

No. _____

In the
Supreme Court of the United States

James Leon Higgins,

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

Adam Nicholson
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Adam_Nicholson@fd.org

QUESTIONS PRESENTED

Whether 18 U.S.C. §922(g) permits conviction for the possession of any firearm that has ever crossed state lines at any time in the indefinite past, and, if so, if it is facially unconstitutional?

Whether USSG §3C1.1(1) permits the assessment of a two-level enhancement for the commission of perjury at the trial of a non-codefendant?

PARTIES TO THE PROCEEDING

Petitioner is James Leon Higgins, 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 James Leon Higgins seeks 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The unpublished opinion of the court of appeals appears as *United States v. Higgins*, No. 21-10544, 2021 WL 5458121 (5th Cir. Nov. 22, 2021). 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 were entered on November 22, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTE, GUIDELINE, AND CONSTITUTIONAL PROVISION

Section 922(g)(1) of Title 18 reads 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.

Guideline 3C1.1 provides:

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

Article I, Section 8 of the United States Constitution provides in relevant part:

The Congress shall have Power

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

On January 25, 2021, James Leon Higgins (Higgins) was charged in a one-count indictment in the Northern District of Texas, Fort Worth division with the offense of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (ROA.24). On January 28, 2021, Higgins entered a guilty plea pursuant to a written plea agreement in which he agreed to waive his right to appeal, with certain exceptions. *See* (ROA.26-32,135). Higgins, 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 outside the state of Texas. (ROA.30). As a part of the plea agreement, the government agreed to a binding recommendation that the federal sentence would run concurrently with pending state charges. *See* (ROA.136)

After the guilty plea, the probation officer prepared a pre-sentence investigation report (“PSR”). In the PSR, applying the provisions of U.S.S.G. 2K2.1, the probation officer found that Higgins’ total offense level, after a three-level reduction for acceptance of responsibility, was a level 20. (ROA.150). The probation officer determined that Higgins had a criminal history score of 5, resulting in a criminal history category III. (ROA.154). With a total offense level 20 and a criminal history category III, Higgins had an advisory Guideline imprisonment range of 41–

51 months. (ROA.160). In paragraphs 99 and 100, the PSR identified grounds that warranted an upward departure or upward variance: a criminal history score substantially underrepresenting the seriousness of Higgins's prior history, and (2) the nature of the offense. (ROA.162).

Higgins had three objections to the PSR that did not affect the guideline calculations. *See* (ROA.167-168). The addendum resolved all of Higgins' objections except his objection that the PSR did not fully disclose his intellectual disability. (ROA.176). The government filed a motion for an upward variance, arguing that the advisory range of 41-51 months did not adequately reflect the seriousness of the offense and other sentencing factors listed in 18 U.S.C. § 3553(a). *See* (ROA.110-119). Higgins filed a sentencing memorandum asking for a sentence within the guideline range of 41-51 months, pointing out that Mr. Higgins suffered from borderline intellectual functioning, having a verbal IQ score of 83 and a performance IQ of 72, as well as suffering from ADHD. *See* (Defendant's Memorandum in Aid of Sentencing, pp. 4-6). Higgins' attorney argued those factors at the sentencing hearing and requested a within guideline sentence. *See* (ROA.120-124).

At the sentencing hearing, the district court adopted the findings and conclusions in the PSR and addendum with changes made in the sentencing hearing, and found that Higgins' total offense level was 20, his criminal history category was III, and his advisory guideline range was 41-51 months. *See* (ROA.110).

The district court sentenced Mr. Higgins to 64 months imprisonment, to run concurrently with his pending state cases, a three-year term of supervised release, a

\$100 mandatory special assessment, no fine and no restitution. (ROA.128-129). The district court identified the sentence as an above Guideline sentence, and referred to the circumstances of the offense and Mr. Higgins' criminal history as a basis for the upward variance. *See* (ROA.112-113,162). The district court identified his above Guideline sentence as an upward variance at sentencing and in his written reasons for the sentence. *See* (ROA.130,182).

B. Appellate Proceedings

Petitioner appealed, challenging his conviction, arguing that the Congressional power to regulate interstate commerce did not permit it to criminalize Petitioner's conduct: the mere possession of a firearm that happened to cross state lines at some point in the indefinite past, with no causal connection between the defendant's conduct and the interstate movement of the gun. *See* Initial Brief in *United States v. Higgins*, No. 21-10544, 2021 WL 5458121, at *7–19 (5th Cir. Filed Sept. 16, 2021)(“*Higgins* Initial Brief”). He thus argued that to the extent that 18 U.S.C. §922(g) actually reached his conduct, it was facially unconstitutional. *See Higgins* Initial Brief, at *13–14. Alternatively, he contended that the statute should be construed to require a greater connection to interstate commerce than that admitted in the defendant's “Factual Resume” in support of the plea. *See id.* Petitioner conceded that these claims were foreclosed by circuit precedent, *see id.* at *14, and the court of appeals agreed, [Appx. A]; *United States v. Higgins*, No. 21-10544, 2021 WL 5458121 (5th Cir. Nov. 22, 2021).

