No._____

In the Supreme Court of the United States

BRANDON KEITH THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Apparently exercising its authority under the Commerce Clause, Congress criminally prohibited the simple possession of a firearm that was "in or affecting" commerce. 18 U.S.C. § 922(g)(1). Despite widespread recognition that this statute reaches beyond this Court's Commerce Clause cases, lower courts have understood this Court's statutory interpretation in *Scarborough v. United States*, 431 U.S. 563 (1977), as a constitutional pronouncement that a "minimal nexus requirement" (specifically, the fact that a firearm at some point in the past moved from one state to another) is all that is needed to establish federal jurisdiction under the Commerce Clause. However, numerous lower courts have recognized that this conclusion conflicts with later cases from this Court that interpret the Commerce Clause. This appeal presents two issues:

1. **Does Congress have authority under the Commerce Clause to criminally punish the simple possession of an object that moved from one state to another at some time in the past?**
2. **Is 18 U.S.C. § 922(g)(1) applied unconstitutionally when the court tells the jury it must find only prior interstate movement but does not require it to find that the gun possession was currently "in or affecting" commerce?**

RELATED PROCEEDINGS

This case arises from the following proceedings: *United States v. Thompson*, No. 24-4006 (10th Cir. April 15, 2025), and *United States v. Thompson*, No. 2:21-cr-316 DBB (D. Utah Jan. 17, 2024). There are no other proceedings related to this case under Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Statutes

Rules

Other

PETITION FOR WRIT OF CERTIORARI

Petitioner Brandon Thompson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's published decision is reported at 23 F.4th 1277 and is included in the appendix at A2. The district court's written ruling on the Commerce Clause issues presented here is reported at 617 F. Supp. 3d 1290 and is attached in the Appendix at A13. The district court's oral ruling on the jury instructions was not reported and is attached here at A22.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its decision on April 15, 2025. On July 10, 2025, Justice Gorsuch granted Mr. Thompson's motion to extend the filing deadline until August 13, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause)

> 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)

> 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 . . . possess in or affecting commerce, any firearm or ammunition.

Tenth Circuit Pattern Jury Instruction 2.44

> POSSESSION OF A FIREARM BY A CONVICTED FELON 18 U.S.C. § 922(g)(1)
>
> The defendant is charged in count ———— with a violation of 18 U.S.C. section 922(g)(1).
>
> This law makes it a crime for any person who has been previously convicted in any court of a felony to knowingly possess any firearm [or ammunition], in or affecting interstate [or foreign] commerce.
>
> To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> . . . .
>
> Fourth: before the defendant possessed the firearm [or ammunition], the firearm [or ammunition] had moved at some time from one state to another [or from a foreign country to the United States].

STATEMENT OF THE CASE

I. Proceedings Below

Employees of a cellphone store called police when they saw Petitioner Brandon Thompson try to shoplift merchandise from the store. Police responded to the store, and when they confronted him, Mr. Thompson fled into the parking lot. One of the officers caught up to him and tried to tackle him. As they wrestled, Mr. Thompson tried to pull the officer's gun out of its holster. The officer had his hand on Mr. Thompson's hands and prevented him from getting the gun out of the holster. Mr. Thompson was arrested without ever getting the gun out of the holster.

The State of Utah charged Mr. Thompson with attempting to disarm a police officer, a first-degree felony that carried a term of imprisonment of 5 years to life in prison. Utah Code § 76-5-102.8. This state prosecution, however, was dismissed after federal prosecutors indicted Mr. Thompson for possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g)(1).

It is well settled that "the Constitution does not grant the federal government a police power or a general authority to combat violent crime." *United States v. Patton*, 451 F.3d 615, 618 (10th Cir. 2006) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 5 L.Ed. 257 (1821)). Thus, § 922(g)(1) contains "an express jurisdictional element involving interstate activity that might limit its reach." *See id.* at 623 (quoting *United States v. Grimmett*, 439 F.3d 1263, 1272 (10th Cir.2006)). Specifically, § 922(g)(1) applies only to possession of a firearm that is "in or affecting commerce." 18 U.S.C. § 922(g).

