No. _____

In the

Supreme Court of the United States

_____

Flavio Charles Patino,
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

Under what circumstances does the Second Amendment protect the right of persons previously convicted of a felony offense to keep arms?

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

PARTIES TO THE PROCEEDING

Petitioner is Flavio Charles Patino, 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 Flavio Charles Patino 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The unpublished opinion of the court of appeals is found at *United States v. Patino,* No. 24-10080, 2025 WL 637429 (5th Cir. February 27, 2025). It is reprinted in Appendix A to this Petition. The Petition arises from the judgment of conviction and sentence, which is attached as Appendix B.

JURISDICTION

The court of appeals issued an opinion affirming the district court judgment on February 27, 2025. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

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…
>
> The Second Amendment provides:
>
> ***

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Amarillo police saw Petitioner Flavio Charles Patino sleeping in his car at a park after the park had closed. (Record in the Court of Appeals, at 115-118). When he opened the door, they found a gun. (Record in the Court of Appeals, at 115-118). He had previous felony convictions, as detailed below. (Record in the Court of Appeals, at 115-118). The record contains no evidence of his misuse of this firearm, nor any other contemporaneous illegal activity, save being in a park too late. He told police that he bought the gun for $500, and they later determined that it originated in Turkey. (Record in the Court of Appeals, at 116-118).

The federal government indicted Petitioner for possessing a firearm after a felony conviction. (Record in the Court of Appeals, at 12-13). The indictment alleged that the firearms had once been shipped in interstate commerce, but it alleged no greater connection to interstate commerce than that. (Record in the Court of Appeals, at 12).

Petitioner moved to dismiss the indictment, contending that the Second Amendment does not permit Congress to forbid gun possession by felons. [Appx. C]; (Record in the Court of Appeals, at 49-66). The motion expressly invoked the government's burden to justify with historical evidence any regulation in facial conflict with the text of the Second Amendment. [Appx. C, at 10]; (Record in the Court of Appeals, at 58). It also asserted that 18 U.S.C. §922(g)(1) should be construed to require more than the mere prior movement of a firearm across state

lines in the indefinite past, and, alternatively, that Congress lacks the power to ban firearm possession upon so feeble a connection to interstate commerce. [Appx. C, at 2-6]; (Record in the Court of Appeals, at 50-54). He conceded these latter commerce-based arguments to be foreclosed. [Appx. C, at 6]; (Record in the Court of Appeals, at 54).

Answering the Second Amendment argument, the government cited two pieces of historical evidence, trying to show that the original understanding of the Second Amendment would have permitted 18 U.S.C. §922(g)(1). First, it cited laws at Founding that permitted capital punishment and estate forfeiture as punishment for felonies. (Record in the Court of Appeals, at 74-77). Second, it cited laws that disarmed Catholics, enslaved people, non-citizen immigrants, Native Americans, and political dissidents. (Record in the Court of Appeals, at 78-80). It also cited the English Bill of Rights, a pre-revolutionary anti-Catholic enactment that expressly restricted the right to bear arms to Protestants. (Record in the Court of Appeals, at 78-80). The district court denied the motion, concluding that it was foreclosed and/or contrary to Supreme Court precedent. (Record in the Court of Appeals, at 102-113). It cited no historical evidence. (Record in the Court of Appeals, at 102-113).

The defendant pleaded guilty with a plea agreement. (Record in the Court of Appeals, at 191-199). Although the plea agreement waived appeal, it contained an express exception for an appeal of the motion to dismiss. (Record in the Court of Appeals, at 196).

Probation prepared a Presentence Report, which of course recounted Petitioner's criminal history. It showed a conviction for robbery (which it alleged to involve a firearm) from 1995, when Petitioner was 18 years old; it also showed an aggravated assault conviction (a prison altercation), when he was 19. (Record in the Court of Appeals, at 210-211). Then, it showed a conviction for "assault on a public servant" in 2003, though it did not describe the facts of the case at all. (Record in the Court of Appeals, at 211). Finally, it showed convictions in 2007 and 2010 for possessing less than two ounces of marijuana and possessing a firearm after a felony conviction, respectively. (Record in the Court of Appeals, at 211-212).

