APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

No. 21-4121

MELYNDA VINCENT,

Plaintiff - Appellant,

v.

PAMELA J. BONDI, Attorney General of the United States,*

Defendant - Appellee.

FILED February 11, 2025

OPINION

BACHARACH, Circuit Judge.

Ms. Melynda Vincent sued the Attorney General, claiming that the Second Amendment entitles her to possess firearms. We rejected this claim and dismissed the action. *Vincent v. Garland*, 80 F.4th 1197, 1200–02 (10th Cir. 2023). But the Supreme Court vacated our dismissal and remanded for reconsideration in light of *United States v. Rahimi*, 602 U.S. 680, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024). *Vincent v. Garland*, —— U.S. ——, 144 S. Ct. 2708, 219 L.Ed.2d 1314 (2024)

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* Pursuant to Fed. R. App. P.43(c)(2), Pamela J. Bondi is substituted for Merrick B. Garland as the Appellee in this appeal.

(mem.).[1] Given this remand, we've freshly considered the Second Amendment claim and conclude that *Rahimi* doesn't undermine the panel's earlier reasoning or result.

1. Ms. Vincent is prohibited from possessing firearms.

Ms. Vincent was convicted of bank fraud, a federal felony. 18 U.S.C. § 1344. This conviction triggered 18 U.S.C. § 922(g)(1), which prohibits individuals with felony convictions from possessing firearms. Ms. Vincent claims that the Second Amendment prohibits application of § 922(g)(1) to nonviolent offenders like herself.

2. Our precedent renders this prohibition constitutional.

We addressed a similar constitutional challenge to § 922(g)(1) in *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009). There we held that § 922(g)(1) does not violate the Second Amendment. *Id.* at 1047. A precedent like *McCane* would generally bind us when addressing the same issue. *United States v. Salazar*, 987 F.3d 1248, 1254 (10th Cir. 2021). But an exception exists when the Supreme Court has indisputably and pellucidly abrogated our precedent. *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015).

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[1] The remand doesn't necessarily signal a disagreement with the panel's reasoning or result. *See* Stephen M. Shapiro et al., *Supreme Court Practice* ch. 5, § 5.12(b) (11th ed. 2019); *see also Lawrence v. Chater*, 516 U.S. 163, 174, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (noting that the Supreme Court was granting certiorari, vacating the circuit court's judgment, and remanding given the uncertainty about "the legal impact of a new development"). So we view the Supreme Court's remand as a direction to reassess the validity of our panel opinion in light of *Rahimi*.

Ms. Vincent argues that the Supreme Court abrogated *McCane* in *United States v. Rahimi*, 602 U.S. 680, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024). In a non-precedential opinion, we rejected Ms. Vincent's reading of *Rahimi*. *United States v. Curry*, 2024 WL 3219693, at *4 n.7 (10th Cir. June 28, 2024) (unpublished). We do so again.

In *McCane*, we held that § 922(g)(1) was constitutional, relying on the Supreme Court's statement in *District of Columbia v. Heller* that it was not "cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons." 573 F.3d 1037, 1047 (10th Cir. 2009) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)). *Rahimi* again recognized the presumptive lawfulness of these longstanding prohibitions, "like those on the possession of firearms by 'felons.'" *Rahimi*, 602 U.S. at 682, 144 S.Ct. 1889 (quoting *Heller*, 554 U.S. at 626, 627 n.26, 128 S.Ct. 2783). With this recognition of the prohibitions as presumptively lawful, three other circuits have held that *Rahimi* doesn't abrogate their earlier precedents upholding the constitutionality of § 922(g)(1). *United States v. Hunt*, 123 F.4th 697, 703–04 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024); *United States v. Hester*, 2024 WL 4100901, at *1 (11th Cir. Sept. 6, 2024) (per curiam) (unpublished).[2]

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[2] After *Rahimi* was decided, the Third and Fifth Circuits recognized abrogation of their earlier precedents. But to do so, those courts relied on *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022)—not *Rahimi*. *Range v. Att'y Gen. U.S.*, 124 F.4th 218, 225–226 (3d Cir. 2024); *United States v. Diaz*, 116 F.4th 458, 465 (5th Cir. 2024). Unlike our court, those circuits had earlier upheld the constitutionality of gun restrictions by considering the relationship between

The Sixth Circuit has taken a different approach, concluding that its precedent on § 922(g)(1) is no longer viable. *United States v. Williams*, 113 F.4th 637, 648 (6th Cir. 2024). For this conclusion, the court relies on *Bruen* and *Rahimi*, which reiterated the need to consult historical analogs. *Id.*

We depart from the Sixth Circuit's approach. Under the Supreme Court's order, our sole task is to consider the effect of *Rahimi*. To do so, we must follow our prior opinion in *McCane* unless it has been indisputably and pellucidly abrogated. *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015).