At trial, the government proposed a jury instruction that would have required the jury to decide whether "[t]he firearm or ammunition was in or affecting commerce." (Pet. App. A24.) And later proposed supplemental instructions that would have defined interstate commerce and required the jury to decide whether Mr. Thompson's alleged possession affected commerce, as required by the statute. (Pet. App. A25-26.) Counsel agreed with the proposed instructions generally but asked the government to add language that would clarify that the jury was to consider only the impact on commerce that possession of the firearm would have.

A day later, the government proposed a different instruction that took this issue away from the jury. Instead of letting the jury decide whether possession of the firearm was "in or affecting" commerce, the government replaced the jurisdictional element with the following description: "before the defendant possessed the firearm, the firearm had moved at some time from one state to another or from a foreign country to the United States." (Pet. App. A29 (citing 10th Cir. Patt. Jury Inst. 2.44).) Mr. Thompson objected to this instruction because it did not require the jury to find the jurisdictional element, whereas the first proposed instruction did.

The district court overruled Mr. Thompson's objection and gave the government's proposed instruction. (Pet. App. A22.) A federal agent testified at trial that the officer's gun was manufactured in Austria, which obviously satisfied the element as described by the court. Despite Mr. Thompson's failure to get the gun out of the holster, the jury decided he possessed it and found him guilty.

Mr. Thompson filed a Rule 29 motion for a judgment of acquittal, arguing that replacing the jurisdictional element with a finding that the gun was manufactured in another state took the statute beyond Congress's authority under the Commerce Clause. The district court rejected this argument, finding itself bound by Tenth Circuit precedents: "if a firearm has traveled across state lines, the minimal nexus with interstate commerce is met and the statute can be applied. No further showing of the actual effect of the defendant's actions on interstate commerce is required." (Pet. App. A18.) And when Mr. Thompson appealed, the

Tenth Circuit rejected this claim because it too was bound by prior precedent. *United States v. Thompson*, 133 F.4th 1094, 1101 (10th Cir. 2025) (citing *Scarborough v. United States*, 431 U.S. 563 (1977); *United States v. Urbano*, 563 F.3d 1150, 1153-55 (10th Cir. 2009)).

II. Prior Precedents

Years before this case, the Tenth Circuit concluded that *this Court* had authorized Congress to prohibit possession of an item that had previously moved from one state to another. *See, e.g., United States v. Dorris*, 236 F.3d 582 (10th Cir.2000); *United States v. Patton*, 451 F.3d 615 (10th Cir. 2006); *United States v. Urbano*, 563 F.3d 1150, 1154 (10th Cir. 2009). This view appears to be unanimous across the circuits.

The Tenth Circuit's Commerce Clause analysis is striking because of its conclusion that the Commerce Clause, as interpreted by this Court more recently, does not authorize Congress to prohibit simple possession of an object just because it was manufactured in a different state. *United States v. Patton*, 451 F.3d 615, 634 (10th Cir. 2006). Nevertheless, the Tenth Circuit decided to ignore its own Commerce Clause analysis because *this Court* in *Scarborough v. United States*, 431 U.S. 463 (1977), had "assumed that Congress could constitutionally regulate the possession of firearms solely because they had previously moved across state lines." 451 F.3d at 634.

Given the way that lower courts have understood this Court's decision in *Scarborough* to constrain their analysis, this Court alone can address whether § 922(g) is constitutional.

REASONS FOR GRANTING THE WRIT

I. The Commerce Clause does not authorize Congress to criminally prohibit the simple possession of an item.

It is true that this Court's "understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time." *Gonzales v. Raich*, 545 U.S. 1, 15–16 (2005). As currently understood, however, the Commerce Clause does not authorize Congress to criminally prohibit simple, intrastate possession of an object that is "not an essential part of a comprehensive scheme of economic regulation." *Patton*, 451 F.3d at 633-34.

In 1942, this Court held that purely local, noncommercial activity can "be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Five decades later, this Court held that *Wickard* could not be used to sustain a federal law (a different subsection of § 922) that made it a federal crime to possess a firearm in a school zone. *United States v. Lopez*, 514 U.S. 549 (1995). The Court explained:

> Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561. Five years later, this Court applied *Lopez* to the Violence Against Women Act of 1994, striking down a federal civil remedy for the victims of gender-motivated

crimes of violence because this statute, like the statute in *Lopez*, did not regulate economic activity. *United States v. Morrison*, 529 U.S. 598 (2000).

