No. _____

# In The Supreme Court Of The United States

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Edell Jackson,

Petitioner,

vs.

United States of America,

Respondent.

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On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

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**APPENDIX TO**
**PETITION FOR WRIT OF CERTIORARI**

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# United States Court of Appeals

For the Eighth Circuit

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No. 22-2870

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United States of America,

*Plaintiff - Appellee*, v.

Edell Jackson,

*Defendant - Appellant*.

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Appeal from United States District Court for the District of Minnesota

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Submitted: May 11, 2023
Filed: June 2, 2023

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Before SMITH, Chief Judge, COLLOTON and BENTON, Circuit Judges.

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COLLOTON, Circuit Judge.

Edell Jackson appeals his conviction for unlawful possession of a firearm as a previously convicted felon. He argues that the district court[1] erred when it instructed the jury on the elements of the offense, and

[1] The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

when it responded to two questions from the jury during deliberations. He also contends that he had a constitutional right under the Second Amendment to possess a firearm as a convicted felon. We affirm the judgment.

I.

In January 2021, police officers responded to a report of "shots fired" in Brooklyn Center, Minnesota. The officers were informed that a suspect was located in a parking lot in nearby Minneapolis. When the officers arrived at the parking lot, they observed Jackson sitting in a parked vehicle, next to a snowbank. Two law enforcement vehicles drove forward and pinned Jackson's vehicle against the snowbank. Jackson fled his vehicle, shed his jacket while he ran from the officers, but eventually was apprehended. The officers later found a Bersa Thunder nine millimeter handgun in Jackson's jacket pocket.

Before this arrest, Jackson had sustained two convictions in Minnesota for sale of a controlled substance in the second degree in 2011 and 2012, respectively. *See* Minn. Stat. § 152.022.1(1). Jackson was sentenced to 78 months' imprisonment for the first conviction, and 144 months for the second, and was released from state prison in 2017. After

the incident in Minneapolis where a handgun was found in Jackson's pocket, a federal grand jury charged him with unlawful possession of a firearm as a previously convicted felon. *See* 18 U.S.C. § 922(g)(1).

The case proceeded to trial. Jackson testified that after he was released from state prison, he was on parole for three years until he was discharged in August 2020. He testified that when he was discharged, his parole officer brought him discharge papers to sign. According to Jackson, the parole officer told him that his rights had been restored, and that he was able to register to vote and "do everything else as a productive citizen of society." Jackson also testified that his parole officer did not give him specific instructions on whether he could possess firearms. Jackson claimed that he believed based on these communications that his right to possess firearms had been restored.

The government introduced a copy of Jackson's discharge papers, entitled "Notice of Sentence Expiration and Restoration of Civil Rights." The document provides that "your civil rights have been restored," which "includes a restoration of your right to vote in Minnesota." But the document also states that "if you have been convicted of a Crime of Violence under Minn. Statute § 624.712 subd. 5, you cannot ship,

transport, possess or receive a firearm for the remainder of your lifetime."

The jury returned a guilty verdict. Before sentencing, Jackson moved to dismiss the indictment based on the Second Amendment in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). He argued that the felon- in-possession statute, § 922(g)(1), is unconstitutional on its face and as applied to him. The district court denied the motion and sentenced Jackson to a term of 108 months' imprisonment.

II.

Jackson first argues that the district court erred when it instructed the jury on the elements required for a conviction under 18 U.S.C. § 922(g)(1). We review the district court's formulation of the jury instructions for abuse of discretion, and its interpretation of the law *de novo*. *United States v. Haynie*, 8 F.4th 801, 804 (8th Cir. 2021).

A conviction under § 922(g)(1) requires the government to prove that (1) the defendant sustained a previous conviction for a crime punishable by a term of imprisonment exceeding one year, (2) he knowingly possessed a firearm, and (3) he knew that he belonged to a category of persons prohibited from possessing a firearm, and (4) the firearm was in or

affecting interstate commerce. *See Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019); *United States v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020).

The district court instructed the jury that the government must prove the following elements:

> One, the defendant has previously been convicted of a crime punishable by imprisonment for more than one year;
>
> Two, after that, the defendant knowingly possessed a firearm, that is a Bersa model Thunder 9mm semi-automatic pistol bearing serial number E17838;
>
> Three, at the time the defendant knowingly possessed the firearm, he knew he had been convicted of a crime punishable by imprisonment for more than one year; and
>
> Four, the firearm was transported across a state line at some time during or before the defendant's possession of it.

The court instructed that under Minnesota law, the sale of a controlled substance in the second degree is a crime punishable by imprisonment for more than one year. *See* Minn. Stat. § 152.022.1(1), (3). The court further explained that when an offender is convicted of this drug offense, the State of Minnesota "does not permit the full restoration of the defendant's civil rights insofar as he was not permitted to ship, transport, possess, or receive a firearm for the remainder of his lifetime." *See* Minn. Stat. §§ 609.165(1), 624.712(5). The court also instructed the jury as follows:

> For you to find that element number three is proved beyond a reasonable doubt, you must unanimously agree that the defendant knew he had been convicted of a crime punishable by imprisonment for more than one year at the time he knowingly possessed the firearm described in the Indictment. *In making that determination, you may consider whether the defendant reasonably believed that his civil rights had been restored, including his right to possess a firearm.*

R. Doc. 65, at 15 (emphasis added).

Jackson contends that the court abused its discretion when it instructed the jury on the first element of the offense—that the defendant had been convicted of a crime punishable by more than a year of imprisonment. He relies on the fact that a prior conviction does not qualify under § 922(g)(1) if the conviction "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored. . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.* § 921(a)(20).

Jackson contends that the court should have provided the jury with the statutory language from § 921(a)(20), and allowed the jury to decide whether his right to possess a firearm had been restored. Jackson's argument is foreclosed by *United States v. Stanko*, 491 F.3d 408 (8th Cir. 2007), which held that whether a predicate conviction satisfies the

criteria under § 921(a)(20) is "a question of law for the court rather than one of fact for the jury." *Id.* at 412; *see United States v. Boaz*, 558 F.3d 800, 805 (8th Cir. 2009). Therefore, the district court did not abuse its discretion when it instructed the jury on the first element of the offense.

Jackson next challenges the district court's instruction on the third element of the offense regarding knowledge. Although the instructions permitted the jury to consider whether Jackson reasonably believed his rights were restored, he maintains that the language should have required the jury to do so by using the phrase "must consider." But Jackson himself proposed to instruct the jury that it "may consider" whether he reasonably believed his rights had been restored. The court incorporated his suggestion into the final instructions. Because Jackson requested the precise language about which he now complains, any error was invited, and his objection is waived. *United States v. Defoggi*, 839 F.3d 701, 713 (8th Cir. 2016).

Even if Jackson's objection were not waived, the claim of error was forfeited, and we would review at most for plain error. *United States v. Reed*, 636 F.3d 966, 970 (8th Cir. 2011). Jackson cannot meet this standard, because the instruction on the third element was not obviously

wrong. *See United States v. Olano*, 507 U.S. 725, 734 (1993). *Rehaif* held that in a prosecution under § 922(g), "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200. Jackson was barred because he had been convicted of a crime punishable by imprisonment for more than one year, *see* 18 U.S.C. §§ 922(g)(1), 921(a)(20), and his right to possess had not been restored. Minn. Stat. §§ 609.165(1), 624.712(5).

Consistent with *Rehaif*, the jury instructions required the government to prove that Jackson "knew he had been convicted of a crime punishable by imprisonment for more than one year." Jackson contends that the instruction was flawed because it did not require the jury to find that he knew he was *still* a prohibited person at the time of the charged offense, despite a possible restoration of rights. But the instructions further provided that in making the determination about knowledge, the jury may consider whether Jackson reasonably believed that his right to possess a firearm had been restored. The instruction thus allowed Jackson to argue, and a jury to find, that he lacked the requisite knowledge due to a belief that his rights had been restored. Jackson cites

no authority that the instruction as formulated was plainly erroneous.

Jackson also argues that the district court erred when it responded to two questions from the jury during its deliberations. We review a district court's decision on whether to supplement jury instructions for abuse of discretion. *United States v. White*, 794 F.2d 367, 370 (8th Cir. 1986).

The jury first inquired about the court's instruction on the third element of the offense. The question asked for "clarification" on a sentence in the instructions that stated: "In making that determination, you may consider whether the defendant reasonably believed that his civil rights had been restored, including his right to possess a firearm." The court responded: "It is one issue that you may consider in evaluating whether the government has proven element #3 beyond a reasonable doubt." Jackson agreed to the response, telling the court that "I don't have any objection." Jackson therefore waived his objection to the court's supplemental instruction. *See United States v. Davis*, 826 F.3d 1078, 1082 (8th Cir. 2016).

The jury asked a second question: "Does the defendant believing that his civil rights had been restored, AND knowing that he had been

convicted of a crime punishable by imprisonment for more than one year translate to having proven" element three of the offense. The court responded that "[t]his is a question that you must decide based on the evidence before you and my instructions." Jackson objected to the court's response, and urged the court to answer "no."