The court imposed 30 months imprisonment, to be followed by three years of supervised release. (Record in the Court of Appeals, at 177-178).

B. Appellate Proceedings

Petitioner appealed, arguing that the district court erred in denying the Motion to Dismiss, though he conceded that his Commerce Clause claim was foreclosed by circuit precedent. *See* Initial Brief in *United States v. Patino*, No. 24-10080, 2024 WL 2060780 (5th Cir. Filed April 29, 2024)("Initial Brief"). As to the Second Amendment claim, however, he maintained that the government had not met its burden to demonstrate that 18 U.S.C. §922(g)(1) comported with the nation's history and tradition of valid firearm regulation, specifically contesting the relevance of capital punishment and estate forfeiture for felonies at Founding. *See* Initial Brief, at **10-12. The government successfully moved to stay the proceedings, then moved for summary affirmance. *See* Unopposed Motion for

Summary Affirmance in *United States v. Patino*, No. 24-10080 (5th Cir. Filed Nov. 20, 2024). By that point the Fifth Circuit had decided *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), which held that 18 U.S.C. §922(g)(1) did not violate the Second Amendment when the defendant has been previously convicted of a serious theft offense. As such, Petitioner did not oppose the summary disposition of the case, which the court of appeals granted in an unpublished opinion. *See* [Appx. A]; *United States v. Patino*, No. 24-10080, 2025 WL 637429, at *1 (5th Cir. Feb. 27, 2025)(unpublished)

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari in this case to resolve the profound uncertainty, including an acknowledged circuit split, regarding the constitutionality of 18 U.S.C. §922(g)(1) under the Second Amendment.

In New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), this Court held that when a firearm restriction contravenes the text of the Second Amendment, it is valid only to the extent that it is consistent with the nation's history and tradition of valid firearm regulation. *See Bruen*, 597 U.S. at 19. It rejected the notion that firearm regulations understood to be outside the power of government at Founding may be affirmed today based on a sufficiently compelling governmental interest. *See id.*

Section 922(g)(1) of Title 18 forbids the possession of firearms by most persons convicted of an offense punishable by more than a year's imprisonment. Since *Bruen*, "Section 922(g)(1)'s constitutionality has divided courts of appeals and district courts." Supplemental Brief for the Federal Parties in Nos. 23-374, *Garland v. Range* 23-683, at 2 (June 24, 2024)("Supplemental Brief in *Range*"), *available at https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf* , *last visited May 22, 2025*. As the Ninth Circuit recently observed *en banc*, "[f]our circuits have upheld the categorical application of § 922(g)(1) to all felons." *United States v. Duarte*, No. 22-50048, 2025 WL 1352411, at *3 (9th Cir. May 9, 2025)(*en banc*)(citing *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024); *Vincent v. Bondi*, 127 F.4th

1263, 1265–66 (10th Cir. 2025), and *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, 145 S.Ct. 1041 (2025)). The *en banc* Ninth Circuit joined this group in a decision that produced four separate opinions, including a partial dissent. *See Duarte*, 2025 WL 1352411, at *14. In so doing, it overruled a panel opinion that had found the statute unconstitutional as applied to a person with prior convictions for vandalism, drug possession, and evading arrest. *See United States v. Duarte*, 101 F.4th 657, 661 (9th Cir. 2024), *reh'g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. 2024), *different results on rehearing* 2025 WL 1352411, at *3 (9th Cir. May 9, 2025)(*en banc*). This brings the total number of courts rejecting all constitutional challenges to the statute to five.

But as the *en banc* Ninth Circuit court also recognized, two more circuits, including the court below, "have left open the possibility that § 922(g)(1) might be unconstitutional as applied to at least *some* felons," *Duarte*, 2025 WL 1352411, at *3 (citing *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024), and *United States v. Williams*, 113 F.4th 637, 661–62 (6th Cir. 2024))(emphasis in original), while the *en banc* Third Circuit has actually held the statute unconstitutional as applied to a man with a prior felony conviction for making a false statement to obtain food stamps, *see Range v. Att'y Gen.*, 124 F.4th 218, 222–23 (3d Cir. 2024)(*en banc*). Many district courts, though not the majority, have also found the statute unconstitutional in individual cases. *See* Supplemental Brief in *Range*, at *4-5, nn.1-3 (collecting cases); *see also United States v. Gomez*, __F.Supp.2d__, 2025 WL

971337 (N.D. TX March 25, 2025)(marijuana possession), *appeal pending*. As the government observed last year, moreover, "[s]ome of those decisions have involved felons with convictions for violent crimes, such as murder, manslaughter, armed robbery, and carjacking." *Id*. at **4-5, & n.1.