In *McCane*, we relied on *Heller*'s instruction that felon dispossession laws are presumptively valid. *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *see* p. 1264–65, above. This presumption was reaffirmed in *Rahimi*. 602 U.S. at 682, 144 S.Ct. 1889. So *Rahimi* doesn't clearly abrogate the presumptive validity of § 922(g)(1). *See United States v. Hunt*, 123 F.4th 697, 703 (4th Cir. 2024) (concluding that "nothing in *Bruen* or *Rahimi*" would undermine the Fourth Circuit's earlier reliance on *Heller* to uphold the con-stitutionality of § 922(g)(1)).

One district court in our circuit ruled that *Rahimi* had overturned *McCane*, relying on the absence of a historical inquiry. *United States v. Forbis*, 2024 WL 3824642, at *4–5 (N.D. Okla. Aug. 14, 2024). But that

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§ 922(g)(1) and a sufficiently important governmental interest. *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010); *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001). The Supreme Court rejected that method of analysis in *Bruen*, 597 U.S. at 26, 142 S.Ct. 2111. But *McCane* had approached the issue differently than the Third and Fifth Circuits. *See* p. 1264–65, above. In any event, the remand requires reconsideration in light of *Rahimi*, not *Bruen*.

court and three other district courts have elsewhere concluded that *McCane* remains binding after *Rahimi*.

Case	**Is *McCane* abrogated by *Rahimi*?**
United States v. Rodish, 2024 WL 4905716, at *3 (D. Colo. Nov. 27, 2024)	No.
United States v. Hawkins, 2024 WL 4751401, at *4 (D. Kan. Nov. 12, 2024)	No.
United States v. Sutton, 2024 WL 3932841, at *4 (N.D. Okla. Aug. 23, 2024)	No.
United States v. Harris, 2024 WL 3571756, at *4 (W.D. Okla. July 29, 2024)	No.

We too conclude that *McCane* remains binding.

3. *McCane* applies to nonviolent as well as to violent offenders.

Ms. Vincent argues, however, that the Second Amendment protects nonviolent offenders like herself. But this argument is unavailable under *McCane*. There we upheld the constitutionality of § 922(g)(1) without drawing constitutional distinctions based on the type of felony involved. *See In re: United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (unpublished) (stating that *McCane* had "rejected the notion that *Heller* mandates an individualized inquiry

concerning felons pursuant to § 922(g)(1)")[3]; *accord United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024) (concluding "that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)"). *McCane* instead upheld the constitutionality of § 922(g)(1) for all individuals convicted of felonies. *See* p. 1264–65, above. Under *McCane*, the Second Amendment doesn't prevent application of § 922(g)(1) to nonviolent offenders like Ms. Vincent. So we readopt our prior opinion and affirm the dismissal.[4]

[3] *In re: United States* is persuasive but not precedential. 10th Cir. R. 32.1(A).

[4] Ms. Vincent also requests that we sua sponte engage in en banc review to reassess our pre-*Bruen* precedent. But the panel can't order en banc consideration. *See* Fed. R. App. R. 40(a) (eff. Dec. 1, 2024). And Ms. Vincent hasn't filed a petition for en banc consideration.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-4121

MELYNDA VINCENT,

Plaintiff - Appellant,

v.

MERRICK B. GARLAND, Attorney General of the United States,

Defendant - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 2:20-CV-00883-DBB)

Before BACHARACH, KELLY, and CARSON, Circuit Judges.

BACHARACH, Circuit Judge.

Roughly 50 years ago, Congress banned the possession of firearms by convicted felons. Gun Control Act of 1968, § 922(h)(1), Pub. L. No. 90 618, 82 Stat. 1213, 1220 (codified as amended at 18 U.S.C. § 922(g)(1)). After Congress enacted this ban, the Supreme Court held that the Second Amendment guarantees a personal right to possess firearms. *District of Columbia v.*

Heller, 554 U.S. 570, 595 (2008). Based on the Court's language, we upheld the constitutionality of the ban on convicted felons' possession of firearms. *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009).