Jackson argues that the jury's question suggests that it did not understand the instructions, and may have convicted him despite his asserted belief that his right to possess a firearm had been restored. He contends that the court abused its discretion by not supplementing the instructions to "cure the jury's misdirection." A district court has broad discretion to decide what amplification of the instructions, if any, is necessary. *United States v. Bayer*, 331 U.S. 532, 536 (1947). "The trial judge in the light of the whole trial and with the jury before him may feel that to repeat the same words would make them no more clear, and to indulge in variations of statement might well confuse." *Id.* Here, the jury's question effectively asked the court to direct the jury whether a particular element of the offense had been proved under a hypothetical set of assumptions. The question, moreover, did not align with the original instructions, because it referred to the defendant "believing that

his civil rights had been restored" without the qualification that the belief was "reasonable." The district court permissibly declined to answer the jury's hypothetical and instead properly referred them back to the original instructions. There was no abuse of discretion.

III.

Jackson also appeals the district court's denial of his motion to dismiss the indictment. He argues that § 922(g)(1) is unconstitutional as applied to him, because his drug offenses were "non-violent" and do not show that he is more dangerous than the typical law-abiding citizen.

We conclude that the district court was correct that § 922(g)(1) is not unconstitutional as applied to Jackson based on his particular felony convictions. The Supreme Court has said that nothing in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which recognized an individual right to keep and bear arms, "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 626; *see McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion). The decision in *Bruen*, which reaffirmed that the right is "subject to certain reasonable, well-defined restrictions," 142 S. Ct. at 2156, did not disturb those statements or cast doubt on the prohibitions. *See id.* at

2157 (Alito, J., concurring); *id*. at 2162 (Kavanaugh, J., concurring, joined by Roberts, C.J.); *id*. at 2189 (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.). Given these assurances by the Supreme Court, and the history that supports them, we conclude that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1).[2]

History shows that the right to keep and bear arms was subject to restrictions that included prohibitions on possession by certain groups of people. There appear to be two schools of thought on the basis for these regulations. A panel of the Third Circuit recently surveyed the history in light of *Bruen* and concluded that legislatures have longstanding authority and discretion to disarm citizens who are not "law- abiding"—*i.e.*, those who are "unwilling to obey the government and its laws, whether or not they had demonstrated a propensity for violence." *Range*

[2]According to published data, a rule declaring the statute unconstitutional as applied to all but those who have committed "violent" felonies would substantially invalidate the provision enacted by Congress. The most recent available annual data show that only 18.2 percent of felony convictions in state courts and 3.7 percent of federal felony convictions were for "violent offenses." Sean Rosenmerkel et al., *Felony Sentences in State Courts, 2006 – Statistical Tables* 3 tbl.1.1 (revised Nov. 2010), https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf; Mark Motivans, *Federal Justice Statistics, 2021*, at 12 tbl.7 (Dec. 2022), https://bjs.ojp.gov/sites/g/files/ xyckuh236/files/media/document/fjs21.pdf.

*v. Att'y Gen.*, 53 F.4th 262, 269 (3d Cir. 2022) (per curiam), *vacated, reh'g en banc granted*, 56 F.4th 992 (3d Cir. 2023). Jackson contends that a legislature's traditional authority is narrower and limited to prohibiting possession of firearms by those who are deemed more dangerous than a typical law-abiding citizen. While the better interpretation of the history may be debatable, we conclude that either reading supports the constitutionality of § 922(g)(1) as applied to Jackson and other convicted felons, because the law "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130.

Restrictions on the possession of firearms date to England in the late 1600s, when the government disarmed non-Anglican Protestants who refused to participate in the Church of England, Joyce Lee Malcom, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 45 (1994), and those who were "dangerous to the Peace of the Kingdom," Militia Act of 1662, 13 & 14 Car. 2 c. 3, § 13. Parliament later forbade ownership of firearms by Catholics who refused to renounce their faith. An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W. & M., Sess. 1, c. 15 (1688). The English Bill of Rights established Parliament's authority to determine which citizens

could "have arms . . . by Law." An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 W. & M., Sess. 2, c. 2, § 7 (1689)); *see Bruen*, 142 S. Ct. at 2141-42.

In colonial America, legislatures prohibited Native Americans from owning firearms. Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 Law & Hist. Rev. 567, 578-79 (1998); *see also* Act of Aug. 4, 1675, 5 *Records of the Colony of New Plymouth* 173 (1856); Act of July 1, 1656, *Laws and Ordinances of New Netherland* 234-35 (1868). Religious minorities, such as Catholics in Maryland, Virginia, and Pennsylvania, were subject to disarmament. Bellesiles, *supra*, at 574; Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 263 (2020). In the era of the Revolutionary War, the Continental Congress, Massachusetts, Virginia, Pennsylvania, Rhode Island, North Carolina, and New Jersey prohibited possession of firearms by people who refused to declare an oath of loyalty. *See 4 Journals of the Continental Congress*, 1774-1789, at 205 (Worthington Chauncey Ford ed., 1906); Act of Mar. 14, 1776, ch. 21, 1775-76 Mass. Acts 479; Act of May 1777, ch. III, 9 *The Statutes at Large; Being a Collection of all the Laws of*

*Virginia* 281-82 (1821); Act of June 13, 1777, ch. 756 §§ 2-4, 1777 Pa. Laws 110, 111-13; Act of June 1776, 7 *Records of the Colony of Rhode Island and Providence Plantations in New England* 567 (1862); Act of Nov. 15, 1777, ch. 6, 1777 N.C. Sess. Laws 231; Act of Sept. 20, 1777, ch. XL, 1777 N.J. Laws 90; *see also* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders* 5 & nn. 38-41 (Duke L. Sch. Pub. L. & Legal Theory Series No. 2020-80), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3702696.

The influential "Dissent of the Minority," *see Heller*, 554 U.S. at 604, published by Anti-Federalist delegates in Pennsylvania, proposed that the people should have a right to bear arms "unless for crimes committed, or real danger of public injury from individuals." 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971). Early legislatures also ordered forfeiture of firearms by persons who committed non-violent hunting offenses, *see* Act of Oct. 9, 1652, *Laws and Ordinances of New Netherland* 138 (1868); Act of Apr. 20, 1745, ch. III, 23 *The State Records of North Carolina* 218-19 (1904); and they authorized punishments that subsumed disarmament—death or forfeiture of a perpetrator's entire estate—for non-violent offenses involving deceit and

wrongful taking of property. *See* An Act for the Punishment of Certain Crimes Against the United States, Pub. L. No. 1-9, § 14, 1 Stat. 112, 115 (1790); Act of Feb. 21, 1788, ch. 37, 1788 N.Y. Laws 664-65; Act of May 1777, ch. XI, 9 *The Statutes at Large; Being a Collection of all the Laws of Virginia* 302-03 (1821); *A Digest of the Laws of Maryland* 255-56 (1799); Stuart Banner, *The Death Penalty: An American History* 3, 18, 23 (2002); John D. Bessler, *Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment* 56-57 (2012); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 330-32, 342, 344-47 (1982). While some of these categorical prohibitions of course would be impermissible today under other constitutional provisions, they are relevant here in determining the historical understanding of the right to keep and bear arms.

Based on this historical record, the Third Circuit panel in *Range* concluded that legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a threat purportedly posed by these people "to an orderly society and compliance with its legal norms," not merely to address a person's demonstrated propensity for violence. 54 F.4th at 281-82. This conclusion was bolstered

by the Supreme Court's repeated statements in *Bruen* that the Second Amendment protects the right of a "law-abiding citizen" to keep and bear arms. *See* 142 S. Ct. at 2122, 2125, 2131, 2133-34, 2135 n.8, 2138, 2150, 2156. As stated by the D.C. Circuit, "it is difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms." *Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019). On this view, for which there is considerable support in the historical record, Congress did not violate Jackson's rights by enacting § 922(g)(1). He is not a law- abiding citizen, and history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society. *See also United States v. Bena*, 664 F.3d 1180, 1183-84 (8th Cir. 2011); *United States v. Adams*, 914 F.3d 602, 610-11 (8th Cir. 2019) (Kelly, J., concurring in the judgment).

If the historical regulation of firearms possession is viewed instead as an effort to address a risk of dangerousness, then the prohibition on possession by convicted felons still passes muster under historical analysis. Not all persons disarmed under historical precedents—not all Protestants or Catholics in England, not all Native Americans, not all

Catholics in Maryland, not all early Americans who declined to swear an oath of loyalty—were violent or dangerous persons. The Third Circuit panel understood this fact to mean that the historical justification for regulation was not limited to dangerousness. *Range*, 53 F.4th at 275, 282. But if dangerousness is considered the traditional *sine qua non* for dispossession, then history demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons. Legislatures historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed. In reasoning by analogy from that history, "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132; *see* Blocher & Carberry, *supra*, at 11-12.

