

No.

In the Supreme Court of the United States

JAMES DAVID ALLEN, II,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit, No. 23-3636

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the mere fact that a firearm was sold across state lines, at some point prior to the defendant's acquisition of it, enough to permit Congress to penalize the defendant's possession of that firearm under its Commerce Clause authority, where the defendant did not himself participate in the interstate commerce?

LIST OF PARTIES

James David Allen, II, petitioner.

United States of America, respondent.

RELATED CASES

United States v. Allen, No. 4:20-cr-00300-HSG-1, United States District Court for the Northern District of California. Judgment entered on February 26, 2021.

United States v. Allen, No. 21-10060, United States Court of Appeals for the Ninth Circuit. Judgment of reversal entered on May 16, 2022.

United States v. Allen, No. 4:20-cr-00300-HSG-1, United States District Court for the Northern District of California. Judgment entered on November 16, 2023.

United States v. Allen, No. 21-10060, United States Court of Appeals for the Ninth Circuit. Judgment of affirmance entered on May 29, 2026.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner James David Allen, II respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Decades ago, in *Scarborough v. United States*, 431 U.S. 563 (1977), this Court held that any past connection of a gun to interstate commerce was enough to satisfy the jurisdictional element of the former statute penalizing possession of a firearm by a felon. That opinion does not withstand scrutiny under the Court’s more recent Commerce Clause jurisprudence. In a series of cases beginning with *United States v. Lopez*, 514 U.S. 549 (1995), the Court has made clear that, while the Commerce Clause permits regulation of economic activities that substantially affect interstate commerce, it does not authorize plenary federal regulation of noneconomic conduct, including mere firearm possession. Such an understanding 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.

Justice Thomas, and many circuit judges, have recognized the tension in the Court’s caselaw and Congress’s unconstitutional overreach. But they are waiting for this Court to formally overrule *Scarborough*.

In the meantime, thousands of Americans are suffering unconstitutional convictions and prison sentences each year. “In Fiscal Year 2021—the most recent year for which the Sentencing Commission publishes [18 U.S.C.] § 922(g)(1)-specific data—the federal government obtained 7,454 convictions: nearly one every hour, 24/7/365.” *United States v. Luna*, No. 25-40272, 2026 WL 2507689, at *3 (5th Cir. Aug. 25, 2026) (Willett, J., dissenting) (citing U.S. Sent’g Comm’n, Quick Facts: Felon in Possession of a Firearm (Fiscal Year 2021), <https://perma.cc/9MYC-CQBA>).

The time has come for this Court to clarify Congress’s authority under the Commerce Clause.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit summarily affirmed Mr. Allen’s appeal as controlled by existing circuit precedent, in an unpublished order issued on May 29, 2026. *United States v. James David Allen*, No. 23-3636; Appendix (App.) A.

STATEMENT OF JURISDICTION

The district court had original jurisdiction over this prosecution, alleging a violation of the laws of the United States, pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 2253(c) and issued its judgment on May 29, 2026. Mr. Allen did not

petition for rehearing. The filing deadline for the petition for certiorari was extended by this Court’s August 19, 2026 order, to October 26, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Article I, Section 8 states, in relevant part: “The 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. 3.

STATUTORY PROVISION

18 U.S.C.¹ § 922 states, in relevant part:

(g) It shall be unlawful for any person-- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

A. Procedural History

Mr. Allen was charged by indictment with one count of being a felon in possession of a firearm and ammunition, § 922(g)(1). At his first trial, the jury found him guilty of the sole count on November 10, 2020. On February

¹ Unspecified statutory references are to Title 18 of the United States Code.

24, 2021, the district court sentenced him to a prison term of 72 months, to be followed by three years of supervised release.

On May 16, 2022, in appeal number 21-10060, the court of appeals vacated the judgment, holding that Mr. Allen had been denied his right to a public trial.

Prior to his second trial, Mr. Allen filed a motion to dismiss the indictment, which included the Commerce Clause claim he raises herein. The district court denied the motion. The court made no findings of fact; it simply cited Ninth Circuit cases that had rejected similar arguments.

Upon retrial, the jury again found Mr. Allen guilty, on December 7, 2022. On November 8, 2023, the district court sentenced him to a prison term of 63 months, to be followed by three years of supervised release.