That same year, this Court held that the federal arson statute could not be applied constitutionally to the arson of a private residence. *Jones v. United States*, 529 U.S. 848 (2000). That statute made it a federal crime to damage or destroy, "by means of fire or an explosive, any. . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." *Id.* at 850 (quoting 18 U.S.C. § 844(i)). This jurisdictional element is identical in its substance to the jurisdictional element here. Applying *Lopez*, the Court held that "an owner-occupied residence not used for any commercial purpose does not qualify as property 'used in' commerce or commerce-affecting activity; arson of such a dwelling." *Id.* at 850-51. The Court explained that the law "is not soundly read to make virtually every arson in the country a federal offense." *Id.* at 859. Thus, the jurisdictional element limited the federal statute to "property *currently used* in commerce or in an activity affecting commerce," which did not include "a dwelling place used for everyday family living." *Id.* (emphasis added).

Another five years later, this Court upheld a federal ban on simple possession of marijuana. *Gonzales v. Raich*, 545 U.S. 1 (2005). *Raich* described "three general categories of regulation in which Congress is authorized to engage under its commerce power." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). These are "the channels of interstate commerce"; "the instrumentalities of interstate commerce, and persons

or things in interstate commerce"; and "activities that substantially affect interstate commerce." *Id.*

Raich held that although marijuana was a commodity that could potentially be sold, the purely intrastate possession of marijuana "implicated" "[o]nly the third category." 545 at 17. Thus, after *Raich*, there can be no argument that the felony firearm ban is authorized under the first two categories.[1] Following *Raich*, there can be no serious argument that either of the first two categories of commerce regulation authorize the federal prohibition of a purely intrastate, noncommercial act. Here, possession of a firearm that is not possessed for sale is a purely intrastate act, so the only possible source of Congressional authority could be the third category.

Raich's analysis of the third category forecloses its use to save § 922(g). *Raich* explained, "When Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class." *Id.* at 17 (citation omitted). With respect to marijuana, Congress had "devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the [Controlled Substances Act]." *Id.* at 13. Thus, the intrastate possession of marijuana could be prohibited to protect this closed market. When "a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising

[1] As discussed further below, even if prior interstate movement makes a firearm "in commerce" for purposes of some cases, it does not follow that such a firearm is forever in commerce and, thus, permanently subject to federal regulation.

under that statute is of no consequence." *Id.* at 17 (citations omitted). This Court concluded: "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18.

Thus, the question after *Raich* should be whether "failure to regulate [gun possession] would undercut the regulation of the interstate market in that commodity." *Id.* While that may be the case for marijuana, it is not the case for firearms. With marijuana, Congress had expressed an intent to regulate (prohibit) the "total incidence" of marijuana use, making it illegal everywhere throughout the country. *See id.* at 17. By contrast, Congress has not outlawed the possession of firearms altogether (nor could it). Indeed, the government's interstate commerce expert testified at trial that federal law does not prohibit felons from possessing firearms that were possessed in the state they were manufactured in.

The Tenth Circuit relied on *Raich* to hold that the intrastate possession of body armor that had moved in commerce could not be constitutionally regulated under this third category. In *United States v. Patton*, the court explained:

> In both *Raich* and *Wickard*, the regulation of domestic possession and use was justified on the basis of its impact on a comprehensive regulatory scheme directed at interstate production, distribution, and sale. By contrast, in *Lopez*, where there was no such connection to a comprehensive regulation of the national market, the Court made clear that Congress could not reach mere possession under the Commerce Clause. 514 U.S. at 560 ("Section 922(g) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.").

451 F.3d at 626-27. The Tenth Circuit was clear: "Where the statute is not part of a

comprehensive scheme of regulation, however, the Court has not upheld federal regulation of purely intrastate noneconomic activity." *Id.* at 627.

After *Raich*, there can be no sound argument that Congress has authority to prohibit the purely intrastate possession of a firearm based solely on the fact that the gun had previously moved in commerce. This law "cannot be justified as a regulation of the channels of commerce, as a protection of the instrumentalities of commerce, or as a regulation of intrastate activity that substantially affects interstate commerce." *Id.* at 634.