Congress enacted an analogous prohibition in § 922(g)(1) to address modern conditions. In the Omnibus Crime Control and Safe Streets Act of 1968, Congress found that there was "widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce," and that "the ease with which any person can acquire firearms other than a rifle

or shotgun (including criminals . . ., narcotics addicts, mental defectives, . . . and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States." Pub. L. No. 90-351, § 901(a)(1), (2), 82 Stat. 225, 225. Congress found that "only through adequate Federal control over interstate and foreign commerce in these weapons" could "this grave problem be properly dealt with." *Id.* § 901(a)(3). By prohibiting possession of firearms by convicted felons and others, Congress intended to further this purpose without placing "any undue or unnecessary Federal restrictions or burdens on law-abiding citizens." *Id.* § 901(b). In the Safe Streets Act of 1968 and the Gun Control Act of 1968, Congress also tailored the prohibition on possession of firearms by exempting those convicted of felony offenses "pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate." *Id.* § 902 (codified at 18 U.S.C. § 921(b)(3)); Pub. L. No. 90-618, 82 Stat. 1213, 1216 (codified at 18 U.S.C. § 921(a)(20)).

The Supreme Court has observed that the purpose of the Safe Streets Act, as amended by the Gun Control Act, was to curb "lawlessness

and violent crime." *Huddleston v. United States*, 415 U.S. 814, 824 (1974). The "very structure of the Gun Control Act demonstrates that Congress . . . sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett v. United States*, 423 U.S. 212, 218 (1976). Congress prohibited "categories of presumptively dangerous persons from transporting or receiving firearms," *Lewis v. United States*, 445 U.S. 55, 64 (1980), because they "pose[d] an unacceptable risk of dangerousness." *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 120 (1983). "Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Id.* at 119. That determination was not unreasonable.

To be sure, the historical understanding that legislatures have discretion to prohibit possession of firearms by a category of persons such as felons who pose an unacceptable risk of dangerousness may allow greater regulation than would an approach that employs means-end scrutiny with respect to each individual person who is regulated. But that result is a product of the method of constitutional interpretation endorsed by *Bruen*:

> Indeed, governments appear to have *more* flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny. After all, history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller*. By contrast, if courts applied strict scrutiny, then presumably very few gun regulations would be upheld.

*Heller v. District of Columbia*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). *Cf. Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting) (concluding before *Bruen* that Congress cannot dispossess felons based solely on status, and that "a very strong public-interest justification and a close means-end fit" is required before a felon may be subject to a dispossession statute based on dangerousness) (quoting *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017)).[3]

[3] A footnote in Heller referred to "presumptively lawful regulatory measures" that forbid the possession of firearms by felons and the mentally ill, prohibit the carrying of firearms in sensitive places such as schools or government buildings, and impose conditions and qualifications on the commercial sale of arms. The Court said that it identified these measures "only as examples," and that the list was not exhaustive. 554 U.S. at 627 n.26. Some have taken the phrase "presumptively lawful" to mean that the Court was suggesting a presumption of constitutionality that could be rebutted on a case-by-case basis. That is an unlikely reading, for it would serve to cast doubt on the constitutionality of these regulations in a range of cases despite the Court's simultaneous statement that "nothing in our

In sum, we conclude that legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms. Whether those actions are best characterized as restrictions on persons who deviated from legal norms or persons who presented an unacceptable risk of dangerousness, Congress acted within the historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons. Consistent with the Supreme Court's assurances that recent decisions on the Second Amendment cast no doubt on the constitutionality of laws prohibiting the possession of firearms by felons, we conclude that the statute is constitutional as applied to Jackson. The district court properly denied the motion to dismiss the indictment.[4]

opinion should be taken to cast doubt" on the regulations. Id. at 626; see supra n.2. We think it more likely that the Court presumed that the regulations are constitutional because they are constitutional, but termed the conclusion presumptive because the specific regulations were not at issue in *Heller*.

[4] In *United States v. Adams*, we said that a defendant raising an as-applied challenge to § 922(g)(1) must show "(1) that the Second Amendment protects his particular conduct, and (2) that his prior felony conviction is insufficient to justify the challenged regulation of Second Amendment rights." 914 F.3d at 605. Jackson argues that his particular conduct of carrying a concealed weapon was constitutionally protected. We need not address that question, because we conclude that the prohibition is

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For these reasons, the judgment of the district court is affirmed.

SMITH, Chief Judge, joining in Parts I and II, and concurring in part in Part III and in the judgment.

I concur fully in Parts I and II of the opinion. I concur as to the judgment in Part III and agree that § 922(g)(1) is not unconstitutional as applied to Jackson and that *Heller* remains the relevant precedent we are bound to apply.

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constitutional as applied to Jackson regardless of his particular conduct.

UNITED STATES DISTRICT
COURT DISTRICT OF
MINNESOTA

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| United States of America,<br><br>Plaintiff,<br><br>vs.<br><br>Edell Jackson,<br><br>Defendant. | ) | File No. 21-cr-51 (DWF/TNL)<br><br>Courtroom 7C<br>St. Paul, Minnesota<br>March 26, 2022<br>9:35 a.m. |

BEFORE THE HONORABLE DONOVAN W. FRANK
UNITED STATES DISTRICT COURT JUDGE
**(SENTENCING)**

**APPEARANCES**:

| | |
|---|---|
| For the Plaintiff: | United States Attorney's Office<br>Thomas Calhoun-Lopez, AUSA<br>300 South 4th Street Suite 600<br>Minneapolis, Minnesota 55415 |
| For the Defendant: | Daniel L Gerdts, Lawyer<br>Daniel Gerdts, ESQ.<br>331 Second Avenue South, Ste 705<br>Minneapolis, MN 55401 |
| Court Reporter: | Lynne M. Krenz, RMR, CRR, CRC<br>Suite 146<br>316 North Robert Street St. Paul,<br>Minnesota 55101 |

Proceedings reported by certified stenographer;
transcript produced with computer.

**P R O C E E D I N G S**

**IN OPEN COURT**

(Defendant present)

THE COURT: Why don't we have introductions of counsel first.

For the record, we can start with government's counsel and move on to defense counsel.

MR. CALHOUN-LOPEZ: Good morning, Your Honor. Thomas Calhoun-Lopez on behalf of the United States.

MR. GERDTS: Dan Gerdts, Your Honor, with Mr. Jackson. He's seated beside me.

THE COURT: Good morning to each of you, including you, Mr. Jackson.

This matter is set for sentencing today. After the conclusion of a jury trial, the Court ordered a presentence investigation. That's now been provided to the parties.

The parties have filed their memorandums and sentencing positions, including objections to the presentence investigation. But consistent with kind of the interchange between chambers and respective counsel, I thought we would first deal with defendant's motion to dismiss the case based upon the recent U.S. Supreme Court case with respect to the possession of gun issues, so...

And I'll acknowledge that both parties have submitted

memorandums on that issue.

And going into it, unless something unexpected or unusual happens during any additional argument by counsel, it is the intent of the Court to rule on this issue off the bench and then file it with a short written opinion at the conclusion of the hearing.

So with that, I'll hear from Mr. Gerdts.

And if you're comfortable coming to the podium, that's fine, too.

MR. GERDTS: Well, Your Honor, I don't have a lot to add in addition to my --

THE COURT: Right.

MR. GERDTS: -- my written arguments.

I would note that much of what the government cites in its response is dictum from the recent Supreme Court cases discussing how nothing in their opinion will suggest that it's going to affect the felon in possession prohibition, however that is and has been observed by others, is merely dicta by the Court.

You of course, Your Honor, have to deal with the fact that the Eighth Circuit has precedent on this that is probably still binding on you, at least with regard to the facial challenge.

THE COURT: Mm-hmm.

MR. GERDTS: I don't know with regard to the

as-applied challenge not so much.

But I really don't have anything else to add.

THE COURT: Okay.

MR. GERDTS: It's set forth in the written memorandum.

THE COURT: It is. It is. I'll hear from government's counsel.

MR. CALHOUN-LOPEZ: Your Honor, the government will likewise rest on its brief unless the Court would like additional argument or has additional questions.

THE COURT: No. Thank you.

And that doesn't surprise me because you both submitted memorandum covering that. And, of course, it preserves the issue for all -- preserves the issues for all purposes, including appeal.

So the Court would say this first. I will make an observation that Mr. Gerdts has made. It is true, and I'll just requote it since both -- in the concurring opinion of Justice Kavanaugh, he quoted both Justice Alito in *Heller*. And obviously as you all know -- and Scalia. And as you know, they said, "Nothing in our opinion should be taken to cast out on longstanding prohibitions on the possession of firearms by felons or laws forbidding the carrying of firearms and sensitive places." And that's not an issue here. And so what the Court will do is will go ahead and

make a ruling, followed by a -- with short memorandum.

The Court agrees, and it was observed by both parties that *Bruen*, and then for the record, this is a New York case, for B-R-U-E-N, is how that's spelled, did expand upon the Supreme Court's decision in Heller, that's H-E-L-L-E-R.

But then it is also is true, as I think clear, that *Heller* still remains a good law. And in *Bruen* the Supreme Court declined to adopt, as both parties noted in their submissions, the two-step framework that circuits, including the Eighth Circuit, have implemented since *Heller*, significantly however the Court concluded that *Bruen* is in keeping with and consistent with the *Heller* decision.

And in *Heller,* as both parties noted, the Court stated that, "Nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons."