The Supreme Court has recently created a new test for the scope of the right to possess firearms. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022). Based on the Supreme Court's creation of a new test, the plaintiff challenges the constitutionality of the ban when applied to individuals convicted of nonviolent felonies. To resolve this challenge, we must consider whether the Supreme Court's new test overruled our precedent. We conclude that our precedent has not been overruled.

1. The plaintiff challenges the ban after conviction of a nonviolent felony.

The plaintiff is Ms. Melynda Vincent, who was convicted of a nonviolent felony (bank fraud). Because of this conviction, Ms. Vincent can't possess a firearm for the rest of her life. *See* 18 U.S.C. § 922(g)(1). Ms. Vincent challenges that prohibition, arguing that it violates the Second Amendment rights of nonviolent felons like herself.[1]

[1] Ms. Vincent also challenged a Utah law that prohibited convicted felons from possessing firearms. After Ms. Vincent appealed, however, Utah changed its law to permit certain felons to possess firearms after seven years of good behavior. *See* H.B. 507, 2023 Gen Sess. (Utah 2023). The new law allows Ms. Vincent to possess a firearm, so we dismissed Ms. Vincent's challenge to the old version of Utah's law.

2. The Supreme Court hasn't expressly abrogated our precedent on the constitutionality of the federal ban.

To resolve this challenge, we must consider the scope of the Second Amendment. This amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. For over two centuries, the nature of this right was uncertain. In 2008, however, the Supreme Court clarified this right in *District of Columbia v. Heller*, 554 U.S. 570 (2008). There the Court focused on the text and history of the Second Amendment, concluding that it guarantees a right to bear arms unconnected with service in the militia. *Id.* at 579–92. The Court observed that it wasn't "cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 626. We applied this observation in *United States v. McCane* to uphold the constitutionality of the federal ban on felons' possession of firearms. 573 F.3d 1037, 1047 (10th Cir. 2009).

The district court was obligated to apply our precedent. *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990). So the court applied *McCane* and dismissed Ms. Vincent's challenge to the constitutionality of the federal ban. In considering that dismissal, we conduct de novo review. *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009). To conduct de novo review, we must consider the current caselaw even if it didn't exist when the district court ruled.

That caselaw includes *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), where the Supreme Court addressed the scope of the Second

Amendment.[2] In *Bruen*, the Court concluded that the Second Amendment prohibits a state from requiring gun owners to demonstrate a special need in order to obtain a license to carry a firearm in public. *Id.* at 2134–35, 2156. Ms. Vincent argues that *Bruen* abrogated our precedential opinion in *McCane*.

Like the district court, we're generally obligated to apply our own precedents. *United States v. Salazar*, 987 F.3d 1248, 1254 (10th Cir. 2021). But an exception exists when the Supreme Court has issued an opinion contradicting or invalidating the analysis in our precedent. *United States v. Brooks*, 751 F.3d 1204, 1209–10 (10th Cir. 2014). So we must decide whether the Supreme Court's opinion in *Bruen* contradicted or invalidated our analysis in *McCane*.

In *Bruen*, the Supreme Court created a test requiring consideration of two questions:

1. Does the Second Amendment's plain text cover an individual's conduct?
2. If the answer is *yes*, has the government justified the ban by showing that it's consistent with the nation's "historical tradition of firearm regulation"?

142 S. Ct. at 2129–30.

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[2] The Supreme Court decided *Bruen* during the pendency of the appeal. But we must address the effect of *Bruen* anyway. *See United States v. Novey*, 922 F.2d 624, 629 (10th Cir. 1991) (reasoning that we may consider arguments based on an intervening Supreme Court case—which was decided during the pendency of the appeal—even though the parties did not make those arguments to the district court), *overruled on other grounds by United States v. Flowers*, 464 F.3d 1127 (10th Cir. 2006).

