No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FLAVIO CHARLES PATINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

/s/ Kevin Joel Page

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 24-10080
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
February 27, 2025
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

FLAVIO CHARLES PATINO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:23-CR-40-1

Before GRAVES, WILLETT, and WILSON, *Circuit Judges*.

PER CURIAM:[*]

Flavio Charles Patino appeals his conviction for possession of a firearm by a felon. *See* 18 U.S.C. § 922(g)(1). He contends that § 922(g)(1) violates the Second Amendment in light of *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), and that § 922(g)(1) exceeds Congress's power to regulate felon gun possession under the Commerce

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Clause per *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 529 (2012). The Government has filed an unopposed motion for summary affirmance, arguing that Patino's arguments are foreclosed by our precedent. In the alternative, the Government moves for an extension of time to file a merits brief.

As Patino concedes, his Second Amendment challenge to § 922(g)(1) is foreclosed. *See United States v. Diaz*, 116 F.4th 458, 471–72 (5th Cir. 2024). Patino also concedes that his Commerce Clause challenge is foreclosed. *See, e.g.*, *United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013) (holding § 922(g)(1) is "a valid exercise of Congress's authority under the Commerce Clause"); *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020) (same); *United States v. Leal*, No. 22-10098, 2022 WL 4298116, at *1 (5th Cir. Sept. 16, 2022) (same).

Accordingly, the Government's motion for summary affirmance is GRANTED. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). The Government's alternative motion for an extension of time is DENIED. The judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Amarillo Division

UNITED STATES OF AMERICA

v.

FLAVIO CHARLES PATINO

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:23-CR-040-Z-BR-(1)
U.S. Marshal's No.: 64706-510
Anna Marie Bell, Assistant U.S. Attorney
Eric Coats, Attorney for the Defendant

On September 22, 2023 the defendant, FLAVIO CHARLES PATINO, entered a plea of guilty as to Count One of the Indictment filed on May 25, 2023. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(8)	CONVICTED FELON IN POSSESSION OF A FIREARM	09/13/2022	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of $100.00 as to Count One of the Indictment filed on May 25, 2023.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed January 30, 2024.

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

Signed January 31, 2024.

IMPRISONMENT

The defendant, FLAVIO CHARLES PATINO, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Thirty (30) months as to Count One** of the Indictment filed on May 25, 2023. This sentence shall ***run concurrently*** with any future sentence which may be imposed in Case No. OVDC-368-22 in Randall County District Court which is related to the instant offense.

The Court makes the following recommendations to the Bureau of Prisons:

1. that the Defendant be allowed to participate in a full mental health evaluation to identify treatment, if eligible, if consistent with security classification;

2. that the Defendant be allowed to pursue automotive mechanics to include diesel mechanics, if possible, if eligible, if consistent with security classification; and

3. that the Defendant be allowed to serve his term of incarceration at the first available BOP facility with the necessary mental health resources, if possible, if eligible, if consistent with security classification.

The Defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Three (3) years** as to Count One of the Indictment filed on May 25, 2023.

While on supervised release, in compliance with the Standard Conditions of supervision adopted by the United States Sentencing Commission at Section 5D1.3(c), the defendant shall:

1. The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

3. The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

4. The defendant shall answer truthfully the questions asked by the probation officer.

5. The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

7. The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

13. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

Also, as set forth in the Notice of Intent to Impose Conditions of Supervised Release signed and dated January 30, 2024, the Defendant shall comply with the below-listed other conditions of supervised release, which are derived from Sections 5D1.3(a), (b), (d), and (e), in relevant part:

1. The defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3583(d)).

2. The defendant shall not unlawfully possess a controlled substance (*see* 18 U.S.C. § 3583(d)).

3. The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (*see* 18 U.S.C. § 3583(d)).

4. The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3583(d)).

5. If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)).

6. The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.

7. If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).

8. The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (34 U.S.C. § 40702).

9. The defendant shall participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least $25 per month.

10. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

11. The defendant shall abstain from the use of alcohol and all other intoxicants during the term of supervision.

12. The defendant shall participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least $25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because it is not applicable in this case.

FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), and subject to the provisions of 21 U.S.C. § 853(n), it is hereby ordered that Defendant's interest in the following property is condemned and forfeited to the United States: **a Zigana, model PX9, 9mm pistol, Serial No. T062020BM08020 — including any additional ammunition, magazines, and/or firearms accessories recovered**.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

BY _____
Deputy Marshal

APPENDIX C

In the United States District Court
for the Northern District of Texas
Amarillo Division

UNITED STATES OF AMERICA Plaintiff,	§ §	
v.	§ §	Case No. 2:23-CR-040-Z
FLAVIO CHARLES PATINO Defendant.	§ §	

DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

Defendant Flavio Charles Patino ("Patino") moves to dismiss the indictment because it charges an offense—the "possess" prong of 18 U.S.C. § 922(g)(1)—that Congress had no power to enact.

Introduction and Background

The grand jury alleged that, on September 13, 2022, Defendant Patino violated the possession prong of 18 U.S.C. § 922(g)(1) and § 924(a)(8). Section 922(g)(1) provides, in pertinent part:

> (g) It shall be unlawful for any person— (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, *or possess in or affecting commerce, any firearm* or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1) (emphasis added).

Laws completely banning felons from possessing firearms did not exist at the time of the founding or at the ratification of the Second Amendment. *See*, e.g., *Kanter v. Barr*, 919 F.3d 437, 462 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated on other grounds by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (recognizing that "scholars have not identified

eighteenth or nineteenth century laws depriving felons of the right to bear arms"). The current federal ban first appeared in 1968. Even so, courts have thus far upheld § 922(g)(1) against constitutional attack.

Legal Standard

Federal Rule of Criminal Procedure 12(b)(1) allows a defendant to "raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." In deciding the motion, the Court should "take the allegations of the indictment as true." *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004) (quoting *United States v. Hogue*, 132 F.3d 1087, 1089 (5th Cir. 1998)). The balance of this motion thus assumes that the Government will prove, beyond a reasonable doubt, the facts alleged in count one of the Indictment.

Argument

This Court should dismiss count one of the Indictment because the "possess" prong of 18 U.S.C. § 922(g)(1), as commonly understood and applied, violates the Constitution. First, it exceeds Congress's powers under the interstate commerce clause. Second, it violates the Second Amendment.

A. The "possession" prong of Section 922(g) exceeds Congress's power under the Commerce Clause.

Unlike the states, Congress does not have a general police power. "The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing U.S. Const., Art. I, § 8, and James Madison, *The Federalist* No. 45, pp. 292–293 (C. Rossiter ed. 1961)). The only enumerated power that might justify laws like § 922(g) is the Commerce Clause: "Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. Const., Art. I, § 8.

The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power":

> [1] Congress may regulate the use of the channels of interstate commerce. . .
>
> [2] Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . [and]
>
> [3] Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558–59 (citations omitted).

Section 922(g)'s possession prong is widely understood to reach *any* act of gun possession if the firearm itself, or even any component used to make the firearm, later travels across a state or international boundary line.[1] This construction of the statute reaches a broad swath of non-commercial activity that has no connection at all to any of these authorized areas of regulation.

Defendant concedes that courts have thus far rejected both the *statutory* argument (that "possess in or affecting commerce" means something other than the object passed across a state or international boundary at some point in the past) and the *constitutional* argument (that the statute exceeds Congress's power). There are many cases rejecting these arguments in the Fifth Circuit and elsewhere. A sampling of those adverse decisions is provided below.

[1] Defendant does not agree that this is a correct understanding of the statutory language. The common reading of "possess *in or affecting commerce*" elides the distinction between this nexus element and the nexus element that applies to *receiving* firearms—which is properly understood to reach only *commercial* purchase or acquisition: "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." By using *different language* to define the federal-nexus element for possession, Congress surely intended a *different meaning* than the nexus element for receipt. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th 1972). Moreover, the common interpretation of the statute presents constitutional problems that should be avoided by a more narrow reading.

United States v. Bass, 404 U.S. 336 (1971), is a statutory interpretation case about an abrogated statute:

> 'Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . *and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm* shall be fined not more than $10,000 or imprisoned for not more than two years, or both.'

Bass, 404 U.S. at 337 (emphasis added) (quoting Section 1201(a) of Title VII of the Gun Control Act of 1968, Pub. L. 90-351, 82 Stat. 236). The Supreme Court held that the statutory language "in commerce or affecting commerce" applied to the crimes of receipt and possession, not just to transportation. The court then went on to muse—in dicta— that the crime of "receiv(ing) . . . in commerce or affecting commerce," could be proven if the evidence "demonstrates that the firearm received has previously traveled in interstate commerce." 404 U.S. at 350.

