No. _____

In the

Supreme Court of the United States

Joshua Devon Barrow,

Petitioner,

v.

United States,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an individual's probation or supervised release status categorically strips them of Second Amendment protection under 18 U.S.C. § 922(g)(1), or whether courts must instead apply the *Bruen-Rahimi* historical analysis to determine if the specific predicate offense historically justified disarmament?
2. Does 18 U.S.C. § 922(g)(1) violate the Commerce Clause when the government's only jurisdictional burden is to prove that a part of the firearm crossed state lines at some point in the indeterminate past?

PARTIES TO THE PROCEEDING

Petitioner is Joshua Devon Barrow, who was the Defendant-Appellant in the court below. Respondent, the United States, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

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

- *United States v. Barrow*, No. 24-10155, 2025 WL 1984267, 2025 U.S. App. LEXIS 17757 (5th Cir. July 17, 2025)
- *United States v. Barrow*, No. 2:23-cr-00038-Z-BR-1 (N.D. Tex. Feb. 14, 2024)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua Devon Barrow seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Barrow*, No. 24-10155, 2025 WL 1984267, 2025 U.S. App. LEXIS 17757 (5th Cir. July 17, 2025). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on July 17, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

This Petition involves the Second Amendment:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend II.

This Petition also involves the Commerce Clause:

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

U.S. Const. art. 1 § 8.

Finally, this Petition involves the federal felon-in-possession statute:

> 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[.]

18 U.S.C. § 922(g)(1).

STATEMENT OF THE CASE

This Petition arises from a direct appeal from a direct appeal raising an as-applied constitutional challenge and Commerce Clause challenge to a conviction under 18 U.S.C. § 922(g)(1).

On March 29, 2023, police officers responded to a call of an unconscious man in the driver's seat of a vehicle at an intersection in Amarillo, Texas. Emergency medical personnel broke the drivers-side window of the vehicle and transported the man, Joshua Devon Barrow, Appellant, to a regional hospital. When officers searched the vehicle, they discovered a firearm under the driver's seat.

Although Mr. Barrow was later released from the hospital without law-enforcement intervention, he had a subsequent encounter with police, in Houston, Texas. During a police interview there, he admitted to possessing a firearm during the Amarillo incident on March 29th.

The government indicted Mr. Barrow on one count of convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Mr. Barrow then filed a motion to dismiss, arguing that the statute under which he was charged—§ 922(g)(1)—was unconstitutional, on two grounds. First, it violates the Second Amendment as understood in *Bruen*. Second, it exceeds Congress's power under the Commerce Clause. The district court denied Mr. Barrow's motion to dismiss based on, *inter alia*, adherence to Fifth Circuit precedent.

Mr. Barrow then pleaded guilty to the felon-in-possession charge and was sentenced to 72 months imprisonment. Mr. Barrow pleaded open, without a written plea agreement or waiver of appeal.

On appeal, the Fifth Circuit affirmed Mr. Barrow's conviction. Rather than resolving the Second Amendment challenge under the *Bruen-Rahimi* framework, it instead affirmed on the basis that he was on supervised release at the time he possessed the firearm. On the Commerce Clause issue, it affirmed under longstanding Fifth Circuit precedent.

This Petition advances the issues raised in the motion to dismiss and re-urged on appeal, under both the Second Amendment and the Commerce Clause.

REASONS FOR GRANTING THIS PETITION

I. The Fifth Circuit erred in resolving Mr. Barrow's as-applied Second Amendment challenge by relying on his supervision status rather than conducting a *Bruen-Rahimi* historical analysis of his specific predicate offense.

The Fifth Circuit below declined to analyze the challenged statute on its own terms. Instead of conducting the rigorous historical analysis that the *Bruen-Rahimi* test requires for Mr. Barrow's specific predicate offenses—possession of a controlled substance, conspiracy to distribute drugs, and bribery of a public official—the court created an extratextual categorical exception based solely on Mr. Barrow's supervision status. In other words, the court held that Mr. Barrow is foreclosed on his challenge to 18 U.S.C. § 922(g)(1), even if he would otherwise prevail, simply because he was on supervised release at the time of his instant offense. *United States v. Barrow*, No. 24-10155, 2025 WL 1984267, 2025 U.S. App. LEXIS 17757, at *5-6 (5th Cir. July 17, 2025).