This test didn't exist when we decided *McCane*. But the emergence of a new test doesn't necessarily invalidate our earlier precedent. We addressed a similar issue in *Barnes v. United States*, 776 F.3d 1134 (10th Cir. 2015). The issue there involved the jurisdictional nature of the Federal Tort Claims Act's statute of limitations for suits brought against the United States. Prior to *Barnes*, we had held that the statute was jurisdictional. *Casias v. United States*, 532 F.2d 1339, 1340 n.1 (10th Cir. 1976). But the Supreme Court later created a new framework to assess the jurisdictional nature of statutes of limitations in suits brought against the United States. *Sebelius v. Auburn Reg. Med. Ctr.*, 568 U.S. 145, 153–54 (2013). Though we hadn't used that framework for the Federal Tort Claims Act's statute of limitations, we applied our earlier precedent because the Supreme Court's new framework hadn't contradicted or invalidated our prior characterization of the FTCA's statute of limitations. *Barnes*, 776 F.3d at 1147–48.

Under *Barnes,* we can't jettison *McCane* just because it might have been undermined in *Bruen*. *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1142 (10th Cir. 2023). We must instead determine whether *Bruen* indisputably and pellucidly abrogated *McCane*. *Barnes*, 776 F.3d at 1147.[3]

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[3] *Bruen* expressly abrogated a test in some circuits, which had considered Second Amendment challenges based on tests considering the fit between the means used to carry out a governmental interest and the strength of that interest. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129 (2022); *see United States v. Rahimi*, 61 F.4th 443, 449 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023). But no one suggests that *Bruen* expressly abrogated anything that we had said in *McCane*. Unlike those circuits, we hadn't relied in *McCane* on the means or ends of the

In *Bruen* itself, the Supreme Court didn't address the ban on felons' possession of firearms. The Court instead addressed the constitutionality of a New York licensing scheme for carrying a handgun in public. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122–24 (2022). In addressing that licensing scheme, the Court articulated a historical test for the scope of the Second Amendment's right to bear arms. *Id.* at 2129–30. For that test, the Court drew upon *District of Columbia v. Heller*, which had recognized a personal right to bear arms. 554 U.S. 570, 595 (2008). In recognizing that right, the Supreme Court considered the text and historical origins of the Second Amendment. *Id*. at 605–20. After this historical discussion, the Court noted that

- "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" and
- felon dispossession statutes are "presumptively lawful."

Id. at 626–27 & n.26.

In *McCane*, we relied solely on this language from *Heller*,[4] reasoning that the Supreme Court had appeared to recognize the constitutionality of longstanding

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ban on felons' possession of firearms. *See United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009).

[4] Judges elsewhere disagree on whether this language in *Heller* had constituted dicta or part of the Supreme Court's holding. *Compare United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (characterizing this language as dicta), *with United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010) (stating that this language was not dicta). We need not resolve that disagreement because we're bound by *McCane* regardless of whether *Heller's* language constituted dicta or part of the holding.

prohibitions on possession of firearms by convicted felons. 573 F.3d 1037, 1047 (10th Cir. 2009).

Though *Bruen* created a new test for determining the scope of the Second Amendment, the Court didn't appear to question the constitutionality of longstanding prohibitions on possession of firearms by convicted felons. If anything, *Bruen* contains two potential signs of support for these prohibitions.

First, six of the nine Justices pointed out that *Bruen* was not casting any doubt on this language in *Heller*. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2157 (2022) (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.).[5]

Second, *Bruen* apparently approved the constitutionality of regulations requiring criminal background checks before applicants could get gun permits. In *Bruen*, the Court struck down state regulations that had required the showing of a special need before someone could get a license to carry a gun. 142 S. Ct. at 2123–24, 2156. But the Court added that it wasn't questioning the constitutionality of "shall-issue" licensing regimes. *Id*. at 2138 n.9. These regimes don't require a showing of special need, but they do "often require applicants to undergo a background check" to ensure that the applicant is a "law-abiding, responsi-

[5] Elsewhere, two other Justices (Justices Thomas and Gorsuch) have recognized the existence of historical support for the constitutionality of laws prohibiting felons' possession of firearms. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 140 S. Ct. 1525, 1540–41 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting).

ble citizen[]." *Id*. (quoting *Dist. of Columbia v. Heller*, 544 U.S. 570, 635 (2008)).