The Tenth Circuit is hardly the only court to recognize that § 922(g) exceeds Congress's Commerce Clause authority. There is a growing chorus of federal judges at *all* levels, who can see that § 922(g)(1) cannot be sustained under this Court's Commerce Clause precedents. *See, e.g., Alderman v. United States*, 562 U.S. 1163, 1168 (2011) (Thomas, J., dissenting from the denial of certiorari); *United States v. Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc) (citing other dissents that raise this issue); *United States v. Storey*, 571 F. Supp. 3d 1296, 1298 (M.D. Fla. 2021). Given the widespread recognition that § 922(g) exceeds Congress's Commerce Clause authority, why do lower courts refuse to strike it down?

II. This Court has never ruled on the constitutionality of a felony firearm ban.

Patton explains why lower courts refuse to take up this issue: they believe this Court has already decided that a felony firearm ban is a constitutional exercise of Congress's Commerce Clause authority. However, these cases wrongly apply this

Court's statutory construction analysis to a constitutional question this Court has *never* taken up.

Despite its conclusion that the federal prohibition of intrastate possession of an object "does not fit within any of the *Lopez* categories," the Tenth Circuit in *Patton* concluded that it was required to uphold the prohibition because "it is supported by the pre-*Lopez* precedent of *Scarborough v. United States*, 431 U.S. 563 (1977), which held that Congress intended a felon-in-possession statute to prohibit possession of any firearm that had moved in interstate commerce." 451 F.3d at 634 (citing cases that have similarly found themselves bound by *Scarborough*). As a matter of statutory construction, *Scarborough* concluded: "we see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce." 431 U.S. at 575.

Patton is hardly unique in its decision that *Scarborough* precludes it from analyzing the constitutionality of the "minimal nexus" requirement of prior, interstate movement. However, treating *Scarborough* as a constitutional pronouncement has major analytical flaws. As one circuit judge put it recently, reading *Scarborough* in this way "dramatically expands the reach of the federal government under the Commerce Clause. No Supreme Court precedent requires it. And no proper reading of the Commerce Clause permits it." *United States v. Seekins*, 52 F.4th 988, 992 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc)

For one thing, *Scarborough* did not actually consider whether the jurisdictional hook was constitutionally sufficient. The only issue in Scarborough was "whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the *statutorily* required nexus between the possession of a firearm by a convicted felon and commerce." 431 U.S. at 564 (emphasis added). To resolve this dispute, the Court "turn[ed] first to the statute." *Id.* at 569. Then, deciding that the text was "ambiguous at best," the Court turned to the legislative history. *Id.* at 570-77. And after reviewing the legislative history, the Court concluded "that Congress intended no more than a minimal nexus requirement," so evidence of prior movement was sufficient to establish a nexus to commerce. *Id.* at 577. A close reading of *Scarborough* shows that it is about statutory interpretation, not constitutional authority.

To be sure, *Scarborough* acknowledged that *Congress* had "some concern about the constitutionality of such a statute," and it went on to show how those concerns were addressed in the legislative debate. *Id.* at 575. However, *Scarborough* never questioned whether Congress had, in fact, exercised its legislative authority constitutionally. Instead, *Scarborough* took it for granted that Congress had authority to act and concluded that a certain factual scenario (prior interstate movement of the firearm) was sufficient. Lower courts are simply wrong that *Scarborough* decided a "minimal nexus requirement" was constitutional under the Commerce Clause. *See, e.g., United States v. Dorris*, 236 F.3d 582, 584 (10th Cir. 2000) ("In 1977, the Supreme Court . . . [held that] proof the possessed firearm

previously traveled in interstate commerce was sufficient to satisfy the nexus between the possession of a firearm by a felon and commerce.")

Patton endorses this reading of *Scarborough* and its chilling effect on lower courts' Commerce Clause analysis:

> *Scarborough* decided only a question of statutory interpretation about a previous version of the felon-in-possession statute, but the decision assumed that Congress could constitutionally regulate the possession of firearms solely because they had previously moved across state lines. The constitutional understanding implicit in *Scarborough*—that Congress may regulate any firearm that has ever traversed state lines—has been repeatedly adopted for felon-in-possession statutes by [courts around the country]."

