No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

CHAD PRESTON BREWER,
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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QUESTION PRESENTED

I. This Court should use this case to answer the reoccurring, important question whether, when enacting the Unlawful Possession of a Firearm or Ammunition statute (18 U.S.C. § 922(g)(1), Congress intruded into an area traditionally left to the states' exercise of the police power and exceeded its authority under the Commerce Clause; whether the courts below have contradicted the plain words of the statute, legislative history, and this Court's holdings in allowing for convictions that do not comport with the statute's requirements that the possession of the firearm or ammunition be in or affection interstate commerce or that there be a knowing violation of the statute.

II. Certiorari should be granted to correct the Fifth Circuit's interpretation of 18 U.S.C. § 922(g),which is that the statute requires only that the government prove that the defendant possessed a firearm or ammunition that had been shipped in the unknown past by unknown individual's unrelated to the defendant or his possession of the firearm, and which contradicts the plain words of the statute which require that the defendant "ship or transport in interstate commerce, or possess in or affecting commerce."

III. Certiorari should be granted to correct the Fifth Circuit's error in reading the statutory scheme as requiring only a knowing possession of a firearm or ammunition, in contradiction to the plain language of the statute, which requires a knowing violation of 18 U.S.C. § 922(g) for there to be an offense, the legislative history of the statute ,and this Court's holdings in *Bryan v. United States,* 524 U.S. 184, 193 (1998), *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), *Staples v. United States*, 511 U.S. 600, 618-19 (1994), *McFadden v. United States*, 135 S.Ct. 2298 (2015), *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994); *Liparota v. United States*, 471 U.S. 419, 423 (1985); *Morissette v. United States*, 342 U.S. 246, 273 (1952), all of which hold that if the *mens rea* is "knowingly," the government must prove the defendant had knowledge of the facts that constitute the offense?

PARTIES

Chad Preston Brewer 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 Chad Preston Brewer 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 is captioned as *United States v. Chad Preston Brewer,* No. 18-10158, and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on January 26, 2018, 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 September 6, 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 pertinent part:

> 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. Trial Court Proceedings

Mr. Brewer was charged by a two count indictment with possession of ammunition in and affecting interstate commerce after having been convicted of a felony offense in violation of 18 U.S.C. § 922(g)(1) and with possession with intent to distribute more than 50 grams of methamphetamine in violation of 21 U.S.C. § 841(a)(1). Mr. Brewer pleaded guilty. There was no plea agreement no waiver of appeal. The district court sentenced Mr. Brewer to 168 months of imprisonment, along with a term of supervised release of five years (120 months on count one, 168 months on count two, with three and five years supervision and both sentences run concurrent).

When Mr. Brewer entered his plea of guilty, he was advised that the element of the offense with regard to the interstate commerce element is as follows: "that possession of the ammunition was in or affected interstate commerce--that is, **that at sometime before the Defendant possessed the ammunition, it had traveled from one state or country to another."** As to the *mens rea*, the elements as described to Mr. Brewer required only that Mr. Brewer knowingly possessed the ammunition.

B. Circuit Court Proceedings

On appeal, Mr. Brewer argued that the criminal statute 18 U.S.C. §922(g), as construed, violates the Constitution in that it regulates conduct that falls outside the commerce clause, Article I, § 8, cl. 3. Brewer relied upon the Supreme Court decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). Brewer also contended that the statute itself has been misconstrued by the Fifth Circuit. The statute requires that the possession of the ammunition be in affecting interstate commerce. This phrase is defined by Fifth Circuit precedent to mean that the firearm or ammunition crossed state lines at some unspecified point in the past. **The Fifth Circuit simply does not require that the defendant's possession itself be in or affecting interstate commerce.** Thus, the indictment does not allege that the defendant purchased the firearm or ammunition, or possessed it in connection with any manner of commercial transaction. Petitioner then argued that, as the indictment does not allege, and the government did not prove, an offense falling within the plain language of the statute, nor the commerce clause, the conviction must be vacated and the indictment should be dismissed. Put another way, the Fifth Circuit's construction of 18 U.S.C. 922(g) is contrary to its plain words, and violates the commerce clause facially and as applied.

