categorize such possession as "significantly affecting interstate commerce" defies all logic and results in the

extension of unconstitutional and essentially unlimited regulatory and police power to Congress.

## II. THE CIRCUITS ARE SPLIT AS TO WHETHER A DISTRICT JUDGE, BY MERELY UTTERING A BOILERPLATE PHRASE, CAN COMPLETELY INOCULATE A GUIDELINES ERROR FROM APPELLATE REVIEW.

### A. The Majority of Circuits Do Not Truncate an Appellate Review Simply Because They Encounter an Inoculating Statement from a District Judge.

The majority approach—adopted by the Second, Third, Sixth, Seventh, Ninth, and Tenth Circuits—provides that a Guidelines calculation error is not harmless merely because the district court included a boilerplate statement that it would have reached the same sentence without regard to any Sentencing Guidelines calculation errors. Instead, these circuits require that a sentencing court clearly explain its reasoning for choosing a sentence that deviates from the correct Guidelines range.

The Second Circuit sets a high bar for harmless error review that exemplifies the majority rule. It is a searching review: "A non-Guidelines sentence requires a written statement of reasons that lays out the justification for a non-Guidelines sentence '*with specificity*.' This requirement is *not an empty formality*." *United States* v. *Seabrook*, 968 F.3d 224, 235 (2d Cir. 2020) (emphasis added) (quoting *United States* v. *Cavera*, 550 F.3d 180, 192-93 (2d Cir. 2008)). Simply put, "the district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination when the record in-

dicates that it did." *Id.* at 233–34. In *Seabrook*, the district court was presented with the correct Guidelines range and, in announcing its sentence, asserted a Guidelines disclaimer. Determining that the court's Guidelines calculation was erroneous, however, the circuit court scrutinized the significant upward sentencing variance imposed. "Absent . . . explanation," the appeals court reasoned, it could not "be certain that the [district] court's calculus would not have been altered had it appreciated the full extent of the upward variance it was contemplating." *Id.* at 234. It therefore vacated and remanded the case for resentencing. Circuit precedent cautions that "a district court generally should not try to answer the hypothetical question of whether or not it definitely would impose the same sentence on remand if this Court found particular enhancements erroneous." *United States* v. *Feldman*, 647 F.3d 450, 460 (2d Cir. 2011). Indeed, "a simple incantation" cannot "exempt[] from procedural review" "criminal sentences." *Id.*

The Third Circuit similarly requires that district courts articulate their reasoning in order for a Guidelines disclaimer to be effective. See *United States* v. *Zabielski*, 711 F.3d 381, 389 (3d Cir. 2013) ("Though probative of harmless error, these [inoculation] statements will not always suffice to show that an error in calculating the Guidelines range is harmless; indeed, a district court must still explain its reasons for imposing the sentence under either Guidelines range."); *United States* v. *Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) ("[A] statement by a sentencing court that it would have imposed the same sentence even absent some procedural error does not render the error harmless unless that 'alternative sentence' was, itself, the product of the three step sentencing process"); *United States* v. *Langford*, 516 F.3d 205, 218 (3d Cir. 2008) ("A

'blanket statement' that the sentence imposed is fair is not sufficient; a district court must determine a Guidelines range without the miscalculation error and explain any variance from it based on § 3553(a) factors."). In *United States* v. *Smalley*, 517 F.3d 208, 215 (3d Cir. 2008), the Third Circuit vacated and remanded a sentence because, even though the district court had included a Guidelines disclaimer, "the alternative sentence [was] a bare statement devoid of any justification . . . ."

The Sixth Circuit also refuses to take a Guidelines disclaimer at face value. In *United States* v. *Collins*, the circuit rejected a district court's claim that it would have varied a defendant's sentence upward regardless of a Guidelines error. 800 F. App'x 361, 363 (6th Cir. 2020). It did so reasoning that the "incorrect guidelines range may well have had an upward 'gravitational pull' on the ultimate sentence" because "the court nowhere suggested that it would have opted for what would have been a significant 39-month *upward* variance from the correct guidelines range." *Id.*