This approach violates established principles dating back to *Williams v. Illinois*, which forbid courts from defending a statute by pointing to entirely different grounds for regulation that are not embodied in the challenged law itself. 399 U.S. 235, 238-39 (1970). Section 922(g)(1) prohibits firearm possession based on prior felony conviction, not current supervision status, yet the Fifth Circuit sidestepped the central question by concluding that Mr. Barrow could theoretically be disarmed for an unrelated reason.

Second, the decision below highlights the fundamental constitutional infirmity of Section 922(g)(1)'s categorical lifetime ban on all felons. The government cannot

meet its burden under *Bruen* and *Rahimi* to demonstrate historical tradition supporting such a sweeping prohibition because no such tradition exists—neither the federal government nor any state categorically disarmed all felons until the 20th century, nearly two centuries after the Second Amendment's ratification. The circuit split on these issues has left millions of Americans with inconsistent constitutional protections depending solely on their geographic location. This case presents both questions cleanly: his non-violent offenses exemplify convictions that historically would not have justified permanent disarmament, while the court's reliance on his supervision status rather than the challenged statute itself illustrates the methodological error plaguing post-*Bruen* jurisprudence.

A. The Fifth Circuit sidestepped the required historical analysis by creating an extratextual "supervision exception" to the Second Amendment.

The decision below represents a fundamental departure from established constitutional methodology. Rather than conducting the rigorous historical analysis that *Bruen* and *Rahimi* require for the specific predicate offense that triggered Mr. Barrow's § 922(g)(1) prohibition—possession of a controlled substance, conspiracy to distribute drugs, and bribery of a public official—the panel relied a categorical exception based solely on his supervision status. *Barrow*, 2025 WL 1984267, at *5-6 (affirming under the court's precedent in *United States v. Giglio*, 126 F.4th 1039 (5th Cir. 2025)). This approach contradicts both this Court's precedents and *Bruen-Rahimi*'s historical methodology.

1. The Fifth Circuit in *Giglio* improperly bypassed *Bruen-Rahimi*'s requirements through interest-balancing disguised as categorical rules.

The Fifth Circuit's reliance on *United States v. Giglio*, 126 F.4th 1039 (5th Cir. 2025) exemplifies the methodological error that has infected post-*Bruen* jurisprudence. *Giglio* purported to conduct an historical analysis but actually engaged in the exact type of interest-balancing that *Bruen* forbids—reasoning that the government's interest in monitoring and controlling individuals under community supervision justifies restricting their Second Amendment rights. 126 F.4th at 1045.

Giglio's analysis fails at every level. The court concluded that "Early American history reveals that individuals could be disarmed while carrying out such sentences" and that this tradition justified disarming individuals on supervised release. *Id.* at 1045. But this sweeping assertion lacks the specific historical analysis that *Bruen-Rahimi* demands. As this Court has emphasized, "[w]hy and how the regulation burdens the right are central to this inquiry." *United States v. Rahimi*, 602 U.S. 680, 692 (2024). The government must demonstrate not just that some historical disarmament occurred, but that it occurred for reasons analogous to the specific modern prohibition at issue.

2. *Giglio*'s historical analysis relies on inapposite founding-era forfeiture laws.

Giglio's historical foundation crumbles under scrutiny. The court relied primarily on founding-era forfeiture laws, particularly Pennsylvania's 1790 statute that required individuals convicted of "robbery, burglary, sodomy or buggery" to

"forfeit to the commonwealth all … goods and chattels" and "be sentenced to undergo a servitude of any term … not exceeding ten years." Act of Apr. 5, 1790, ch. 1516, § 1, 13 Statutes at Large of Pennsylvania, at 511–12 (James T. Mitchell & Henry Flanders eds., 1908).

These forfeiture laws are fundamentally different from § 922(g)(1) in both their "why" and "how"—the very factors *Rahimi* identified as central to the constitutional inquiry. 602 U.S. at 692.

