No. _____

In the

Supreme Court of the United States

_____

Brian Marc Fraser,

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 there is a reasonable probability of a different result if the court of appeals were permitted to consider the Commission's Proposed Amendment to USSG §4B1.2?

II. 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?

PARTIES TO THE PROCEEDING

Petitioner is Brian Mark Fraser, 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 Brian Marc Fraser 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The unpublished opinion of the Court of Appeals is reported at *United States v. Fraser*, 2023 WL 142085 (5th Cir. January 10, 2023)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The unpublished panel opinion and judgment of the Fifth Circuit were entered on January 10, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Guideline 4B1.2 currently provides in relevant part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Proposed Amendment Six to the 2023 Sentencing Guidelines would provide in relevant part:

> (3) ROBBERY.—"Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member

of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

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.

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. Trial Proceedings

Brian Marc Fraser pleaded guilty to possessing a firearm in spite of a prior conviction. *See* (Record in the Court of Appeals, at 106-109). He admitted that the firearm had previously traveled across state lines. *See* (Record in the Court of Appeals, at 108). But he did not admit when the firearm crossed state lines, nor whether it did so in response to anything he did. *See* (Record in the Court of Appeals, at 108).

A Presentence Report (PSR) applied an elevated base offense level on the ground that Petitioner's prior Texas convictions for robbery and aggravated robbery constituted "crimes of violence" under USSG §§2K2.1 and 4B1.2. *See* (Record in the Court of Appeals, at 263). It thus found a final offense level of 27 and a criminal history category of VI, resulting in a Guideline recommendation of 120 months imprisonment, the statutory maximum. *See* (Record in the Court of Appeals, at 275-276). The PSR also noted a prior conviction for aggravated assault, but assessed no criminal history points for it, citing USSG §4A1.2(e)(3). *See* (Record in the Court of Appeals, at 267).

Ultimately, the government would defend the PSR, introducing copies of the state court records underlying the robberies and aggravated assault. *See* (Record in the Court of Appeals, at 280-324). As respects the simple robbery, the indictment and judicial confession from the prior state proceedings said that the defendant caused injury to another in the course of a theft. *See* (Record in the Court of Appeals, at 314-

315). As respects the aggravated robbery, the records said that the defendant threatened or put another in fear in the course of a theft. *See* (Record in the Court of Appeals, at 323-324). The aggravated assault records also alleged and admitted a threatened injury. *See* (Record in the Court of Appeals, at 293-294).

The defense objected to the characterization of the prior robbery convictions as "crimes of violence" under USSG §4B1.2. *See* (Record in the Court of Appeals, at245-252). The objection contended first that Texas simple robbery lacks the use, attempted use, or threatened use against the person of another because it can be committed recklessly. *See* (Record in the Court of Appeals, at 246-247). And it contended Texas aggravated robbery, even Texas aggravated robbery-by-threat,[1] lacks this element because it can be committed without a deliberate attempt to target the victim. *See* (Record in the Court of Appeals, at 247-250). Finally, the objection argued that neither offense constitutes the generic offense of "robbery" because neither requires the use of force to overcome the victim's resistance, but instead merely requires an injury or threat during the course of a theft. *See* (Record in the Court of Appeals, at 250-252).

The district court overruled the objections and imposed the Guideline sentence of 120 months imprisonment. *See* (Record in the Court of Appeals, at 172). It said that it would have imposed the same sentence under different Guidelines. *See* (Record in the Court of Appeals, at 172). It reiterated in the statement of reasons that it would

[1] The objection also contended that robbery is not divisible into robbery-by-injury and robbery-by-threat-or-fear and that the least culpable means of any robbery or aggravated robbery offense encompasses reckless conduct. *See* (Record in the Court of Appeals, at247-250).

have imposed the same sentence for the same reasons. *See* (Record in the Court of Appeals, a t330).

