

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

LINDSEY EWING,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for 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

Recently this Court and individual Justices have increasingly explained that Congress's power under the Commerce Clause to criminalize conduct otherwise falling under the states' traditional police power is subject to limits—and that those limits have teeth.

Q: In light of *Bond v. United States*,¹ *Nat'l Fed'n of Indep. Bus. v. Sebelius*,² and the dissent from denial of certiorari in *Alderman v. United States*,³ does the federal Unlawful Felon in Possession of a Firearm statute (18 U.S.C. § 922(g)(1)) exceed Congress's authority to regulate under the Commerce Clause?

¹ ___ U.S. ___, 134 S.Ct. 2077 (2014).

² ___ U.S. ___, 132 S.Ct. 2566 (2012) (*NFIB*).

³ 131 S. Ct. 700, 701 (Thomas and Scalia, JJ., dissenting from denial of *certiorari*), citing *United States v. Lopez*, 514 U.S. 549, 558–559 (1995).

PARTIES

Lindsey Ewing is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lindsey Ewing respectfully petitions for 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Lindsey Ewing*, No. 17-10099, 697 Fed.Appx. 407, (5th Cir. September 21, 2017) (unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on January 24, 2017, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on DATE. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

Article I, Section 8 of the U.S. Constitution provides in part:

The Congress shall have power... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian [sic] tribes

Title 18, Section 922(g) of the United States Code provides in part:

It shall be unlawful for any person –
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

STATEMENT

A. Trial Court Proceedings

Appellant ultimately pleaded guilty to a single count indictment alleging his Unlawful Possession of Firearm by a Felon, in violation of 18 U.S.C. § 922(g)(1). (ROA.30-3124). Appellant pleaded guilty without plea agreement; his accompanying Factual Resume states:

On January 13, 2016, undercover Fort Worth police officers negotiated through cell phone text messaging the purchase of a Yugoslavia, Model 59\66, 7.62-caliber semiautomatic rifle, serial number; J-358396, from Ewing for \$250. The two agreed to meet at the east parking lot of La Gran Plaza at 4200 South Freeway in Fort Worth, Texas.

Around 1 p.m. that same day, the undercover officers called Ewing and confirmed the meeting. The officers went to the location and saw Ewing outside the car she said she would be in. One officer met with Ewing, gave her the \$250, and asked her for the gun. Ewing told the officer the gun was in the trunk of her car. She then opened her trunk and showed the officer a tan cloth she said contained the gun. The officer took the tan cloth, brought it back to his car, and confirmed it contained a Yugoslavia, Model 59\66, 7.62-caliber semi-automatic rifle, serial number I-358396. Ewing admits she possessed this gun.

An interstate-nexus expert with the Bureau of Alcohol, Tobacco, Firearms, and Explosives examined the charged firearm and determined it had been manufactured outside the state of Texas. Thus, Ewing admits that before she possessed the charged firearm, it had traveled in interstate or foreign commerce at some point.

Finally, Ewing admits that before she possessed the charged firearm, she had been convicted of the following felony offense: November 2014 Tarrant County conviction in case #1349617D, methamphetamine possession, receiving nine months in jail.

See (ROA.43-44)

At sentencing, the district court imposed 33 months of imprisonment and three years supervised release.

B. Circuit Court Proceedings

On appeal, Petitioner re-urged his challenges to the statute. Specifically, he argued that 18 U.S.C. § 922(g) is unconstitutional in that it regulates conduct that falls

outside the government's power to regulate commerce. He conceded that the issue was foreclosed by Fifth Circuit precedent.

The court of appeals summarily reviewed and concluded that this Court's decision in *National Federation of Independent Business* did not overrule the circuit court's precedent(s) that upheld the constitutionality of Section 922(g)(1). *See United States v. Isom*, 631 Fed. App'x 244 (Per curiam) (5th Cir. 2016)(unpublished). Thus, it affirmed.

REASONS FOR GRANTING THE WRIT

This Court should use this case to settle the reoccurring, important question whether, when enacting the Unlawful Felon in Possession of a Firearm statute (18 U.S.C. § 922(g)(1), Congress intruded into an area traditionally left to the states' exercise of the police power and exceeded its authority under the Commerce Clause.

The Court should review this increasingly-timely issue because the admitted-to facts establish *only* that the firearm in question had traveled in interstate commerce at an earlier, undetermined time and in no way implicate—much less—establish any effect on interstate commerce, much less a requisite *substantial* effect on commerce.

A. Introduction.

“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*, __ U.S. __, __, 132 S.Ct. 2566, 2577 (2012). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See id.* (“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.*, 132 S.Ct. at 2578 (“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*, __ U.S. __, 134 S.Ct. 2355, 2364 (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.*, 132 S.Ct. at 2578. 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).