The "Why" Problem: The forfeiture laws targeted specific violent crimes that directly threatened public safety. The 1790 Pennsylvania law applied only to robbery, burglary, and sodomy—serious violent offenses. Similarly, the Massachusetts law cited in *Giglio* applied to "anti-riot laws" involving persons who "unlawfully, routously, riotously and tumultuously continue together" to prevent government officers from fulfilling their duties. Act of Oct. 28, 1786, 1 Laws of the Commonwealth of Massachusetts, at 346, 347 (J.T. Buckingham ed., 1807). These laws responded to immediate public safety threats, not the broad category of all felonies that § 922(g)(1) encompasses.

The "How" Problem: The forfeiture laws imposed fundamentally different burdens than modern community supervision. Historical sentences typically involved physical custody or banishment from the community entirely. For example, the Pennsylvania law imposed "servitude" not probation or supervision. Act of Apr. 5, 1790, ch. 1516, § 1, 13 Statutes at Large of Pennsylvania, at 511, 511–12 (James T. Mitchell & Henry Flanders eds., 1908). The Massachusetts law imposed

"imprisonment" not probation or supervision. Act of Oct. 28, 1786, 1 Laws of the Commonwealth of Massachusetts, at 346, 347 (J.T. Buckingham ed., 1807).

Modern community supervision operates entirely differently. Individuals on probation or supervised release live freely in their communities, work regular jobs, support families, and exercise most constitutional rights while subject to limited conditions. The founding-era concept of disarming someone physically confined or banished bears little resemblance to disarming someone who otherwise lives as a free member of the community.

This difference in "how" the burden operates is constitutionally significant. When the historical precedent involved complete state control over an individual's movements and circumstances, disarmament was merely one aspect of total deprivation of liberty. But when someone lives freely in the community—where the need for self-defense is greatest—the burden of disarmament is qualitatively different and more severe than anything the historical precedent contemplated.

Ultimately, *Giglio* creates an arbitrary system where defendants with identical predicate offenses face different constitutional protections based solely on whether they are under supervision. Such a result undermines the value-neutral historical analysis that *Bruen-Rahimi* requires.

B. The approach below violates basic principles of constitutional adjudication.

The Fifth Circuit's methodology violates fundamental principles governing constitutional challenges to criminal statutes. Courts cannot uphold a conviction

under one law by pointing to entirely different grounds for regulation that are not embodied in the challenged statute.

1. *Williams v. Illinois* prohibits defending statutes based on alternative regulatory approaches.

This Court's decision in *Williams v. Illinois* directly condemns the approach taken below. 399 U.S. 235 (1970). In *Williams*, the state argued that its statute was "not constitutionally infirm simply because the legislature could have achieved the same result by some other means." *Id.* at 238-39. This Court rejected that argument, explaining that the state's authority to use alternative regulatory approaches "does not resolve the [constitutional] issue" actually presented by the challenged law. *Id.* at 239. The Court then reached the merits of the constitutional challenge to the statute.

Mr. Barrow's probation status is precisely the kind of alternative means constitutional avoidance that *Williams* rejected. Section 922(g)(1) prohibits possession based on prior felony conviction, not current supervision status. The statute's text makes this clear: it applies to one "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Current supervision status is irrelevant to this conviction-based prohibition.

2. The supervision approach reintroduces the interest-balancing that *Bruen* rejected.

Bruen explicitly rejected means-ends scrutiny in favor of a historical analysis specifically to avoid an "interest-balancing inquiry" that requires deciding on "a case-by-case basis whether the right is *really worth* insisting upon." *N.Y. State Rifle &*

Pistol Ass'n v. Bruen, 597 U.S. 1, 22-23 (2022) (emphasis in original). The supervision exception recreates exactly this prohibited analysis by requiring courts to assess whether governmental monitoring interests justify restricting Second Amendment rights.

As Justice Kavanaugh emphasized in *Rahimi*, this represents "a value-laden and political task that is usually reserved for the political branches." 602 U.S. at 732-33 (Kavanaugh, J., concurring). When courts abandon analysis of the challenged regulation's historical foundations and instead evaluate collateral circumstances, they engage in precisely the "value-laden" judgments about constitutional worthiness that *Bruen* sought to eliminate.