In preserving "shall-issue" regimes and related background checks, the Court arguably implied that it was constitutional to deny firearm licenses to individuals with felony convictions. *Bruen*'s language thus could support an inference that the Second Amendment doesn't entitle felons to possess firearms. *See Range v. Att'y Gen. United States*, 69 F.4th 96, 114 (3d Cir. 2023) (Shwartz, J., dissenting, joined by Restrepo, J.) (inferring from *Bruen*'s approval of criminal background checks "that felon bans" on guns "are presumptively lawful"). *But see Atkinson v. Garland*, 70 F.4th 1018, 1022 (7th Cir. 2023) (stating that *Bruen*'s apparent approval of criminal background checks, before issuance of a public carry permit, doesn't resolve the constitutionality of the ban on felons' possession of firearms).

Given the six Justices' reaffirmation of the *Heller* language and the Court's apparent approval of "shall-issue" regimes and related background checks, we conclude that *Bruen* did not indisputably and pellucidly abrogate our precedential opinion in *McCane*.

3. The ban is constitutional under *McCane*.

McCane squarely upheld the constitutionality of the ban on felons' possession of firearms. *See* p. 2, above. Under *McCane*, we have no basis to draw constitutional distinctions based on the type of felony involved. *See In re: United States*, No. 09-4145, slip op. at 8 (10th Cir. Aug. 13, 2009) (unpublished) (stating that *McCane* had "rejected the notion that *Heller* mandates an individualized inquiry concerning felons

pursuant to § 922(g)(1)");[6] *accord United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023) (concluding "that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)"). *McCane* instead upheld the constitutionality of the federal ban for *any* convicted felon's possession of a firearm. *See* p. 2, above. We thus follow *McCane* and affirm the dismissal.

[6] *In re: United States* is persuasive but not precedential. 10th Cir. R. 32.1(A).

BACHARACH, J., concurring.

The majority opinion explains that the Supreme Court has not indisputably and pellucidly abrogated our precedent in *McCane*. In some circumstances, the Supreme Court's creation of a new standard might implicitly upend our precedent. For example, we might question the continued viability of *McCane* if the Supreme Court's creation of a new test would have required us to view the federal law as unconstitutional. *See, e.g.*, *United States v. Tanksley*, 848 F.3d 347, 349–52 (5th Cir. 2017) (concluding that the Supreme Court's creation of a new test implicitly abrogated a panel precedent when the new test required a different outcome), *supplemented on other grounds by United States v. Tanksley*, 854 F.3d 284 (5th Cir. 2017). But in my view, the constitutionality of the federal law (18 U.S.C. § 922(g)(1)) would remain debatable even under the Supreme Court's new test in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022). So even if it were possible for the Supreme Court to implicitly abrogate our precedent, the Court didn't do so in *Bruen*.

Under *Bruen*, the threshold issue is whether the plain text of the Second Amendment covers the individual's conduct. *See* Maj. Op. at 5. The text of the Second Amendment shows that it applies only to the right of *the people* with respect to possession of *Arms*. *See id.* at 3. There's no question about the applicability of the term *Arms*: The federal ban addresses firearms, which are considered *Arms* under the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (defining *keep Arms* from the Second Amendment as *have weapons*). But does the term *the people* include individuals convicted of nonviolent felonies?

The answer is debatable. *Bruen* had no occasion to address the scope of *the people* as used in the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2157 (2022) (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm . . . ."). But *Bruen* referred fourteen times to the Second Amendment's protection of *law-abiding citizens*. *Id.* at 2122, 2125, 2131, 2133–34, 2135 n.8, 2138 & n.9, 2150, 2156. These references proved critical to the Court's historical analysis. For example, the Court searched the historical record and found no historical analogues requiring a special need for "law-abiding citizens" to possess guns. *Id.* at 2150, 2156 (2022). The Court contrasted these requirements with background checks or firearm safety courses, which don't intrude on the rights of "law-abiding" citizens. *Id.* at 2138 n.9.

But *Heller* also referred to *the people* as all members of the political community. 554 U.S. at 580. These references led the Third Circuit to conclude that convicted felons are among *the people* protected under the Second Amendment. *Range v. Att'y Gen. United States*, 69 F.4th 96, 101–03 (3d Cir. 2023) (en banc).[1]

If individuals convicted of nonviolent felonies aren't among *the people* protected under the Second Amendment, I would regard the ban as constitutional without further historical inquiry. But if we were to interpret the term *the people* to include individuals convicted of nonviolent felonies, we would need to consider whether the statutory prohibition was "consistent with" our

[1] Dictionaries of this era sometimes defined *people* broadly. *E.g.*, Noah Webster, *Am. Dict. of the English Lang.*, *People* (1828) (defining *people* to "comprehend[] all classes of inhabitants, considered as a collective body, or any portion of the inhabitants of a city or county").

"historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126; *see* Maj. Op. at 5. This inquiry is demanding and subject to differing interpretations. *See Atkinson v. Garland*, 70 F.4th 1018, 1024 (7th Cir. 2023) ("[T]he historical analysis required by *Bruen* will be difficult and no doubt yield some measure of indeterminacy."); *id.* at 1025 (Wood, J., dissenting) (stating that *Bruen*'s historical inquiry, with respect to the law prohibiting felons' possession of firearms, "necessarily will be inconclusive").

Courts can differ on whether historical analogues existed for the statutory prohibition on felons' possession of firearms. In determining whether historical analogues exist, we consider English views dating from the late seventeenth century, the Founders' views in the run-up to adoption of the Second Amendment, and the interpretation of the Second Amendment from its ratification through the end of the nineteenth century. *Bruen*, 142 S. Ct. at 2127.

In the late seventeenth century, English and colonial authorities had categorically prohibited particular groups from possessing guns. *See United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023). But authorities have relied on different grounds for these prohibitions. For example, some judges trace these prohibitions to concern over a group's threat to the political community. *See, e.g.*, *Atkinson v. Garland*, 70 F.4th 1018, 1035 (7th Cir. 2023) (Wood, J., dissenting); *Range v. Att'y Gen. United States*, 69 F.4th 96, 110 (3d Cir. 2023) (Ambro, J., concurring) ("[I]t fits within our Nation's history and tradition of disarming those persons who legislatures believed would, if armed, pose a threat to the orderly functioning of society."). Other judges trace the prohibitions to threats of violence without parsing the traits of individual

members. *See, e.g.*, *Jackson*, 69 F.4th at 504 ("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.").

Given the variety of interpretations, judges differ on how they apply these historical analogues. Some judges see no historical basis for bans involving nonviolent felonies. *See Range*, 69 F.4th at 105–06 (concluding that no historical analogue exists to bar possession of firearms by someone convicted under a state law criminalizing a false statement to obtain food stamps); *id.* at 109, 112–13 (Ambro, J., concurring) (suggesting that the Second Amendment protects someone who made a false statement to obtain food stamps, but not individuals convicted of violent crimes). Other judges find a historical basis for bans involving any convicted felon. *See Jackson*, 69 F.4th at 505–06; *Range*, 69 F.4th at 113–16 (Shwartz, J., dissenting, joined by Krause, J.); *id.* at 118–28 (Krause, J., dissenting); *Atkinson v. Garland*, 70 F.4th 1018, 1035 (7th Cir. 2023) (Wood, J., dissenting).[2]

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[2] Scholars also disagree on the existence of historical analogues for a ban on felons' possession of firearms. *Compare* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 714–28 (2009) (stating that the Founders understood that the right to bear arms for self-defense had not categorically excluded individuals convicted of crimes), *with* Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L.J. 1339–64 (2009) (stating that members of the founding generation recognized that the sovereign could disarm persons convicted of common-law felonies).

Given the judicial disagreement over historical analogues for the federal ban, *Bruen* did not indisputably and pellucidly contradict or invalidate our precedent in *McCane*. *See United States v. Garza*, No. 22-51021, 2023 WL 4044442 (5th Cir. June 15, 2023) (unpublished) (stating that "it is not clear" that *Bruen* requires a court to find 18 U.S.C. § 922(g)(1) unconstitutional on its face or as applied). So *McCane* controls Ms. Vincent's appeal and requires us to affirm the dismissal.[3]

[3] Ms. Vincent argues that adherence to *McCane* would "prevent any district court from ever applying the *Bruen* test. Accordingly, *Bruen* has implicitly overruled *McCane*." Appellant's Reply Br. at 2. But that's not necessarily true. *McCane* addressed only the federal ban on possession by convicted felons. Given the limited scope of the issue in *McCane*, our opinion there doesn't necessarily prevent application of *Bruen* to challenges involving the constitutionality of other gun laws.

APPENDIX C

THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

Case No. 2:20-cv-00883-DBB

MELYNDA VINCENT,

Plaintiff,

v.

MERRICK B. GARLAND, Attorney General of the United States, and SEAN REYES, Attorney General of the State of Utah,

Defendants.

