**No. _____**

In the

Supreme Court of the United States

_____

**Terry Glenn Evans**,

*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

_____

Christy Martin
*Assistant Federal Public Defender*

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
christy_martin@fd.org

## QUESTIONS PRESENTED

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

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

## PARTIES TO THE PROCEEDING

Petitioner is Terry Glenn Evans, 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

QUESTIONS PRESENTED ..... i

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

II. 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? ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF CONTENTS ..... iii

INDEX TO APPENDICES ..... iv

TABLE OF AUTHORITIES ..... v

PETITION FOR WRIT OF CERTIORARI ..... 1

OPINION BELOW ..... 1

JURISDICTION ..... 1

STATUTORY AND CONSTITUTIONAL PROVISIONS ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE PETITION ..... 4

I. This Court should decide the constitutionality of 18 U.S.C. §922(g)(1) under the Second Amendment. It should hold this Petition pending resolution of any merits cases presenting that issue. ..... 4

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. ..... 11

CONCLUSION ..... 18

## INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, *United States v. Evans*, 2026 WL 237734 (5th Cir. Jan. 29, 2026) (unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, *United States v. Evans,* No. 3:22-cr-00200-1 (entered July 22, 2025).

## TABLE OF AUTHORITIES

**Page(s)**

### Constitutional Provisions

U.S. Const. amend. II ..... 4, 5, 7, 9, 10, 11

U.S. Const. Art. I, § 8..... 11, 12, 13, 14, 15

### Federal Cases

*Bond v. United States*,
572 U.S. 844 (2014) ..... 11, 12, 16, 17

*Gibbons v. Ogden*,
22 U.S. 1, 9 Wheat. 1 (1824)..... 14

*Nat'l Fed'n of Indep. Bus. v. Sebelius*,
567 U.S. 519 (2012) ..... 11, 12, 13, 14, 15, 16

*New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,
597 U.S. 1 (2022) ..... 4, 5, 6, 9

*Range v. Att'y Gen. U.S.*,
124 F.4th 218 (3d Cir. 2024) ..... 10

*Scarborough v. United States*,
431 U.S. 563 (1963) ..... 11, 12, 13, 16

*Stutson v. United States*,
516 U.S. 163 (1996) ..... 11

*United States v. Betancourt*,
139 F.4th 480 (5th Cir. 2025)..... 8

*United States v. Darby*,
312 U.S. 100 (1941) ..... 12

*United States v. Diaz*,
116 F.4th 458 (5th Cir. 2024)..... 7, 8

*United States v. Duarte*,
No. 22-50048, 2025 WL 1352411 (9th Cir. May 9, 2025)..... 9

*United States v. Dubois*,
94 F.4th 1284 (11th Cir. 2024)..... 10

*United States v. Gay*,
98 F.4th 843 (7th Cir. 2024) ..... 9

*United States v. Hunt*,
123 F.4th 697 (4th Cir. 2024) ..... 10

*United States v. Jackson*,
110 F.4th 1120 (8th Cir. 2024) ..... 9

*United States v. Moore*,
111 F.4th 266 (3d Cir. 2024) ..... 10

*United States v. Moore*,
666 F.3d 313 (4th Cir. 2012) ..... 4

*United States v. Morrison*,
529 U.S. 598 (2000) ..... 12

*United States v. Rahimi*,
602 U.S. 680 (2024) ..... 4, 5, 6, 7, 11

*United States v. Schnur*,
132 F.4th 863 (5th Cir. 2025) ..... 8

*United States v. Williams*,
113 F.4th 637 (6th Cir. 2024) ..... 8, 9

*Vincent v. Bondi*,
127 F.4th 1263 (10th Cir. 2025) ..... 10

*Wickard v. Filburn*,
317 U.S. 111 (1942) ..... 14

**Federal Statutes**

18 U.S.C. § 229(a) ..... 16, 17

18 U.S.C. § 229F(8)(A) ..... 17

18 U.S.C. § 922(g)(1) .....4, 5, 7, 8, 9, 12, 15, 16, 17, 18

18 U.S.C. § 922(g)(8)(C)(i) ..... 6, 7

## PETITION FOR WRIT OF CERTIORARI

Petitioner Terry Glenn Evans seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINION BELOW

The opinion of the court of appeals is reported at *United States v. Evans*, No. 25-10854, 2026 WL 237734 (5th Cir. Jan. 29, 2026) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence entered in *United States v. Evans*, No. 3:22-cr-200 (July 22, 2025), is attached as Appendix B.

## JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on January 29, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS

### Question I

Section 922(g) of Title 18 reads:

> 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.

The Second Amendment to the United States 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.

### Question II

Article I, Section 8 of the United States Constitution provides:

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

### I. Facts and Proceedings in District Court

Petitioner Terry Glenn Evans pleaded guilty to an indictment charging a single count of violating 18 U.S.C. § 922(g)(1). At rearraignment, the magistrate advised Mr. Evans that § 922(g)(1) required the government to prove that he knowingly had a firearm, and that "the possession of the firearm was in or affecting interstate commerce." *See Evans*, No. 25-10854, Record on Appeal ("ROA") at 273. In the factual resume, he agreed that "before Mr. Evans possessed the firearm, it had traveled from one State or Country to another." ROA at 057. Mr. Evans further agreed that the firearm "was manufactured outside of the State of Texas and it travelled to Texas." ROA at 060.

Before sentencing, Mr. Evans moved to dismiss the indictment, arguing that (1) Congress exceeded the limits of the Commerce Clause when it criminalized the mere possession of a firearm, rendering 18 U.S.C. § 922(g)(1) unconstitutional; (2) that § 922(g) violated the Second Amendment in criminalizing the possession of a firearm for life by anyone previously convicted of a felony based on this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022); and (3) that § 922(g) violated the Second Amendment in criminalizing the possession of a firearm as applied to Mr. Evans. ROA at 080. The district court denied Mr. Evans's motion both as untimely and based on Fifth Circuit precedent. ROA at 134.

## II. Appellate Proceedings

On appeal, Mr. Evans challenged the denial of the Motion to Dismiss on both Second Amendment and Commerce Clause grounds. He acknowledged that the issues are foreclosed in the Fifth Circuit. The court of appeals affirmed. *See* Pet.App.A.

## REASONS FOR GRANTING THE PETITION

### I. This Court should decide the constitutionality of 18 U.S.C. §922(g)(1) under the Second Amendment. It should hold this Petition pending resolution of any merits cases presenting that issue.

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 convicted of a crime punishable by a year or more. Despite this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges to the statute 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*, 597 U.S. 1 (2022), and then *United States v. Rahimi*, 602 U.S. 680 (2024). But Circuit Courts of Appeals applying *Bruen* and *Rahimi* have adopted different approaches to testing 18 U.S.C. § 922(g)(1) against Second Amendment challenges. A few have interpreted the Second Amendment to allow Congress to disarm those considered dangerous based on historical analogues to laws disarming armed rebels and suspected traitors. The Fifth Circuit has interpreted the Second Amendment as constitutional when applied to a defendant whose disqualifying conviction would

have faced capital punishment or forfeiture of estate in or around the Founding Era. The Court needs to clarify the Second Amendment's relationship to § 922(g)(1).

**a. The legal framework of *Bruen* and *Rahimi***

In *Bruen,* the Court held that where the text of the Second Amendment covers regulated conduct, the government may defend that regulation only by showing it comports with the nation's historical tradition of gun regulation. 597 U.S. at 17. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *Id.* The opinion began with a comparison between the Second Amendment's text and the challenged law. The State of New York criminalized the unlicensed possession of a firearm in the home and on the street, and any New Yorker who wanted to obtain a license to carry a firearm outside the home needed to make a showing of "proper cause." *Id.* at 1 (quoting N.Y. Penal Law Ann. § 400.00(2)(f)). This Court began by finding a conflict between this law and the Second Amendment's plain text. The right to bear arms, this Court explained, "refers to the right to wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 32 (*quoting District of Columbia v. Heller*, 554 U.S. 570, 584 (2008)). Since the "definition of 'bear' naturally encompasses public carry," the Second Amendment "presumptively guarantee[d]" the petitioner's "right to 'bear' arms in public for self-defense." *Id.* at 32-33.

