No. _____

In the Supreme Court of the United States

JEROSWASKI WAYNE COLLETTE, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAUREEN SCOTT FRANCO
Federal Public Defender

BRADFORD W. BOGAN
Assistant Federal Public Defender
Western District of Texas
300 Convent Street, Suite 2300
San Antonio, Texas 78205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Title 18 U.S.C. § 922(g)(1) categorially bars all convicted felons (meaning those convicted of "a crime punishable by imprisonment for a term exceeding one year") from possessing firearms "in or affecting commerce" or which have been "shipped or transported in interstate or foreign commerce." Collette's conviction under this statute presents two issues:

1) Does § 922(g)(1) violate the Second Amendment, facially or as applied to Collette?

2) Does § 922(g)(1) exceed Congress's powers under the Commerce Clause?

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Petitioner Jeroswaski Wayne Collette asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 10, 2024.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

- *United States v. Collette*, No. 7:22-CR-141-DC-1 (W.D. Tex.) (criminal judgment entered Dec. 5, 2022)
- *United States v. Collette*, No. 22-51062, 2024 WL 4457462 (5th Cir. Oct. 10, 2024) (per curiam) (unpublished)

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OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Collette*, No. 22-51062, 2024 WL 4457462 (5th Cir. Oct. 10, 2024) (per curiam), is reproduced at Pet. App. 1a–6a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on October 10, 2024. Collette filed a timely petition for panel rehearing on October 24, 2024. That rehearing petition was denied on November 5, 2024. This petition is filed within 90 days after denial of rehearing. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Second Amendment to the U.S. Constitution provides that "[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.

Article I § 8 of the U.S. Constitution provides that "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, § 8, cl. 1, 3.

FEDERAL STATUTE INVOLVED

Title 18 U.S.C. § 922(g)(1) provides:

> 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

Collette raises two challenges to his conviction of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). First, he argues that the district court erred by denying his motion to dismiss the indictment because the statute is unconstitutional under the Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), both facially and as applied to him. Second, Collette argues that the statute exceeds Congress' power under the Commerce Clause.

1. Collette is a convicted felon. He has prior state felony convictions for possession of controlled substances (marijuana and cocaine), theft, and being a felon in possession of a firearm. Here, Collette was charged in a one-count indictment with violating § 922(g)(1) by possessing two firearms—a Glock 19 9mm pistol and

a Smith & Wesson .40 caliber pistol—that had been "shipped and transported in interstate commerce[.]"[1]

This charge stemmed from Collette's arrest following the repossession of his car in Midland, Texas. When Collette went to the towing yard to retrieve his belongings from the car, he argued with the office manager at the towing yard about their procedures. One of those belongings was a holstered Glock. As Collette was leaving the towing yard, he pointed the gun at the manager while waiving it around—behavior that prompted the manager to call the police.

Police officers arrested Collette when he returned to the business that evening. He admitted that he kept the Glock in his car and that he also had a Smith & Weston pistol at home. Collette said that he took the Glock home after retrieving it from his car earlier that day. Collette showed officers pictures of the two pistols on his phone.

Officers got a search warrant for Collette's apartment to seize the firearms. When they arrived, they could smell marijuana. Collette's girlfriend was there at the time, but they let her leave. Officers found a gun holster and a pound of marijuana in the apartment, but no guns.

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[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

Officers contacted Collette's girlfriend, and she told them that Collette had called her earlier and told her to move the guns. She had called a friend of hers to come get them. Officers retrieved both pistols—the Glock and the Smith & Wesson—from the friend. They believed that Collette had used his Apple watch to tell his girlfriend to move the guns.

2. Collette pleaded not guilty and proceeded to trial. The morning of trial, Collette filed a motion to dismiss the indictment, arguing that "§ 922(g)(1) is unconstitutional under the Second Amendment, both facially and as applied to [him], under the new standard announced by the Supreme Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022)." He argued that the charged conduct—"possession of a firearm commonly used for self-defense"—is protected by the plain text of the Second Amendment. The statute is facially unconstitutional, Collette argued, because the Government cannot satisfy its burden, under *Bruen*, of establishing that § 922(g)(1) is consistent the Nation's history of firearm regulation given the lack of similar founding-era laws. And he argued that the § 922(g)(1) is unconstitutional as applied to him because he has never been convicted of any violent crimes.