Brewer further contended that the conviction should be vacated because the indictment did not allege and there was no factual basis to establish that Brewer knew that his possession of the ammunition was in or affecting interstate commerce. Brewer relied upon, among other decisions, *Flores-Figueroa v. United States*, 556 U.S. 646 (2009).

The court of appeals summarily reviewed and affirmed. *See* Appx. A.

REASONS FOR GRANTING THE WRIT

I. This Court should use this case to answer the reoccurring, important question whether, when enacting the Unlawful Possession of a Firearm or Ammunition statute (18 U.S.C. § 922(g)(1), Congress intruded into an area traditionally left to the states' exercise of the police power and exceeded its authority under the Commerce Clause; whether the courts below have contradicted the plain words of the statute, legislative history, and this Court's holdings in allowing for convictions that do not comport with the statute's requirements that the possession of the firearm or ammunition be in or affection interstate commerce or that there be a knowing violation of the statute.

In light of *Bond v. United States*, 134 S.Ct. 2077 (2014). *Nat'l Fed'n of Indep. Bus. v. Sebelius*,567 U.S. 519 (2012) (*NFIB*) and the dissent from denial of certiorari in *Alderman v. United States*,131 S. Ct. 700, 701 (Thomas and Scalia, JJ., dissenting from denial of *certiorari*), citing *United States v. Lopez*, 514 U.S. 549, 558–559 (1995), does the federal Unlawful Possession of a Firearm or ammunition statute (18 U.S.C. § 922(g)(1)), as construed (or misconstrued) by the circuit courts, exceed Congress's authority to regulate under the Commerce Clause?

The Court should review this increasingly-timely issue because the admitted-to facts establish *only* that the firearm or ammunition in question had traveled in interstate commerce at an earlier, undetermined time. The facts do not establish that the defendant's possession was in or affecting

interstate commerce, quite the opposite, they in no way implicate–much less–establish any effect on interstate commerce, much less a requisite *substantial* effect on commerce. Yet, the Fifth Circuit and all the circuits do not require more, as they have misconstrued the plain words of the statute and the requirements of the commerce clause.

A. Introduction.

"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 id.* ("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*, 134 S.Ct. 2077, 2091 (2014).

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).

B. *Alderman v. United States*: What properly constitutes a "Substantial Affect on Commerce?"

As this Court almost certainly knows, numerous "facial" challenges have been brought to Section 922(g)(1) on the basis that, to conform with the Court's opinion in *United States v. Lopez*, section § 922(g)(1) must set out a "substantial affect" on interstate commerce. The gist of those challenges is that *Lopez* identifies three categories of activity that Congress's commerce power authorizes it to regulate: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) "activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce." *See Alderman v. United States*, 131 S. Ct. 700, 701 (Thomas and Scalia, JJ., dissenting from denial of *certiorari*), citing *United States v. Lopez*, 514 U.S. 549, 558–559 (1995). Challengers have assailed the statute, arguing that mere possession of a firearm or ammunition that may have moved in interstate commerce at some earlier point is not an activity that falls within *Lopez*'s third category.

Of course, although with some notable (and increasing) dissents, the circuit courts—including the Fifth Circuit—have rejected these *Lopez* challenges and relied on this Court's pre-*Lopez* opinion in *Scarborough v. United States*, 431 U.S. 563 (1977), when doing so. In *Alderman*, however, Justices Scalia and Thomas, noted the confusion at the circuit court level concerning the interaction between *Scarborough* and *Lopez*. *See Alderman*, 131 S. Ct. at 701–02.

Petitioner submits that 18 U.S.C. § 922(g)(1) is unconstitutional and that *Lopez*—and not *Scarborough*—resolves the challenge in his favor. And he suggests that Justice Thomas and Justice

Scalia's reasoning in the *Alderman* dissent from the denial-of-certiorari only buttresses the need for the Court to decide this case. This is certainly so in light of the Court's 2012 and 2014 decisions discussed below.

