

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN MARQUE GILSTRAP,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for 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

- I. Whether the case should be held in light of any case establishing limitations on Congressional power to criminalize areas of traditional state responsibility under the Commerce Clause?

PARTIES

Bryan Marque Gilstrap is the petitioner; he was the defendant-appellant below.
The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bryan Marque Gilstrap respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the sentence is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on August 22, 2017 sentencing the defendant, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on August 15, 2018. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

Article I, Section 8 of the U.S. Constitution provides in part:

The Congress shall have power... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian [sic] tribes

Title 18, Section 922(g) of the United States Code provides in part:

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

Federal Rule of Criminal Procedure 11(b)(3) provides:

Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

STATEMENT OF THE CASE

Bryan Marque Gilstrap was indicted on one count of possessing a firearm after having been convicted of a felony. He pleaded guilty without a plea agreement, and admitted that his firearm had previously been shipped and transported in interstate or foreign commerce. He received a sentence of 48 months. [Appx. B]. On appeal, he unsuccessfully challenged his sentence and conviction, arguing that the interstate commerce clause does not authorize the prohibition of items that have merely moved in commerce at an unspecified time in the past. [Appx. A].

REASONS FOR GRANTING THE WRIT

I. This Court should hold the instant Petition in light of any case establishing further limitations on Congressional power to criminalize areas of traditional state responsibility under the Commerce Clause.

“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 534 (“The Constitution’s express conferral of some powers makes clear that it does not grant others.”) There is no general federal police power. *See United States v. Morrison*, 529 U.S. 598, 618-619 (2000). Every exercise of Congressional power must be justified by reference to a particular grant of authority. *See Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 535 (“The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.”) A limited central government promotes accountability and “protects the liberty of the individual from arbitrary power.” *Bond v. United States*, 564 U.S. 211, 222 (2011).

The Constitution grants Congress a power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, § 8, cl. 3. But this power “must be read carefully to avoid creating a general federal authority akin to the police power.” *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 536. This Court has held that “[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states,” and includes a power to regulate activities that “have a substantial effect on interstate commerce.” *United States v. Darby*, 312 U.S. 100, 118-119 (1941). But *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*) suggests a different analysis. In *NFIB* five members of this Court found that the individual mandate component of the Affordable Care Act could not be

justified by reference to the Commerce Clause. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 558 (Roberts., C.J. concurring). Although this Court recognized that the failure to purchase health insurance affects interstate commerce, five Justices did not think that the constitutional phrase “regulate Commerce ... among the several States,” could reasonably be construed to include enactments that compelled individuals to engage in commerce. *See id.* (Roberts., C.J. concurring). Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *See id.* (Roberts., C.J. concurring).

The majority of the Justices in *NFIB* thus required more than a demonstrable effect on commerce: they required that the challenged enactment itself *be* a regulation of commerce – that it affect the legality of pre-existing commercial activity. Possession of firearms, like the refusal to purchase health insurance, may “substantially affect commerce.” But such possession is not, without more, a commercial act.

To be sure, *NFIB* does not explicitly repudiate the “substantial effects” test. Indeed, Chief Justice Roberts’ opinion quotes *Darby*’s statement that “[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states...” *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 549 (Roberts., C.J. concurring); *see also id.* (Roberts., C.J. concurring)(distinguishing *Wickard v. Filburn*, 317 U.S. 111 (1942)). It is therefore perhaps possible to read *NFIB* narrowly: as an isolated prohibition on affirmatively compelling persons to engage in commerce. But it is difficult to understand how this reading of the case would be at all consistent with *NFIB*’s textual reasoning. The text of the Commerce Clause does not distinguish between Congress’s power to affect commerce by regulating non-commercial activity (like possessing a firearm), and its power to affect commerce by compelling people to join a commercial market (like health insurance). Rather it simply says that Congress may “regulate ... commerce between the several states.” And that phrase either is or

is not limited to laws that affect the legality of commercial activity. Five justices in *NFIB* took the text of the Clause seriously and permitted Congress to enact only those laws that were, themselves, regulations of commerce. *NFIB* thus allows Congress only the power “to prescribe the rule by which commerce is to be governed.” *Gibbons v. Ogden*, 22 U.S. 1, 196, 9 Wheat. 1 (1824).