On May 29, 2026, the court of appeals summarily affirmed the judgment, citing controlling circuit precedent.

B. Factual Background

The facts of the case pertinent to the question presented are as follows. A more detailed factual summary can be found in Appendix B (excerpt of Appellant's Opening Brief).

On July 8, 2022, police officers in Pinole, California responded to a radio dispatch about two abandoned vehicles. They found Mr. Allen asleep in one

of the cars. Dispatch informed the officers that the license plate was registered in Washington State to a vehicle that had been reported as stolen.

The police arrested Mr. Allen and conducted an inventory search of the vehicle prior to towing it. They found a loaded, AR-15-style rifle and ammunition.

A special agent with the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) determined, from the serial number on the rifle and other sources, that it was manufactured by Aero Precision in Tacoma, Washington. The ammunition was manufactured by the Lake City Army Ammunition Plant in Independence, Missouri.

The ATF agent testified that a firearms trace summary document showed that a pawnshop in Marysville, Washington was the first seller of the gun to a private purchaser in 2018 – a Mr. Drayton of Lake Stevens, Washington. The agent subsequently added that, before the firearm arrived at the pawnshop in Washington, the manufacturer first sent it to Brownells, a major retailer in Iowa. The agent had not said this on direct examination; he hadn't testified to it at the first trial; it was not stated on the firearms trace summary; and it was not included in his expert disclosures. But the agent asserted, somewhat uncertainly, that he found the information about the Iowa sale on "eTrace" – "From what I had checked, it looked liked it had first been shipped to Brownells in Iowa"

At some point after the sale to Mr. Drayton, an unnamed resident of Washington put the firearm on consignment at a store there – Puget Sound Security Locksmith and Firearms. The store owner testified that the gun was taken from his store in late June 2020. The police never found out who took it, and no evidence was presented that Mr. Allen was responsible.

The parties stipulated that Mr. Allen knew he had previously been convicted of a felony.

REASONS FOR GRANTING THE PETITION

A. The Question Presented Is Important and Frequently Recurring.

“At common law, only a few grave crimes qualified as ‘felonies.’” *Luna*, 2026 WL 2507689, at *2 (Willett, J., dissenting) (citing Francis Wharton, A Treatise on the Criminal Law of the United States 1 (1846) (listing “murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny”)). “Today, after generations of criminal-code expansion, the label reaches conduct ranging from reading someone else’s email to ‘opening a bottle of ketchup at the supermarket and putting it back on the shelf.’” *Id.* (citing Neil Gorsuch & Janie Nitze, Over Ruled: The Human Toll of Too Much Law 105–10 (2024); Paul H. Robinson et al., The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading, 100 J.

Crim. L. & Criminology 709, 719 (2010); and *Folajtar v. Att’y Gen. of the U.S.*, 980 F.3d 897, 921 (3d Cir. 2020) (Bibas, J., dissenting)²).

Nearly 90 years ago, Justice Robert Jackson warned that, “[w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.” Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc’y 18, 19 (1940). Justice Gorsuch has described how “criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something.” *Nieves v. Bartlett*, 587 U.S. 391, 412 (2019) (Gorsuch, J., concurring in part and dissenting in part). Today, nearly twenty million Americans have felony convictions. *United States v. Cockerham*, 162 F.4th 500, 517 (5th Cir. 2025) (Higginson, J., dissenting).

Whether each of those millions of citizens should be forever banned from possessing a gun, including for self-defense, is a matter of passionate debate among conscientious Americans. *See United States v. Seekins*, 52 F.4th 988, 992 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc). The Framers of our Constitution intended to leave such debates to the

² *Abrogation recognized by Range v. Att’y Gen. United States*, 124 F.4th 218, 224 (3d Cir. 2024).

States. *See Alderman v. United States*, 562 U.S. 1163, 131 S.Ct. 700, 703 (2011) (opinion of Justices Thomas and Scalia, dissenting from denial of certiorari).

The result of Congress’s unconstitutional exercise of authority is, as noted above, that thousands of our citizenry who have any past felony conviction are federally punished for gun possession each year. And that is only the felony-conviction provision. Section 922 includes many other possession offenses as well, which have no requirement that the accused was personally involved in interstate commerce.