451 F.3d at 634.

For years, lower courts have been asking this Court to take up this issue because they believe *Scarborough* prevents them from reaching the constitutionality of § 922(g)(1). *See, e.g., Alderman v. United States*, 562 U.S. 1163 (2011) (Thomas, J., dissenting from denial of cert.) ("Recognizing the conflict between *Lopez* and *their interpretation* of *Scarborough*, the lower courts have cried out for guidance from this Court." (emphasis added)); *United States v. Alderman*, 565 F.3d 641, 643 (9th Cir. 2009) ("[A]bsent the Supreme Court or our en banc court telling us otherwise . . . the felon-in-possession of body armor statute passes muster"); *Patton*, 451 F.3d at 636 ("Any doctrinal inconsistency between *Scarborough* and the Supreme Court's more recent decisions is not for this Court to remedy."); *United States v. Lemons*, 302 F.3d 769, 773 (7th Cir. 2002) (noting that if this Court's Commerce Clause cases compel a different result, "it is for the Supreme Court to so hold"); *United States v. Cortes*, 299 F.3d 1030, 1037 n. 2 (9th Cir. 2002)

(deciding that "[u]ntil the Supreme Court tells us otherwise," the court must "follow *Scarborough* unwaveringly"); *United States v. Kirk*, 105 F.3d 997, 1016 n.25 (5th Cir. 1997) (Jones, J., dissenting) (concluding that despite "tension" between *Scarborough* and later Commerce Clause precedents, "[w]e are not at liberty to question" *Scarborough's* "minimal jurisdictional nexus" and "will continue to enforce § 922(g)(1)"); *United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996) (holding that *Scarborough*, not Commerce Clause precedents, applies to statutes with a jurisdictional hook); *United States v. Kuban*, 94 F.3d 971, 973 n. 4 (5th Cir. 1996) (noting the "powerful argument" against the constitutionality of § 922(g)(1) but reading *Scarborough* "as barring the way" for an "inferior federal court"); *United States v. Bishop*, 66 F.3d 569, 587–88 & n. 28 (3d Cir. 1995) (upholding carjacking statute, because of its jurisdictional hook and noting that until the Supreme Court is more explicit on the relationship between its Commerce Clause cases and *Scarborough* a lower court is "not at liberty to overrule existing Supreme Court precedent").

The lower courts have consistently (and wrongly) inferred a constitutional holding from this Court's statutory interpretation in *Scarborough*, and they believe this precedent prevents them from applying the Commerce Clause as this Court has instructed them to do. This analytical impasse is one that only this Court can resolve. It is time for this Court to take up this important constitutional question.

III. Replacing the jurisdictional element with an instruction that requires a jury to find only that the object previously moved from one state to another is an unconstitutional expansion of Congress's Commerce Clause authority.

Even if this Court were to decide that prior interstate movement of an object can support federal prohibition of the intrastate possession of that object, the lower courts' application of this rule has created another constitutional problem. Specifically, lower courts instruct juries that they must convict if they find that gun moved from one state to another. *See, e.g.,* 10th Cir. Patt. Jury Inst. 2.44 (Feb. 7, 2025). Even if this fact is sufficient in *some* cases, directing a jury that it is constitutionally sufficient in *all* cases improperly expands the jurisdictional element beyond what the Commerce Clause authorizes.

Section 922(g) requires that the gun be "in or affecting" commerce, and this is the fact the jury must find. Federalism is not served when a federal criminal statute is construed so broadly that it makes "virtually every [instance of that act] a federal offense." *Jones*, 529 U.S. at 859. Thus, to survive a constitutional challenge, the jurisdictional element must describe "property *currently used* in commerce or in an activity affecting commerce." *Id.* (emphasis added). Where the jurisdictional element here requires proof that the gun was possessed "in or affecting" commerce, the jury must be allowed to decide that question, and under *Jones* the jury must find that the impact on commerce is contemporaneous with the criminal act.