II. 18 U.S.C. § 922(g)(1), as interpreted by the Fifth Circuit, exceeds Congress's power under the Commerce Clause.

18 U.S.C. § 922(g)(1) should require proof of more than interstate activity at the time a firearm was manufactured—perhaps either recent movement in interstate commerce or some commercial conduct on a defendant's part. In the absence of such a connection to interstate commerce, the statute exceeds Congress's power under the Commerce Clause.

In *Scarborough v. United States*, this Court held, as a matter of statutory interpretation, that the government could satisfy the interstate commerce element of Section 922(g)'s predecessor, 18 U.S.C. § 1201(a) (repealed 1986), by proving that the firearm had traveled across state lines at any prior point, even if the defendant's possession occurred all in one state. *See* 431 U.S. 563, 577 (1977). Eighteen years later, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down a statute

that made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," 18 U.S.C. § 922(q)(1)(A), reasoning that the law violated the Commerce Clause because it "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce." 514 U.S. at 551. *Lopez* clarified that, for a law that regulates neither the channels nor the instrumentalities of commerce to nevertheless comport with the Commerce Clause, the regulated activity must "substantially affect" interstate commerce. *Id*. at 559. Section 922(q) failed that test because there was no evidence that the intrastate, non-commercial act of possessing a gun in close proximity to a school had the requisite "substantial" impact on interstate economic activity, and the statute "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." *Id*. at 561.

In the following years, numerous jurists have identified and called upon this Court to resolve the apparent tension between *Lopez* and *Scarborough*. Justice Thomas, for instance, has observed 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" that, like § 922(g)'s jurisdictional element, "seems to permit Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines." *Alderman v. United States*, 131 S. Ct. 700, 702-03 (2011) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari). That result, Justice Thomas explained, is not only inconsistent with the

Lopez framework but "could very well remove any limit on the commerce power" if taken to its logical extension. *Id*. at 703.

Despite similarly perceiving *Scarborough* as in fundamental and irreconcilable conflict with *Lopez*, the prevailing view of the courts of appeals is that *Scarborough* implicitly assumed the constitutionality of § 922(g)'s predecessor statute, and that "[a]ny doctrinal inconsistency between *Scarborough* and [this] Court's more recent decisions is not for [the lower courts] to remedy." *United States v. Alderman*, 565 F.3d 641, 645 (9th Cir. 2009); *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006); *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting); *see also United States v. Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (Jones, J., for half of the equally divided court) ("not[ing] the tension between" *Scarborough* and *Lopez* but observing that the Fifth Circuit has felt constrained to nevertheless "continue to enforce § 922(g)(1)" because a court of appeals is "not at liberty to question the Supreme Court's approval of [Section 922(g)'s] predecessor statute").

The courts of appeals have therefore made clear their intention to follow *Scarborough* "until the Supreme Court tells [them] otherwise." *Patton*, 451 F.3d at 648. And nine of those courts have specifically upheld the constitutionality of § 922(g)(1) based on *Scarborough*'s 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); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *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); *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, 715-16 (11th Cir. 2010).

This question is important and independently warrants review. Section 922(g)(1) is one of the most often-applied federal criminal statutes. Yet, as Justice Thomas has observed, and as many lower-court judges have echoed, the degree of proof needed to convict under that statute is in serious tension with the Court's modern understanding of the limited nature and scope of the federal power to regulate noneconomic, intrastate activity. In recently urging the Fifth Circuit to reconsider this issue *en banc*, Judge Ho emphasized that the "constitutional limits on governmental power do not enforce themselves." *United States v. Seekins*, 52 F.4th 988, 989 (5th Cir. 2022) (Ho, J., dissenting from the denial of rehearing en banc). The interpretation of § 922(g)(1)'s jurisdictional element that the circuits understand *Scarborough* to require effectively "allows the federal government to regulate any item so long as it was manufactured out-of-state—without any regard to when, why, or by whom the item was transported across state lines." *Id.* at 990. That broad conception of federal regulatory authority is at odds with the *Lopez* framework. Only this Court can "prevent [that framework] from being undermined by a 1977 precedent that d[id] not squarely address the constitutional issue." *Alderman*, 131 S. Ct. at 703 (Thomas, J., dissenting from the denial of certiorari).

CONCLUSION

Petitioner respectfully requests that this Court grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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