No. _____

In the

Supreme Court of the United States

_____

Antonio Demond Baker,
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, when enacting the Unlawful Felon in Possession of a Firearm statute (18 U.S.C. § 922(g)), Congress exceeded its authority to act?

II. Whether the Unlawful Felon in Possession of a Firearm statute (18 U.S.C. § 924(g)(1)), violates the Second Amendment to the Constitution?

PARTIES TO THE PROCEEDING

Petitioner is Antonio Demond Baker, 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

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Antonio Demond Baker 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The unpublished opinion of the court of appeals is found at *United States v. Baker*, No. 22-10435, 2023 WL 142086 (5th Cir. Jan. 10, 2023). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The 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 STATUTES AND CONSTITUTIONAL PROVISION

Section 922(g)(1) of Title 18 reads in relevant part:

> (g) It shall be unlawful for any person—
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year
> ***
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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

Appellant Antonio Demand Baker pleaded guilty to a single count of violating 18 U.S.C. 922(g), by possessing a firearm after a felony conviction. *See* (ROA.69). He entered into a plea agreement that waived appeal, (ROA.189–96), save for certain exceptions not at issue here. *See* (ROA.194). The factual resume alleged that the firearm had moved from one state to another, but it alleged no more robust connection to interstate commerce. *See* (ROA.45–46). The court imposed a sentence of 96 months' imprisonment. (ROA.71).

B. The Appeal

On direct appeal, Mr. Baker argued for the first time that Title 18 U.S.C. § 922(g) is unconstitutional because it regulates conduct that falls outside the government's power to regulate commerce. Petitioner relied upon this Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2577 (2012). In its written opinion, dated January 10, 2023, the Court of Appeals recognized that this issue was foreclosed by its prior decisions, including *United States v. Alcantar*, 733 F.3d 143 (5th Cir. 2013). *See* [Appendix A, at *1–2].

REASONS FOR GRANTING THE PETITION

I. This Court should grant review to settle the reoccurring, important question of 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.

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*, 567 U.S. 519, 533 (2012). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See id.* 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, 618-19 (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 (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. 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, 118-19 (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*, 562 U.S. 700, 701 (2011)(Thomas and Scalia, JJ., dissenting from denial of *certiorari*), citing *United States v. Lopez*, 514 U.S. 549, 558–59 (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, have

noted the confusion at the circuit court level concerning the interaction between *Scarborough* and *Lopez*. *See Alderman*, 562 U.S. 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. Sebellius*: A Refinement of the Commerce Clause Analysis.

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (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.,* 567 U.S. at 558. 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. Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *See id.*

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 . . . ." *Id.* at 549; *see also id.* at 552–53 (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 (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.* (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.* at 557 (some emphasis added, some emphasis removed). And he finally said that Congress could not anticipate a future activity "in order to regulate individuals not currently engaged ***in commerce***." *Id.* (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.

In the present case, there is no allegation in the indictment, nor any evidence presented at trial that indicates Petitioner's possession of the gun was an *economic* activity; this should have been fatal to the conviction. However, Petitioner was convicted of this offense merely because the gun he possessed may have traveled in commerce sometime prior to his possession. Accordingly, under the law of the Fifth Circuit, the Petitioner did not even have to be engaged in commerce or affect commerce in order to be guilty of an offense under Section 922(g). 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.

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

The Fifth Circuit has rejected Petitioner's arguments because *NFIB* did not expressly support Petitioner's view of the Commerce Clause. But this Court's decision in *Bond v. United States*, 572 U.S. 844 (2014), undercuts that logic. *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*, 572 U.S. at 856–60. 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 of firearm possession or the deployment of poison are not, either of them, prohibitions on commercial activity in the ordinary case.

E. Plain Error

This constitutional challenge was not raised before the district court and can only be reviewed for plain error. *See United States v. Hinojosa*, 749 F.3d 407, 411 (5th Cir. 2014). However, if this Court were to determine that 18 U.S.C. § 922(g) were unconstitutional—a question implicated in the petition for certiorari in *Seekins v. United States* No. 22-6853) (docketed Feb. 23, 2023), which is currently before the Court–it would appear that such error would be treated as plain error by the Court of Appeals for the Fifth Circuit and the case would be remanded. See *United States v. Hornyak*, 805 F.3d 196, 199 (5th Cir. 2015).

II. This Court should grant review to settle the question of whether the Unlawful Felon in Possession of a Firearm statute (18 U.S.C. § 922(g)(1)) violates Mr. Baker's rights under the Second Amendment to the Constitution.

A. The Court's *Bruen* decision suggests that § 922(g)(1) is unconstitutional.

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the Court upended the two-step framework often used to review Second Amendment challenges.

> We hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a

> court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2126.

In *District of Columbia v. Heller*, the Court mused: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." 554 U.S. 570, 626 (2007).

Now, however, *Bruen* has dramatically changed the calculus for Second Amendment challenges, casting doubt on *Heller's* dicta about felony disarmament through its focus on tradition and history: "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–635) (emphasis in *Bruen*). Felons who have completed any sentences are among "the people" protected by the First, Second, and Fourth Amendments to the Constitution. Section 922(g)(1) entirely deprives them of the right to possess firearms for self-defense, in the home or elsewhere.

B. Plain Error

Again, this constitutional challenge was not raised before the district court and can only be reviewed for plain error. *See United States v. Hinojosa*, 749 F.3d 407, 411 (5th Cir. 2014). However, if this Court were to determine that 18 U.S.C. § 922(g)(1) were unconstitutional, it would appear that such error would be treated as plain error by the Court of Appeals for the Fifth Circuit and the case would be remanded. See *United States v. Hornyak*, 805 F.3d 196, 199 (5th Cir. 2015).

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 and vacate the judgment below. Alternatively, Petitioner requests that the Court hold this Petition pending an outcome in *Seekins v. United States* (No. 22-6853) (docketed Feb. 23, 2023).

Respectfully submitted this 10th day of April, 2023.

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