B. *Scarborough* Should Be Overruled Because It Is Inconsistent With This Court’s Contemporary Understanding of the Commerce Clause.

Mr. Allen’s gun and ammunition may have been sold across state lines prior to his possession of them, but it is undisputed that there is no evidence he ever participated in any interstate commerce. *Scarborough* tolerated such an incidental connection to commerce, but the Court’s contemporary Commerce Clause jurisprudence does not.

“The Constitution creates a Federal Government of enumerated powers.” *Lopez*, 514 U.S. at 552 (citing U.S. CONST. art. I, § 8). “‘The powers delegated by the . . . Constitution to the federal government are few and defined.’ [Citation.]” *Id.* “Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the

scope of those delegated powers, has created offenses against the United States.” *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion). One such power vested in Congress is the authority “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

In the 1977 case of *Scarborough v. United States*, the defendant had been convicted of possession of a firearm by a felon under former § 1202(a), a predecessor to § 922(g)(1). *Scarborough*, 431 U.S. at 563–64. He argued that proof the firearm had traveled in interstate commerce before he possessed it was insufficient to satisfy the statutorily required nexus with commerce. *Id.* at 564; see former § 1202(a) (applying where the felon “receives, possesses, or transports [the firearm] in commerce or affecting commerce”).

Scarborough was not about whether former § 1202(a) was a valid exercise of Congress’s commerce power. To be sure, Congress had enacted the statute under its Commerce Clause authority. See *Scarborough*, 431 U.S. at 571. But the thrust of the case was the question of statutory interpretation – whether prior movement of the gun satisfied the statute – not the statute’s constitutionality. See *id.* at 569–70. The defendant argued that the firearm’s travel across state lines had to be contemporaneous with and connected to the defendant’s possession. *Id.* at 568–69.

Interpreting the language and history of the statute, this Court held: “[W]e 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.” *Scarborough*, 431 U.S. at 575 (footnote omitted). “And we see no basis for contending that a weapon acquired after a conviction affects commerce differently from one acquired before and retained.” *Id.* at 572.

Nearly two decades later, in *Lopez*, 514 U.S. at 551, the Court held that a federal statute prohibiting possession of a firearm in a school zone, former § 922(q), was an invalid exercise of Congress’s commerce power. Tracing the history of its Commerce Clause jurisprudence, the Court observed that, while it had sanctioned a fairly broad scope of interstate commerce, it had confirmed that the “commerce power ‘must be considered in the light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local’” government power to regulate citizens’ activities. *Id.* at 557 (citation omitted). “When Congress criminalizes conduct already denounced as criminal by the States, it effects a ‘change in the sensitive relation between federal and state criminal jurisdiction.’ [Citation.]” *Id.* at 561 n.3. “[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” *Id.* at 557 n.2

(quoting *Hodel v. Virginia Surface Min. and Reclamation Ass’n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)).

Lopez identified three categories of activities from the Court’s past cases that Congress may regulate under the Commerce Clause. *Lopez*, 514 U.S. at 558. These include (1) regulation of “the use of the channels of interstate commerce,” (2) regulation and protection of “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,” and (3) regulation of activities that “substantially affect” interstate commerce. *Id.* at 558–59 (citations omitted).

Applying this framework to the statute at issue, *Lopez* found that possession of a gun in a school zone only fell arguably into the third category – activities having a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 559. However, the Court found it did not qualify because possession of a gun in a school zone had “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Id.* at 561 (footnote omitted).

Lopez rejected the government’s claims that there was a substantial effect on interstate commerce, including arguments that possession of a firearm in a school zone could result in violent crime, which in turn could affect the national economy by (1) spreading insurance costs throughout the

population, and (2) reducing individuals’ willingness to travel to unsafe areas within the country. *Lopez*, 514 U.S. at 563–64. The Court also rejected the government’s contention that there was a substantial effect on commerce via harming the learning environment and therefore the nation’s economic wellbeing. *Id.* at 564. “[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.” *Id.*; *see also id.* at 585 (“[T]he power to regulate ‘commerce’ can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States.”) (Thomas, J., concurring). Moreover, the statute interfered with some States’ policy choices not to outlaw the conduct. *Id.* at 561 n.3. And “[m]ost egregiously, section [922(q)] inappropriately [overrode] legitimate State firearms laws with a new and unnecessary Federal law.’ [Citation.]” *Id.*; *see also United States v. Morrison*, 529 U.S. 598, 615 (2000) (Congress lacked commerce authority to enact the federal civil remedy for gender-motivated violence because accepting petitioner’s reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption); *Jones v. United States*, 529 U.S. 848, 850–51 (2000) (“an owner-occupied residence not used for any commercial purpose does not qualify as property ‘used in’ commerce or commerce-

affecting activity”). Indeed, it is hard to imagine a more local act than possession of an item.