District Judge David Barlow

MEMORANDUM DECISION AND ORDER GRANTING [16] AND [17] DEFENDANTS' MOTIONS TO DISMISS

Melynda Vincent brought an action against Merrick B. Garland and Sean Reyes for a declaratory judgment that federal and state felon-dispossession statutes 18 U.S.C. § 922(g)(1) and Utah Code § 76-10-503(3)(a) are unconstitutional as applied to her.[1] Defendants moved to dismiss.[2] Because Vincent cannot bring an as-applied challenge under the Second Amendment to the felon-dispossession statutes, Defendants' Motions to Dismiss are GRANTED.

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[1] *See* Amended Complaint, ECF No. 10 at ¶¶ 32–39.

[2] *See* Defendant Sean Reyes's Motion to Dismiss, ECF No. 16; Defendant Merrick Garland's Motion to Dismiss, ECF No. 17.

BACKGROUND

In 2008, Plaintiff Melynda Vincent pled guilty to bank fraud.[3] She committed that fraud at a time when she was addicted to methamphetamine.[4] Since the time of her offense, Vincent graduated from a drug treatment program, earned an undergraduate degree and two graduate degrees, and founded a nonprofit organization for drug treatment and criminal-justice reform.[5] Now, Vincent desires to purchase and possess a firearm, but she cannot lawfully do so because 18 U.S.C. § 922(g)(1) and Utah Code § 76-10-503(3)(a) bar convicted felons from possessing firearms.[6]

STANDARD

Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6) when the complaint, standing alone, is legally insufficient to state a claim on which relief may be granted.[7] Each cause of action must be supported by sufficient, well-pled facts to be plausible on its face.[8] In reviewing a complaint on a Rule 12(b)(6) motion to dismiss, factual allegations are accepted as true and reasonable inferences are drawn in a light most favorable to the plaintiff.[9] But the court disregards "assertions

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[3] ECF No. 10 at ¶¶ 10–11.

[4] *Id.* ¶ 9.

[5] *Id.* ¶¶ 15, 20–24.

[6] *Id.* ¶ 2.

[7] Fed. R. Civ. P. 12(b)(6).

[8] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[9] *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

devoid of factual allegations" that are nothing more than "conclusory" or "formulaic recitation[s]" of the law.[10]

DISCUSSION

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[11] In *District of Columbia v. Heller*,[12] the Supreme Court interpreted the Second Amendment to "confer[] an individual right to keep and bear arms."[13]

Vincent challenges two statutes in this case. 18 U.S.C. 922(g)(1) prohibits "any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" from "possess[ing] in or affecting commerce, any firearm or ammunition."[14] Similarly, Utah Code § 76-10-503(3) prohibits a person convicted of a nonviolent felony from purchasing, transferring, possessing, or using a firearm.[15] Vincent argues that the application of these statutes to her violates her Second Amendment right to keep and bear arms.[16]

Heller found that the Second Amendment recognizes an individual right to keep and bear arms, but it also noted that "the right secured by the Second Amendment is not unlimited."[17] The Court specifically stated

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[10] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009).

[11] U.S. Const. amend. II.

[12] 554 U.S. 570 (2008).

[13] *Id.* at 595.

[14] 18 U.S.C. 922(g)(1).

[15] Utah Code Ann. § 76-10-503(3).

[16] *See* Amended Complaint, ECF No. 10 at ¶ 32–39.

[17] *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons. . . ."[18]

It is precisely the prohibition on the possession of firearms by those convicted of a felony that Vincent wishes to challenge, at least as to herself. Vincent asserts that "her unique personal characteristics and circumstances" require a declaration that the challenged federal and Utah laws prohibiting her from possessing a firearm are unconstitutional as they apply to her.[19] And Vincent characterizes the language in *Heller* as dicta because the right of a felon to possess a firearm was not at issue there.[20] But Supreme Court dicta binds this court "almost as firmly as . . . the Court's outright holdings."[21]

In interpreting *Heller*, the Tenth Circuit has not permitted either facial or as-applied Second Amendment challenges to § 922(g)(1).[22] In *United States v. McCane*, the Tenth Circuit rejected a Second Amendment challenge to § 922(g), noting that "[t]he Supreme Court . . . explicitly stated in *Heller* that 'nothing in our opinion should be taken to cast doubt on longstanding

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[18] *Id.*

[19] ECF No. 10 at ¶ 39.

