No. _____

In the

Supreme Court of the United States

_____

Michael Steven Smith,

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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QUESTION 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?

PARTIES TO THE PROCEEDING

Petitioner is Michael Steven Smith, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Regulations

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Steven Smith 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The unpublished opinion of the court of appeals is reported at *United States v. Smith*, No. 23-10303, 2024 WL 1049473 (5th Cir. Mar. 11, 2024). It is reprinted in Appendix A to this Petition. The district court's judgment in *United States v. Smith*, No. 4:22-cr-00347-O (N.D. Tex.), is attached as Appendix B. The Factual Resume in Support of Plea is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 11, 2024. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTE AND CONSTITUTIONAL PROVISION

Section 922(u) of Title 18 reads in relevant part:

> It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that 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. Facts and Proceedings in District Court

Petitioner Michael Steven Smith pleaded guilty to a single count of violating 18 U.S.C. §922(u), by unlawfully taking firearms held in a firearm licensee's business inventory. The factual resume in support of his plea, with respect to the interstate commerce element of the offense, stated that "the firearms had traveled at some time in interstate or foreign commerce." *See* Pet.App.C at 2. The court accepted Petitioner's plea and imposed a sentence of 120 months imprisonment. *See* Pet.App.B at 2.

B. Appellate Proceedings

On appeal to the Fifth Circuit Court of Appeals, Petitioner argued that the Congressional power to regulate interstate commerce did not permit it to criminalize Petitioner's conduct: the theft of a firearm[s] 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. He thus argued that to the extent that 18 U.S.C. §922(u) actually reaches his conduct, it is facially unconstitutional. 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. Petitioner conceded that these claims were foreclosed by circuit precedent and the court of appeals agreed. Pet.App.A at 1; *United States v. Smith*, No. 23-10303, 2024 WL 1049473 (5th Cir. Mar. 11, 2024) (unpublished) (citing *United States v. Alcantar*, 733 F.3d 143, 145-46 (5th Cir. 2013)).

REASON FOR GRANTING THE PETITION

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.

Similar to its counterpart at § 922(g), the jurisdictional element of § 922(u) requires only that a firearm has at some point crossed state lines. Section 922(u)'s jurisdictional element, "shipped or transported in interstate or foreign commerce" is even more explicit that mere movement at some point across state lines is all that is required under the statute.[1]

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*

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[1] Section 922(u) prohibits theft of a firearm from a firearm licensee's business inventory. It is important to note that "inventory" in this context does not equate to being held for sale or "in commerce." The firearms stolen in this case were not available for sale but were held for repair. They were listed as store inventory and were logged into the store's Firearms Acquisition and Disposition Record Book as required by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") pursuant to 27 CFR § 478.122.

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 (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

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 theft of the guns was an economic activity or even that the stolen guns were part of a commercial activity. *See* Pet.App.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(u) criminalizes theft *without* reference to economic activity. Accordingly, it sweeps too broadly.

Scarborough further stands in direct tension with *Bond*, which shows that §922(u) ought not be construed to reach the theft of any firearm held by a licensee 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(u) to reach the conduct admitted here: theft 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 proof that it moved across state lines in the recent past, nor even proof that the conduct affected the commercial activity of the firearms licensee. 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.

CONCLUSION

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

Respectfully submitted this 5th day of June, 2024.

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