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to resolve the tension between *Scarborough v. United States*, 431 U.S. 563 (1963), on the one hand, and *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and *Bond v. United States*, 572 U.S. 844 (2014), on the other.

A. *Scarborough* stands in tension with more recent precedents regarding 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*, 572 U.S. 844, 863 (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

Notwithstanding these limitations, and the text of Article I, Section 8, 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). Relying on this expansive vision of Congressional power, this Court held in *Scarborough v. United States*, 431 U.S. 563 (1963), that a predecessor statute to 18 U.S.C. §922(g) reached every case in which a felon possessed firearms that had once moved in interstate commerce. It turned away concerns of lenity and federalism, finding that Congress had intended the interstate nexus requirement only as a means to insure the constitutionality of the statute. *See Scarborough*, 431 U.S. at 577.

It is difficult to square *Scarborough*, and the expansive concept of the commerce power upon which it relies, with more recent holdings of the Court in this area. In *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), 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 557-558 (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.* at 550 (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, 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, 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 552-553 (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), 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, the factual resume does not state that Petitioner's possession of the gun was an economic activity. *See* [Appx. C]. Under the reasoning of *NFIB*, 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.

Further, the factual resume fails to show that Petitioner was engaged in the relevant market at the time of the regulated conduct. *See* [Appx. C]. 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 557. 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.* at 556 (emphasis added). As such, *NFIB* brought into serious question 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*, 431 U.S. at 577.

Scarborough stands in even more direct tension with *Bond v. United States*, 572 U.S. 844 (2014), which shows that §922(g) ought not be construed to reach the possession by felons of every firearm that has ever crossed state lines. *Bond* was

convicted of violating 18 U.S.C. §229, a statute that criminalized the knowing possession or use of “any chemical weapon.” *Bond*, 572 U.S. at 853; 18 U.S.C. §229(a). She placed toxic chemicals – an arsenic compound and potassium dichromate – on the doorknob of a romantic rival. *See id.* This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 859-862.

Notably, §229 defined the critical term “chemical weapon” broadly as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.” 18 U.S.C. §229F(8)(A). Further, it criminalized the use or possession of “any” such weapon, not of a named subset. 18 U.S.C. §229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

The Government’s reading of section 229 would “alter sensitive federal-state relationships,” convert an astonishing amount of “traditionally local criminal conduct” into “a matter for federal enforcement,” and “involve a substantial extension of federal police resources.” [*United States v. Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, “hardly” a poisoning “in the land would fall outside the federal statute’s domain.” *Jones [v. United States]*, 529

U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 572 U.S. at 863

As in *Bond*, it is possible to read §922(g) to reach the conduct admitted here: possession of an object that once moved across state lines, without proof that the defendant's conduct caused the object to move across state lines, nor even proof that it moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, nor to the interstate movement of commodities.

The better reading of the phrase “possess in or affecting commerce” – which appears in §922(g) – therefore requires a meaningful connection to interstate commerce. Such a reading would require either: (1) proof that the defendant's offense caused the firearm to move in interstate commerce or, at least, (2) proof that the firearm moved in interstate commerce at a time reasonably near the offense.

B. A certiorari grant in this case is a good way to address the issue.

The present case is an excellent vehicle to resolve these tensions. The defendant moved to dismiss the prosecution on the ground that §922(g) exceeds the Commerce Power. *See* (Record in the Court of Appeals, at 46-53). The motion also

raised the question of how 922(g) ought to be construed to avoid this constitutional question. It argued:

Morrison and *Jones* indicate that 18 U.S.C. § 922(g)'s "possess . . . in or affecting commerce" phrase does not reach the situation here, where the sole link to interstate commerce is the fact that the firearm in question was, at some unspecified point in the possibly remote past, manufactured in another state and then transported to Texas.

(Record in the Court of Appeals, at 49). The issue is thus adequately preserved in district court.

It is also well preserved in the court of appeals. Petitioner sought appellate relief from his conviction, raising both the constitutional challenge to the statute and the question of statutory construction discussed herein. *See* Initial Brief in *United States v. Higgins*, No. 19-10755, 2019 WL 6271105, at *13-18 (5th Cir. Filed Nov. 21, 2019).

Finally, and most critically, the factual resume admits no more facts than that the firearm once moved across state lines. *See* [Appx. C]. The case clearly and directly presents the proper interpretation of the statute in light of the limitations on the commerce power, and of its constitutionality.

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 21st day of February, 2022.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Adam Nicholson

Adam Nicholson
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: Adam_Nicholson@fd.org

Attorney for Petitioner