Application of *Lopez* and *Morrison* to § 922(g)(1) should yield the conclusion that possession of a firearm by a felon is not an activity that has a substantial effect on interstate commerce. As Justice Thomas has identified, most recently in his concurrence in *United States v. Hemani*, 608 U.S. 772 (2026), section 922(g) “‘cannot be reconciled’ with this Court’s modern Commerce Clause doctrine.” *Id.* at 797 (quoting *Alderman*, 131 S.Ct. at 702 (Thomas, J., dissenting)). Accordingly, “lower court judges have for decades concluded that under this Court’s precedents, § 922(g) exceeds Congress’s power to regulate interstate commerce.” *Id.* at 799 (collecting cases). But the majorities in such cases have upheld the federal statutes by misapprehending this Court’s jurisprudence in two ways: “Some have thought that *Scarborough*’s statutory holding required them to uphold § 922(g)’s constitutionality. Others have concluded that the presence of a so-called ‘jurisdictional hook’ in § 922(g) renders the statute constitutional under *Lopez* and *Morrison*.” *Id.*; *see id.* at 800–01 (collecting cases). This includes *United States v. Latu*, 479 F.3d 1153, 1154–57 (9th Cir. 2007), on which the Ninth Circuit’s affirmance in the present case was based.

However, as described above, “*Scarborough* addressed only whether ‘Congress intended no more than a minimal nexus requirement’ in its

statutory requirement that the firearm in question was received, possessed, or transported ‘in commerce or affecting commerce.’” *Hemani*, 608 U.S. at 800 (Thomas, J., concurring) (quoting *Scarborough*, 431 U.S. at 564). It was decided based on “the statute’s ‘language’ and ‘legislative history,’ not constitutional law.” *Id.* (quoting *Scarborough*, 431 U.S. at 575).

Moreover, a “jurisdictional hook” is insufficient as well. “Congress cannot regulate the possession of every thing that ever traveled across state lines.” *Hemani*, 608 U.S. at 801 (Thomas, J., concurring). “[T]reating Congress’s jurisdictional element as dispositive could very well remove any limit on the commerce power and would trespass on traditional state police powers.” *Id.* (citation and quotation marks omitted). “[T]he fact that § 922(g) purports to be an exercise of Congress’s Commerce Clause powers does not mean that it falls within the legitimate scope of those powers.” *Id.* at 802.

Accordingly, the lower courts’ reliance on *Scarborough*, to allow the federal government to punish possession of every firearm that someone in the past sold across state lines, irrespective of whether the defendant participated in such commerce, cannot withstand scrutiny under this Court’s contemporary understanding of the Commerce Clause. Under our federal system of government, “[t]he powers of the legislature are defined, and limited; [so] that those limits may not be mistaken, or forgotten, the

constitution is written.” *Marbury v. Madison*, 1 Cranch 137, 176, 5 U.S. 137, 2 L.Ed. 60 (1803).

CONCLUSION

For the foregoing reasons, Mr. Allen respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals.

Dated: October 12, 2026

Respectfully submitted,

s/ David L. Annicchiarico

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Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 29 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES DAVID ALLEN,

Defendant - Appellant.

No. 23-3636

D.C. No.

4:20-cr-00300-HSG-1

Northern District of California,
Oakland

ORDER

Before: S.R. THOMAS, MILLER, and H.A. THOMAS, Circuit Judges.

The motion (Docket Entry No. 31) for summary affirmance is granted. *See*

United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

Appellant's arguments are foreclosed. *See United States v. Duarte*, 137 F.4th 743,

761 (9th Cir. 2025) (en banc), *cert. denied*, __ S. Ct. __, 2026 WL 135692 (U.S.