Before the trial began, the district court announced that it was carrying the motion, which it said was "a good motion to file[,]" with the trial "to give the Government time to respond" to it. At trial, the Government presented testimony and audio exhibits from the office manager and the police officers about the events that day at the towing yard, Collette's arrest and interrogations, and the recovery of the pistols. Also, an ATF agent testified that the Glock and Smith & Wesson had been manufactured in Austria and Connecticut, respectively, and had traveled interstate to make it to Texas.

The jury found Collette guilty as charged in the indictment.

3. The Government never responded to Collette's motion to dismiss. About two-and-a-half weeks after the trial, the district court denied the motion in a memorandum opinion. The court agreed that *Bruen* had abrogated the two-step means-end scrutiny that courts had used to analyze challenges to firearms laws before that decision. Applying the *Bruen* framework, the court concluded that Collette's conduct—possession of a firearm—was covered by the plain text of the Second Amendment. Thus, the court recognized that, under *Bruen*, "§ 922(g)(1)'s constitutionality hinges on whether the Government can show that prohibiting felons from

possessing a firearm is consistent with the Nation's historical tradition of firearm regulation."

On the historical question, the district court "note[d] that the Government did not respond to" Collette's motion to dismiss. Nevertheless, the court "conduct[ed] its own historical inquiry[,]" "stress[ing] the importance of constitutional questions like the one here."

The court began by acknowledging that the law "prohibiting felons from possessing firearms at the federal level is less than 65 years old." As for founding-era laws, the court recognized that "history lacks direct examples about felons specifically[.]" (discussing, *inter alia*, then-Judge Barrett's dissent in *Kanter v. Barr*, 919 F.3d 437, 451–69 (7th Cir. 2019)).

But in the district court's view, "just because there are no straightforward examples does not mean the Court's historical inquiry stops there." The court went on to conclude that "[t]here is a historical tradition of excluding felons from 'the people'" protected by the text of the Second Amendment. In the court's view, "the people" is a term that "means only those with political rights." The court then pointed to laws that prohibit felons from voting and to case law limiting the First Amendment rights of speech and assembly. Based on these "historical analogies[,]" the court concluded

that "this Nation has a historical tradition of excluding felons and those who abuse their rights to commit violence from the rights and powers of 'the people.'" Reasoning that "the right under the Second Amendment should be no different[,]" the court concluded that "§ 922(g)(1) is constitutional on its face and as applied to" Collette.

4. The district court sentenced Collette to 120 months' imprisonment and three years' supervised release. Collette appealed.[2]

5. On appeal, Collette renewed his arguments that § 922(g)(1) violates the Second Amendment under the test set forth in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), and that the statute exceeds Congress's power under the Commerce Clause (although he acknowledged that this latter argument was foreclosed by existing precedent).

While Collette's appeal was pending, another panel of the Fifth Circuit decided *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024). *Diaz* rejected the two Second Amendment arguments—as-applied and facial—Collette raised in his case. First, *Diaz* rejected an as-applied challenge to § 922(g)(1). 116 F.4th at 467–71. *Diaz* reasoned that the prior felony at issue—vehicle theft—was suffi-

[2] The court of appeals exercised jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

ciently analogous to horse theft, an offense that could result in capital punishment or estate forfeiture in the founding era. *Id.* at 467–68. Those laws "establish that our country has a historical tradition of severely punishing people like Diaz who have been convicted of theft." *Id.* at 468–69. And disarming such people "fits within this tradition of serious and permanent punishment." *Id.* at 470. Second, *Diaz* held that, because § 922(g)(1) was constitutional as applied in that case, it was not facially unconstitutional. *Id.* at 471–72.