C. National Federation v. Sebellius: A Refinement of the Commerce Clause Analysis.

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*), this Court suggested a different Commerce Clause analysis comes to bear. 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.*,132 S.Ct. at 2591 (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.* at 2586 (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 this Court in *NFIB* thus required more than a demonstrable effect on commerce: the majority required that the challenged enactment itself ***be*** a regulation of commerce – that it affect the legality of pre-existing commercial activity. Possession of firearms or ammunition, like the refusal to purchase health insurance, may or may not "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, the Chief Justice's 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.* at 552-53 (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.

This is so because 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 or ammunition), 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 Chief Justice's language 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, Petitioner's possession of the ammunition was not alleged to be, nor was there any evidence that it 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, there was no allegation and no evidence that Petitioner was engaged in the relevant market at the time of the regulated conduct. The Chief Justice has 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.* (emphasis added). As such, *NFIB* overrules the long-standing notion that a firearm or ammunition 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 (1977).

Here, there was neither an allegation nor evidence that Mr. Brewer was "currently engaged" in the gun market at the time of his arrest. Nor was there evidence as to how recently Petitioner came to possess the gun. As to Petitioner, at least, the statute is unconstitutional.

D. *Bond. v. United States* provides additional supporting authority by which to illustrate congressional overreach.

This Court's decision in *Bond v. United States*, 134 S.Ct. 2077 (2014), resolved the question of whether federalism limits the authority of Congress to implement a treaty by criminalizing areas of traditional state concern, specifically the deployment of poisons. *See Bond v. United States*, 12-158, Petition for Certiorari (August 1, 2012), 2010 WL 1506717.

In *Bond*, the Chief Justice wrote to explain that, as it had explained in *NFIB*, the Court recognizes the federalism principles that limit Congress's regulatory authority under the Commerce Clause. *See Bond*, 134 S.Ct. at 2088-2090. For virtually all of the reasons set out there, its holding–that prohibitions on the use of poison represent an area of traditional state concern, outside the scope of federal authority– support a finding that federal prohibitions on ammunition possession are likewise unconstitutional. Ammunition and firearms, like poison, are dangerous instrumentalities traditionally committed to the State police power. Both arguably affect commerce, but prohibitions on firearm or ammunition possession or the deployment of poison are not, either of them, prohibitions on commercial activity in the ordinary case.

Here, of course, the record establishes only that Mr. Brewer was a felon and that he had possessed a firearm or ammunition that had, at some antecedent time, traveled in interstate commerce to arrive in Texas. At no time in the proceedings below, did the Respondent prove the possession of the weapon was actually in or had an effect on interstate commerce, much less any "substantial" effect. Furthermore, at the time he was arrested and the ammunition in question detected, Petitioner was not engaged in any economic activity whatsoever.

II. This Court should grant certiorari to determine if the Fifth Circuit's interpretation of 18 U.S.C. § 922(g), (which is that the statute requires only that the government prove that the defendant possessed ammunition that had been shipped in the unknown past by unknown individual's unrelated to the defendant or his possession of the ammunition), contradict the plain words of the statute which require that the defendant "ship or transport in interstate commerce, or possess in or affecting commerce."

Even if the statute on its face is deemed to be constitutional, the Fifth Circuit has misconstrued the plain words of the statute and allowed for convictions that do not meet Congress's intent and which are unconstitutional. The Fifth Circuit's interpretation of § 922(g) contradicts the plain words of the statute because the statute requires that the defendant "ship or transport in interstate . . . commerce, or possess in or affecting commerce . . . . " This is contrary to the Fifth Circuit's misreading that the government need only prove that the defendant possessed ammunition that **had been** shipped in the unknown past by unknown individuals unrelated to the defendant and unrelated to the defendant's possession of the ammunition. Therefore, the conviction below is invalid.