Jan. 20, 2026); *United States v. Walker*, 68 F.4th 1227, 1230 (9th Cir. 2023);

United States v. Latu, 479 F.3d 1153, 1156-57 (9th Cir. 2007).

AFFIRMED.

APPENDIX B

The retrial began on December 6, 2022 and concluded on December 7, 2022. ER-131-32. The jury again found appellant guilty. ER-117. On November 8, 2023, the court sentenced him to a prison term of 63 months, to be followed by three years of supervised release. ER-3, 118. Appellant filed a timely notice of appeal on November 18, 2023. ER-119.

STATEMENT OF FACTS

On July 8, 2022, City of Pinole police officers responded to a radio dispatch about two abandoned vehicles. ER-69-70. They found appellant asleep in one of the cars. ER-71-73. Dispatch informed the officers that the license plate was registered in Washington State to a vehicle that had been reported as stolen. ER-70, 73.

Appellant identified himself as “James Allen, also Carpenter.” ER-74-75. He had two Washington driver’s licenses, both of which had the name “James David Allen, II.” ER-76, 80. Appellant said he was on his way to San Francisco. ER-75. Dispatch confirmed that he wasn’t the registered owner of the car. ER-76-77. However, appellant repeatedly told the officers he had a bill of sale for the vehicle. ER-92.

The police arrested appellant and conducted an inventory search of the vehicle prior to towing it. ER-78-80. They found a loaded, AR-15-style rifle on the front passenger floorboard, leaned up against the seat, underneath a jacket. ER-81. There was a magazine inserted into the rifle, with a second magazine taped to it. ER-84. In the trunk, the police found a third magazine containing ammunition. ER-83-88. There were 79 bullets in total. ER-85.

The gun had graffiti-style writing on it. ER-82. This included the initials "JDA," Roman numeral "II," and "Carpenter." ER-82, 86-87.

The police gave appellant *Miranda* warnings. ER-88-89. Appellant said he wanted an attorney, and the officers stopped speaking to him. ER-89. But on the ride to the police station, appellant was mumbling to himself. ER-89-90. One thing the officers heard was something to the effect that appellant wished they had conducted a traffic stop on him because it would've made the day a little more entertaining. ER-90. Asked what he meant, appellant said he would have shot it out with them. ER-91.

A special agent with the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) testified that commercial manufacturers are required to submit serial numbers to the ATF for all of the firearms they manufacture. ER-94. From the serial number on the rifle in appellant's vehicle and other sources, the agent determined it was manufactured by Aero Precision in Tacoma, Washington. ER-95, 96-98. The ammunition was manufactured by the Lake City Army Ammunition Plant in Independence, Missouri. ER-99-103.

The ATF agent testified that a firearms trace summary document showed that a pawnshop in Marysville, Washington was the first seller of the gun to a private purchaser in 2018 – a Mr. Drayton of Lake Stevens, Washington. ER-104-05, 108. The agent subsequently added that, before the firearm arrived at the pawnshop in Washington, the manufacturer first sent it to Brownells, a major retailer in Iowa. ER-106-07. The agent hadn't said this on direct examination, he hadn't testified to it at the first trial, it wasn't stated on the firearms trace summary, and it wasn't included in his expert disclosures. ER-106-07, 110-11. But the agent asserted, somewhat

uncertainly, that he found the information about the Iowa sale on “eTrace.” ER-107 (“From what I had checked, it looked liked it had first been shipped to Brownells in Iowa . . .”).

At some point after the sale to Mr. Drayton, an unnamed resident of Washington put the firearm on consignment at a store there – Puget Sound Security Locksmith and Firearms. ER-109, 113. The store owner testified that the gun was taken from his store in late June 2020. ER-112, 114-15. The police never found out who took it. ER-116.

The parties stipulated that appellant knew he had previously been convicted of a felony. ER-93.

SUMMARY OF ARGUMENT

I. As this Court recently held in *United States v. Duarte*, 101 F.4th 657, 690 (9th Cir. 2024), *reh’g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. 2024), it is unconstitutional under the Second Amendment to prohibit a person with a prior felony conviction from possessing a firearm, unless that person’s prior crime was punishable by execution, life imprisonment, or permanent forfeiture of the offender’s estate at the time