And then Kavanaugh, I should say Justice Kavanaugh, went on with his concurrence, joined by the Chief Justice Alito stating, "They stressed in their concurrences that *Bruen* did not disturb what the Court had said in *Heller* about restrictions imposed by possessing firearms, namely the 'longstanding' prohibitions on the possession of firearms by felons."

And then obviously, Alito -- Justice Alito went on

to say, "Nor have we disturbed anything that we said in *Heller* or the *McDonough* case, which they've both said.

And then Justice Breyer, interestingly enough in his dissent, joined by Justices Kavanaugh and Sotomayer emphasize that, "*Bruen* casts no doubt on *Heller's* treatment of laws prohibiting firearm's possession by felons."

And, of course, as Mr. Gerdts mentioned, following *Heller* the Eighth Circuit upheld the constitutionality in a case called *United States versus Irish*. And that still remains in the Court's view good law.

But I think in fairness, *Irish*, and for the benefit of counsel, that's the -- that was back in 2008, it was an unpublished case but then the Eighth Circuit later reiterated that holding in a published case, *United States versus Seay*, I probably misprounced that. It's 620 F.3d 919, 2010.

And so where that takes us today is, well perhaps a defendant similarly situated to Mr. Jackson, would hope and like the Court to scrutinize the history more carefully a felon in possession statutes.

I do find that at this time, based upon the facts of this case and the -- and the Supreme Court case that that's unnecessary. The Supreme Court has made its position I think quite clear about these statutes. And as aptly stated in a Seventh Circuit case in *United States versus*

*Bloom*, I apologize for citing numbers, but 149 F.3rd 649, "The Supreme Court often articulates positions through a language that an unsympathetic audience might dismiss as dictum and expects these formulations to be followed."

So where we sit today, noting the strong objection of the defense, is that the Court declines to rule as-applied or on its face the statute here unconstitutional and therefore declines and respectfully dismisses the motion to dismiss the indictment and the verdict in the case.

And then that context before we move to sentencing, is there any other requests by defense counsel other than to note your objection for any clarification or other issue?

MR. GERDTS: No. Thank you, Your Honor.

THE COURT: Anything further by government's counsel?

MR. CALHOUN-LOPEZ: No, Your Honor. Thank you.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

United States of America,

Plaintiff,

v.

Edell Jackson,

Defendant.

Criminal No. 21-51 (DWF/TNL)

**MEMORANDUM OPINION AND ORDER**

## INTRODUCTION

This matter is before the Court on Defendant Edell Jackson's motion to dismiss his indictment. (Doc. No. 100.) He alleges that the charging statute, 18 U.S.C. § 922(g)(1) (felon in possession of a firearm), is unconstitutional and thus his indictment should be dismissed. For the reasons set forth below, the Court denies Jackson's motion.

## BACKGROUND

Between 1996 and 2010, Jackson was convicted of eleven felonies and six misdemeanors. Ten of the felony convictions involved drugs and one involved the unlawful possession of a firearm. He was most recently discharged from supervised release in 2020.

In 2021, Jackson illegally possessed a firearm and was charged with violating 18 U.S.C. § 922(g)(1). Following trial, a jury found Jackson guilty of being a felon in possession of a firearm. Jackson now moves to dismiss the indictment, arguing that the

felon-in-possession statute violates the Second Amendment of the United States Constitution.

## DISCUSSION

Jackson asserts that 18 U.S.C. § 922(g)(1), which prohibits convicted felons from possessing a firearm, is both facially unconstitutional and unconstitutional as applied to him. The Court addresses each argument in turn.

### I. Facial Challenge

As the Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010), the Second Amendment of the United States Constitution protects "the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022). "[C]onsistent with *Heller* and *McDonald*," the Supreme Court recently held that the Second Amendment also "protect[s] an individual's right to carry a handgun for self-defense outside the home." *Id.* To justify a gun regulation, the government "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.

The Court made clear in *Bruen* that its recent holding is "in keeping with *Heller*." *Id.* In *Heller*, the Court stated that "'longstanding prohibitions on the possession of firearms by felons' are 'presumptively lawful,' and cited 'historical justifications' on which it could 'expound' later." *United States v. Williams*, 24 F.4th 1209, 1211 (8th Cir. 2022) (quoting *Heller*, 554 U.S. at 626-27 & n.26, 635). The Court reiterated its position on felon-in-possession statutes in *McDonald*, stating, "We made it clear in *Heller* that our

holding did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill." *McDonald*, 561 U.S. at 786 (internal quotations and citation omitted). Given this language, "Courts of Appeals have unanimously upheld the constitutionality of section 922(g)(1) against facial attacks." *Medina v. Sessions*, 279 F. Supp. 3d 281, 287 (D.D.C. 2017) (citation omitted).

In *Bruen*, the Court again stressed that *Heller* and *McDonald* remain good law. Justice Kavanaugh, joined by Chief Justice Roberts, stated that *Bruen* does not disturb what the Court has said in *Heller* about the restrictions imposed on possessing firearms, namely the "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring). Justice Alito stated in his concurrence, "Nor have we disturbed anything that we said in *Heller* or *McDonald*." *Id.* at 2157 (Alito, J., concurring). Finally, Justice Breyer, joined by Justices Kagan and Sotomayor, emphasized that *Bruen* "cast[s] no doubt on" *Heller*'s treatment of laws prohibiting firearms possession by felons. *Id.* at 2189 (Breyer, J., dissenting).

While Jackson would like this Court to scrutinize the history of felon-in-possession statutes, such examination is unnecessary at this time. Following *Heller* and *McDonald*, the Eighth Circuit upheld the constitutionality of 18 U.S.C. § 992(g)(1) in *United States v. Seay*, 620 F.3d 919, 924 (8th Cir. 2010). This remains good law. Jackson's facial challenge to section 922(g)(1) is therefore denied.

## II. As-Applied Challenge

Jackson next argues that 18 U.S.C. § 922(g)(1) is unconstitutional as applied. "An as-applied challenge asks the reviewing court to declare the disputed statute unconstitutional 'on the facts of the particular case.'" *United States v. Adams*, 914 F.3d 602, 605 (8th Cir. 2019) (quoting *Sanjour v. EPA*, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995)). "The as-applied challenger does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *Id.* (internal quotations and citation omitted). Jackson argues that because his prior eleven felony convictions were nonviolent, his conviction under section 922(g)(1) is unconstitutional as applied to him.

The Eighth Circuit "has not resolved whether the felon-in-possession statute is susceptible to as-applied challenges." *Williams*, 24 F.4th at 1211.[1] And no as-applied challenge to section 922(g)(1) has been successful in this circuit. Still, the Eighth Circuit has indicated that a defendant may make a successful as-applied challenge to section 922(g) by presenting "facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment

[1] The Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits "have held that section 922(g)(1) is constitutional as applied to all felons." *Medina*, 279 F. Supp. 3d at 287 (citing cases). The Third, Seventh, and D.C. Circuits have allowed as-applied challenges but never granted one by a felon. *Id.* And the First Circuit has expressed skepticism about an as-applied challenge. *Id.*

protections."[2] *United States v. Brown*, 436 F. App'x 725, 726 (8th Cir. 2011) (internal quotations and citation omitted).

Jackson argues that historical tradition, as understood in 1791, does not support a blanket ban on the possession of firearms by all convicted felons. Rather, Jackson argues, only those deemed to be dangerous were historically prohibited from possessing guns. *See Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). Jackson contends that he is not dangerous because his prior eleven felony convictions were nonviolent, and thus the law as applied to Jackson in this case was unconstitutional.

The Court takes issue with Jackson's argument for two reasons. First, the Court fundamentally disagrees with the notion that a person who commits a nonviolent felony is *ipso facto* not dangerous. Second, and most importantly, the Eighth Circuit's prior review of historical scholarship from the Founding Era reveals that gun restrictions were not limited to those deemed to be dangerous but were instead "directed at citizens who [were] not law-abiding and responsible." *United States v. Bena*, 664 F.3d 1180, 1183

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[2] Jackson argues that because the Constitution "presumptively protects" conduct covered by the "plain text" of the Second Amendment, the burden is on the government to prove that his status is sufficient to justify a restriction of his Second Amendment right. (*See* Doc. No. 100 at 4 (emphasis omitted).) But Jackson's argument ignores *Heller*, which, as explained above, remains good law. *Heller* noted that felon-in-possession statutes are "presumptively lawful." *Heller*, 554 U.S. at 627 n.26 & 635. Thus, consistent with Eighth Circuit case law, the burden remains on Jackson to prove his as-applied challenge.

(8th Cir. 2011). Nevertheless, Jackson has proven himself to be both dangerous and unable to abide by the law.