In Collette's case, the court of appeals held that *Diaz* foreclosed his Second Amendment challenges. Pet. App. 1a. First, the court held that Collette's facial challenge was foreclosed by *Diaz*. Pet. App. at 5a. Second, the court held that Collette had forfeited his as-applied challenge by not sufficiently addressing the issue in his briefs. *Id*. However, the court went on to address Collette's as-applied challenge anyway, noting that it would reject the challenge even if the panel were to consider it. *Id*. Collette, like Diaz, has a prior conviction for felony theft.[3] Pet. App. at 6. Finding no daylight between *Diaz* and Collete on that point, the court concluded

[3] The record contains no details on the theft. The PSR shows only that, in 2011, Collette pleaded guilty to "theft" in Louisiana state court and was sentenced to "14 months' confinement." According to the probation officer who prepared the PSR, "[i]nvestigative records and court records were unavailable."

that "*Diaz* therefore controls and forecloses Collette's as-applied challenge even if it was properly raised on appeal." *Id.*

REASONS FOR GRANTING THE WRIT

I. The categorical, lifetime ban on possessing a firearm, under 18 U.S.C. § 922(g)(1), violates the Second Amendment, facially or as applied to a person with a prior drug felony conviction.

The Second Amendment guarantees "the right of the people to keep and bear arms." Yet § 922(g)(1) denies that right, on pain of imprisonment, to anyone previously 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 for decades. *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). *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. 597 U.S. at 24. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *Id.* at 19–24.

After *Bruen*, the courts of appeals have grappled with whether § 922(g)(1) infringes on rights protected by the Second Amendment. Before this Court decided *United States v. Rahimi*, 602 U.S. 680 (2024), the Ninth Circuit held that Section 922(g)(1) violated the Second Amendment as applied to a person who has previous convictions for possession of drugs for sale, evading a police officer, and possession of a firearm as a felon. *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024), *reh'g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. 2024). Similarly, both pre- and post-*Rahimi*, the Third Circuit sustained the Second Amendment challenge of a man previously convicted of making a false statement to obtain food stamps, notwithstanding the felony status of that offense. *Range v. Attorney General of the United States*, 124 F.4th 218 (3d Cir. 2024) (en banc).

By contrast, the Eighth Circuit has held post-*Bruen* that § 922(g)(1) is constitutional in all instances, at least against Second Amendment attack. *United States v. Cunningham*, 114 F.4th 671, 673 (8th Cir. 2024), *reh'g denied*, No. 22-1080, 2024 WL 4031748 (8th Cir. Aug. 30, 2024); *see also United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024) (§ 922(g)(1) constitutional as applied to defendant with prior drug trafficking convictions), *reh'g denied*, 121 F.4th 656 (8th Cir. Nov. 5, 2024). The Eleventh Circuit

likewise has held that "felons are categorically 'disqualified' from exercising their Second Amendment rights." *United States v. Dubois*, 94 F.4th 1285 (11th Cir. 2024), *petition for cert. granted, judg't vacated, remanded* (U.S. Jan. 13, 2025) (No. 24-5744). And the Seventh Circuit has determined that the issue can be decided only after robust development of the historical record, remanding to consider such historical materials as the parties could muster. *Atkinson v. Garland*, 70 F.4th 1018, 1023–1024 (7th Cir. 2023).

The Court's recent decision in *Rahimi*, which applied the *Bruen* framework for analyzing Second Amendment challenges to a criminal law for the first time, did not resolve the conflict over the constitutionality of § 922(g)(1). *Rahimi* held that 18 U.S.C. § 922(g)(8)(C)(i)—which prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that the person represents a credible threat to the physical safety of others—is constitutional. *Rahimi*, 602 U.S. at 690.