Further, the courts of appeals have acknowledged extensive disagreement and uncertainty regarding certain methodological issues relevant to the resolution of *Bruen* challenges. These include the relevance of laws at Founding that did not directly regulate firearms, such as capital punishment and estate forfeiture, ***compare*** *Range*, 124 F.4th at 231 (capital punishment and estate forfeiture for non-violent crime not relevant), **with** *Diaz*, 116 F.4th at 469-470 (giving dispositive weight to the availability of capital punishment for crimes analogous to the defendant's prior conviction); the status of pre-*Bruen* circuit precedent, ***compare*** *Vincent*, 127 F.4th at 1265–66 (circuit precedent unaffected, and collecting cases), ***with*** *Williams*, 113 F.4th at 648 (*Bruen* displaces earlier circuit precedent), and the significance of *dicta* in *Heller*, *Bruen*, and *Rahimi* regarding "presumptively valid" restrictions on firearm ownership, ***compare*** *Duarte*, 2025 WL 1352411, at **4-6 (relying heavily on such passages to affirm §922(g)(1)) ***with*** *Diaz*, 116 F.4th at 465-466 (declining to give them controlling weight). And circuit opinions resolving challenges to §922(g)(1) frequently generate dissenting and concurring opinions, attesting to the pervasive uncertainty and disagreement in the area. *See Range*, 124 F.4th at 221 (six opinions, one dissent); *Duarte*, 2025 WL 1352411, at *1 (four opinions, one partial dissent)(reversing panel); *Williams*, 113 F.4th at 642

(concurring opinion from Judge concurring only in judgment in panel decision); *Atkinson v. Garland*, 70 F.4th 1018, 1019 (7th Cir. 2023)(dissent from panel decision).

The issue merits intervention by this Court. There is a clear and acknowledged circuit split on the constitutionality of a federal statute. At least seven circuits have weighed in, and there is relative balance as between those maintaining that the statute is always constitutional, and those acknowledging its constitutional vulnerabilities. The split will therefore not resolve spontaneously. And as can be seen above, a substantial volume of lower court opinions provide an ample resource to assist this Court in the resolution of the matter.

The matter is profoundly weighty. Two circuits (the Third and Ninth) have dealt with the issue *en banc*, demonstrating that it meets the standards for discretionary review. And these two *en banc* treatments of the issue drew nine *amici*, further attesting to its importance. *See Range*, 124 F.4th at 221; *Duarte*, 2025 WL 1352411, at *1. More than 6,000 people suffered conviction for violating this statute in Fiscal Year 2024 alone, almost all of whom went to prison. *See* United States Sentencing Commission, *Quick Facts*, *18 U.S.C. §922(g) Firearms Offenses*, at 1, *last visited May 22, 2025, available at* *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY24.pdf* . And of course most states have comparable statutes, which means that the true number of persons incarcerated each year for possessing a firearm after a felony conviction may be many times this number. *See*

e.g. Alaska Stat. § 11.61.200(a)(1), (b)(1)-(3); Ariz. Rev. Stat. Ann. §§ 13-904(A), (B); 13-905; 13-906; Cal. Penal §§ 12021, 4852.17; Col. Rev. Stat. § 18-12-108.

The lack of clear answers about the constitutionality of this statute (and its state analogues) is intolerable for many reasons. First, there is a strong possibility that substantial numbers of Americans are in prison, and that more will go to prison, for the exercise of a fundamental constitutional right. That should be anathema in a free constitutional republic. Second, and conversely, the lack of clarity as to the scope of the Second Amendment right to own a firearm after a felony conviction may deter lawful prosecutions of criminal activity, jeopardizing public safety. Third, this lack of clarity may deter constitutionally protected conduct, or encourage reliance on mistaken beliefs about the scope of a constitutional right, resulting in illegal conduct and imprisonment. *See United States v. Schnur*, 132 F.4th 863, 871 (5th Cir. 2025)(Higginson, J., concurring)(expressing concern about the notice problems that flow from uncertainty regarding the constitutional status of §922(g)(1)).