Six years later, the Supreme Court recognized that the holding of *Bass* was limited to the nexus element applying to receipt and possession; the "suggestions" of ways to satisfy the element were "unnecessary" to the decision. *Scarborough v. United States*, 431 U.S. 563, 568 (1977). But *Scarborough* affirmed a conviction under that theory, rejecting the defendant's suggestion that it is "not enough that the Government merely show that the firearms at some time had travelled in interstate commerce." *Id.* at 566. As a matter of statutory interpretation, the Court held that "Congress intended no more than a minimal nexus requirement." *Scarborough*, 431 U.S. at 577.

In the first precedential decision to consider the felon-in-possession crime after *Lopez*, the Fifth Circuit held that *Scarborough*'s statutory interpretation holding also foreclosed the constitutional challenge to that theory:

> As we noted on direct appeal, an ATF weapons expert testified at Rawls' trial that the revolver he possessed was manufactured in Massachusetts, so

> that the revolver's presence in Texas had to result from transport in interstate commerce. This evidence is sufficient to establish a past connection between the firearm and interstate commerce.

United States v. Rawls, 85 F.3d 240, 243 (5th Cir. 1996).

Subsequent Fifth Circuit decisions have continued to affirm this reading of § 922(g)'s "in or affecting commerce" language against statutory and constitutional challenges.

Lopez seemed to, but did not expressly, overrule the more permissive test for federal regulation of gun possession articulated in *Scarborough*. A fair reading of *Scarborough* suggests that the case was concerned solely with statutory interpretation and did not purport to resolve any constitutional issues. *See United States v. Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc).

Supreme Court Justices and judges on lower courts have acknowledged the irreconcilability of *Lopez* and a constitutional reading of *Scarborough*. *See Alderman v. United States*, 131 S. Ct. 700, 702 (2011) (Thomas, J., dissenting from denial of certiorari) ("*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez*."); *see also United States* v. *Hill*, 927 F.3d 188, 215 n.10 (4th Cir. 2019) (Agee, J., dissenting) ("While some tension exists between *Scarborough* and the Supreme Court's decision in *Lopez*, the Supreme Court has not granted certiorari on a case that would provide further guidance"); *United States* v. *Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting) ("[T]he precise holding in *Scarborough* is in fundamental and irreconcilable conflict with the rationale of" *Lopez*.). Judge Ho's opinion dissenting from denial of rehearing en banc in *Seekins* is the most recent and thorough objection to the established view. 52 F.4th at 980–92. "In the en banc poll, seven judges voted in favor of rehearing" "and nine voted against rehearing." *Seekins*, 52 F.4th 988 (5th Cir. 2022).

If *Scarborough* is a constitutional decision, then it grants the federal government unlimited power to regulate the affairs of Americans. *See Alderman*, 131 S. Ct. at 702–03 (Thomas, J., dissenting from denial of certiorari) ("The lower courts' reading of *Scarborough*, by trumping the *Lopez* framework, could very well remove any limit on the commerce power."). Any physical object has almost certainly crossed a state line at some point in the past. To hold that this past travel grants Congress a perpetual right to regulate what someone does or does not do with that object is to eliminate any restrictions on Congress's power. Five Justices again rejected the view that the Commerce Clause grants the federal government power "to regulate an individual from cradle to grave." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557–58 (2012) (Roberts, J.); *see also id.* at 649 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

Thus far, the Fifth Circuit has adhered to the view that *Scarborough*'s "minimal nexus" is sufficient both to prove guilt under the statute and to bring any subsequent act of possession within Congress's power to regulate. *United States v. Alcantar*, 733 F.3d 143, 145–46 (5th Cir. 2013).

Defendant urges the Court to hold that Section 922(g)'s possession prong, as commonly understood and applied, exceeds Congress's enumerated powers.

B. Section 922(g)(1)'s possession prong is unconstitutional under the Second Amendment.

"When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2129–30. The text of the Amendment— "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— "guarantee[s] the individual right to possess and carry

weapons in case of confrontation that does not depend on service in the militia." *Bruen*, 142 S. Ct. at 2127. (Internal quotation marks omitted).