But *Rahimi* is a narrow decision that embraces *Bruen*'s focus on text, history, and tradition. *First*, the Court rejected the Government's theory that the Second Amendment allows Congress to

disarm anyone who is not "responsible" and "law-abiding."[4] *Id.* at 701; *see id.* at 772–73 (Thomas, J., dissenting) ("The Government … argues that the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding.' Not a single Member of the Court adopts the Government's theory."). Not only did the Court state that "responsible" is a "vague term" and it is "unclear what such a rule would entail," *id.* at 701, but it further clarified that the Government's proposed rule did not "derive from [its] case law." *Id.* It noted that *Heller*[5] and *Bruen* used the term "responsible" to "describe the class of ordinary citizens who undoubtedly enjoy the right," but neither decision adopted that formulation to define the limits of the Second Amendment. *Id.*; *see also id.* at 773 (Thomas, J., dissenting) ("The Government's claim that the Court already held the Second Amendment protects only 'law-abiding, responsible citizens' is specious at best.").

Second, *Bruen* reiterated that the Government must "demonstrate that the regulation is consistent with this Nation's historical

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[4] At oral argument, the Government said that it was not invoking the "law-abiding" prong of its proposed rule for individuals subject to § 922(g)(8). *See* Tr. of Oral Arg. 8–9, *United States v. Rahimi*, No. 22-915 (U.S. Nov. 7, 2023). So the majority opinion discussed only the "responsible" prong. *Rahimi*,602 U.S. at 701–02. In his dissenting opinion, Justice Thomas—who agreed with the majority in rejecting the Government's theory—provided a more robust analysis discussing both prongs. *Id.* at 772–77 (Thomas, J., dissenting).

[5] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

tradition of firearm regulation." *Bruen*, 597 U.S. at 17. This requires a court to "ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances." *Rahimi*, 602 U.S. at 692 (cleaned up). "Why and how the regulation burdens the right are central to this inquiry." *Id.*

Rahimi held that the Government had justified § 922(g)(8)(C)(i) by pointing to a tradition of "temporarily disarm[ing]" an "individual found by a court to pose a credible threat to the physical safety of another." *Id.* at 702. In particular, *Rahimi* relied on surety laws and "going armed" laws to establish a tradition similar to § 922(g)(8)(C)(i). *Id.* at 694–700. *Rahimi* thus endorses an incremental approach to Second Amendment challenges driven by a detailed historical analysis applied to a specific law, not sweeping generalities.

But *Rahimi*'s historical analysis otherwise provides little guidance here because § 922(g)(8)(C)(i) and § 922(g)(1) are very different. Section 922(g)(8)(C)(i) restricts gun possession if a restraining order "includes a finding that [a] person represents a credible threat to the physical safety of [an] intimate partner or child." In

other words, the statute "restricts gun use to mitigate demonstrated threats of physical violence" and applies only once a court has made an individualized finding that such a threat exists. *Rahimi*, 602 U.S. at 698. Section § 922(g)(1), by contrast, is a categorical ban that prohibits everyone convicted of a crime punishable by more than one year in prison from possessing a gun—without any individualized finding and regardless of whether they misuse firearms to threaten others.

Rahimi also emphasized that § 922(g)(8)(C)(i)'s restriction is "temporary." *Id.* at 699. That is, the statute "only prohibits firearm possession so long as the defendant 'is' subject to a restraining order." *Id.* (cleaned up). Section 922(g)(1), however, imposes a "permanent, life-long prohibition on possessing firearms." *Id.* at 766 (Thomas, J., dissenting); *see Duarte*, 101 F.4th at 685 (discussing "§ 922(g)(1)'s no-exception, lifetime ban").

The stark differences between § 922(g)(1) and § 922(g)(8)(C)(i) confirm that the Court's decision upholding the latter does not resolve the constitutionality of the former, and the issue plainly merits certiorari. It involves a direct conflict between the federal courts of appeals as to the constitutionality of a criminal statute. Section

922(g)(1) is a staple of federal prosecution.[6] It criminalizes 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 may defend himself against violence by possessing a handgun, or whether such self-defense is undertaken only on pain of 15 years imprisonment.

