No. _____

In the

Supreme Court of the United States

_____

Jose Angel Hernandez,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a 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 this Court should grant certiorari to determine whether 18 U.S.C. § 924(a) is unconstitutional by exceeding the scope of the commerce clause and whether the statute requires knowledge of the interstate commerce element?

PARTIES TO THE PROCEEDING

Petitioner is Jose Angel Hernandez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jose Angel Hernandez 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 located within the Federal Appendix at *United States v. Hernandez*, No. 19-10993, 812 Fed. Appx. 253 (5th Cir. July 14, 2020) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit on remand were entered on July 14, 2020. On March 19, 2020, the Court extended the 90-day deadline to file a petition for certiorari to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

18 U.S.C. § 922(g) provides in relevant part:

> It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable for a term of imprisonment exceeding one year... to ship or transport in interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition....

18 U.S.C. § 924(a) provides in relevant part:

> (2) Whoever knowingly violates subsection...(g)... of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . .

Article I, Section 8, clause 3 of the United States Constitution provides in part the authority of Congress "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

LIST OF RELATED PROCEEDINGS

1. *United States v. Jose Angel Hernandez*, 5:19-CR-00039-H-BQ-1. United States District Court, Northern District of Texas. Judgment entered August 23, 2019.

2. *United States v. Jose Angel Hernandez*, Fifth Circuit No. 19-10993, opinion dated July 14, 2020. *United States v. Hernandez*, 812 Fed. Appx. 253 (5th Cir. 2020) (unpublished).

STATEMENT OF THE CASE

On March 20, 2019, Jose Angel Hernandez (Hernandez) was charged in a two-count indictment in the Northern District of Texas, Lubbock division. (ROA.8).[1] Count One charged the offense of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and Count Two charged the offense of possession of a firearm with an obliterated serial number. (ROA.8-9). On March 29, 2019, Hernandez filed a motion to dismiss the indictment alleging the constitutional arguments raised below in this brief. (ROA.38-45). The motion to dismiss was denied by the district court. (ROA.48).

On April 15, 2019, Hernandez entered a guilty plea to the Count One of the indictment pursuant to a written plea agreement (ROA.62). Hernandez, in a written factual resume, stipulated to facts that purported to establish the elements of the offense. However, there was no stipulation that he had knowledge that the firearm traveled in interstate commerce prior to his possession of the firearm, or that his possession otherwise affected interstate commerce beyond the fact that the firearm was manufactured in Maine. Moreover, the factual resume did not contain a stipulation that Hernandez knew he was a convicted felon. *See* (ROA.58-60). However, on August 19, 2019, Hernandez signed, and the parties filed a First Amended Factual Resume, which listed as an element that the defendant knew he had been convicted of a felony and contained a stipulation that Hernandez did have

[1] For the convenience of the Court and the parties, Petitioner is citing to the page number of the record on appeal below.

that knowledge. *See* (ROA.76-79). However, again there was no stipulation to his knowledge of the interstate commerce element. Moreover, the only facts showing any effect on interstate commerce was a sentence stating that the firearm in question was manufactured in Maine. *See id.* The district court sentenced Mr. Hernandez to 96 months imprisonment, a three-year term of supervised release, a $100 mandatory special assessment, no fine and no restitution. (ROA.86-88).

On appeal, Hernandez challenged the reasonableness of his sentence and preserved for further review the issue concerning the constitutionality of 18 U.S.C. § 922(g), recognizing that the issue was foreclosed by circuit precedent. The Fifth Circuit affirmed the sentence and overruled Hernandez's constitutional challenge to the statute. *See United States v. Hernandez*, 812 Fed. Appx. 253, 254 (5th Cir. 2020).

REASONS FOR GRANTING THIS PETITION

I. This Court should grant certiorari to determine whether 18 U.S.C. § 922(g) is unconstitutional by exceeding the scope of the commerce clause and whether the statute requires knowledge of the interstate commerce element?

Petitioner Hernandez pleaded guilty to one count of possession of a firearm in interstate commerce after having sustained a felony conviction, and received a 96-month sentence of imprisonment. In pleading guilty, however, he did not admit that he knew the firearm had moved in interstate commerce, nor was he advised that was an element of the offence. The district court nonetheless accepted the plea.