In *United States v. Darrington*, 351 F.3d 632, 633–34 (5th Cir. 2003), the Fifth Circuit held that 18 U.S.C. § 922(g)(1) "does not violate the Second Amendment." When the Supreme Court later decided *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court mused: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626. Relying on that language, the Fifth Circuit has stated that "*Heller* provides no basis for reconsidering *Darrington*." *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009).

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the Supreme Court upended the two-step framework the Fifth Circuit and other courts used to review Second Amendment challenges:

> We hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2126.

Before *Bruen*, the Fifth Circuit had reasoned that § 922(g)(1) is a "longstanding" prohibition even though "it cannot boast a precise founding-era analogue." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012), abrogated by *Bruen*, 142 S. Ct. at 2126. But *Bruen*'s focus on tradition and history—and its prohibition on considering the *wisdom* of a prohibition—casts doubt on *Heller*'s dicta about

felon disarmament. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–635) (emphasis in *Bruen*).

Notably, no Fifth Circuit authority post-dating *Bruen* actually holds that felons lack Second Amendment rights. A panel of the Fifth Circuit held in an unpublished case that "[b]ecause there is no binding precedent explicitly holding that § 922(g)(1) is unconstitutional and because it is not clear that *Bruen* dictates such a result," there was no plain error. *United States v. Johnson*, No. 22-20300, 2023 WL 3431238 (at *1 (5th Cir. May 12, 2023), holds that) (unpublished). Of course, an error may be error without being plain.

Importantly, the Fifth Circuit did hold in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), government pet. filed March 21, 2023 (No. 22-915), that 18 U.S.C. § 922(g)(8), which forbids possession of firearms by those subject to domestic violence restraining orders, violated the Second Amendment. The opinion made reference to the following statement in Heller:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession **2817 of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626–27; (footnote omitted); *see Rahimi*, 61 F.4th at 452. It discussed this passage, however, only to explain that Americans do not lose their Second Amendment rights every time a legislature chooses to label them as non-law-abiding, as Congress has done with people under restraining orders. *See id.* Moreover, *Rahimi* did not rule on the constitutionality of felon disarmament laws, nor hold that the Second Amendment's guarantees are limited to "law-abiding, responsible citizens." Insofar as it addresses § 922(g)(1), it did so only in *dicta* at best.

Of greater significance is *Rahimi*'s treatment of pre-*Bruen* precedent, which had upheld § 922(g)(8) against Second Amendment challenge. *See id.* at 449 (citing *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020), and *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001)). The court agreed with *Rahimi* that "*Bruen* overrules our precedent and that under *Bruen*, § 922(g)(8) is unconstitutional." *Id*. at 450. In discussing *Bruen*, the court noted that "[t]o the extent that the [Supreme] Court did not overtly overrule *Emerson and McGinnis*—it did not cite those cases but discussed other circuits' similar precedent—*Bruen* 'clearly fundamentally change[d]' our analysis of laws that implicate the Second Amendment . . . rendering our prior precedent obsolete." *Rahimi*, 61 F.4th at 450–51. *Accord Range v. Att'y Gen. United States of Am*., 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (dismissing as unpersuasive circuit court decisions that pre-dated *Bruen*) (citations and internal quotation marks omitted). Thus, as the Fifth Circuit recognized in *Rahimi*, *Bruen* "fundamentally" changed the analytical framework for assessing Second Amendment challenges. For the same reason that precedent concerning § 922(g)(8) is now "obsolete," *Rahimi*, 61 F.4th at 451, so too is Fifth Circuit precedent upholding the constitutionality of § 922(g)(1).

1. The Second Amendment's plain text covers the conduct prohibited by § 922(g)(1)'s possession prong.

"[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126. There can be no doubt that § 922(g)(1)'s possession prong prohibits the very conduct protected by the Second Amendment's "operative clause"—that is, "to possess and carry weapons in case of confrontation." *See Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592). The complete prohibition applies everywhere—at home, in public, in transit, or at rest. This applies throughout the duration of an ex-felon's life.

Recently, the En Banc Third Circuit held in *Range*, *supra*, that *Bruen's* methodology is not consistent with any contention that only "law-abiding, responsible citizens" count among "the people" protected by the Second Amendment. *Range*, 69 F.4th at 103. That court noted that restricting the Second Amendment's protection only to only "law-abiding, responsible citizens" would "devolve[] authority to legislators to decide whom to exclude," thereby "contraven[ing] *Heller's* reasoning that 'the enshrinement of constitutional rights necessarily takes certain policy choices off the table.'" *Id.* at 102–103 (citing *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008); *Bruen*, 142 S. Ct. at 2131 (warning against "judicial deference to legislative interest balancing."). The Second Amendment, like much of the Bill of Rights, is a restraint on Congress; it would not serve its function if ordinary Congressional determinations of dangerousness could determine its scope.