The Seventh Circuit requires a "detailed" inoculating statement focusing "specific . . . attention to the contested guideline issue" before it will find harmless error. *United States* v. *Asbury*, 27 F.4th 576, 581 (7th Cir. 2022) (citing *United States* v. *Abbas*, 560 F.3d 660, 667 (7th Cir. 2009)). The statement must "explain the 'parallel result,'" meaning it is "tied to the decisions the court made" and "account[s] for why the potential error would not 'affect the ultimate outcome.'" *Id.* at 581–82 (quoting *United States* v. *Bravo*, 26 F.4th 387, 397 (7th Cir. 2022). In *Asbury*, the judge's inoculating statement acknowledging possible Guidelines error was not specific enough because it "shed[] no light on which . . . potential errors [the court] had in mind." *Id.* at 583. See also *Bravo*, 26 F.4th at 397 (rejecting a

Guidelines disclaimer because the court failed to explain "why a sentence so tied to one guidelines range would have come out the same way with a different starting point"). Indeed, in the Seventh Circuit, "[a] generic disclaimer of all possible errors will not do." *Asbury*, 27 F.4th at 581. This is for good reason. Otherwise, "the judge would have no incentive to work through the guideline calculations" and could "proceed to sentence based exclusively on her own preferences," a result antithetical to Congress' envisioned approach to uniform sentencing. *Id.*

The Ninth Circuit similarly requires that a Guidelines disclaimer be accompanied by an explanation for the decision. In *United States* v. *Munoz-Camarena,* the Ninth Circuit explained that "[a] district court's mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand, because the court's analysis did not flow from an initial determination of the correct Guidelines range. The court must explain, among other things, the reason for the *extent* of a variance." 631 F.3d 1028, 1031 (9th Cir. 2011). In *United States* v. *Acosta-Chavez,* the district court explicitly calculated both the enhanced and unenhanced Guidelines ranges and landed on a sentence in the middle. 727 F.3d 903, 909–10 (9th Cir. 2013). Reasoning the enhanced range "overstate[d]" the conviction while the unenhanced range "would not sufficiently address the statutory factors," the court determined a 30-month sentence would "adequately and fairly address[] all of the statutory factors." *Id.* The Ninth Circuit was unconvinced. Because "[t]he district court's alternative explanation . . . [did] not explain the 'extent' of the variance," the erroneous sixteen-level enhancement was not harmless. *Id.* at 910.

The Tenth Circuit agrees. "At the very least, the district court must find and articulate sufficient facts and reasons to allow us to review the appropriateness of the enhancement." *United States* v. *Peña-Hermosillo*, 522 F.3d 1108, 1112 (10th Cir. 2008). "In the absence of explanation," the court continues, "we might be inclined to suspect that the district court did not genuinely 'consider' the correct guidelines calculation in reaching the alternative rationale, as is required under *United States* v. *Booker*." *Id.* at 1117. See also *United States* v. *Porter*, 928 F.3d 947, 963 (10th Cir. 2019) ("It is not enough for the district court to say 'that its conclusion would be the same even if all the defendant's objections to the presentence report had been successful.'").

### B. The Minority of Circuits, Including the Fifth, Accept an Inoculating Guidelines Disclaimer at Face Value and Truncate Review.

The Fifth Circuit's approach is emblematic of the minority rule. These circuits accept Guidelines errors without inquiry as long as the district court includes a boilerplate disclaimer that the Guidelines did not matter to its sentence. There need only be a scintilla of evidence in the record that the sentencing court had before it both the "correct" and "incorrect" Guidelines ranges when it handed down its sentence. In practice, this latter inquiry is not searching, and at least the Eleventh Circuit does not engage in it at all.

*United States* v. *Vega-Garcia* is typical of the Fifth Circuit's approach. A Guidelines error is harmless simply if "the district court considered both [Guidelines] ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way." 893 F.3d 326, 327 (5th

Cir. 2018) (per curiam); see also *United States* v. *Guzman-Rendon,* 864 F.3d 409, 412 (5th Cir. 2017). The court does not need to explicitly state that it considered both ranges as long as there is record evidence it was presented with both. See *United States* v. *Medel-Guadalupe*, 987 F.3d 424, 429 (5th Cir. 2021), *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.") Unlike the majority of circuits, if the initial tests are met, the Fifth Circuit does not inquire further into the reasons underlying a sentencing variance. Critically this approach leaves unreviewed whether the incorrect Guidelines calculation impermissibly influenced the sentence despite the judge's disclaimer. "Error does not necessarily result when the district court's reasons" for setting a non-Guidelines sentence "are not clearly listed for our review" when the court's reasoning is otherwise apparent from the record. *United States* v. *Bonilla*, 524 F.3d 647, 657–58 (5th Cir. 2008), *overruled on other grounds by United States* v. *Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018).