On direct appeal, Hernandez argued that his conviction under 18 U.S.C. § 922(g) was unconstitutional because it did not require knowledge of the interstate commerce element. Hernandez also argued that § 922(g) is unconstitutional because it allows for a conviction based upon the firearm in question merely traveling from one state to another at some undisclosed point in time and without the knowledge of the defendant. The court of appeals rejected these arguments based upon previous precedent, and in the process incorrectly identified *Rehaif* as foreclosing the issue:

> Hernandez's argument that past movement of a firearm in interstate commerce is insufficient is foreclosed by *United States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996). His argument challenging the constitutionality of § 922(g) as exceeding the Commerce Clause is foreclosed by *United States v. Alcantar*, 733 F.3d 143, 145-46 (5th Cir. 2013). His mens rea argument is foreclosed by *United States v. Rose*, 587 F.3d 695, 705-06 (5th Cir. 2009); *United States v. Dancy*, 861 F.2d 77, 80-82 (5th Cir. 1988); *Rehaif v. United States*, —— U.S. ——, 139 S. Ct. 2191, 2194, 2196, 204 L.Ed.2d 594 (2019).

United States v. Hernandez, 812 Fed. Appx. at 254.

Does the interstate commerce element, as interpreted by the Courts violated 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*, 132 S. Ct. 2566, 2577 (2012) (Roberts. C.J.) (plurality op.). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See id*. at 2577 ("The Constitution's express conferral of some powers makes clear that it does not grant others.") (Roberts. C.J.) (plurality op.). 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.*, 132 S. Ct. at 2578 (Roberts. C.J.) (plurality op.) ("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, 220 (2011). The Constitution grants to Congress a power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Constitution, 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.*, 132 S. Ct. at 2578 (Roberts. C.J.) (plurality op.).

The phrase "in and affecting commerce" is defined by Fifth Circuit precedent to include a situation where the firearm crossed state lines at some unspecified point in the past unrelated to the defendant or his or her present possession, and, according to this Circuit, the statue does not require that the defendant purchased the firearm,

or possessed it in connection with any manner of commercial transaction. *See, United States v. Wallace*, 889 F.2d 580, 583 (5th Cir. 1989). As so interpreted, the Fifth Circuit still has held that 18 U.S.C. § 922(g) does not exceed Congress's power to regulate interstate commerce. *See id*. at 583. But the opinion of five Justices in *Nat'l Fed'n of Indep. Bus. v. Sebelius* casts serious doubt on that conclusion. Five Justices in that case concluded that the power to regulate commerce does not include the power to compel commerce. *See id*. at. 2586 (Roberts, C.J.) (plurality op.); *id*. at. 2642 (Scalia, .J., dissenting). The inescapable conclusion is that to fall within the commerce power, federal action must not merely affect commerce, it must act directly on a commercial activity. After all, the failure of individuals to purchase health insurance - at issue in NFIB - surely affected interstate commerce. *See id*. at. 2642 (Scalia, .J., dissenting) ("Failure to act does result in an effect on commerce . . .") But because inaction was not a commercial act, it was beyond the power of Congress to prohibit. Similarly, mere possession of a firearm that may have crossed state lines years ago is not a commercial act. It does not involve the purchase or sale of any commodity. Certainly, possession of such a firearm does not amount to an act of interstate commerce.

The factual basis for the guilty plea in the factual résumé states only that "The ATF Special Agent was also able to determine that the firearm was manufactured in the state of Maine, thereby affecting interstate commerce." (ROA.60,79). Thus, there is an insufficient factual basis to establish a valid federal offense within the

constitution. If this conduct violates 18 U.S.C. § 922(g), that statute violates the commerce clause facially and as applied.

This Court should grant review to determine whether the interstate commerce element of 18 U.S.C. § 922(g), as applied by the courts, violates the Commerce Clause.

Does §§ 922(g) and 924(a) require knowledge of the interstate commerce element?

Section 924(a) of Title 18 provides for criminal punishment to anyone who "knowingly violates subsection ... (g)." In *Rehaif v. United States*, 139 S.Ct. 2191 (June 21, 2019), this Court held:

> We conclude that in a prosecution under 18 U.S.C. §922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. We express no view, however, about what precisely the government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here.
>
> *Id*. at 2200.

In 1986, Congress passed the Firearms 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" if that person

happens to be a felon. Nor does the statute punish whoever "knowingly possesses a firearm" if the firearm possession happens to be in or affect interstate commerce. It punishes "whoever knowing violates" the statute.

Knowing possession of a weapon is obviously 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 a felon, that he possessed a weapon, and that the possession of the weapon was in or affecting interstate commerce.

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 proof 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*, this 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

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. In this case, the maximum penalty for a § 922(g) case can be up to life, if enhancements apply. See 18 U.S.C. § 924(e).

Further support is found in *McFadden v. United States*, 135 S. Ct. 2298 2015), *McFadden* 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"); *United States v. X Citement Video*, 513 U.S. 64, 72 (1994); *Liparota v. United States*, 471 U.S. 419, 423 (1985); and *Morissette v. United States*, 342 U.S. 246, 273 (1952).

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. As noted above, 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).

Accordingly, this Court should grant review to determine whether the knowingly mens res applies to the interstate commerce element.

CONCLUSION

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

Respectfully submitted this 11th day of December, 2020.

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