The Court then turned to history. The plain-text analysis established a conflict between New York's licensing regime and the Second Amendment, so the burden

shifted to the State of New York to establish the challenged law's consistency with historical firearm regulations. On this topic, the Court began with a word of caution: "[N]ot all history is created equal." *Id.* at 34. "Constitutional rights are," after all, "enshrined with the scope they were understood to have when the people adopted them." *Id.* at 34 (quoting Heller, 554 U.S. at 634-35). Given that reality, "historical evidence that long predates" the Second Amendment's enactment "may not illuminate the scope of the right[s]" at issue "if linguistic or legal conventions changed in the intervening years." *Id.* This Court similarly cautioned "against giving postenactment history more weight than it can rightly bear." *Id.* at 35. "[T]o the extent later history contradicts what the text says, the text controls." *Id.* at 36.

With those rules in mind, this Court surveyed "the Anglo-American history of public carry" and ultimately declared New York's proper-cause licensing regime unconstitutional. *Id.* at 70. Sure enough, various laws "limited the intent for which one could carry arms, the manner by which one carried arms, [and] the exceptional circumstances under which one could not carry arms," but the historical evidence established no tradition of "prohibit[ing] the public carry of commonly used firearms for personal defense." *Id.* New York's argument from history failed, and this Court held the challenged licensing regime to be an unconstitutional infringement on the right to bear arms. *Id.* at 70-71.

In *Rahimi*, this Court held that 18 U.S.C. §922(g)(8)(C)(i), which prohibits possession of a firearm based on the existence of a restraining order issued after a state court has found one poses "a credible threat to the physical safety" of another

person, comports with the Second Amendment. 602 U.S. at 690. The Court resolved Mr. Rahimi's claim by comparing "the tradition the surety and going armed laws represent" to § 922(g)(8)(C)(i). *Id*. at 699. All three, this Court explained, "restrict[] gun use to mitigate demonstrated threats of physical violence." *Id.* All three "involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* All three were also temporary. *Id*. at 698. The Court emphasized its limited holding, which was "only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id*. at 702.

That reasoning raises serious questions about the constitutionality of 18 U.S.C. §922(g)(1). Section (g)(1) imposes a permanent, not a temporary, firearm disability. And that disability can arise from all manner of criminal convictions that do not involve a judicial finding of future physical dangerousness.

**b. The circuit courts' inconsistent application to § 922(g)(1)**

There is no circuit-court consensus on how to judge § 922(g)(1)'s constitutionality. In *United States v. Diaz*, the Fifth Circuit recognized the possibility of as-applied relief and asked whether the defendant's disqualifying conviction (or a conviction for a crime like it) would have faced capital punishment or forfeiture of estate in or around the Founding Era. 116 F.4th 458, 468-69 (5th Cir. 2024). This test turns on the disqualifying convictions and places the burden of persuasion on the government. *Id.* at 467. The court held § 922(g)(1) to be constitutional as applied to a defendant with a disqualifying conviction for felony theft. *Id*. at 470-71 & n.4. The

Fifth Circuit premised this holding on the historical existence of harsh penalties for theft, which included capital punishment and forfeiture of estate. *Id.* at 469. "[I]f capital punishment was permissible to respond to theft," the Fifth Circuit reasoned, "then the lesser restriction of permanent disarmament that § 922(g)(1) imposes is also permissible." *Id.* The Fifth Circuit's as-applied holding resolved the defendant's facial challenge in the government's favor. *Id.* at 471-72.