[20] Opposition to Defendants' Motion to Dismiss, ECF No. 31 at 9.

[21] *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)); *see also United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring).

[22] *See United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), *cert. denied*, 559 U.S. 970 (2010); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (unpublished) (citing *McCane*, 573 F.3d at 1047).

prohibitions on the possession of firearms by felons.'"[23] Then, in an unpublished majority decision in *In re United States*, the Tenth Circuit explained: "We have already rejected the notion that *Heller* mandates an individualized inquiry concerning felons pursuant to § 922(g)(1). . . . Furthermore, we have rejected, albeit in a slightly different context, the idea that § 922(g)(9) allows for individual assessments of the risk of violence."[24]

In sum, Vincent invites this court to do what the Tenth Circuit has not authorized. She invites the court to reject some of the analysis in *Heller* and put aside *McCane*.[25] But that is not this court's role. This court applies the instructions of the Tenth Circuit and the Supreme Court, rather than questioning the underlying bases for their determinations.[26]

Vincent seemingly recognizes this, describing her challenge as "potentially foreclosed" by one of the relevant higher court decisions.[27] She is right; it is. However, Vincent asserts that *McCane* is distinguishable because it involved a criminal case, not a civil challenge like the one here. Vincent does not explain why the analysis of the constitutional and statutory issues would change as a result, but instead simply

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[23] *McCane*, 575 F.3d at 1047 (citing *Heller*, 554 U.S. at 626).

[24] *In re United States*, 578 F.3d at 1200 (citations omitted).

[25] ECF No. 31 at 4–8, 10–11.

[26] The Tenth Circuit has previously described its mandate "to follow the Supreme Court's directions, not pick and choose among them as if ordering from a menu." *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008); *United States v. McCane*, 573 F.3d 1037, 1050 (10th Cir. 2009) (Tymkovich, J., concurring). Obviously, that statement applies to this court as well.

[27] ECF No. 31 at 11.

states that the Tenth Circuit has yet to hear from someone like her and that the Tenth Circuit should consider then Judge (now Justice) Barrett's later dissent in a Seventh Circuit case.[28] These arguments, clearly directed to the Tenth Circuit itself, are not actionable by this court.

Vincent also contends that her rehabilitation and the passage of time since her conviction should relieve her from firearm dispossession.[29] As the United States notes, no court of appeals has ever sustained a challenge to a dispossession statute on those grounds.[30] In fact, those courts that have considered whether rehabilitation and passage of time can remove an individual from those not entitled to Second Amendment rights have explicitly rejected that argument.[31]

The Tenth Circuit simply has not authorized the kind of individualized assessment of the constitutionality of felon-dispossession statutes that Vincent requests from this court. Thus, Vincent's as-applied

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[28] *Id.* at 4–7, citing *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting).

[29] ECF No. 2 at ¶ 39.

[30] ECF No. 17 at 10.

[31] *Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019) ("Nor can Medina's present contributions to his community, the passage of time, or evidence of his rehabilitation un-ring the bell of his conviction."); *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017) ("[E]vidence of rehabilitation, likelihood of recidivism, and passage of time are not bases for which a challenger might remain in the protected class of 'law-abiding, responsible' citizen."); *Binderup v. Att'y Gen.*, 836 F.3d 336, 350 (3d Cir. 2016) ("There is no historical support for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited.").

challenges to §§ 922(g)(1) and 76-10-503(3)(a) fail as a matter of law.

ORDER

Because Vincent cannot bring an as-applied challenge under the Second Amendment to the felon-dispossession statutes, Defendant Garland's Motion to Dismiss is GRANTED. Defendant Reyes's Motion to Dismiss is GRANTED. The Amended Complaint is dismissed with prejudice.

Signed October 5, 2021.

BY THE COURT

/s/ David Barlow
David Barlow
United States District Judge

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 23–683

MELYNDA VINCENT,

Petitioner

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *United States* v. *Rahimi*, 602 U. S. ___ (2024).

IT IS FURTHER ORDERED that the petitioner, Melynda Vincent, recover from Merrick B. Garland, Attorney General, Three Hundred Dollars ($300.00) for costs herein expended.

July 2, 2024

A True copy SCOTT S. HARRIS
Clerk of the Supreme Court of the United States

/s/ Scott S. Harris