The present case is an apt vehicle to resolve the uncertainty. The issue is fully preserved, as Petitioner filed a detailed motion to dismiss the indictment based on the Second Amendment. *See* [Appx. C, at 1-2, 6-18]. He pressed the issue at the Fifth Circuit, *see* Initial Brief in *United States v. Patino*, No. 24-10080, 2024 WL 2060780, at **4-19(5th Cir. Filed April 29, 2024), conceding it was foreclosed only after the Fifth Circuit held in a published opinion that "theft offenses" could serve as valid predicates for §922(g)(1), *see Diaz*, 116 F.4th at 468-470.

Further, the defendant's challenge could well be resolved in his favor; at a minimum, it does not present factors that could cause the case to be resolved on narrow, unilluminating grounds. The defendant was not on parole, probation, or supervised release, which has been held to strip citizens of their Second Amendment rights until discharged. *See United States v. Giglio*, 126 F.4th 1039, 1045 (5th Cir. 2025). The record contains no allegation that Petitioner misused his firearm during the instant offense, which might render §922(g)(1) analogous to "going armed" laws as applied to his conduct. *See United States v. Rahimi*, 602 U.S. 680, 697 (2024). The defendant possessed a firearm that was lawful in itself, not a machinegun, sawed-off shotgun, or other kind of weapon that might be outside the scope of the Second Amendment. *See Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016). And although Petitioner waived appeal, he negotiated a specific exception for the motion to dismiss the indictment. *See* (Record in the Court of Appeals, at 196).

The defendant's last conviction potentially indicative of violence occurred 19 years before the instant offense, though the record shows nothing more than the title of the offense: assault on a public servant. *See* (Record in the Court of Appeals, at 211). That offense can be committed by reckless conduct, or by offensive touching. Tex. Penal Code §22.01(b)(1). Although Petitioner has sustained adult convictions for aggravated robbery and aggravated assault, those convictions date 25 years prior to the instant offense, when he was just 18 and 19 years old, respectively. *See* (Record in the Court of Appeals, at 210-211). More recently, he has sustained a misdemeanor marijuana conviction and a conviction for the state version of the

same offense at issue here: possessing a firearm after a felony conviction. *See* (Record in the Court of Appeals, at 211-212). To the extent that the Second Amendment calls for a global assessment of the defendant's dangerousness at the time of the gun possession, *see Range*, 124 F.4th at 232 (considering the nature of the defendant's prior conviction, its age, and the defendant's present dangerousness), Petitioner might well present a credible case that he is no longer a sufficient threat to society to justify the loss of his right to bear arms.

The court below regards prior convictions for robbery and assault as valid bases for disarmament. It has affirmed §922(g)(1) as applied to defendants with prior convictions for theft or robbery on the grounds that serious theft offenses were capital at Founding, and that they could be punished with estate forfeiture at the time. *See Diaz*, 116 F.4th at 469-470. It has also affirmed §922(g)(1) on the ground that a defendant's prior convictions for robbery or aggravated assault rendered §922(g)(1) comparable to "going armed" or "affray" laws thought valid at Founding, *see Schnur*, 132 F.4th at 871. And the government is certainly free to propound these theories on the merits. But they are not so obviously correct as to make a grant of *certiorari* here a poor use of the Court's resources. To the contrary, these questions are close, and they cut to the heart of the constitutional uncertainty currently surrounding §922(g)(1).

It is hardly clear that the existence of capital punishment at Founding for one of defendant's prior crimes much resembles a regime of permanent

disarmament for those felons not executed. As now Justice Barrett persuasively reasoned addressing this argument:

> …one might reasonably ask: "So what?" We wouldn't draw this inference from the severity of founding-era punishment in other contexts—for example, we wouldn't say that the state can deprive felons of the right to free speech because felons lost that right via execution at the time of the founding. The obvious point that the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society.