The statute requires and the indictment in this case alleged that Mr. Brewer' possession of ammunition was "in and affecting commerce." However, this phrase is defined by Fifth Circuit precedent to mean something different than those plain words. The Fifth Circuit requires only that the jury find that the ammunition crossed state lines at some unspecified point in the past. Nor does

the record establish any more than this. The indictment did not allege and the record does not support an offense falling within the plain words of the statute, nor the commerce clause

A conviction based on nothing more than the fact that the firearm or ammunition passed from one state to another at some point in the undetermined past, and with no showing that the interstate movement of the weapon was in any way related to its present possession, comports with neither the statute nor the Constitution. The statute in question, makes it unlawful for a felon to "**possess in or affecting commerce**, any firearm or ammunition . . . ." 18 U.S.C. 922(g) (emphasis added). The current possession of a firearm or ammunition that has come to rest in a state in the distant past is not a possession **in** interstate commerce nor is it a possession affecting interstate commerce. Moreover, the fact that an item has moved from one state to another at some point in the undetermined past is not a sufficient basis to confer power to the federal government to regulate possession of the item under the Commerce Clause. See U.S. Const. art. I, § 8, cl. 3. The reliance on the interstate movement of a firearm or ammunition in the undetermined past as a basis for a federal prosecution/conviction is inconsistent with the holdings in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598, 627 (2000), and *Jones v. United States*, 529 U.S. 848, 859 (2000).

This Court should grant review to correct the blatant and pervasive error.

III. This Court should grant certiorari to determine if the Fifth Circuit erred in reading the statutory scheme which requires a knowing violation of 18 U.S.C. § 922(g) for there to be an offense, as requiring only a knowing possession of a firearm or ammunition, in contradiction to the plain language of the statute, the legislative history of the statute and this Court's holdings in *Bryan v. United States,* 524 U.S. 184, 193 (1998), *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), *Staples v. United States*, 511 U.S. 600, 618-19 (1994), *McFadden v. United States*, 135 S.Ct. 2298 (2015), *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994); *Liparota v. United States*, 471 U.S. 419, 423 (1985); *Morissette v. United States*, 342 U.S. 246, 273 (1952), which hold that where the *mens rea* is "knowingly," the government must prove the defendant had knowledge of the facts that constitute the offense?

The Fifth Circuit has contradicted the plain words of the statute, legislative history, and this Court's holdings in allowing for convictions that do not comport with the statute's requirements that there be a knowing violation of the statute. This Court should grant review to correct another blatant and pervasive misconstruction of the statute regarding the proper *mens rea*. The circuit courts all hold that the government need only prove a knowing possession of a firearm or ammunition. The courts are wrong.

The plain language of the statute limits prosecutions to one who "knowingly violates" the statute.

In 1986, Congress passed the Firearm Owners Protections Act [FOPA]. A major thrust of this legislation was to alter the previous federal criminal law governing firearms by explicitly doing away with strict liability or quasi strict liability for offenses. Thus, Congress added the requirement in 18 U.S.C. § 924, that for a person to be liable for punishment, the government must prove that the person either willfully or knowing violated the relevant section of § 922(g). The explicit language of the relevant statute in this case allows the government to punish "[w]hoever **knowingly violates** subsection . . . (g) . . . of 922 . . . ." (Emphasis added.) The statute simply does **not** punish whoever "knowingly possesses a firearm or ammunition" if that person happens to be a felon. Nor does the statute punish whoever "knowingly possesses a firearm or ammunition" if the firearm or ammunition possession happens to be in or affect interstate commerce. It punishes "whoever knowing violates" **the statute**.

Obviously, knowing possession of a weapon is not, by itself, a crime. The statute requires a knowing violation of § 922(g). Thus, by the plain words of the statute, the defendant must know these three things: that he is an felon, that he possessed a weapon, and that the possession of the weapon was in or affecting interstate commerce.