The Eighth Circuit has denied as-applied challenges to section 922(g)(1) when the defendant fails to demonstrate that he is "no more dangerous than a typical law-abiding citizen." *Brown*, 436 F. App'x at 726. Here, Jackson has failed to demonstrate that he is no more dangerous than a typical law-abiding citizen. Although his prior felonies were nonviolent, they involved dangerous conduct. Ten of Jackson's prior felony convictions involved drugs, one involved the unlawful possession of a firearm, and four of his prior drug convictions involved drug trafficking. Moreover, Jackson has fled from the police to avoid arrest on numerous occasions, including before his most recent arrest in 2021. While in custody, Jackson has shown a pattern of behavioral problems, including disorderly conduct, disobeying orders, fighting, and tampering with security devices. Jackson has also repeatedly violated his probation terms. *See United States v. Hughley*, 691 F. App'x 278, 279 (8th Cir. 2017) (per curiam) (denying the defendant's as-applied challenge to section 992(g)(1) where he was "convicted of multiple [drug-related] felonies and has repeatedly violated his probation terms"). While in his brief, Jackson swiftly concludes that he is no more dangerous than the typical law-abiding citizen, the Court disagrees. His prior eleven felony convictions—as well as his behavior in custody and during supervised release—warrant a restriction on his Second Amendment right.

Additionally, the Eighth Circuit has found that restricting felons from possessing guns has not solely been about dangerousness. "Scholarship suggests historical support for a common-law tradition that permits restrictions directed at citizens who are not law-

abiding and responsible." *Bena*, 664 F.3d at 1183. The concept of the right to bear arms was "tied to that of the virtuous citizen." *Id.* (internal quotations and citation omitted). Other circuits, and most scholars of the Second Amendment, have similarly concluded that "the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) (citing *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)). In sum, those who commit *serious* crimes—whether violent or nonviolent—forfeit their right to possess firearms.

In this case, Jackson has previously committed eleven serious crimes, ten of which involved drugs and one of which involved the unlawful possession of a firearm. He has demonstrated that he is not able to abide by the law and thus he has failed to demonstrate that he may be trusted to possess a firearm. For these reasons, the Court denies Jackson's as-applied challenge.

**CONCLUSION**

For the reasons set forth above, the Court denies Jackson's motion to dismiss the indictment.

## ORDER

Based upon the foregoing, and the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Defendant Edell Jackson's motion to dismiss (Doc. No. [100]) is **DENIED**.

Dated: September 13, 2022

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

**UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

No: 22-2870

United States of America

Appellee

v.

Edell Jackson

Appellant

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Appeal from U.S. District Court for the District of Minnesota
(0:21-cr-00051-DWF-1)

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**ORDER**

The petition for en banc rehearing is denied. The petition for panel rehearing is also denied. Judges Erickson, Grasz, Stras, and Kobes would grant the petition for rehearing en banc.

COLLOTON, Circuit Judge, concurring in the denial of rehearing.

The dissent from denial of rehearing en banc asserts as its central premise that the panel opinion supposedly failed to grasp a basic point of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), that the government bears the burden to show that the felon-in-

possession statute is constitutional. (The petition for rehearing properly does not make this argument.) To the contrary, the panel was well aware of *Bruen*, and concluded that the historical evidence shows that the statute "is consistent with the Nation's historical tradition of firearm regulation." 69 F.4th at 502 (quoting *Bruen*, 142 S. Ct. at 2130). The dissent misconstrues a trailing footnote whose only purpose was to note that it was unnecessary to address the defendant's particular conduct at the time he possessed a firearm. There will be debates about the historical evidence, but the panel opinion faithfully applied the *Bruen* framework and the Supreme Court's assurance that nothing in its originalist opinion recognizing an individual right under the Second Amendment "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *accord McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion) ("We repeat those assurances here.").

STRAS, Circuit Judge, with whom ERICKSON, GRASZ, and KOBES, Circuit Judges, join, dissenting from the denial of rehearing en banc.

By cutting off as-applied challenges to the federal felon-in-possession statute, *see* 18 U.S.C. § 922(g)(1), *Jackson* and *Cunningham* give "second-class" treatment to the Second Amendment. *N.Y. State Rifle*

*& Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)). Even worse, they create a group of second-class citizens: felons who, for the rest of their lives, cannot touch a firearm, no matter the crime they committed or how long ago it happened. *See United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023); *United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023). I dissent from the decision to deny rehearing en banc.

I.

*Jackson*, the first of the two opinions, fails to get the basics right. The Supreme Court told us last year that the burden is on "*the government* [to] demonstrate that the regulation"—here, the ban on possessing a firearm as a felon— "is consistent with this Nation's historical tradition of firearms regulation." *Bruen*, 142 S. Ct. at 2126 (emphasis added). Yet *Jackson* does not put the government to its task of establishing an "historical analogue." *Id.* at 2133 (emphasis omitted); *see Jackson*, 69 F.4th at 502.

Worse yet, *Jackson* actually flips the burden. It says that the *defendant*, not the government, must "show . . . that his prior felony conviction is insufficient to justify the" stripping of Second Amendment rights. *Jackson*, 69 F.4th at 506 n.4 (citation omitted). How can that be?

Apparently one of our pre-*Bruen* cases says so. *See United States v. Adams*, 914 F.3d 602, 605 (8th Cir. 2019). It should go without saying that we have to follow what the Supreme Court says, even if we said something different before.

Other courts have done so. *See Range v. Att'y Gen. United States*, 69 F.4th 96, 98 (3d Cir. 2023) (en banc) (holding that "*the Government* did not carry its burden" in a similar case (emphasis added)); *id.* at 109 (Ambro, J., concurring) (recognizing "*the Government's* failure to carry its burden" (emphasis added)); *id.* at 113 (Schwartz, J., dissenting) (disagreeing with the majority because "*the Government* has presented sufficient historical analogues" (emphasis added)); *United States v. Daniels*, — F.4th —, 2023 WL 5091317, at *5 (5th Cir. Aug. 9, 2023) ("*[T]he government* has the burden to find and explicate the historical sources that support . . . constitutionality . . . ." (emphasis added)); *Atkinson v. Garland*, 70 F.4th 1018, 1019 (7th Cir. 2023) ("*[T]he government* bear[s] the burden of 'affirmatively prov[ing] that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.'" (emphasis added) (quoting *Bruen*, 141 S. Ct. at 2127)); *see also United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023).

Correcting a basic and fundamental error like this one was reason enough to grant rehearing.

The rest of *Jackson* shows why. From all appearances, it took the burden seriously, despite getting it backwards. Rather than conduct a probing examination of "historical[ly] analog[ous]" laws, *Bruen*, 142 S. Ct. at 2133 (emphasis omitted), it identified a few examples from a now-vacated Third Circuit decision and concluded that felons seem enough like Native Americans, slaves, Catholics, and Loyalists for Congress to disarm them too. *See Jackson*, 69 F.4th at 502–04 ("[H]istory supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society." (relying on *Range v. Att'y Gen. United States*, 53 F.4th 262 (3d Cir. 2022), *vacated and reheard en banc*, 69 F.4th 96 (3d Cir. 2023)). It never really tells us why, perhaps because it thought it was the defendant's job to connect the dots.

Consider what flipping the burden does. When no one makes much of an effort to present historical evidence about a law's constitutionality, the government will always win. All sorts of firearms regulations will now be presumptively constitutional, with the burden falling on the regulated, not the regulator, to establish they are not. This error will affect our consideration of all types of laws, from age restrictions, *see*

*Worth v. Harrington*, — F.Supp.3d —, 2023 WL 2745673, at *1 (D. Minn. March 31, 2023), and magazine-capacity limits, *see Or. Firearms Fed'n v. Kotek Or. All. for Gun Safety*, — F.Supp.3d —, 2023 WL 4541027, at *1 (D. Or. July 14, 2023), to permit requirements, *see id.* It is, in other words, "exceptionally importan[t]" to fix. Fed. R. App. P. 35(a)(2).

II.

Reversing the burden also lets *Jackson* avoid the sort of probing historical analysis *Bruen* requires. In particular, it makes no effort to draw the necessary connections between colonial-era laws and the felon-in-possession statute. Why were these particular groups targeted? What, if anything, does their disarmament have to do with felons? What lessons can we draw from the history? It is not as simple as saying some groups lost their arms, so felons should lose them too. After all, it goes without saying that we would not allow Congress to indiscriminately strip Catholics and Native Americans, two groups targeted by colonial-era disarmament laws, of their guns today.

There is, unsurprisingly, more to the story. Early laws were about lessening the danger posed by armed rebellion or insurrection. *See Kanter v. Barr*, 919 F.3d 437, 457 (7th Cir. 2019) (Barrett, J., dissenting); Adam Winkler, *Gunfight* 115–16 (2011). Slave revolts, for example, were

a constant threat in the decades leading up to the Revolution. *See* Herbert Aptheker, *American Negro Slave Revolts* 18–19 (5th ed. 1987) (citing the "nearly unanimous agreement" among scholars that there was "widespread fear of servile rebellion" throughout the 18th century (footnote omitted)); *id.* at 162–208 (describing attempted slave revolts from 1672 through 1791). Violent confrontations with Native Americans were also a concern, especially in frontier states like Pennsylvania and Virginia. *See Kanter*, 919 F.3d at 458 (Barrett, J., dissenting) ("Native Americans . . . were thought to pose more immediate threats to public safety and stability and were disarmed as a matter of course."). Disarmament laws targeted these two groups, in other words, because they were dangerous. *See Atkinson*, 70 F.4th at 1035 n.2 (Wood, J., dissenting) (cataloging laws disarming Native Americans).