Kanter v. Barr, 919 F.3d 437, 461–62 (7th Cir. 2019)(Barrett, J. dissenting), *abrogated by* Bruen. Further, it is not the case that crimes like robbery were usually treated as capital at Founding. *See id*. at 459 ("Throughout the seventeenth and eighteenth centuries, capital punishment in the colonies was used 'sparingly,' and property crimes including variations on theft, burglary, and robbery 'were, on the whole, not capital.'")(citing Lawrence M. Friedman, *Crime and Punishment in American History* 42 (1993)).

Likewise, an analogy to estate forfeiture probably cannot justify the permanent disarmament of felons today. Forfeiture of estate, in fact, never took hold in America. In his 1803 edition of Blackstone's Commentaries, St. George Tucker noted the complete absence of then penalty in the laws of Virginia and the United States Code. St. George Tucker, 5 Blackstone's Commentaries 377 n.8 (1803). This led him to declare the practice "abolished in this country, so far as relates to the recompense to be made to the state, or the United States." *Id*. at 387 n.14. Writing in 1832, James Kent made a similar point. "[T]he tendency of public opinion," he explained, "has been to condemn forfeiture of property, at least in cases

of felony, as being an unnecessary and hard punishment of the felon's posterity." 2 James Kent, Commentaries on American Law 385 (2d ed 1832).

Finally, the Fifth Circuit's use of affray or "going armed" laws to justify permanent disarmament represents an extremely dubious historical analogy to §922(g)(1), no matter the defendant's prior conviction. In *Rahimi*, *supra*, this Court indeed utilized these laws to justify the temporary deprivations exacted by 18 U.S.C. §922(g)(8). That made sense: as Blackstone recounted, persons who went armed to the terror of the people, or fought in public, could be subjected to "recognizance." 4 W. Blackstone, Commentaries on the Laws of England 149 (Lonag Inst. Electronic Edition, combining 1st and 2d ed. 1769), *available at https://lonang.com/wp-content/download/Blackstone-CommentariesBk4.pdf, last visited May 22, 2025*. And such Recognizance could result in forfeiture of the arms misused by the defendant and by imprisonment. 4 Blackstone 85. But Blackstone, cited in *Rahimi*, gives no suggestion that Recognizance would be permanent, nor that forfeiture of arms involved in an affray or public terror exacted a permanent ban on acquiring new arms in the home. *See Rahimi*, 602 U.S. at 697. So while these laws might have represented a reasonable approximation of §922(g)(8), which forbids firearm possession only during the pendency of a restraining order, they impose significantly lighter burdens on the right of firearm ownership than §922(g)(1).

In short, the constitutional status of §922(g)(1) is deeply unsettled and surpassingly important to the government, public, and criminal defendants. The present case offers an excellent opportunity to provide meaningful answers.

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 ensure 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* (Record in the Court of Appeals, at 116-118). Rather, it shows only that he bought the gun at some point, not that he continued to possess it in furtherance of any effort to transact business of some kind. *See* (Record in the Court of Appeals, at 116-118). 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, though it does at least show that he paid for the gun. *See* (Record in the Court of Appeals, at 116-118). 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. This case is an excellent vehicle to resolve the tension between *Scarborough* and the Court's more recent Commerce Clause jurisprudence.

The record in this case says only that the defendant's firearm traveled to the United States from Turkey at some point. *See* (Record in the Court of Appeals, at 116-118). It does not say that the defendant obtained the gun in an interstate transaction, nor that his purchase caused such a transaction to take place. *See* (Record in the Court of Appeals, at 116-118). It does not show his movement across state or international lines with the gun. *See* (Record in the Court of Appeals, at 116-118). Rather, it shows simple possession of a firearm after an entirely local economic transaction, made federal by the happenstance that the gun once crossed an international border. The case thus provides an excellent opportunity to identify the outer limits of Congress's Commerce Clause authority – if Petitioner's activity falls within Congress's power, it essentially possesses a police power. Further, the error is fully preserved in both district court, [Appx. C], and in the court of appeals, Initial Brief, at **19-23.

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 27th day of May, 2025.

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