B. *Alderman v. United States*: What properly constitutes a “Substantial Affect on Commerce?”

As this Court almost certainly knows, numerous “facial” challenges have been brought to Section 922(g)(1) on the basis that, to conform with the Court’s opinion in *United States v. Lopez*, section § 922(g)(1) must set out a “substantial affect” on interstate commerce. The gist of those challenges is that *Lopez* identifies three categories of activity that Congress’s commerce power authorizes it to regulate: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) “activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce.” *See Alderman v. United States*, 131 S. Ct. 700, 701 (Thomas and Scalia, JJ., dissenting from denial of *certiorari*), citing *United States v. Lopez*, 514 U.S. 549, 558–559 (1995). Challengers have assailed the statute, arguing that mere possession of a firearm that may have moved in interstate commerce at some earlier point is not an activity that falls within *Lopez*’s third category.

Of course, although with some notable (and increasing) dissents, the circuit courts—including the Fifth Circuit—have rejected these *Lopez* challenges and relied on this Court’s pre-*Lopez* opinion in *Scarborough v. United States*, 431 U.S. 563 (1977), when doing so. In *Alderman*, however, Justices Scalia and Thomas, noted the confusion at the circuit court level concerning the interaction between *Scarborough* and *Lopez*.in doing so. *See Alderman*, 131 S. Ct. at 701–02.

Petitioner submits that 18 U.S.C. § 922(g)(1) is unconstitutional and that *Lopez*—and not *Scarborough*—resolves the challenge in his favor. And he suggests that Justice Thomas and Justice Scalia’s reasoning in the *Alderman* dissent from the denial-of-certiorari only buttresses the need for the Court to decide this case. This is certainly so in light of the Court’s 2012 and 2014 decisions discussed below.

C. *National Federation v. Sebelius*: A Refinement of the Commerce Clause Analysis.

In *Nat’l Fed’n of Indep. Bus. v. Sebelius*, __ U.S. __, 132 S.Ct. 2566 (2012) (*NFIB*), this Court suggested a different Commerce Clause analysis comes to bear. In *NFIB* 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.*, 132 S.Ct. at 2591 (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 2586 (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.*, 132 S.Ct. at 2585 (Roberts., C.J. concurring); *see also id.* at 2588 (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 2590 (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; 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, and is certainly unconstitutional as applied against the defendant in this prosecution.

Further, the factual resume fails 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 2590. 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 2590 (emphasis added). As such, *NFIB* overrules 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 v. United States*, 431 U.S. 563, 577 (1963).

Here, Petitioner’s factual resume does not show that he was “currently engaged”

in the gun market at the time of his arrest. Nor does the factual resume address how recently Petitioner came to possess the gun. As to Petitioner, at least, the statute is unconstitutional.

D. *Bond v. United States* provides additional supporting authority by which to illustrate congressional overreach.

The Fifth Circuit rejected Petitioner's arguments because *NFIB* did not expressly support Petitioner's view of the Commerce Clause. But this Court's recent decision in *Bond v. United States*, ___ U.S. ___, 134 S.Ct. 2077 (2014), undercuts that lower court's assertion. *Bond* presented the question of whether federalism limits the authority of Congress to implement a treaty by criminalizing areas of traditional state concern, specifically the deployment of poisons. *See Bond v. United States*, 12-158, Petition for Certiorari (August 1, 2012), available at pp. i-ii, <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-158-2012-08-01-Bond-Cert-Pet-Final.pdf>. And, of course, this Court answered that question affirmatively.

In *Bond*, the Chief Justice wrote to explain that, as it had explained in *NFIB*, the Court recognizes the federalism principles that delimit Congress's regulatory authority under the Commerce Clause. *See Bond*, 134 S.Ct. at 2088-2090. For virtually all of the reasons set out there, its holding—that prohibitions on the use of poison represent an area of traditional state concern, outside the scope of federal authority—would occasion a finding that federal prohibitions on firearms possession are likewise unconstitutional. Firearms, like poison, are a dangerous instrumentality traditionally committed to the State police power. Both arguably affect commerce, but prohibitions firearm possession or the deployment of poison are not, either of them, prohibitions on commercial activity in the ordinary case.

Here, of course, Petitioner's factual recital admitted only that he was a felon and that he had possessed a firearm that had, at some antecedent time, traveled in

interstate commerce to arrive in Texas. At no time in the proceedings below, did the Respondent allege (or prove) an affect on interstate commerce, much less any alleged “substantial” effect. Furthermore, at the time he was arrested and the gun in question detected, Petitioner was not engaged in any economic activity whatsoever.

CONCLUSION

Because the Fifth Circuit did not, quite frankly, apply this Court’s precedents in a consistent manner to the federal firearms statute at issue—and because all the sister circuits are seemingly content to wait for this Court to apply its Commerce Clause jurisprudence to the federal firearms scheme—Petitioner asks that this Honorable Court begin that inquiry by granting a writ of *certiorari* in this case.

Respectfully submitted this 20th day of December, 2017.

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