The other circuits are at least as deferential to district judges. In *United States* v. *Marsh*, the First Circuit encountered a bare disclaimer that simply stated the court would have imposed the same sentence as a non-Guidelines sentence under the statutory sentencing factors. "While the district court's explicit acknowledgement of § 3553(a) was brief, we do not require the court to 'address those factors, one by one, in some sort of rote incantation when explicating its sentence.'" 561 F.3d 81, 86 (1st Cir. 2009) (internal citation omitted). See also *Ouellette*, 985 F.3d at 110 ("Because the district court made clear that it would have imposed the

same sentence regardless of the Guidelines, any alleged error in calculating Ouellette's BOL is harmless.").

The Fourth Circuit likewise will deem Guidelines errors harmless if the district court says it would have imposed the same sentence anyway, provided the variance is substantively reasonable. See *United States* v. *Prater*, 801 F. App'x 127, 128 (4th Cir. 2020) (per curiam) (mem.); *Mills*, 917 F.3d at 330; *United States* v. *Gomez-Jimenez*, 750 F.3d 370, 382–83 (4th Cir. 2014); *United States* v. *Hargrove*, 701 F.3d 156, 161–63 (4th Cir. 2012).

The Eighth Circuit is similarly deferential: "When the district court explicitly states that it would have imposed the same sentence of imprisonment regardless of the underlying Sentence Guideline range, 'any error on the part of the district court is harmless.'" *United States* v. *Peterson,* 887 F.3d 343, 349 (8th Cir. 2018) (quoting *United States* v. *Davis*, 583 F.3d 1081, 1094–95 (8th Cir. 2009)). See also *United States* v. *Still*, 6 F.4th 812, 818 (8th Cir. 2018) ("[W]e conclude that such error was harmless because the district court stated that it would have varied upward had it not applied the cross-reference."); *United States* v. *Waller,* 689 F.3d 947, 958 (8th Cir. 2012).

The Eleventh Circuit takes the most deferential approach to Guidelines disclaimers. When a district court has "stated on the record that it would have imposed the same sentence either way, that is 'all we need to know' to hold that any potential error was harmless.'" *Henry*, 1 F.4th at 1327 (citing *United States* v. *Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006)).

* * * * *

The circuits are thus firmly divided on a frequently recurring and fundamental question regarding the review of sentencing errors on appeal. The split is deep enough that there can be no expectation that the courts will resolve the split absent this Court's intervention. Additionally, the Eighth and Eleventh Circuits have both declined to reconsider their positions *en banc,* even when litigants have pointed out that their positions diverge from most other circuits. See Denial of Pet. for Reh'g, *United States* v. *Foston*, No. 21-2435 (8th Cir. June 21, 2022); see also *Foston* Pet. for Reh'g at 6 (arguing that sentencing courts "should not be allowed to inoculate a Guideline" error through blanket statements); *United States* v. *Henry*, 18-15251 (11th Cir., Aug. 17, 2021) (denying petition for rehearing).

### C. The Fifth Circuit's Rule Undermines the Core Purpose of the Sentencing Reform Act.

The Fifth Circuit is wrong to hold a Guidelines error categorically harmless any time it is accompanied by a judicial disclaimer that the sentence would be the same without the error. The majority rule, which requires a district court to additionally explain the reasons behind any sentencing variance, is the only way to ensure the error did not unduly influence the sentence. Harmless error findings based on boilerplate Guidelines disclaimers conflict with the analysis that this Court requires both at sentencing hearings and at every appellate review. See *Gall*, 552 U.S. at 49–51.

Properly calculating the Guidelines is a mandatory step for sentencing courts. *Id.* at 49. The Guidelines are crucial to sentencing, even if the sentencing judge chooses to depart from the Guidelines range, because while not binding, the Guidelines are "the product of careful study based on extensive empirical evidence

derived from the review of thousands of individual sentencing decisions.'" *Id.* at 46. Thus, even when a sentencing court decides not to impose a Guidelines sentence, it must explain its sentencing decision by reference to the properly calculated Guidelines sentence; it is "uncontroversial" that a "major departure [from the Guidelines] should be supported by a more significant justification than a minor one," and sentencing courts "must adequately explain the chosen sentence . . . to promote the perception of fair sentencing." *Id.* at 50.