More recently, the Fifth Circuit held that a defendant's felony aggravated battery conviction was a "crime of violence" indicating that "he poses a threat to public safety and the orderly functioning of society[,]" and therefore, disarming him "is consistent with this Nation's historical tradition of firearm regulation and punishment of people who have been convicted of violent offenses." *United States v. Schnur*, 132 F.4th 863, 870 (5th Cir. 2025) (citations omitted) (cleaned up). Then, in yet another case, the court looked to the facts of the defendant's felony aggravated assault convictions—in which he disregarded a red light, drove at 107 miles per hour, caused a major crash and injured two people—and determined that he could be disarmed under *Schnur* because he "poses a threat to public safety." *United States v. Betancourt*, 139 F.4th 480, 484 (5th Cir. 2025) (quoting *Schnur*, 132 F.4th at 870) (internal quotation marks omitted).

The Sixth Circuit upheld § 922(g)(1)'s as-applied constitutionality against a defendant with violent criminal convictions after analogizing § 922(g)(1)'s application to that defendant with an array of historical laws from both England and America disarming those considered simply "dangerous." *United States v. Williams*, 113 F.4th

637, 662-63 (6th Cir. 2024). The Sixth Circuit's as-applied test turns on a defendant's entire criminal record rather than the disqualifying offense and asks whether that record reveals the defendant to be "dangerous." *Williams*, 113 F.4th at 657. The Seventh Circuit has also embraced a similar approach of inquiring of *any reason* an individual could constitutionally be disarmed. *United States v. Gay*, 98 F.4th 843, 847 (7th Cir. 2024), *reh'g denied*, 2024 WL 3816648 (7th Cir. Aug. 14, 2024) (rejecting challenge from defendant previously convicted of 22 felonies and on supervision).

The Eighth Circuit rejected the availability of as-applied challenges and declared the statute facially constitutional based on historical laws disarming either those "unwilling to obey the law" or "those deemed more dangerous than a typical law-abiding citizen." *United States v. Jackson*, 110 F.4th 1120, 1125, 1126-29 (8th Cir. 2024). Those analogues, the Eighth Circuit concluded, would allow modern-day laws disarming "persons who deviated from legal norms [and] persons who presented an unacceptable risk of dangerousness," *Id.* at 1129, in other words, any felon. The Ninth Circuit has joined this camp. *United States v. Duarte*, No. 22-50048, 2025 WL 1352411, at *14 (9th Cir. May 9, 2025) ("§ 922(g)(1)'s permanent and categorical disarmament of felons is consistent with this Nation's historical tradition of firearm regulations").

The Fourth Circuit differs from each in having held that *Bruen* "did not disturb" prior Fourth Circuit "holdings about whether a given situation is outside the ambit of the individual right to keep and bear arms," thus the law does not regulate protected Second Amendment activity because "people who have been convicted of

felonies are outside the group of law-abiding responsible citizens" that the Second Amendment protects. *United States v. Hunt*, 123 F.4th 697, 704 (4th Cir. 2024) (internal quotations omitted). The Tenth and Eleventh Circuits seems to agree. *See Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025) (relying on pre-*Rahimi* precedent that resolved the matter citing *Heller* and observing that the prohibition on felon firearm possession is "presumptively lawful"); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, No. 24-5744, 2025 WL 76413 (U.S. Jan. 13, 2025) (holding that *Bruen* did not abrogate circuit precedent foreclosing such challenges).

The Third Circuit resolved an appeal from a defendant on supervised release without considering the defendant's record at all. *United States v. Moore*, 111 F.4th 266, 272-73 (3d Cir. 2024). The court instead declared the existence of Founding Era laws authorizing temporary forfeiture for those convicted of some crimes as analogous to a modern-day defendant's disarmament while serving a term of supervised release. *Id.* at 271-72. Thereafter, the Third Circuit upheld an as applied challenge by a petitioner with a decades-old food stamp fraud conviction, holding that the government could not show a historical tradition of depriving people such as petitioner of his Second Amendment right to possess a firearm. *Range v. Att'y Gen. U.S.*, 124 F.4th 218, 232 (3d Cir. 2024).