Although Collette has a previous felony conviction, this Court may well find that the Second Amendment supports a broad or facial challenge to § 922(g)(1). The dissenters in *Range* expressed serious doubts as to whether the logic of that decision could be contained to those convicted of relatively innocuous felonies. *See, e.g.*, *Range*, 124 F.4th at 394–95 (Shwartz, J., dissenting). Likewise, the Seventh Circuit has expressed doubt as to whether the Second Amendment distinguishes between violent and non-violent felonies. *Atkinson*, 70 F.4th at 1023. And the Fifth Circuit has drawn a different line, focusing on whether the predicate felony would have subjected the defendant to the severe penalties of capital punishment and estate forfeiture during the founding era. *United*

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[6] *See* U.S. Sentencing Comm'n, *QuickFacts: 18 U.S.C. § 922(g)(Firearms Offenses* (showing that 8,688 cases in FY 2022 involved § 922(g) convictions (13.5% of all cases), with the vast majority of those being under § 922(g)(1) for a prior felony conviction) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf (last visited Feb. 2, 2025).

States v. Diaz, 116 F.4th 458, 467–71 (5th Cir. 2024) (§ 922(g)(1) constitutional as applied to defendant with auto theft conviction because some horse thieves were executed during the founding era). Meanwhile the Sixth Circuit has taken another approach, requiring that individuals have "a reasonable opportunity to prove" they do not fit the "class-wide generalization" of dangerousness. *United States v. Williams*, 113 F.4th 637, 662 (6th Cir. 2024) (§ 922(g)(1) constitutional as applied to defendant with aggravated robbery convictions).

II. This Court should grant certiorari say whether § 922(g)(1) is a valid exercise of Congress' Commerce Clause power.

"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) ("NFIB"). 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, 618–619 (2000). Every exercise of Congressional power must be justified by reference to a particular grant of authority. *See NFIB*, 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." U.S. Const. art. I, § 8, cl. 3. But this power "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 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)(1) reached every case in which a felon possessed firearms that had once moved in interstate commerce. *Scarborough* dismissed 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 *National Federation of Independent Business v. Sebelius*, 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* 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...." *NFIB*, 567 U.S. at 549 (Roberts., C.J. concurring) (quoting *Darby*, 312 U.S. at 118–119); *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 the Clause 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 (1824).

And indeed, much of the Chief Justice's language in *NFIB* is consistent with this view. His concurring opinion rejected 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...." *NFIB*, 567 U.S. at 556 (Roberts., C.J. concurring). Significantly, the Chief Justice 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). 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). 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 (Roberts., C.J. concurring). 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). 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 basis for Collette's conviction does not establish that his possession of the gun was an economic activity. His indictment alleged that he "possesse[ed]" two firearms that "ha[d] been shipped and transported in interstate commerce[.]" The sole evidence offered at trial to support the commerce element was testimony from an ATF agent that the firearms had been manufactured in Austria and Connecticut and had traveled interstate commerce to get to Texas. The Government offered no proof that Collette had traveled in interstate commerce to bring the firearms to Texas, nor even proof that Collette had purchased the firearms from any vendor participating in interstate commerce. 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 § 922(g)(1) criminalizes *all* possession, without reference to economic activity. It therefore sweeps too broadly.

Further, the record here fails to show that Collette 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. *NFIB*, 567 U.S. at 557 (Roberts., C.J. concurring). 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 (Roberts., C.J. concurring). As such, *NFIB* brings into serious question the longstanding 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*, which shows that § 922(g)(1) 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 criminalizes 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 car door, mailbox, and doorknob of a romantic

rival. *See id*. at 852. 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. The Court instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id*. at 859–862.

Notably, § 229 defines the critical term "chemical weapon" broadly as including "a toxic chemical," defined 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, the statute criminalizes 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 [(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 [(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)(1) 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 allow Congress to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce or to the interstate movement of commodities. The Court should grant certiorari to say otherwise.

CONCLUSION

FOR THESE REASONS, Collette asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
300 Convent Street, Suite 2300
San Antonio, Texas 78205
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Bradford W. Bogan
BRADFORD W. BOGAN
Assistant Federal Public Defender

Counsel of Record for Petitioner

DATED: February 4, 2025