2. The Government cannot show that the possession prong is consistent with history and tradition.

Under *Bruen*, the government bears the burden of proving § 922(g)(1)'s constitutionality. 142 S. Ct. at 2130. After *Bruen*, the government must "justify" § 922(g)(1)'s possession prong "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2130. Absent a regulation addressing "unprecedented societal concerns or dramatic technological changes," *id*. at 2132, the government meets that burden only by presenting a historical analogy, regarded as a valid exercise of legislative authority at Founding, that is comparable in burden and rationale to the contemporary challenged law, *see id.* at 2133. It cannot do so here.

"Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I."

C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J. L. & Pub. Pol'y 695, 708 (2009); *see also* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) ("The Founding generation had no laws . . . denying the right to people convicted of crimes."). Professor Carlton Larson performed a historical study and found no analogs for § 922(g)(1) in the 17th, 18th, or 19th centuries:

> As far as I can determine, state laws prohibiting felons from possessing firearms or denying firearms licenses to felons date from the early part of the twentieth century. The earliest such law was enacted in New York in 1897, and similar laws were passed by Illinois in 1919, New Hampshire, North Dakota, and California in 1923, and Nevada in 1925.

Carlton F.W. Larson, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L. J. 1371, 1376 (2009). A recent opinion of the Southern District of Mississippi confirms this analysis, at least at the federal level. *United States v. Bullock*, __F.Supp.3d__, 2023 WL 4232309 (June 28, 2023), observes:

> The federal felon-in-possession ban was enacted in 1938, not 1791 or 1868—the years the Second and Fourteenth Amendments were ratified. The government's brief in this case does not identify a "well-established and representative historical analogue" from either era supporting the categorical disarmament of tens of millions of Americans who seek to keep firearms in their home for self-defense.

Bullock, __F.Supp.3d__, 2023 WL 4232309 at *2.

As noted, the government bears the burden of demonstrating that § 922(g) comports with the historical tradition of firearm regulation. *Bruen*, 142 S.C.t at 2132; *Range*, 69 F.4th at 98; *Atkinson v. Garland*, __F.4th __, 2023 WL 407154, at *1, 5 (7th Cir. June 20, 2023)(vacating and remanding so that the district court can determine whether "the government has carried its burden" under *Bruen* to show that § 922(g)(1) is "part of the historical tradition that delimits the outer bounds of the right to keep and bear arms"); *Bullock*, __F.Supp.3d__, 2023 WL 4232309 at *2. The defendant thus has not burden to show that he or she possesses Second Amendment rights.

Further, this Court is "not obliged to sift the historical materials for evidence to sustain [the challenged restriction]. That is [the government's] burden." *Id.* at 2150. *Accord Rahimi*, 61 F.4th at 454. As will be shown, under *Bruen* and *Rahimi* the government's burden cannot be discharged by reference to historical regulations bearing only rough similarity to the challenged restriction. Whereas here, the restriction addresses a social problem known at Founding. *Bruen*, 142 S. Ct. at 2130; *Rahimi*, 61 F.4th at 454. And *Bruen* clearly treats "firearm violence in densely populated communities" as a societal problem present at Founding, *Bruen*, 142 S. Ct. at 2131, triggering this higher burden.

While the government need not produce a "historical twin" to a challenged restriction, *id.* at 2133, neither may it simply offer a historical regulation bearing only rough similarity in terms of its burden or rationale. A look at *Brue*n's treatment of proffered historical analogues to New York's public carry restriction, makes the point.