So, as it stands, the circuit courts of appeals have staked out different approaches to this important question, but each approach is unconvincing. The Fifth Circuit's as-applied test, initially categorical but evolving toward an ill-defined

violence test, will create impossible line-drawing exercises for each defendant. The analysis from the Sixth, Eighth, Ninth, and Tenth Circuits, in turn, are varied and too general, and depend on "vague" principles implicitly rejected by this Court in *Rahimi*. *See* 602 U.S. at 701. The Fourth Circuit disagrees as to whether felons are among those protected by Second Amendment at all.

This Court should grant certiorari to decide this momentous issue, and, if it does so in another case, should hold this Petition pending the outcome. *See Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.").

## 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.

Courts have held for years that the mere travel across state lines is enough to find that later possession of a firearm affected interstate commerce. These cases follow from this Court's jurisprudence in *Scarborough v. United States*, 431 U.S. 563, 577 (1963), finding federal commerce authority over items that at any point moved across state lines. These cases stand in tension with more recent precedents on the scope of Commerce Clause authority, that is *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*") and *Bond v. United States*, 572 U.S. 844 (2014).

Because *Scarborough* cannot be reconciled with these more recent precedents this Court should grant review to resolve that tension. "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.*, 567 U.S. at 533 (2012) ("*NFIB*"). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *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, 618-619 (2000). Every exercise of Congressional power must be justified by reference to a particular grant of authority. *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*, 572 U.S. at 863.

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. Despite 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*, that a predecessor statute to 18 U.S.C. § 922(g) reached every case in

which a felon had 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 to insure the constitutionality of the statute. 431 U.S. at 577.

It is hard to square *Scarborough*, and the expansive idea of the commerce power on which it relies, with more recent holdings of the Court in this area. In *Nat'l Fed'n of Indep. Bus.*, five members of this Court found that the individual mandate part of the Affordable Care Act could not be justified by reference to the Commerce Clause. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 557-558 (Roberts., C.J. concurring). Although the Court recognized that failing to buy 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. *Id.* at 550 (Roberts., C.J. concurring). Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *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 preexisting commercial activity. Possession of firearms, like the refusal to buy health insurance, may "substantially affect commerce." But this possession is not, without more, a commercial act.

*NFIB* does not explicitly repudiate the "substantial effects" test. 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)). So it is perhaps possible to read *NFIB* narrowly: as an isolated prohibition on affirmatively compelling people to engage in commerce. But it is hard to understand how this reading 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 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 allowed Congress to enact only 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 much of the Chief Justice's language in *NFIB* adheres to 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 repeated 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 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* supports the proposition that enactments under the Commerce Clause must regulate commercial or economic activity, not merely activity that affects commerce.

Here, the factual basis for the plea did not state that Petitioner's possession of the gun was an economic activity. 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: the active participation in a market. But 18 U.S.C. § 922(g)(1) criminalizes all possession, without reference to economic activity. It sweeps too broadly.

The factual basis also did not 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 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). Thus, 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* also stands in tension with *Bond*, so § 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. *Id.* The Court reversed her conviction, holding that any construction of the statute that can reach such conduct would compromise the chief role of states and localities in the suppression of crime. *Id.* at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *Id.* at 859-862.

Section 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). It also criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. § 229(a). This Court still applied a more limited construction of the statute, reasoning that statutes should not be read to sweep 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 it moved across state lines recently. But to do so would intrude deeply on the traditional state responsibility for crime control. This 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. This 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.

## CONCLUSION

Petitioner asks this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, or if it does so in another case to decide the above issues, should hold this Petition pending the outcome.

Respectfully submitted this 28th day of April, 2026.

**JASON D. HAWKINS**
**Federal Public Defender**
**Northern District of Texas**

*/s/ Christy Martin*
Christy Martin
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: christy_martin@fd.org

*Attorney for Petitioner*