Despite this precedent, lower courts, like the Tenth Circuit, routinely take this question away from the jury, substituting instead the dictate that prior interstate movement of the firearm *always* establishes this element. These courts

start with the false premise that a set of facts (prior interstate movement) that is sufficient to establish the jurisdictional element in some cases necessarily implies that those facts will *always* establish the jurisdictional element when they are heard in connection with a different set of facts. This premise is false—it is not hard to imagine a scenario where a jury may find that possession of a firearm does not have a current impact on commerce, notwithstanding its prior interstate travel. By substituting the statutory language with a direction that prior interstate movement is always enough, lower courts have unconstitutionally extended the statute's reach to cases in which there is not a *current* relation to interstate commerce.

Here, Mr. Thompson asked the court to use the statutory language in its statement of the elements, to define interstate commerce, and to let the jury decide whether he possessed the firearm "in or affecting" interstate commerce. Under *Lopez* and its progeny, the court should hold that the "minimal nexus" described in *Scarborough* is not enough to pass constitutional muster. Even if this Court ultimately decides that prior interstate movement can be enough in some cases to establish the necessary jurisdictional element, it should at least ensure that the limits of congressional authority under the Commerce Clause are enforced by requiring the jury to decide, as it did in *Jones*, whether possession of a firearm is *currently* "in or affecting" interstate commerce, as the statute requires. While much could be said about what it means to affect commerce, the courts have already distilled this question into pattern jury instructions. *See, e.g.,* 10th Cir. Patt. Jury

Inst. 1.39.1 (defining effect on interstate commerce); *see also* Pet. App. A26 (government's request to give this instruction to the jury).

A Commerce Clause case in a different context shows how an object's relationship to interstate commerce is something with a beginning and an end that must be decided by a jury. In *United States v. Levine*, the Tenth Circuit analyzed a statute that prohibited tampering with a consumer product in violation of 18 U.S.C. § 1365(b). 41 F.3d 607, 614 (10th Cir. 1994). The issue was whether the tainted product had to "affect interstate commerce at or after the tainting." *Id.* at 610.

The Tenth Circuit held that as with firearms under *Scarborough*, "events prior to [the criminal act, which in that case was tainting,] can serve as the interstate commerce nexus." *Id.* at 612. The court explained that the interstate movement of ingredients would not be enough to establish a nexus with commerce, but once the product was manufactured, "we should consider any movement of the particular canned product that was later tainted, from the time it was produced until it is taken out of interstate commerce by an end user." *Id.* The *Levine* court held that "whether the interstate commerce requirement is met is a question of fact." *Id.* at 614. "Thus, it is for the jury to decide [] whether the product was in interstate commerce at the time of tainting." *Id.* And a conviction could be established by proof that the product was returned to interstate commerce or had "an actual impact on interstate commerce as a result of the tainting of the product." *Id.* at 615. As noted above, *Jones* confirms that the impact on commerce must be contemporaneous with the criminal act.

Levine suggests that prior interstate movement of a firearm should be treated at most like a rebuttable presumption that the commerce element is satisfied. Thus, the government might conceivably establish this element "by showing the firearm traveled in interstate commerce at some point in the past." *United States v. Urbano*, 563 F.3d 1150, 1152 (10th Cir. 2009). But a defendant could point to other facts that refute the conclusion that the firearm is currently "in or affecting" commerce, for example, he might offer evidence that the firearm was "taken out of interstate commerce by an end user." *Levine*, 41 F.3d at 612. And as juries do, the jury would have to decide whether the government had established the statutory, jurisdictional element. But deciding ex ante that prior interstate movement *always* establishes a constitutionally adequate impact on commerce improperly expands § 922(g)(1) beyond what the Constitution permits.

The fact that prior interstate movement might be sufficient in one case to establish this jurisdictional element does not imply that it must necessarily establish this element in *all* cases. The jury must be able to decide whether or not that jurisdictional element has been satisfied. Substituting the minimal nexus for the statutory language improperly creates the possibility that a person will be convicted for possessing a firearm in a way that does not affect interstate commerce. When such instructions are given, the statute is applied in a way that overflows constitutional limits and cannot be sustained.

IV. This Court should grant certiorari to resolve an important question of federal law that it has never taken up before, one that this Court alone can resolve.