And indeed, much of the language of Chief Justice Roberts’ opinion in *NFIB* is consistent with this view. This opinion rejects the government’s argument that the uninsured were “active in the market for health care” because they were “not currently engaged in any **commercial** activity involving health care...” *id.* at 556 (Roberts., C.J. concurring) (emphasis added). The Chief Justice significantly observed that “[t]he individual mandate’s regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing **commercial** activity.” *Id.* (Roberts., C.J. concurring)(emphasis added). He reiterated that “[i]f the individual mandate is targeted at a class, it is a class whose **commercial** inactivity rather than activity is its defining feature.” *Id.* (Roberts., C.J. concurring)(emphasis added). He agreed that “Congress can anticipate the effects on commerce of an **economic** activity,” but did not say that it could anticipate a **non-economic** activity. *Id.* (Roberts., C.J. concurring)(emphasis added). And he finally said that Congress could not anticipate a future activity “in order to regulate individuals not currently engaged **in commerce**.” *Id.* (Roberts., C.J. concurring)(emphasis added). Accordingly, *NFIB* provides substantial support for the proposition that enactments under the Commerce Clause must regulate commercial or economic activity, not merely activity that affects commerce.

Here, the factual resume does not state that Petitioner’s possession of the gun was an economic activity; this should have been fatal to the conviction. As explained by *NFIB*, the Commerce Clause permits Congress to regulate only activities, *i.e.*, the

active participation in a market. But 18 U.S.C. §922(g)(1) criminalizes all possession, without reference to economic activity. Accordingly it sweeps too broadly, and is certainly unconstitutional as applied against the defendant in this prosecution. Further, the factual resume fails to show that Petitioner was engaged in the relevant market at the time of the regulated conduct. Chief Justice Roberts also noted that Congress cannot regulate a person's activity under the Commerce Clause unless the person affected is "currently engaged" in the relevant market. *Id.* at 556. As an illustration, the Chief Justice provided the following example: "An individual who bought a car two years ago and may buy another in the future is *not* 'active in the car market' in any pertinent sense." *Id.* As such, *NFIB* overrules the long-standing notion that a firearm which has previously and remotely passed through interstate commerce should be considered to indefinitely affect commerce without "concern for when the [initial] nexus with commerce occurred." *Scarborough v. United States*, 431 U.S. 563, 577 (1963). Here, the factual resume does not show that the defendant was "currently engaged" in the gun market at the time of his arrest. Nor does the factual resume address how recently Petitioner came to possess the gun. As to Petitioner, at least, the statute is unconstitutional.

In the event that this Court accepts certiorari on this issue while this case is pending, it would be appropriate to vacate the judgment below. This Court "regularly hold(s) cases that involve the same issue as a case on which *certiorari* has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting). Ultimately, a GVR is appropriate where intervening developments reveal a reasonable probability that the outcome below rests upon a premise that the lower court would reject if given the opportunity for further consideration. *See Lawrence*, 516 U.S. at 168. In the present case, the conviction rests on the premise that

statutes affecting commerce, or that regulate activity that affects commerce, fall within Congress's authority, even if such statutes do not regulate an on-going interstate commercial market. If that assumption is called into question, relief would be appropriate.

It is true that the commerce issue was raised for the first time on appeal. Relief would nonetheless be appropriate were the Court to address that issue while the case is pending, notwithstanding the procedural barriers to relief. If the new authority plainly establishes limitations on the Commerce Clause, or plainly limits the scope of 18 U.S.C § 922(g), it will satisfy the plain error standards, notwithstanding the fact that it did not exist at the time of trial proceedings. This is because the plain-ness of error is determined at the time of appeal, not at the time of trial. *See Henderson v. United States*, __ U.S. __, 133 S.Ct. 1121 (2013).

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of *certiorari*.

Respectfully submitted this 13th day of November, 2018.

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