B. Court of Appeals

Petitioner appealed, contending that the Texas offenses of simple robbery-by-injury and aggravated robbery-by-threat did not constitute a "crime of violence" under USSG §4B1.2. On plain error review, he also sought to preserve the claim that both 18 U.S.C. §922(g) and the Constitution require a greater connection to interstate commerce than the movement of a firearm across state lines at an unspecified point in the distant past before the defendant may be convicted of possessing that firearm.

The court of appeals rejected both claims as foreclosed by circuit precedent. *See* [Appendix A]; *United States v. Fraser*, 2023 WL 142085 (5th Cir. January 10, 2023)(unpublished). As respects the sentencing claim, it relied on *United States v. Adair*, 16 F.4th 469 (5th Cir. 2021). *See Fraser*, 2023 WL 142085, at *1. That case holds that Texas robbery offenses constitute the generic offense of "robbery," as enumerated in USSG §4B1.2's definition of a "crime of violence. *Adair*, 16 F.4th at 470-471.

REASONS FOR GRANTING THE PETITION

I. After the decision below, the Sentencing Commission voted to adopt an Amendment to USSG §4B1.2. This proposed Amendment shows that the Commission understood the enumerated offense of "robbery" to require a causal connection between the defendant's assaultive conduct and his or her acquisition of property. As such, the Amendment shows that the Texas offenses of robbery and aggravated robbery likely do not qualify as "robbery" within the meaning of the Guidelines. Because the court below held to the contrary, it should have an opportunity to consider the significance of the proposed Amendment.

Federal Sentencing Guideline 2K2.1 provides for an enhanced base offense level when the defendant has sustained a prior conviction for a felony "crime of violence." USSG §2K2.1(a)(4)(A). That Guideline uses the definition of "crime of violence" found at USSG §4B1.2. *See* USSG §§2K2.1, comment. (n.1). That definition reads as follows:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that–
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

USSG §4B1.2(a).

Relying on its decision in *United States v. Adair*, 16 F.4th 469 (5th Cir. 2021), the opinion below held that the Texas offenses of simple and aggravated robbery both constitute the enumerated offense of "robbery." *See* [Appendix A]; *United States v. Fraser*, 2023 WL 142085, at *1 (5th Cir. January 10, 2023)(unpublished).

The Texas Penal Code sets forth the offense of simple robbery as follows:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code §29.02.

Cognizable judicial records narrowed Petitioner's prior simple robbery offense to the infliction of injury during the course of a theft. *See* (Record in the Court of Appeals, at 314-315).

The Texas Penal Code also contains an offense of aggravated robbery, which it sets forth as follows:

> (a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:
> (1) causes serious bodily injury to another;
> (2) uses or exhibits a deadly weapon; or
> (3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:
> (A) 65 years of age or older; or
> (B) a disabled person.

Tex. Penal Code §29.03.

Cognizable records narrowed Petitioner's aggravated robbery offense to the threat of injury during a theft. *See* (Record in the Court of Appeals, at 323-324).

Below, Petitioner contended that the Texas offenses did not match the enumerated offense of robbery. He noted that the Texas offense did not require that the defendant acquire property by force or intimidation because it did not require a causal connection between the assaultive conduct and the acquisition of property. The court below rejected the claim as foreclosed by precedent. *See Fraser*, 2023 WL 142085, at *1. Since then, however, the Sentencing Commission has promulgated a definition of "robbery" for use in USSG §4B1.2. This Amendment would define robbery as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, **by means of actual or threatened force, or violence, or fear of injury**, immediate or

> future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines* (*Preliminary*), at pdf page 95 (April 4, 2023)(emphasis added)(hereafter "Amendments"), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230405_prelim-RF.pdf , *last visited April 6, 2023.*