This Court has repeatedly warned that the Commerce Clause power "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012). Allowing Congress to criminally punish the simple possession of some commodity that was made somewhere else threatens just that. If Congress can criminalize mere possession of such an object, it follows that Congress could criminalize *any act* done by a person in possession of such an object. The constitutional limit on this power is one of the most important questions before the Court today.

It may be unusual to grant certiorari when there is not a circuit split on an issue, but circuit splits are not the only reason for this Court to grant review. And this is not an issue that can benefit from further development in the circuits because case after case in every circuit reaffirms the view that they can do nothing about *Scarborough* before this Court takes up the issue. On this issue, the tension these courts see between *Scarborough* and the Commerce Clause cases is like a circuit split because although the circuits can't split because of *Scarborough*, they see that the analytical landscape this Court created is incoherent.

This Court should grant certiorari when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court" and also when the lower courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10. Both considerations support granting certiorari here.

The limits of Congressional authority under the Commerce Clause are a vital aspect of federalism. Whereas failure to clearly define the limits of this power creates a risk that a federal police power will emerge, the decision to enforce those limits poses almost no risk to society because the States retain police power to enforce laws now promulgated federally under the Commerce Clause. As the Tenth Circuit recently observed, defendants whose federal crimes can't be sustained under the Commerce Clause are not "off the hook for their alleged crimes" because the State "remains free today to prosecute the defendants for their conduct if it wishes to do so." *United States v. Chavarria*, 140 F.4th 1257, 1259 n.2 (10th Cir. 2025).

As described above, numerous lower courts, like the Tenth Circuit in *Patton* have concluded that statutes like § 922(g) cannot be sustained under this Court's Commerce Clause cases, which means that the decision to uphold § 922(g) "conflicts with relevant decisions of this Court."

And as described above, the constitutionality of a "minimal nexus requirement" "has not been, but should be, settled by this Court." Lower courts wrongly believe *Scarborough* prevents them from applying this Court's Commerce Clause cases to § 922(g). They are waiting for this Court to take up the issue and "have cried out for guidance from this Court." *Alderman v. United States*, 562 U.S. 1163 (2011) (Thomas, J., dissenting from denial of cert.)

There is a growing chorus of federal judges at all levels who believe the "minimal nexus" requirement of *Scarborough* is inadequate to survive Commerce Clause review. But these lower judges refuse to apply this Court's Commerce

Clause precedents to simple possession of a firearm because they believe this Court in *Scarborough* resolved the constitutional issue. They are bound by their misreading of the *Scarborough* and their deference to this court. This court should respect the honest effort of lower court judges to navigate this uneven terrain by taking up this issue.

V. This case is an excellent vehicle to resolve these questions.

This case is an ideal vehicle to resolve the conflict. The issues were presented and preserved below, and there are no procedural hurdles to this Court's review of those questions. There is no reason to further delay the resolution of this issue.

Mr. Thompson recognizes there have been, and are, and undoubtedly will be other opportunities to address the tension between *Scarborough* and the Commerce Clause cases. This case, however, presents a unique opportunity that other cases do not present. In contrast to other petitions that raise only a facial challenge to § 922(g), this case raises the additional question of whether the courts unconstitutionally apply § 922(g) when they tell juries that interstate movement *always* affects interstate commerce. Even if this Court ultimately concludes that the minimal nexus requirement can federal criminalization of intrastate commerce, it should grant relief here because the court did not require the jury to find a current impact on commerce.

This case is unique because it has raised and preserved this "as applied" challenge. (*See* Pet. App. A18.) The court rejected Mr. Thompson's demand that the jury make a finding about the gun's effect on interstate commerce, instead telling the jury that it should convict him if it found that the gun had previously moved

from one state to another. At the end of the day, the best view under *Lopez* and its progeny is that prior interstate movement by itself is constitutionally inadequate to sustain federal prosecution under the Commerce Clause. But granting certiorari in this case will allow the Court to consider the possibility that § 922(g) might be applied constitutionally in some cases, while also concluding that the lower courts' application of the jurisdictional element has extended the statute beyond Congress's authority to regulate commerce.

CONCLUSION

The Court should grant the writ to resolve these important questions.

Respectfully submitted,

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