

No. _____

In the
Supreme Court of the United States

Freddy Castro,

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 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?
- II. Whether 18 U.S.C. § 922(g)(1) comports with the Second Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Freddy Castro, who was the Defendant-Petitioner 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 Freddy Castro seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Freddy Castro*, No. 24-10236, 2024 WL 5118481 (5th Cir. Dec. 16, 2024) (unpublished). 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 December 16, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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" U.S. Const. Art. I, sec. 8.

The Second Amendment to the U.S. Constitution 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." U.S. Const., amend. II.

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. Const. amend. VI.

STATUTORY PROVISIONS INVOLVED

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.

18 U.S.C. § 922(g)(1).

Title 18 U.S.C. § 924(a) provides, in pertinent part,

Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(a)(2) (2018) (amended 2022).

LIST OF PROCEEDINGS BELOW

1. *United States v. Freddy Castro*, 4:23-CR-278, United States District Court for the Northern District of Texas. Judgment and sentence entered on March 11, 2024. (Appendix B).
2. *United States v. Freddy Castro*, No. 23-10236, 2024 WL 5118481 (5th Cir. Dec. 16, 2024) (unpublished), Court of Appeals for the Fifth Circuit. Judgment affirmed on December 16, 2024. (Appendix A).

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Freddie Castro was named in a federal indictment charging him with Possession of a Firearm by a Convicted Felon, a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). (ROA.9). That indictment alleged:

On or about April 29, 2023, in the Fort Worth Division of the Northern District of Texas, the defendant, Freddy Castro, knowing he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed in and affecting interstate and foreign commerce a firearm, namely, a Sig Sauer, model P365 SAS, 9 millimeter caliber pistol, bearing serial number 66A551186.

In violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). (ROA.9). Castro pled guilty to this charge, (ROA.90), without the benefit of a plea agreement. (ROA.289).

Regarding the offense's connection to interstate commerce, Castro's factual resume acknowledged that, in order to sustain a conviction for the alleged offense, the government would have to prove, "[t]hat the possession of the firearm was in or affecting commerce, that is, that before the defendant possessed the firearm it had traveled at some time from one state to another." (ROA.63). Similarly, at his rearraignment, the government announced that the elements of the offense included a requirement "that the possession of the firearm was in or affecting commerce. That is, before the defendant possessed the firearm, it had traveled at one time from one state to another." (ROA.130). In step with these admonishments, Castro stipulated in his factual resume that he "possessed this firearm in and affecting interstate commerce, in that an interstate nexus expert with the Bureau of Alcohol, Tobacco,

Firearms, and Explosives determined that the firearm had been manufactured outside the state of Texas and therefore had to travel in interstate commerce prior to the offense.” (ROA.63).

Although Mr. Castro later raised several objections to his Presentence Report, (ROA.215-22), he did not challenge the constitutionality of the statute of his conviction.

The district court imposed a sentence of 162 months’ imprisonment, followed by a three-year term of supervised release. (ROA.91).

B. Appellate Proceedings

On appeal Petitioner argued, *inter alia*, that 18 U.S.C. § 922(g)(1) is unconstitutional on two grounds. He argued the statute exceeds Congress’s enumerated powers under the Commerce Clause. Also, he argued that the district court erred by failing to inform him that 18 U.S.C. § 922(g)(1) is unconstitutional, in light of *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). The court of appeals disagreed, concluding that these arguments were foreclosed by its precedent. [App. A, at *8-10].

REASONS FOR GRANTING THIS PETITION

- I. 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.**

“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 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* (ROA.62-63). 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. *See* (ROA.62-63). 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.

Petitioner did not challenge the constitutionality of the statute in district court. 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.

II. The courts of appeals have divided as to the constitutionality of 18 U.S.C. § 922(g)(1).

The Second Amendment guarantees “the right of the people to keep and bear arms.” Yet 18 U.S.C. § 922(g)(1) denies that right, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. In spite of this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges for many years. *See United States v. Moore*, 666 F.3d 313, 316-317 (4th Cir. 2012)(collecting cases). This changed, however, following *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, ___U.S.___, 142 S. Ct. 2111 (2022). *Bruen* held that where the text of Second Amendment plainly covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation’s historical tradition of gun regulation. *See Bruen*, 142 S. Ct. at 2129-2130. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id.* at 2127-2128.

After *Bruen*, the courts of appeals have split as to whether 18 U.S.C. § 922(g)(1) trenches on rights protected by the Second Amendment. The Third Circuit previously sustained the Second Amendment challenge of a man convicted of making a false statement to obtain food stamps, notwithstanding the felony status of that offense. *See Range v. Attorney General of the United States*, 69 F.4th 96 (3d Cir. 2023), *vacated sub nom. Garland v. Range*, No. 23-374, ___ U.S. ___, ___ S.Ct. ___, 2024 WL 3259661 (July 2, 2024). . By contrast, the Eighth Circuit has held that § 922(g)(1) is constitutional in all instances, at least against Second Amendment attack. *See United*

States v. Cunningham, 70 F.4th 502 (8th Cir. 2023), *vacated sub nom. Cunningham v. United States*, No. 23-6602, ___ U.S. ___, ___ S.Ct. ___, 2024 WL 3259687 (July 2, 2024) . And the Seventh Circuit thought that the issue could be decided only after robust development of the historical record, remanding to consider such historical materials as the parties could muster. *See Atkinson v. Garland*, 70 F.4th 1018, 1023-1024 (7th Cir. 2023).

This circuit split plainly merits certiorari. It involves a direct conflict between the federal courts of appeals as to the constitutionality of a criminal statute. The statute in question is a staple of federal prosecution.¹ It criminalizes primary conduct in civil society—it does not merely set forth standards or procedures for adjudicating a legal dispute. A felon living in a neighborhood beset by crime deserves to know whether he or she may defend himself against violence by possessing a handgun, or whether such self-defense is undertaken only on pain of 15 years imprisonment.

If the Court grants certiorari to decide the constitutionality of § 922(g)(1), it should hold the instant case pending the outcome, then grant certiorari, vacate the judgment below, and remand if the outcome recognizes the unconstitutionality of § 922(g)(1) in a substantial number of cases.

It is true that the Second Amendment challenge was not preserved in district court, and that any review will therefore eventually have to occur on the plain error

¹ See United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 20, Federal Offenders Sentenced under Each Chapter Two Guideline, p.2 (FY 2022) (showing that 9,367 people were sentenced under USSG § 2K2.1 in FY 2022, which governs prosecutions under 18 U.S.C. § 922(g)), available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table20.pdf>, last visited October 3, 2023.

standard. *See* Fed. R. Crim. P. 52(b). This means that to obtain relief Petitioner must show error, that is clear or obvious, that affects substantial rights, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). But as shown above, there is at least a reasonable probability that the Defendant could establish clear or obvious violation of his Second Amendment rights if this Court evaluates the constitutionality of 9§ 22(g)(1), which it should quickly do. And the obviousness of error may be shown any time before the expiration of direct appeal. *Henderson v. United States*, 568 U.S. 266 (2013). Finally, a finding that the Defendant has been sentenced to prison for exercising a basic constitutional right would affect the outcome and cast doubt on the fairness of the proceedings, to say the least.

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 17th day of March, 2025.

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