As the emphasized portion shows, this definition of robbery would plainly require that the defendant acquire property by means of force or threats. Because the phrase "by means of" says how a defendant must acquire the property, it requires some causal connection between assaultive conduct and the taking; the mere co-occurrence of assaultive conduct and "the course of" of a theft would not suffice. See *Commonwealth v. Jones*, 283 N.E.2d 840, 843 (Mass. 1986) (citing Anderson, *Wharton's Criminal Law & Procedure*, § 559; 46 Am. Jur., Robbery, § 19; *Commonwealth v. Novicki*, 87 N.E. 2d 1, 5 (Mass. 1941); Hale, P. C. (1847 ed.) 534; 77 C. J. S., *Robbery*, §§ 11-14)(common law robbery, which refers to theft "by" force or intimidation, required "a causal connection between the defendant's use of violence or intimidation and his acquisition of the victim's property."); *accord* La Fave, *Substantive Criminal Law*, §20.3(d), p.187 ("There must be a causal connection between the defendant's threat of harm and his acquisition of the victim's property– that is the threat must induce the victim to part with his property."); *see also* BLACK'S

LAW DICTIONARY (11th Ed. 2019)("Means: … 2. Something that helps to attain an end; an instrument; a cause."). Notably, at least one Texas defendant has been convicted where he inflicted injury on another **after discarding** the stolen property. *See Smith v. State*, 2013 WL 476820, at *3 (Tex. App. Houston [14th Dist.] Feb. 7 2013)(unpublished).In no natural sense of the language could this conduct be described as obtaining property "by means of actual or threatened force."

According to the Commission, the purpose of this Amendment was to ensure that robbery includes thefts accomplished by threats to property, and not merely those accomplished by threats to the person. *See* Amendments, at pdf page 92-93. Insofar as the Amendment effectuates this change, reasonable minds might disagree as to whether it will be clarifying or substantive. Insofar as it refers to the "means" by which the defendant acquires property in a robbery, however, the definition simply reveals a background assumption of the Commission. Because the Amendment was not intended to change the relationship between the assaultive conduct and the taking, it may be taken as a statement of current law on this point.

Accordingly, even if Congress does not adopt the Amendment, it sheds significant light on the Commission's understanding of "robbery" as the time it included that offense in the definition of "crime of violence." And it clearly shows that the Texas offenses do not qualify. There is a reasonable probability that consideration of this evidence, not available at the time of the decision below, would convince the court below that it resolved the instant case on an incorrect understanding of the enumerated offense of "robbery."

Further, this would likely produce change in the Guideline range. It is true that the definition of "crime of violence" may be satisfied by an offense that has as an element the use, attempted use, or threatened of force against the person of another. USSG §4B1.2(a)(1). Certainly, Petitioner's simple robbery offense – which resolved to the infliction of injury during a theft – does not qualify under the force clause of USSG §4B1.2. That is because it may be committed recklessly. *See* Tex. Penal Code §29.02(a)(1). The reckless infliction of bodily injury lacks the use, attempted use, or threatened use of physical force against the person of another. *See Borden v. United States*, __U.S.__, 141 S.Ct. 1817, 1821 (2021)(plurality op.). The court below has accordingly said that Texas simple robbery-by-injury lacks such force as an element. *See United States v. Garrett*, 24 F.4th 485, 488–89 (5th Cir. 2022)("If the statute is indivisible and thus only states one crime, Garrett's conviction does not qualify under *Borden* as an ACCA violent felony because robbery can be committed recklessly.")(arguable dicta); *United States v. Ybarra*, 2021 WL 3276471 (5th Cir. 2021)(unpublished).

The force clause analysis is a little trickier when it comes to the aggravated robbery conviction, which resolves to the offense of threatening another or placing another in fear during a theft. Texas robbery-by-threat-or-fear and aggravated robbery-by-threat-or-fear require intentional or knowing conduct. *See* Tex. Penal Code §§29.02(a)(2), 29.03(a). The court below has accordingly held that they possess the threatened use of force as an element. *See United States v. Garrett*, 24 F.4th 485, 491, n.7 (5th Cir. 2022).