This Court has already held that the government must prove the defendant knew all the circumstances that make his possession of a weapon a federal offense

This Court has held that the knowing violation requirement in 18 U.S.C. § 924 requires the government to prove that the defendant did have "knowledge of the facts that constitute the offense." *Bryan v. United States,* 524 U.S. 184, 193 (1998) Yet again, in *Flores-Figueroa v. United States*,

556 U.S. 646 (2009), following a line of cases, the Court held that when a statute requires the government to prove the defendant acted knowingly, it must prove he knew the facts that made his conduct a federal offense. *Id.* at 650-57 1891. In *Staples v. United States*, 511 U.S. 600, 618-19 (1994), the Court held that, even when a statute has no explicit "knowing" element, the government must prove that a defendant had knowledge of "the facts that make his conduct illegal."

In *Staples*, the Supreme Court noted that there is a "presumption that a defendant must know the facts that make his conduct illegal" which "should apply" especially where the alternative is that the statute "would require the defendant to have knowledge only of traditionally lawful conduct. . . ." *Id.* Here, the knowing possession of a firearm or ammunition is not only traditionally lawful conduct, it is a fundamental right. *See District of Columbia v. Heller*, 554 U.S. 570, 602 (2008). Also, the Supreme Court noted that the "severe penalty" of a potential 10-year sentence suggested that Congress did not intend to jettison the usual requirement that the defendant know the facts that make his conduct illegal. *See Staples,* 511 U.S. at 618. Here, the maximum penalty for a § 922(g) case can be life, if enhancements apply! *See* 18 U.S.C. § 924(e).

The legislative history also directly supports the idea that Congress intended that the government must prove the defendant knew the facts and circumstances that constitute the offense.

Congress explicitly stated that the government must prove the defendant knew the facts and circumstances that constitute the offense. "It is the Committee's intent, that unless otherwise specified, the knowing state of mind shall apply to circumstances and results." H.R. Rep. No. 99-495, 99 Cong., 2d Sess. 25-26, reprinted in 1986 U.S. Code Cong. and Ad.News 1327, 1351-52.

The legislative history reveals that a major thrust of the FOPA was to completely alter the gun laws to abolish or alter the perceived "strict liability" created by the absence of any *scienter* requirement in the statute, and by the Supreme Court's decision in *United States v. Freed*, 401 U.S. 601, 609 (1971).

A panel of the Fifth Circuit wrongly decided this issue in *United States v. Dancy*, 861 F.2d 77 (5th Cir. 1988), but in light of *Bryan*, *Staples*, and *Flores-Figueroa*, and other Supreme Court cases, that decision is not valid.

Moreover, *Dancy* is called into question by the Supreme Court's decision in M*cFadden v. United States*, 135 S.Ct. 2298 (2015). The Court in M*cFadden* construed 21 U.S.C. §841(a)(1) (the Controlled Substances Act, or "CSA") as incorporated by 21 U.S.C. §802(32)(A) (the Controlled Substance Analogue Enforcement Act of 1986, or "Analogue Act"). The Analogue Act identifies a group of chemicals similar to controlled substances and tells the courts to treat them as though they were controlled substances in certain circumstances. *See* 21 U.S.C. §802(32)(A). The CSA makes it a crime "for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. §841(a)(1). At issue in M*cFadden* was what precisely a defendant had to know in order to "knowingly … distribute … a controlled substance," in the context of a prosecution for distributing an analogue. *See McFadden*, 135 S.Ct. at 2302.

The Court in M*cFadden* held that the defendant must know not only that he or she is distributing something that happens to be a controlled substance, but also that he or she knows the substance is in fact "a controlled substance." *See id.* at 2304. This is true whether or not the defendant

is prosecuted for trafficking an analogue. *See id.* at 2305. Notably, the "controlled substance" element embraces a legal conclusion – to say that something is a controlled substance provides information about its treatment under federal law. *McFadden* nonetheless held that the knowledge element attaches to this requirement. *See id.* at 2304.

The *McFadden* court specified two ways that a defendant may "know" that a distributed substance is "a controlled substance." First, he or she may know directly the truth of the legal proposition required for conviction: that the distributed substance meets the legal definition of "a controlled substance." That is, he or she may know:

> that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance.