Proffered Analogue	**Basis of Distinction**
English statute forbidding "going armed to terrify the King's subjects," *id.* at 2141-2142.	Challenged contemporary New York statute lacked element of creating fear, *id.* at 2142-21426.
Colonial and 18th Century offenses punishing whoever went "armed offensively," *id.* at 2142-2146.	Challenged contemporary New York statute lacked element of creating fear, *id.* at 2142-2146.
East New Jersey statute that "prohibited the concealed carry of 'pocket pistol[s]' or other 'unusual or unlawful weapons…'" *id.* at 2143-2144.	Historical East New Jersey statute "restricted only concealed carry, not all public carry, and its restrictions applied only to certain 'unusual

	or unlawful weapons,' including 'pocket pistol[s],'" *id.* at 2144.
19th Century statutes prohibiting concealed carry, *id*. at 2146-2147.	Challenged contemporary New York statute prohibited open carry, *id*. at 2146-2147.
19th Century Tennessee "prohibition on carrying 'publicly or privately' any 'belt or pocket pisto[l],'" *id*. at 2147.	Historical Tennessee statute limited by courts to "larger, military-style pistols," *id*. at 2147.
Mid-19th Century surety statutes, *id*. at 2148-2150.	Historical surety statutes burdened the right to public carry only if a person had reasonable cause to fear violence and could be overcome by posting bond or a showing of need, *id*. at 2148-2150.

A clear message emerges to the extent that a challenged statute poses a significantly greater burden on the right to bear arms, than a valid historical analogue, it will conflict with the Second Amendment. *Rahimi* supports the point.

Proffered Analogue	**Basis of Distinction**
Colonial laws disarming disfavored groups, such as enslaved people, Native Americans, and political dissidents, *Rahimi*, 61 F.4th at 457.	§ 922(g)(8) does not target those whose armament poses a perceived threat to the general social order, but only those whose armament threatens a particular person, *id.* at 457.

English and Colonial prohibitions on "going armed to terrify…" *id*. at 457-459.	Historical analogues (eventually) did not require forfeiture of firearms, while § 922(g)(8) prohibits possession of firearms; Historical analogues premised forfeiture on criminal conviction, not civil order as § 922(g)(8) does; Historical analogue requires predictive finding of violence, while § 922(g)(8) is triggered by an order prohibiting domestic violence; Historical analogues targeted public disorder, not private violence as § 922(g)(8) does, *id*. at 457-459.
Historical surety statutes, *id*. at 459-460	"…historical surety laws did not prohibit public carry, much less possession of weapons, so long as the offender posted surety," *id*. at 460.

Against these standards, § 922(g)(1) clearly lacks sufficient historical support to survive Second Amendment challenge. In other litigation, the government has pointed to three historical restrictions as putative analogues to § 922(g)(1). None are relevantly similar.

First, the government has in one case sought to analogize § 922(g)(1) to overtly racist and otherwise discriminatory laws that discriminated against disfavored minorities, disarming "Loyalists, Native Americans, Quakers, Catholics, and Blacks." *Range*, 69 F.4th at 105. To state the obvious, however, most of these laws are moral obscenities, and have no place in defining the

scope of cherished constitutional rights. This is so for several reasons: the statutes are nullified and repudiated by the passage of the Fourteenth Amendment, whose plain text demands equal protection of the law. If they were not retroactively nullified by the Fourteenth Amendment, it would violate the equal protection guarantees of the Fifth and Fourteenth Amendments to give them any weight now. If there were no constitutional bar to their consideration as positive exemplars of the scope of the Second Amendment, they would not, in any case, tend to fulfill that function. This is because legislatures of the era simply could not be trusted to honor the constitutional rights of many of the groups targeted by these laws. The kinds of enactments that legislatures visited upon their African American citizens do not show the content of any constitutional guarantee, but rather their willingness to violate their constitutional rights. Indeed, the fact that the statutes preserved the right to bear arms among felonious people outside the targeted groups tends to show that felony convictions were not thought to destroy the right to bear arms.

At any rate, these statutes are not comparable to § 922(g)(1). As the Third Circuit observed *en banc* "That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that Range is part of a similar group today. And any such analogy would be "far too broad[ ]."" *Range*, 69 F.4th at 105 (quoting *Bruen*, 142 S. Ct. at 2134) (brackets added by *Range).* These putative analogues sought to prevent political unrest, not ordinary street crime.

If any of these statutes are similar to § 922(g)(1), they are no more similar to it than the government's proffered analogues in *Bruen* and *Rahimi*. Of course, the government will have a chance to build its historical case in response to this motion. In addition to the foregoing, this Court should consider two additional considerations.