Since, *Garrett*, however, this Court has provided additional information about the meaning of the term "threatened" in a nearly identically worded provision, namely 18 U.S.C. §924(c). ***Compare*** 18 U.S.C. §924(c)(3)(A) ("…has as an element the use, attempted use, or threatened use of physical force against the person or property of another"), ***with*** USSG §4B1.2(a)(1)("…has as an element the use, attempted use, or threatened use of physical force against the person of another."). *Taylor v. United States*, __U.S.__, 142 S.Ct. 2015 (2022), held that attempted robbery under 18 U.S.C. §1951(a) – the Hobbs Act – lacks any element requiring the use, attempted use, or threatened use of physical force against the person of another. *Taylor*, 142 S.Ct. at 2025-2026.

Taylor rejected the government's argument that Congress used the term "threatened" in an "abstract and predictive" sense." *Id.* at 2023. That is, the government argued that one "threatens" the use of force by engaging in conduct that would lead an objective observer to believe that such use of force is likely to occur. *See id*. at 2022-2023. Relying primarily on the language of the statute, this Court instead read the term "threatened use of force" to "denote '[a] communicated intent to inflict physical or other harm on any person or on property.'" *Id*. at 2022. (quoting BLACK'S LAW DICTIONARY 1327 (5th ed. 1979)). This Court thus believed that the term "threatened use of force," like its neighbors "use of force" and "attempted use of force," captures only offenses that require the prosecution "to prove that the defendant took specific actions **against specific persons** or their property." *Id*. at 2023 (emphasis added).

The threat/fear provision of the Texas robbery statute (and, by incorporation, the aggravated robbery statute) does not require that a defendant "threaten" the victim as this Court construed the term in *Taylor*. Although Tex. Penal Code §29.02(a)(2) refers to "threaten[ing]" another, it also authorizes conviction in a separate and distinct way: "plac[ing] another in fear of imminent bodily injury or death," Tex. Penal Code. 29.02(a)(2). These are not the same. As one Texas court explained, "[t]he general, passive requirement that another be 'placed in fear' cannot be equated with the specific, active requirement that the actor 'threaten another with imminent bodily injury.'" *Williams v. State*, 827 S.W.2d 614, 616 (Tex. App. – Houston [14th Dist.] 1992)(quoting Tex. Penal Code 29.02(a)(2)); *see also Jackson v. State*, 05-15-00414-CR, 2016 WL 4010067, at *4 (Tex. App. 2016)(unpublished)("This is a passive element when compared to the dissimilar, active element of threatening another.").

Texas courts have held that a defendant may satisfy this "passive" element even when they are unaware of the victim's presence. Thus, an armed defendant who enters a convenience store and steals from the register commits robbery if the clerk watches by closed circuit television from the back room. *See Howard v. State*, 333 S.W.3d 137, 140 (Tex. Crim. App. 2011). And a defendant who burgles a car commits robbery if he frightens an unseen child in the back. *See Burgess v. State*, 448 S.W.3d 589, 601 (Tex. App. – Houston [14th Dist.] 2014).

These offenses do not involve a "communicated intent" to inflict harm. Communication, and certainly the communication of "intent," is a two-way process

involving a known sender and receiver. But if the defendant is unaware of the victim's presence, *see Howard*, 333 S.W.3d at 140, or even the victim's existence, *see Burgess*, 448 S.W.3d at 601, he or she is not engaged in a communicative act. Further, these offenses do not require the prosecution "to prove that the defendant took specific actions **against specific persons** or their property." *Taylor*, 142 S.Ct. at 2023 (emphasis added). A defendant who burgles a secretly inhabited car does not act "against specific persons" inside. After *Taylor*, it can no longer be credibly be maintained that the requirement of "intentional targeting" attendant to the "against" clause, *see Borden*, 141 S.Ct. at 1821, applies only to the use of force rather than to the use, attempted use, and threatened use of force all. *See Taylor*, 142 S.Ct. at 2023. The Court said as much. *See id.*