To pass down a reasonable sentence, a district court must at least have in mind the correct Guidelines sentencing range. That is because, "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*.'" *Peugh* v. *United States*, 569 U.S. 530, 542 (2013). Though the district court has the discretion to depart from the Guidelines, the court "must consult those Guidelines and take them into account when sentencing." *United States* v. *Booker*, 543 U.S. 220, 264 (2005).

In *Molina-Martinez* v. *United States,* this Court held that correctly calculating the Guidelines range is the starting point for all sentencing hearings. "When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." 578 U.S. 189, 198 (2016).These holdings emphasize the "anchoring" effect of the Guidelines; the Guidelines shape judges' sentencing decisions whether or not they choose to impose a Guidelines sentence.

The Guidelines also play a crucial role in reviewing sentences on appeal. "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Peugh*, 569 U.S. at 541. When reviewing a sentence on appeal, "the appellate court . . . must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51.

### D. The Question Presented Is Important.

Inconsistency in the circuits' standards for harmless error review in the face of Guidelines disclaimers harms individual liberty, undermines the Guidelines' main purpose of promoting sentencing uniformity, and interferes with the Guidelines' proper and just application. See *Hughes* v. *United States*, 138 S. Ct. 1765, 1774 (2018).

Federal sentencing procedures affect the lives of tens of thousands of individuals every year. Over 57,000 federal defendants were sentenced in 2021 alone, and 31%—17,669 defendants—received sentences that represented variances from the Guidelines. U.S. Sent'g Comm'n, Table 29, "Sentence Imposed Relative to the Guideline Range," *2021 Annual Report and Sourcebook of Federal Sentencing Statistics* 84, https://www.ussc.gov/research/sourcebook-2021. As the foregoing circuit-by-circuit review demonstrated, in nearly half the country, district courts can remove their sentencing decisions from appellate scrutiny with a perfunctory boilerplate disclaimer—effectively

unmooring these sentencing decisions entirely from any sound basis in the Guidelines.

For example, in Amarillo and Lubbock, Texas, alone, an analysis of 208 federal defender cases closed in 2021 revealed that fully 99% of them—and 100% of cases that resulted in non-Guidelines sentences—included a judicial inoculation statement. E-mail from Victoria M. Smiegocki, Assistant Dir. of Rsch., Deason Crim. Just. Reform Ctr., SMU Dedman Sch. of L., to K. Joel Page, Fed. Pub. Def., N.D. Tex. (Feb. 13, 2023, 07:13 CST) (on file with author).

The increasing use of disclaimers to inoculate Guidelines errors has been noted in the circuits. See *Asbury*, 27 F.4th at 581. One Fourth Circuit judge has explicitly "encourage[d] district courts to consider announcing alternative sentences in cases . . . where the guidelines calculation is disputed." *United States* v. *Montes-Flores,* 736 F.3d 357, 374 (4th Cir. 2013) (Shedd, J., dissenting). Meanwhile, the Second Circuit *discourages* this practice. See *Feldman*, 647 F.3d at 460 ("[A] district court generally should not try to answer the hypothetical question of whether or not it definitely would impose the same sentence on remand if this Court found particular enhancements erroneous."). This Court should resolve which practice is proper by issuing clear instructions for appellate courts to follow in assessing the import of a judicial Guidelines disclaimer under the harmless error standard.

Ensuring proper harmless-error reviews of Guidelines miscalculations also benefits the government when it appeals Guidelines miscalculations. See *Porter*, 928 F.3d at 968 (remanding after the government demonstrated the Guidelines miscalculation was not harmless, even though the district court included a Guidelines disclaimer). Because improper sentences

stemming from Guidelines calculation errors "seriously affect the fairness, integrity, or public reputation of judicial proceedings," *Rosales-Mireles* v. *United States,* 138 S. Ct. 1897, 1903 (2018), both the government and criminal defendants have an interest in ensuring that harmless error reviews of such sentences are conducted correctly.

### E. This Case Is an Ideal Vehicle to Resolve the Circuit Split.

This case is an excellent vehicle for resolving this important and recurring question. Mr. Seekins properly presented the issue to the Fifth Circuit which then passed upon the judge's boilerplate statement. Pet. App. 1a–6a. Indeed, the Fifth Circuit's opinion addressed only the inoculation question and, as is often the case, never addressed the Guidelines question itself. *Id.* This truncated form of review deprives litigants and district courts of guidance on important sentencing disputes. There are no jurisdictional questions that would prevent the Court from resolving the issue and nearly every circuit has thoroughly analyzed the issue, creating an entrenched split.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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