The same goes for Catholics. Catholic men could possess firearms for most of the colonial era, yet Pennsylvania, Maryland, and Virginia took them away for about a decade. *See* Act of January 1757, *reprinted in* 5 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 608–09 (James T. Mitchell & Henry Flanders eds., n.p., WM Stanley Ray 1898); Act of May 1756, *reprinted in* 52 *Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland, 1755-1756 (24)*, at 454 (J. Hall

Pleasants ed., 1935); Act of March 1756, *reprinted in* 7 *The Statutes at Large; Being a Collection of All the Laws of Virginia From the First Session of the Legislature in the Year 1619*, at 35–39 (William Waller Hening ed., Richmond, Franklin Press 1820). All-important context makes clear that the goal was, once again, to prevent armed "rebellion" and "social upheaval[]." *Folajtar v. Att'y Gen. of the United States*, 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting) (citation omitted); *see NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 200 (5th Cir. 2012) (observing that the colonies implemented these restrictions for "public[-]safety reasons"); *Daniels*, 2023 WL 5091317, at *11, 13.

Why were Catholics a concern? The answer is the French and Indian War, which took place from 1754 to 1763. It was an extension of the Seven Years War between Protestant England and Catholic France. *See* Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 115–16 (1st ed. 2012). Protestant colonial governments feared that loyalty to the Pope would cause Catholics to take up arms for France. As one prominent Presbyterian pastor put it, the colonies would suffer from "the horrid arts of . . . popish torture" if the Catholics kept their arms. Samuel Davies,

*Religion and Patriotism the Constituents of a Good Soldier: A Sermon Preached to Captain Overton's Independent Company of Volunteers, Raised in Hanover County, Virginia*, *August 17, 1755*, at 2 (Philadelphia, James Chattin 1755).

The fear was nothing new. Following the toppling of a Catholic monarch in England, King James II, many feared that Catholics might try to rebel against William and Mary, the country's new Protestant monarchs. *See* An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W. & M., Sess. 1, ch. 15 (Eng. 1688); *see also* Johnson, et al., *supra*, at 90–91 (explaining the long history of Protestant and Catholic discontent in England). These suspicions materialized in repeated and often bloody Jacobite rebellions against the English Crown. *See* Geoffrey Plank, *Rebellion and Savagery: The Jacobite Rising of 1745 and the British Empire* 4–5 (2006). The disarming of Catholics in England and Ireland became routine throughout the 18th century because of the risk of guerrilla violence and the lingering threat of a Catholic restoration. *See* Johnson et al., *supra*, at 240.

Religious tension in the colonies was not nearly as intense as in Europe, but as the prospect of war rose, so did anti-Catholic sentiment. Maryland's Committee of Grievance and Courts of Justice, for example,

alleged in 1753 that Catholics had plotted "towards carrying on the Rebellion against King George," among other acts of treachery. 50 *Archives of Maryland*, *supra*, at 201. This report, along with an accompanying wave of anti-Catholic bias, led the Maryland Legislature to pass a law stripping them of their arms in 1756. *See* 52 *Archives of Maryland*, *supra*, at 454.

Pennsylvania and Virginia disarmed Catholics around the same time. "[A]ctual war with the French King and his subjects" and the possibility of "intestine commotions, rebellions, or insurrections" led both states down this path. 5 *The Statutes at Large of Pennsylvania*, *supra*, at 609; *see* 7 *The Statutes at Large; Being a Collection of All the Laws of Virginia*, *supra*, at 35 (explaining that "it is dangerous at this time to permit Papists to be armed"). In fact, the Pennsylvania disarmament statute tied the "papist" prohibition to the war effort: it allowed the "colonel of the regiment within whose district the arms [were] found" to take them for "public use." 5 *The Statutes at Large of Pennsylvania*, *supra*, at 627. Confiscated arms were then redeployed in the fight against France.

A similar pattern emerged with the Loyalists during the Revolutionary War. States like Virginia and Pennsylvania required men

above a certain age to swear a "loyalty oath" to the revolutionary cause. *See* Act of June 13, 1777, § 1, *reprinted in* 9 *The Statutes at Large of Pennsylvania*, *supra*, at 110–11. Refusal to do so would result in the loss of arms. *See id.* at 111–13 (explaining that those who fail to take the oath "renounc[ing] and refus[ing] all allegiance to King George . . . shall be disarmed").

Loyalists, just like the other groups discussed above, posed a danger. People who could not pledge allegiance were likely to aid the British, or possibly even join their ranks. *See* Mark Mayo Boatner III, *Encyclopedia of the American Revolution* 663 (1st ed. 1966) (discussing the nearly 50,000 colonists who fought for the British). And then they could use their arms to kill others, including their fellow citizens. *See Kanter*, 919 F.3d at 457 (explaining that people who failed to take an oath were a "potential threat" to the revolutionary cause (citation omitted)); *Daniels*, 2023 WL 5091317, at *13. Oaths were meant to reduce the danger before the threat materialized into something more.

Practices shortly after the Founding are consistent with the dangerousness rationale. *See Bruen*, 142 S. Ct. at 2136–37 (discussing the concept of "liquidation"). Of the states that protected the right to keep and bear arms, *none* disarmed non-dangerous felons. *Cf. Handbook on*

*the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-Fifth Annual Meeting* 862–63 (1925) (cataloging the earliest felon-in-possession laws in the states). You read that right, none.

Even violent felons, as a class, were not disarmed until the early 20th century, nearly 150 years later. *See* Federal Firearms Act, ch. 850, §§ 1(6), 2(e), 2(f), 52 Stat. 1250, 1250–51 (1938). And it was only in 1961, just 62 years ago, that the federal government finally abandoned dangerousness as the litmus test for disarmament in enacting § 922(g)(1)'s predecessor. *See* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961); *see also Range*, 69 F.4th at 104. There is nothing about felon-dispossession laws that is longstanding, unless six decades is long enough to establish a "historical tradition" of the type contemplated by *Bruen*. Spoiler alert: it is not. *See Bruen*, 142 S. Ct. at 2156 (holding unconstitutional a century-old licensing regime).

In sum, the decades surrounding the ratification of the Second Amendment showed a steady and consistent practice. People considered dangerous lost their arms. But being a criminal had little to do with it.

III.

*Jackson*'s cursory historical analysis does not establish otherwise. I start with a discussion of the so-called "virtue theory" of the Second Amendment, followed by a deep dive into its ratification history.

A.

*Jackson* suggests that "citizens who are not 'law-abiding'" permanently lose their right to keep and bear arms, "whether or not they ha[ve] demonstrated a propensity for violence." *Jackson*, 69 F.4th at 502 (citation omitted); *see id.* at 504 (allowing the disarming of anyone who has "disrespect for the legal norms of society"); *see also Range*, 69 F.4th at 118 (Krause, J., dissenting). The virtue theory views bearing arms as a "civic right" for only the virtuous. *Folajtar*, 980 F.3d at 914 (Bibas, J., dissenting) (debunking the scholarship that supports this position). Felons, being felons, do not fall into that category, so they lose the right. *Id.*

The problem is that nothing in the Second Amendment's text supports such a restrictive interpretation. The right to bear arms belongs to "the people"—the virtuous, the non-virtuous, and everyone in between. U.S. Const. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) ("'[T]he people' . . . unambiguously refers to all members of the

political community, not an unspecified subset."); *Range*, 69 F.4th at 101–02 (making this point).

History is just as definitive on this point. Consider Catholics, who had long been persecuted for their perceived lack of virtue. *See, e.g.*, The Toleration Act of 1688, 1 W. & M., ch. 18. They did not suddenly lose their guns because society viewed them as unvirtuous. Rather, the tipping point was an "actual war" with a Catholic nation, which created a risk that Catholics would sympathize with the French, our enemy, and engage in "rebellion[] or insurrection[]." 5 *The Statutes at Large of Pennsylvania*, *supra*, at 609.

The virtue theory also suffers from an even more glaring flaw. If felon disarmament is so obviously constitutional, then why were there "no [Founding-era] laws . . . denying the right [to keep and bear arms] to people convicted of crimes"? *Binderup v. Att'y Gen. United States*, 836 F.3d 336, 368–69 (3d Cir. 2016) (Hardiman, J., concurring) (citation omitted). After all, *Bruen* tells us to find a "historical analogue" and the most obvious one—disarming felons—did not exist in the colonies or early American states. *Jackson* tries to explain why: the standard penalty for felonies was death, and dead men don't need guns. *See Jackson*, 69 F.4th at 503 (explaining that the "punishments . . . subsumed disarmament");

*Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019) (making the same point).

There are several flaws with this explanation, the first being that it rests on a faulty assumption. Not all felonies were punishable by death, particularly the non-dangerous ones. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, §§ 2, 6, 21, 1 Stat. 112, 112–17 (1790) (creating various term- of-years sentences for nonviolent felonies, such as "misprision" and "bribery"); 2 *The Works of James Wilson* 348 (James DeWitt Andrews ed., Chicago, Callaghan and Company 1896) (explaining that felonies no longer required the death penalty by the time of the Founding); 6 Nathan Dane, *A General Abridgment and Digest of American Law, With Occasional Notes and Comments* 715 (Boston, Cummings, Hilliard & Co. 1824) (noting that "but a very few" felonies were punishable by death); *see also Kanter*, 919 F.3d at 458–62 (Barrett, J., dissenting) (discussing how the concept of "civil death" did not apply after felons had served their sentence). Even many first-time violent offenders escaped the death penalty through the "benefit of clergy," including the famous case of two British regulars who were convicted of manslaughter for their role in the Boston Massacre. *See* Jeffrey Sawyer, *"Benefit of Clergy" in Maryland and Virginia*, 34 Am. J.