Finally, it is also true that the district court stated that it would have imposed the same sentence irrespective of the Guidelines. The court below will sometimes accept such statements at face value, *see United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012); *United States v. Redmond*, 965 F.3d 416, 420-421 (5th Cir. 2020); *United States v. Garcia*, 647 Fed. Appx. 408, 410 (5th Cir. 2016)(unpublished); *United States v. Thomas*, 793 Fed. Appx. 346, 347 (5th Cir. 2020)(unpublished); *United States. v. Rico*, 864 F.3d 381, 386-387 (5th Cir. 2017); *United States v. Reyna-Aragon*, 992 F.3d 381, 387-389 (5th Cir. 2021); *United States v. Castro-Alfonso*, 841 F.3d 292, 297–99 (5th Cir. 2016), but has also vacated sentences in spite of them, *see United States v. Martinez-Romero*, 817 F.3d 917 (5th Cir. 2016); *United States v. Rico-Mejia*, 859 F.3d 318, 323-325 (5th Cir. 2017), *overruled on other grounds by United States v.*

Reyes-Contreras, 910 F.3d 169 (5th Cir. 2018)(en banc), *abrogated by Borden v. United States*, __U.S.__, 141 S.Ct. 1817 (2021); *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017); *United States v. Cardenas*, 598 Fed. Appx. 264, 269 (5th Cir. 2015)(unpublished); *United States v. Vasquez-Tovar*, 420 Fed. Appx. 383, 384 (5th Cir. 2011)(unpublished); *United States v. Leal-Rax*, 594 Fed. Appx. 844 (5th Cir. 2014)(unpublished), *overruled on other grounds by United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018)(en banc), *abrogated by Borden v. United States*, __U.S.__, 141 S.Ct. 1817 (2021); *United States v. Bazemore,* 608 Fed. Appx. 207 (5th Cir. 2015)(unpublished). As such, the bare disclaimer does not independently show that the outcome would be the same if the case were remanded.

So while a different outcome is not certain, there is at least a reasonable probability of a different result. For that reason, this Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of the proposed Amendment:

> [w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996). These intervening events:

> may include a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual

> circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general.

Lawrence, 516 U.S. at 166–67 (internal citations omitted)(citing *Conner v. Simler*, 367 U.S. 486, (1961); *Schmidt v. Espy*, 513 U.S. 801 (1994); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *Louisiana v. Hays*, 512 U.S. 1230 (1994); *NLRB v. Federal Motor Truck Co.*, 325 U.S. 838 (1945); *Wells v. United States*, 511 U.S. 1050 (1994); *Reed v. United States*, 510 U.S. 1188 (1994); *Ramirez v. United States*, 510 U.S. 1103 (1994); *Chappell v. United States*, 494 U.S. 1075 (1990); *Polsky v. Wetherill*, 403 U.S. 916 (1971)).

As the above list makes clear, not all of the events that may give rise to GVR represent binding and dispositive authority. Confessions of error, for example, do not bind the court, yet this Court has issued GVR based on such confessions, even when the confessions were less than total. *See Lawrence*, 516 U.S. at 170-171. It is sufficient, therefore, that Petitioner has identified an intervening event that creates a reasonable probability of a different outcome.

II. 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 firearms), 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 did not state that Petitioner's possession of the firearm was an economic activity. 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) criminalizes all possession, *without* reference to economic activity. Accordingly it stretches the limits of Congressional power.

Further, the factual resume failed to show 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 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 all firearms that have 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. This Court should grant certiorari to address the issue in another case, and hold the instant Petition pending the outcome

Petitioner did not challenge either the sufficiency of his factual resume or the constitutionality of the statute in district court, though he did so in the court of appeals. This probably presents an insurmountable vehicle problem for a plenary grant in the present case. Nonetheless, the issue is worthy of certiorari, as discussed above, and the Court has no shortage of cases presenting it.

If this Court grants certiorari to address this issue, it should hold the instant Petition pending the outcome. In the event that the constitutionality of §922(g) is called into question, or that its scope is limited, it should grant certiorari in the instant case, vacate the judgment below, and remand for reconsideration. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

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 10th day of April, 2023.

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