Id. at 2305. Second, the defendant might know "all of the facts that make his conduct illegal." *See id.* That is, he or she might know what the substance is, even without knowing that the substance is controlled. *See id.* (holding that the knowledge element "can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.")

Sections 922(g) and 924(a) are similar to the laws construed in *McFadden*. Section 924(a) provides criminal penalties for one who "knowingly violates subsection … (g) … of section 922…" And Section 922(g) is violated when a felon possesses a firearm or ammunition or ammunition if that possession is undertaken "in or affecting commerce…" Like the term "controlled substance," the term "violates" embraces a legal conclusion. To say that a defendant has "violated" a law is not

merely to describe his conduct, it is also to provide information about the way that conduct is treated by the law. And just as the CSA (and the Analogue Act) requires the defendant to "***knowingly*** … distribute … a controlled substance," so §924(a) provides penalties only if the defendant "***knowingly*** violates subsection … (g) … of section 922 . . ."

McFadden suggests that when the term "knowingly" precedes a legal conclusion in a criminal statute, the government may prove the element in one of two ways. First, it may prove the defendant's actual knowledge of that legal conclusion. In *McFadden*, this meant the government could prove the defendant's knowledge that the distributed substance in question appeared on the list of controlled substances. *See McFadden*, 135 S.Ct. at 2305. Second, it may prove the facts underlying that legal conclusion, or "all of the facts that make [the defendant's] conduct illegal." *Id.* In *McFadden*, this meant knowledge of the substance's identity, or of facts that placed it on the list of controlled or analogous substances, even if the defendant did not know that the substance was in fact controlled. *See id.*

Applying *McFadden* to §924(a), the government may prove a "knowing … violation" of §922(g) in either of two ways. First, it may prove the defendant's actual awareness that his conduct constituted a violation of §922(g). Second, it may prove that the defendant's knowledge of all facts that constitute a violation of §922(g), including the fact that the firearm or ammunition traveled in interstate commerce. There is no exception for special elements involving a legal conclusion, or that are otherwise unlike traditional components of a criminal offense. The "natural reading" of §924(a) flatly requires the defendant's knowledge of a "violation" of §922(g), which statute is not violated without interstate movement of a firearm or ammunition.

McFadden also provides another important reason to overrule *Dancy* and its progeny. A defendant's conviction under the Analogue Act depends on the interplay of two different statutes: the Analogue Act and the CSA. See 21 U.S.C. §§802(32)(A), 841(a). The knowledge requirement was found in the CSA, but nonetheless extended to the Analogue Act. Specifically, the Court held that the defendant must know that the substance is an analogue, either by knowing that it is so characterized, or by knowing what it is. *See McFadden*, 135 S.Ct. at 2305. Similarly, §924(a) houses the *mens rea* element relevant to the instant proceeding. Yet it incorporates 922(g), without excluding that statute's interstate commerce element. *McFadden* teaches that the scheme's failure to repeat the knowledge element in an incorporated statute does not limit its reach.

McFadden, moreover, is hardly an isolated holding. It is the latest in a long string of Supreme Court opinions that follow a basic rule of construction in criminal cases, namely that:

> courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word "knowingly" as applying that word to each element.

Flores-Figueroa, 556 U.S. at 652; *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994); *Liparota v. United States*, 471 U.S. 419, 423 (1985); *Morissette v. United States*, 342 U.S. 246, 273 (1952). Section 924(a) – which requires that the defendant "knowingly . . . violate[]" another statute – falls naturally within this rule. Supreme Court guidance now overwhelmingly supports the notion that all elements of a §922(g) violation must be known by the defendant, including interstate transportation of the firearm or ammunition.

Therefore, this Court should grant review to correct this error.

Conclusion

Because the Fifth Circuit refuses to apply this Court's precedents to the federal statutes at issue, Petitioner Brewer asks that this Honorable Court correct this ongoing error by granting a writ of *certiorari* in this case.

Respectfully submitted on December 4, 2018.

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