Legal Hist. 49, 49–50 (1990). *Jackson*'s greater-includes-the-lesser argument cannot be right if the greater—the widespread use of death as the punishment for a felony—was itself a fiction.

The second problem is that the argument only works if the greater and the lesser were both punishments for committing a crime. It turns out, however, that disarmament was never one. Death, peace bonds, whippings, hard labor, and prison time were among the punishments available, but conspicuously missing was any dispossession of firearms, much less a lifetime ban on owning them. *See, e.g.*, Act of March 18, 1796, *reprinted in* Laws of the State of New-Jersey; Revised and Published under the Authority of the Legislature 245 (Trenton, Joseph Justice 1821) (punishing manslaughter with a fine or imprisonment and hard labor); Paul Lermack, *Peace Bonds and Criminal Justice in Colonial Philadelphia*, 1976 Pa. Mag. of Hist. & Biography 173, 187 (cataloging the use of peace bonds for felonies).

Third, to the extent *Jackson* characterizes forfeiture of arms as a common non- capital punishment, it only covered firearms used in the actual commission of a crime. The most common examples were non-violent hunting offenses. *See, e.g.*, Act of Apr. 20, 1745, *reprinted in* 23 *The State Records of North Carolina* 218–19 (Walter Clark ed. 1904); Act

of Oct. 9, 1652, *reprinted in* E. B. O'Callaghan, *Laws and Ordinances of New Netherland 1638–1694*, at 138 (Albany, Weed, Parsons and Company, 1868). Another was "Terror of the People"—an ancient offense prohibiting the use of a weapon to terrorize others. George Webb, *The Office of Authority of a Justice of the Peace* 92–93 (Williamsburg, William Parks 1736) (discussing Virginia law); *see* An Act for the Punishing of Criminal Offenders, ch. 11, § 6 (1692), *reprinted in The Charters and General Laws of the Colony and Province of Massachusetts Bay* 237, 240 (Boston, T.B. Wait & Co. 1814); Statute of Northampton, 2 Edw. 3, c. 3 (1328) (requiring forfeiture, among other punishments).

The fact that the state took away a specific firearm does not, as *Jackson* suggests, support the constitutionality of a blanket ban. *Cf. Range*, 69 F.4th at 105. Nothing prevented individual offenders, even those who had forfeited a gun, from buying another.[1] As *Bruen* reminds us, "if earlier generations addressed [a] societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." 142 S. Ct. at 2131. The forfeiture

[1] Forfeiture has a longstanding pedigree in English and American law. *See Austin v. United States*, 509 U.S. 602, 613–14 (1993) (discussing the history). But it never extended to every firearm a person owned.

of a specific gun certainly qualifies as a "materially different means" than stripping a person of the right to keep and bear arms for a lifetime. *Id.*

The fourth and final point takes us right back to the start: if *Jackson* is right, then the government can presumably strip felons of other core constitutional rights too. *See Range*, 69 F.4th at 101–02. Dead men do not speak, assemble, or require protection from unreasonable searches and seizures, so those must be rights belonging to the "people" that anyone who "demonstrate[s] disrespect for legal norms of society," *Jackson*, 69 F.4th at 504, can forfeit too. *See* U.S. Const. amends. I, IV; *Range*, 69 F.4th at 101–02; *cf. Bruen*, 142 S. Ct. at 2130 (explaining that courts should treat the Second Amendment like other enumerated rights). Or perhaps we can try felonies without a jury because they were once punishable by death. *See* U.S Const. amend. V; *Kanter*, 919 F.3d at 462–63 (Barrett, J., dissenting) (highlighting the absurdity of this position); *Folajtar*, 980 F.3d at 920–21 (Bibas, J., dissenting) (same).

It is true that early American legislatures did take away some "civic" rights from felons. Chief among them were voting, sitting on a jury, and holding office. *See* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, 62–63 & tbl. A.7 (2000). But they did so explicitly, sometimes even by constitutionalizing

the restrictions. *See id.* (listing which states disenfranchised felons in the decades after the Founding). One would expect to see similar laws stripping criminals of the right to bear arms. *Cf.* An Act for the Punishment of Certain Crimes Against the United States, Ch. 9, § 21, 1 Stat. 117 (1790) (proclaiming that a person convicted of bribery "shall forever be disqualified to hold any office of honour, trust or profit under the United States"). Yet there were none, a conspicuous absence for a supposedly "longstanding" government power. *Jackson*, 69 F.4th at 502.

B.

*Jackson* has no more success drawing from the Second Amendment's ratification history than it does in its search for an "historical analogue." *See Jackson*, 69 F.4th at 503. Five proposals on the right to bear arms came out of state ratifying conventions. 1 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 326, 328, 335 (Jonathan Elliot ed., 2d ed. Washington, D.C., 1836) (New Hampshire, New York, and Rhode Island); 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665, 681 (1971) (Massachusetts and Pennsylvania). Two do not address criminality at all, so they provide no support for the virtue theory. *See* 1 *Debates in the Several State Conventions*, *supra*, at 328, 335 (identifying New York and Rhode Island

as proposing "[t]hat the people have a right to keep and bear arms"). Only the other three are remotely relevant. *See Kanter*, 919 F.3d at 454 (Barrett, J., dissenting); *see also Folajtar*, 980 F.3d at 915, 919–20 (Bibas, J., dissenting) (referencing the Pennsylvania proposal as the "only piece of historical evidence that comes close to endorsing a ban of all former felons").

The most famous of the three, and the only one *Jackson* cites, is the "Dissent of the Minority," a proposal from a group of Pennsylvania Anti-Federalists. 2 Schwartz, *supra*, at 662, 665. It would have guaranteed, among other things, the right to keep and bear arms "unless for crimes committed, or real danger of public injury from individuals." *Id.* Of course, being a dissent published by a "Minority," it does not reflect what was ultimately ratified, a point *Jackson* seems to miss. Indeed, it did not even garner a majority of the votes of the Pennsylvania delegation, much less the country as a whole.

Indeed, the Second Amendment bears little resemblance to what the Pennsylvania Anti-Federalists wanted it to say. *Compare* U.S. Const. amend. II ("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."), *with* 2 Schwartz, *supra*, at 665 ("[T]he people have a right to

bear arms for the defence of themselves . . . and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals . . ."); *see also United States v. Skoien*, 614 F.3d 638, 648 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (emphasizing the textual differences). The most obvious difference is the absence of any language saying who can lose the right. *Id.* In fact, the absence of anything on that point, over the dissent of one "influential" faction, suggests that any mention of criminality was intentionally left out. *Heller*, 554 U.S. at 604; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107–11 (2012) (describing the negative-implication canon).

The last two proposed amendments tell us even less. The Massachusetts proposal, advanced by Samuel Adams, would have restricted the power of the government to strip "the people of the United States, who are peaceable citizens, from keeping their own arms." 2 Schwartz, *supra*, at 675, 681. Like the Dissent of the Minority, however, it failed to win a majority vote of the state's delegates. And even if it had, "peaceable" is just a synonym for non-dangerous, which suggests that, like the Pennsylvanians who wanted to add "real danger," the Massachusetts delegates understood that dangerousness was what mattered. *Kanter*,

919 F.3d at 455–56 (Barrett, J., dissenting) (analyzing early dictionary definitions to conclude that "peaceable citizens" were "not violent . . . bloody . . . quarrelsome . . . [or] turbulent" (brackets and citations omitted)).

The only somewhat-relevant ratifying proposal that carried a majority at a state convention was from New Hampshire. Its focus was on the *dangerousness* posed by rebellion: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 *The Debates in the Several States*, *supra*, at 326. Making no mention of *other* crimes, it simply reinforces the importance of dangerousness.

* * *

Disarmament is about dangerousness, not virtue. We know that because colonial and post-ratification gun laws targeted rebellion and insurrection, not criminality. There have always been criminals, but there is no suggestion in any "historical analogue" that criminality alone, unaccompanied by dangerousness, was reason enough to disarm someone. *Bruen*, 142 S. Ct. at 2133 (emphasis omitted). And history certainly does not support *Jackson*'s unbending rule that felons can *never* win an as-applied challenge, no matter how non-violent their crimes may be or how long ago they happened.

## IV.

Perhaps recognizing the weakness of the virtue theory, *Jackson* suggests that § 922(g)(1) passes constitutional muster anyway "as an effort to address a risk of dangerousness." *Jackson*, 69 F.4th at 504. But early American legislatures did not arbitrarily classify a group of people as dangerous and then offer no way to prove otherwise. *See Range*, 69 F.4th at 105; *Kanter*, 919 F.3d at 465 (Barrett, J., dissenting) ("The government could quickly swallow the right if it had broad power to designate any group as dangerous and thereby disqualify its members from having a gun.").