First, any defense the government makes of § 922(g)(1), moreover, must amount to more than" a couple of isolated historical facts and incidents, offering no detail about their application and import," which "does not suffice under *Bruen*." *Atkinson*, 2023 WL 4071542, at *3. Rather, the government must "cast a wide[] net," "roll up [its] sleeves," and conduct a thorough historical inquiry to determine the original meaning of the Second Amendment. *Id*. at *3, 5. The Seventh Circuit in *Atkinson*, for example, noted five extremely detailed areas of historical inquiry that should be addressed by litigants:

> 1. Does § 922(g)(1) address a "general societal problem that has persisted since the 18th century?" If this problem existed during a relevant historical period, did earlier generations address it with similar or "materially different means?"
>
> 2. What does history tell us about disarming those convicted of crimes generally and of felonies in particular? Among other sources, the parties could look to commentary from the Founders, proposals emerging from the states' constitutional ratifying conventions, any actual practices of disarming felons or criminals more generally around the time of the Founding, and treatment of felons outside of the gun context (to the extent this treatment is probative of the Founders' views of the Second Amendment). When considering historical regulations and practices, the key question is whether those regulations and practices are comparable in substance to the restriction imposed by § 922(g)(1). To answer the question, the district court and the parties should consider how the breadth, severity, and the underlying rationale of the historical examples stack up against § 922(g)(1).
>
> 3. Are there broader historical analogues to § 922(g)(1) during the periods that *Bruen* emphasized, including, but not limited to, laws disarming "dangerous" groups other than felons? The parties should not stop at compiling lists of historical firearms regulations and practices. The proper inquiry, as we have explained, should focus on how the substance of the historical examples compares to § 922(g)(1).
>
> 4. If the district court's historical inquiry identifies analogous laws, do those laws supply enough of a historical tradition (as opposed to isolated instances of regulation) to support § 922(g)(1)? On this front, the parties should provide details about the enforcement, impact, or judicial scrutiny of these laws, to the extent possible.
>
> 5. If history supports Atkinson's call for individualized assessments or for a distinction between violent and non-violent felonies, how do we define a non-violent or a non-dangerous felony? And what evidence can a court consider in

> assessing whether a particular felony conviction was violent? For instance, can a court consider the felony conviction itself, the facts of the underlying crime, or sentencing enhancements? *Bruen* shows that these distinctions should also have firm historical support.

Id. at *4–5 (internal citations omitted).

Given the allocation of the burden of proof, and the scope of the question, it is well possible that the fulsomeness of the government's effort to muster historical sources may be dispositive, *i.e.* that different courts on different records might come to different conclusions.

Second, historical analogues arising from state laws before the Civil War may be of limited value in examining a contemporary federal enactment. The Second Amendment came in the wake of a substantial controversy as to the wisdom of enacting any federal bill of rights at all. Many in the founding generation believed the first ten amendments were "unnecessary" because "the rights in question are reserved by the manner in which the federal powers are granted." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 5 *Writings of James Madison* 269, 271 (G. Hunt ed. 1904). Indeed, the application of any of the Bill of Rights to the states, much less the Second Amendment right to individual self-defense, was not established or even possible until after the Civil War. For that reason, most lawmakers and judges before this time would have seen nothing unusual in the proposition that States may regulate firearms in ways that were off-limits to Congress.

Two judges have thus recognized that pre-war State regulations may therefore have limited relevance to the scope of the Second Amendment. As Judge Potter explained, concurring in *Range*:

> But precisely because the states—unlike the national government—retained sweeping police powers and weren't originally constrained by the Bill of Rights, they were free to regulate the possession and use of weapons in whatever ways they thought appropriate (subject to state constitutional restrictions that were not uniform). Because of that important difference, it's unclear what many early state laws prove about the contours of the Second Amendment right.

Range, 69 F.4th at 108 (Potter, J., concurring) (citing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833)). Likewise Judge Reeves of this Circuit has dismissed a § 922(g)(1) indictment on Second Amendment grounds, while conceding that "American history might support state-level felon disarmament laws; that at least would align with principles of federalism." *Bullock*, 2023 WL 4232309 at *2.

The present law is not a state level statute; it is not triggered by a death-eligible offense; it is not a surety law; it does not confiscate the fruits of a gun crime; mercifully, it is not an attack on a disfavored religious, political, or racial minority. It is nothing like the enactments contemplated at Founding, and in plain English it trenches on the right of the people to bear arms.

Conclusion

For all these reasons, Defendant asks that the Court dismiss Count one of the Indictment.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that I have conferred with Assistant United States Attorney Meredith Pinkham, who confirms that the government is opposed to this request, as set forth above.

/s/ *Eric Coats*
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