Rather than disarm everyone who might aid the enemy in wartime, the colonists devised a way to determine who was dangerous and who was not: loyalty oaths. Suspected Catholic insurgents in Virginia, for example, could keep their guns if they "sw[ore] undivided allegiance to the sovereign." *See Kanter*, 919 F.3d at 457 (Barrett, J., dissenting) (citation omitted). The same went for suspected Loyalists during the Revolutionary War. *See Daniels*, 2023 WL 5091317, at *11 n.30; *Range*, 69 F.4th at 124–26 (Krause, J., dissenting). Loyalty oaths were a way to tell who might start a rebellion or raise arms against others. They also gave individuals a way to show they were not as dangerous as the

government thought.

They were not perfect. Sometimes they were underinclusive. Benedict Arnold's loyalty oath, for example, did not reveal his treachery. *See* Benedict Arnold's Oath of Allegiance (May 30, 1778) (on file with the National Archives). Other times they were overinclusive. A Pennsylvania law allegedly swept up non- dangerous pacifists like the Quakers, whose religion prohibited both violence and oath taking.[2] *See Jackson*, 69 F.4th at 504 (arguing that some people who refused the oath were not dangerous); *Range*, 69 F.4th at 125 (Krause, J., dissenting); *cf. Heller*, 554 U.S. at 590 ("Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever"); 4 *Journals of the Continental Congress*, *1774-1789*, at 205 (Worthington Chauncey Ford

[2] It is unclear whether many Quakers were actually disarmed in Pennsylvania or other loyalty-oath states. They were only forbidden from taking oaths, after all, and many of the relevant laws, including one of the statutes *Jackson* cites, allowed people to "affirm" or "declare" their loyalty instead. Act of June 13, 1777, ch. 756, § 1, *reprinted in* 9 *The Statutes at Large of Pennsylvania from 1682–1801*, *supra*, at 110–111; Act of June 1776, *reprinted in* 7 *Records of the Colony of Rhode Island and Providence Plantations in New England* 566–67 (John Russell Bartlett ed., Providence, A. Crawford Greene 1862). Other states expressly exempted Quakers from their loyalty-oath requirements. *See* Act of May 1, 1776, ch. 21, § 8, *reprinted in* 5 *The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay* 483 (Boston, Wright & Potter Prtg. Co. 1886).

ed., 1906).

As imperfect as they were, loyalty oaths still identified dangerous people. Whenever anyone refused to pledge their loyalty, particularly during wartime or societal unrest, it raised the possibility that their sympathies laid elsewhere. *See* 5 *The Acts and Resolves*, *supra*, at 479–84 (disarming each man older than 16 who refused to sign a loyalty oath and requiring the "strictest search" of his possessions). And the risk was that they would pose a danger by raising arms against the government or their fellow citizens.

Felons, on the other hand, are different. Murderers are almost always dangerous. But people who utter obscenities on the radio, read another person's email, or open a bottle of ketchup in the store and "put[] it back on the shelf," not so much. *See Folajtar*, 980 F.3d at 921 (Bibas, J., dissenting). Yet § 922(g)(1) does not discriminate. And now, under *Jackson*, there is no recourse—not a loyalty oath or a challenge in court—to prove they pose no danger.

In the end, the argument for blanket disarmament of felons sounds like the type of absolutist argument that the Supreme Court rejected in *Bruen*. Just like the entire city of New York is not a "sensitive place," neither is every felon "dangerous." Both classifications are "too broad[]."

*Bruen*, 142 S. Ct. at 2134. In *Bruen*, the antidote was a court challenge. Here, *Jackson* puts even that cure out of reach. 69 F.4th at 502.

V.

*Jackson* is also wrong to think that *Heller* completely immunized felon-in- possession laws. To be sure, it did not "cast doubt" on their "*presumptive[]* lawful[ness]." 554 U.S. at 626, 627 n.26 (emphasis added). But *Heller* stopped short of saying they are always constitutional, no matter the felon. After all, a measure can be presumptively constitutional and still have constitutionally problematic applications. As-applied challenges exist for exactly this reason. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51, 457– 58 (2008); *Atkinson*, 70 F.4th at 1022 ("Nothing allows us to sidestep *Bruen* in the way the government invites.").

Besides, *Heller* itself had a different focus: it took on the centuries-old debate about whether the Second Amendment creates an individual or collective right. 554 U.S. at 577. It did not adopt a test for Second Amendment challenges, much less decide whether felon bans are constitutional. *See Skoien*, 614 F.3d at 640 (explaining that *Heller* "left open" this issue). And if anything, it undermined the case for the virtue theory by making clear that the right to keep and bear arms is an

"individual," *Heller*, 554 U.S. at 598, rather than a "civic right," *Kanter*, 919 F.3d at 446 n.6 (discussing the scholarship that supports a "civic[-]right" conception of the Second Amendment). *See Heller*, 554 U.S. at 580 ("Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right." (quoting U.S. Const. amend. II)). The two are mutually exclusive. *See Binderup*, 836 F.3d at 370–72 (Hardiman, J., concurring in part).

*Jackson* also seeks refuge in the various separate opinions in *Bruen*. *See Jackson*, 69 F.4th at 502 (citing Justice Alito's concurrence, Justice Kavanaugh's concurrence, and Justice Breyer's *dissent* as "assurances" that *Bruen* did not "cast doubt" on longstanding felon bans); *Cunningham*, 70 F.4th at 506 (same). But just as New York's licensing regime was not before the Court in *Heller*, neither was § 922(g)(1) before the Court in *Bruen*. *See Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) ("[T]oday's decision therefore holds that a State may not enforce a law[] like New York's Sullivan Law . . . . That is all we decide."). Reading the tea leaves from dicta in three separate opinions is no substitute for faithful application of a majority opinion that commanded six votes. *See Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022) ("[D]icta, even if repeated, does not constitute precedent ").

VI.

Perhaps the driving force behind *Jackson* is prudence and practicality, not text or history. The court is worried about what "felony-by-felony" litigation will look like and whether the new post-*Bruen* world will be judicially manageable. *Jackson*, 69 F.4th at 502 & n.2. But the biggest questions all have simple answers. What is the standard? Dangerousness. When will it happen? When a defendant raises an as-applied challenge. What will it look like? The parties will present evidence and make arguments about whether the defendant is dangerous. The truth is that it will look almost the same as other determinations we ask district courts to make every day.

It is not as if assessing dangerousness is foreign. District courts considering whether to release a defendant before trial must consider whether it would "endanger the safety of any other person or the community." 18 U.S.C. § 3142(b). And then at sentencing, dangerousness comes up at least twice. The first is when balancing the statutory sentencing factors, including the need "to protect the public." *Id.* § 3553(a)(2)(C). The second is even a closer match: determining whether a defendant must "refrain from possessing a firearm" while on probation or supervised release. *Id.* § 3563(b)(8) (allowing a judge to

impose numerous conditions on probation, such as "refrain[ing] from possessing a firearm, destructive device, or other dangerous weapon"); *id.* § 3583 (allowing a judge to impose, if "reasonably related" to the sentencing factors, "any condition set forth as a discretionary condition . . . in section 3563(b)"). It is not clear why making one more determination along those same lines, perhaps even on the same facts, would be so difficult.[3]

We also do not have to look far to learn that "felony-by-felony" litigation is nothing to fear. *Jackson*, 69 F.4th at 502. Over a decade before *Bruen*, the Third Circuit explained that a successful as-applied challenge to a § 922(g)(1) conviction required the defendant to "present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011). Substitute the word "dangerousness" and shift the burden of proof to the government, and *Barton* provides the template for what an as-applied challenge looks like post-*Bruen*.

[3] Besides, difficulty of administration is no excuse for failing to follow Supreme Court precedent. See, e.g., Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955).

It should come as no surprise that district courts around the Third Circuit had no trouble handling the task. They considered basic facts in making the determination, including a felon's criminal history, behavior on probation, and history of violence in evaluating whether gun possession posed a danger to the community. *Suarez v. Holder*, 255 F. Supp. 3d 573, 585–89 (M.D. Pa. 2015); *Binderup v. Holder*, 2014 WL 4764424, at *21–31 (E.D. Pa. Sept. 25, 2014), *aff'd*, 836 F.3d 336 (3d Cir. 2016). Exactly what they already do pretrial and at sentencing. We just need to trust judges to do it one more time. *See, e.g.*, *United States v. Banderas*, 858 F.3d 1147, 1150 (8th Cir. 2017) ("The [district] court reasonably concluded that [the defendant] was 'potentially a very dangerous person'").

VII.

These issues are "exceptional[ly] importan[t]." Fed. R. App. P. 35(a)(2). Felon-in-possession cases are common in federal court. And *Jackson*'s holding doing away with as-applied Second Amendment challenges is an outlier. *See Atkinson*, 70 F.4th 1023–24; *Range*, 69 F.4th at 106. Even the case *Jackson* pinned its historical analysis on, *Range*, has now gone the other way. *Compare Range*, 53 F.4th 262, *with Range*, 69 F.4th 96 (en banc). En-banc votes do not come much easier than this

one. I would grant.

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August 30, 2023

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans