No. _____

In the Supreme Court of the United States

SELIM "SAM" ZHERKA,

Petitioner,

v.

PAMELA BONDI, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Amendment permits the government to disarm an American citizen because he has been convicted of a non-violent fraud offense.

PARTIES TO THE PROCEEDING

Petitioner Selim Zherka was the plaintiff before the district court and the plaintiff-appellant in the court of appeals.

Respondent Pamela Bondi, in her official capacity as Attorney General of the United States, was the defendant-appellee before the court of appeals. Bondi replaced Merrick Garland, former Attorney General of the United States, as defendant-appellee after she became Attorney General. Garland was the defendant in the district court, in his official capacity.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Zherka v. Bondi*, No. 22-1108 (2d Cir. June 9, 2025)
- *Zherka v. Garland*, No. 20-cv-7469 (S.D.N.Y. March 23, 2022)

There are no other proceedings in state or federal court, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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This case presents an important and recurring question impacting the fundamental rights of thousands of Americans on which there is a well-defined split among nine courts of appeals: is the federal law generally prohibiting firearm acquisition and possession by individuals who have been convicted of an offense punishable by over a year of imprisonment susceptible to as-applied challenges under the Second Amendment?

The Second Circuit below, along with five of its sister courts, held that the answer is no. But three courts of appeals have held precisely the opposite. The Second Circuit's opinion, though it purports to apply *Bruen*, was fundamentally flawed and therefore reached the wrong answer. This Court should grant certiorari to resolve the split and to provide further guidance regarding the proper application of this Court's Second Amendment precedents to courts of appeals that require this Court's assistance.

In an ordinary case, given the importance of the issue and the presence of a clear circuit split, Petitioner might expect to be joined in seeking certiorari by the Solicitor General appealing an adverse decision from one of the courts on the other side of the split. And indeed, the Government itself urged the Court to take up this issue after the Court decided *Rahimi*. *See* Supplemental Brief for the Federal Parties at 2, 4, *Garland v. Range*, No. 23-374 (U.S. June 24, 2024) But in an about-face, the Government has now declined to seek review of this important issue because "the Department of Justice has recently revitalized an administrative process through which an individual

may obtain relief" from his disability with respect to firearms. *See* Letter from D. John Sauer, Solicitor General, to Richard J. Durbin, Senator, Re: *Range v. Attorney General United States* (Apr. 11, 2025), https://perma.cc/A3EE-M2ML. But while that regime, operated under 18 U.S.C. § 925(c), may be relevant to the constitutionality of Section 922(g)(1) as applied to individuals whose offenses provide a constitutional basis for disarmament in the first instance, it is irrelevant to the principal question presented here: whether Section 922(g)(1) is susceptible to as-applied challenges by individuals who claim that their offenses are not a valid basis for disarmament at all. A discretionary process for *restoring* rights is no cure for a law that invalidly *removes* rights in the first place. This Court therefore should grant certiorari forthwith and resolve the split in the circuits over whether Section 922(g)(1) is susceptible to as applied challenges.

OPINIONS BELOW

The opinion of the court of appeals is reported at 140 F.4th 68 and is reproduced at Pet.App. 1a–61a.

The opinion of the district court is reported at 593 F. Supp. 3d 73 and is reproduced at Pet.App. 62a–78a.

JURISDICTION

The court of appeals issued its judgment on June 9, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions and portions of the United States Code are reproduced in the Appendix beginning at Pet.App. 81a.

STATEMENT

Petitioner Selim Zherka pleaded guilty in 2015 to a charge of conspiracy to make a false statement to a bank and to sign and file a false federal income tax return in violation of 18 U.S.C. § 371. Pet.App. 3a. Zherka was sentenced to 37 months imprisonment and three years of supervised release, and he was required to pay fines, restitution, and forfeiture. *Id.* Zherka completed his sentence in full in May 2020. *Id.* As a result of his conviction for "a crime punishable by imprisonment for a term exceeding one year," Zherka is prohibited from possessing a firearm. 18 U.S.C. § 922(g)(1).

On September 11, 2020, Petitioner filed this suit in the Southern District of New York alleging that the restrictions violated his Second and Fifth Amendment rights. Pet.App. 62a–63a. The district court had jurisdiction under 28 U.S.C. § 1331. With respect to the Second Amendment claim at issue in this petition, the district court applied the Second Circuit's pre-*Bruen* "two-step inquiry" requiring it to first "determine whether the challenged legislation impinges upon conduct protected by the Second Amendment" and to second "determine the appropriate level of scrutiny to apply and evaluate the constitutionality of the law using that level of scrutiny." Pet.App. 68a (citation and quotation marks omitted). Noting the "minimal"

success that as-applied challenges to Section 922(g)(1) had found, following this Court's decision in *Heller*, the district court never reached the second step of its test. Pet.App. 70a, 73a. Rather, it rejected Zherka's argument that 922(g)(1) "burdens conduct protected by the Second Amendment as applied to non-violent felons," because, it concluded, "one need not be dangerous to be removed from the category of 'law-abiding, responsible citizens,' " whom it regarded as possessing Second Amendment rights. Pet.App.71a–73a.

Zherka appealed to the Second Circuit in May 2022. Just over a month later, this Court decided *Bruen*, invalidating the two-step framework that the district court had applied. Pet.App. 6a. Applying *Bruen* in the first instance, the Second Circuit affirmed, holding that "the Second Amendment does not bar Congress from passing laws that disarm convicted felons, regardless of whether the crime of conviction is nonviolent." Pet.App. 54a. Beginning with the text, the court held that "Zherka, notwithstanding his felony conviction, is among 'the people' protected by the Second Amendment," explaining that to hold otherwise "would be at odds with *Heller*," and "would be inconsistent with our understanding of the scope of other constitutional rights" that are similarly guaranteed to "the people." Pet.App. 16a–17a.

Turning to history, however, the Court concluded that "our tradition [of firearm regulation] encompasses not only laws permitting disarmament of particular individuals on a case-by-case basis, but also laws disarming broad classes of people." Pet.App. 35a–36a. The court considered three categories of historical evidence that it found inconclusive but that it

nevertheless weighed in favor of Section 922(g)(1)'s constitutionality. First, it looked to the history of federal laws disarming convicted offenders, though it acknowledged that, dating to 1938 at the earliest (and not disarming individuals for nonviolent convictions until 1961), these "laws alone may not be sufficient to establish a historical tradition of firearms regulation, but the modern concerns that they addressed, and continue to address, diminish the government's burden of drawing a tight historical analogy." Pet.App. 22a.

That was an important first step, because the court next acknowledged that it had little support for its conclusion from the Founding or before. Beginning with the colonial period, the court dismissed "the lack of historical laws prohibiting felons from possessing firearms [as] not dispositive. … '[T]he absence of a distinctly similar historical regulation … can only prove so much,' and here it proves next to nothing." Pet.App. 28a (quoting *Antonyuk v. James*, 120 F.4th 941, 969 (2d Cir. 2024) (brackets and ellipsis in *Zherka*)). The court reached this conclusion because, in its view, disarmament would have been superfluous at a time when death was a standard punishment for a felony conviction. Pet.App. 29a. And although the Founding accompanied a shift from execution to incarceration as the default response for most felonies, the court similarly found support in the fact that state ratifying conventions evidenced "the view that some Founders believed that it was permissible for Congress to disarm convicted felons." Pet.App. 32a. However, because "the proposal that entered the Constitution as the Second Amendment did not contain" any language

suggesting such a restriction, the court acknowledged that this evidence was "inconclusive." Pet.App. 33a.

That led the court to its review of "status based disarmament laws," which it ultimately concluded supported Section 922(g)(1). These ran the gamut, including laws disarming "[r]eligious minorities, political dissenters, Native Americans, and persons of color" because of "a perception that persons in those categories were inherently dangerous or non-law-abiding." Pet.App. 36a. Though it expressed concern about the nature of these laws, the court held that they nevertheless "demonstrate[d] that before, during, and shortly after the Founding, legislative bodies regulated firearms by prohibiting their possession by categories of persons perceived to be dangerous. And those regulations were accepted as lawful" and continued to be at later periods of American history as well. Pet.App. 43a.

The upshot of that alleged historical tradition was that, in the Second Circuit's view, even nonviolent felons like Petitioner could be disarmed as the legislature was entitled to determine that, as a class, "persons convicted of serious crimes" were dangerous and therefore prohibited from possessing arms. Pet.App. 54a. Indeed, given that it was within Congress's discretion to make that decision categorically, *no one* with a predicate conviction under Section 922(g)(1) could make an as-applied challenge to the law under the Second Circuit's reasoning, as "any effort by the courts to craft a line that would separate some felons from others is fraught with peril" and would "usurp the legislative function." Pet.App. 56a–57a.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are split over whether Section 922(g)(1) is susceptible to as-applied challenges by nonviolent offenders.

A. Six courts of appeals have held that Section 922(g)(1) is constitutional under the Second Amendment and not amenable to any form of as-applied challenge. Just like the Second Circuit below, the Tenth Circuit in *Vincent v. Bondi* held that Section 922(g)(1) is immune to as-applied challenges. 127 F.4th 1263, 1265 (10th Cir. 2025), *pet. for certiorari pending*, No. 24-1155 (U.S. May 8, 2025). Unlike the Second Circuit, it did not, in reaching that conclusion, conduct any sort of *Bruen* analysis. Rather, it relied on its pre-*Bruen* precedent under which this Court's statement in *District of Columbia v. Heller*, that "nothing in [this] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," 554 U.S. 570, 626 (2008), was taken as entirely foreclosing objections to 922(g)(1), *Vincent*, 127 F.4th at 1265. Because that precedent purportedly "upheld the constitutionality of § 922(g)(1) for all individuals convicted of felonies," the Tenth Circuit concluded that "the Second Amendment doesn't prevent application of § 922(g)(1) to nonviolent offenders." *Id.* at 1266.

The Eighth Circuit reached the same result in *United States v. Jackson*, similarly placing primary importance on the "presumptively lawful" language in *Heller*, though it did also discuss the historical analysis mandated by *Bruen*. 110 F.4th 1120, 1128–29 (8th Cir. 2024), *cert denied*, No. 24-6517, 2025 WL 1426707

(U.S. May 19, 2025). In its historical analysis, *Jackson* held that "the right to keep and bear arms was subject to restrictions that included prohibitions on possession by certain groups of people," and that there are "two schools of thought on the basis for these regulations." *Jackson*, 110 F.4th at 1126. Either "legislatures have longstanding authority and discretion to disarm citizens who are not law-abiding and are unwilling to obey the law," or, according to the more restrictive view, a legislature can "prohibit[] possession of firearms by those who are deemed more dangerous than a typical law-abiding citizen." *Id.* The debate was largely academic in the court's view, however, because "either reading supports the constitutionality of § 922(g)(1) as applied to Jackson and other convicted felons." *Id.* Indeed, *Jackson* placed special emphasis on the acceptability of overbroad laws under this putative historical tradition: "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." *Id.* at 1128. And yet, the court held that they could be disarmed because they belonged to a *class* that was viewed as dangerous.

The Fourth Circuit in *United States v. Hunt*, like the Tenth, held that the circuit's pre-*Bruen* caselaw foreclosing as-applied to challenges to Section 922(g)(1) remained controlling. 123 F.4th 697, 702 (4th Cir. 2024), *cert denied*, No. 24-6818, 2025 WL 1549804 (U.S. June 2, 2025). In the alternative, it stated that reaching the historical question, it would essentially adopt the Eighth Circuit's analysis,

likewise declining to definitively state which read of the historical record was best because "either reading of the relevant history supports the constitutionality of § 922(g)(1) as applied to Hunt and other convicted felons." *Hunt*, 123 F.4th at 706 (quotation marks and brackets omitted).

In *United States v. Duarte*, the Ninth Circuit also reaffirmed its pre-*Bruen* practice of "foreclose[ing] Second Amendment challenges to § 922(g)(1), regardless of whether an underlying felony is violent or not," finding support for that practice both in this Court's "assurances" of the constitutionality of the felon-in-possession ban and its reading of the preservation of "shall issue" licensing regimes as "arguably impl[ying] that it is constitutional to deny firearm licenses to individuals with felony convictions." 137 F.4th 743, 750–51 (9th Cir. 2025) (en banc) (quotations and citations omitted). It proceeded to apply *Bruen*, but only to confirm its prior practice. *Id.* at 752. In doing so, it held that although felons are part of "the people" covered by the Second Amendment's plain text, *id.* at 753–55, "§ 922(g)(1)'s permanent and categorical disarmament of felons is consistent with this Nation's historical tradition of firearm regulation," *id.* at 761. Like the Eighth Circuit, it accepted as valid historical regulatory principles that "(1) legislatures may disarm those who have committed the most serious crimes; and (2) legislatures may categorically disarm those they deem dangerous, without an individualized determination of dangerousness," and it concluded that "either supplies a basis for the categorical application of § 922(g)(1) to felons." *Id.* at 755. Judge VanDyke, joined two of his colleagues, dissented in part

and criticized the majority for "taking the broadest possible path to uphold § 922(g)(1)." *Id.* at 779 (Van-Dyke, J., concurring and dissenting in part). While the dissent acknowledged a "tradition of disarming groups deemed to be dangerous," it argued that "the danger motivating their disarmament was always a very particular one: a violent attack against the community," and that such a rationale was far narrower than the sweep of Section 922(g)(1)'s coverage. *Id.* at 797 (internal quotation marks omitted).

The Eleventh Circuit in *United States v. Dubois*, similarly concluded that *Bruen* and *Rahimi* left its prior circuit precedent untouched because neither decision "cast doubt on felon-in-possession prohibitions." 139 F.4th 887, 893 (11th Cir. 2025) (internal quotation marks omitted). As such, the Court's previous reading of "*Heller* as limiting the right to 'law-abiding and qualified individuals' and as clearly excluding felons from those categories" controlled and spelled the end for any challenge to 922(g)(1) before reaching *either* the text or the history of the Second Amendment. *Id.* (quoting *United States v. Rozier*, 598 F.3d 768, 771 & n.6 (11th Cir. 2010)).

B. These decisions are incompatible with the decisions of the Third, Fifth, and Sixth Circuits, all of which have held that as-applied challenges under Section 922(g)(1) are possible (and, in the case of the Third Circuit, held one was successful) because at least some individuals covered by Section 922(g)(1) cannot constitutionally be disarmed consistent with history. In *Range v. Attorney General*, the en banc Third Circuit considered another challenge by an individual whose only disarming conviction was a fraud

offense, and a lopsided majority of the court, with 10 judges joining the majority opinion and three more concurring in the judgment, held that there is no "longstanding history and tradition of depriving people like Range of their firearms." 124 F.4th 218, 232 (3d Cir. 2024) (en banc). In reaching that conclusion, the court looked at much of the same history that the circuits on the other side of the split have held categorically validates Section 922(g)(1) and reached an opposing result. While the Third Circuit agreed that there is a history of banning possession of firearms by *dangerous* individuals, it held that any attempt to "stretch dangerousness to cover all felonies and even misdemeanors that federal law equates with felonies" extended that tradition too far. *Id.* at 230. Rejecting the notion that Founding-era punishments up to and including death for felony crimes meant that "the particular (and distinct) punishment" of disarmament was "rooted in our Nation's history and tradition," the Third Circuit held such reasoning was too broad and contrasted it with this Court's narrower conclusion, in *Rahimi*, that disarmament was historically justified only in response to the threatened use of firearms to physically harm others. *Id.* at 231 (emphasis omitted).

In *United States v. Diaz*, the Fifth Circuit held Section 922(g)(1) was constitutional as-applied to an individual who had convictions for vehicular theft and evading arrest with a vehicle and was also in possession of methamphetamine and attempting to break into a car when arrested in possession of a handgun as a felon. 116 F.4th 458, 462 (5th Cir. 2024), *cert denied*, No. 24-6625, 2025 WL 1727419 (U.S. June 23, 2025). The court credited historical laws punishing

felonies, including theft felonies, with death, as historical analogues, and it also looked to colonial "going armed offensively" laws that punished crimes with forfeiture of weapons to hold that Section 922(g)(1) was constitutional as applied to *Diaz*. 116 F.4th at 468, 470–71. The court cautioned, however, that Section 922(g)(1) would not be constitutional in all cases, because "[s]imply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny," as "not all felons today would have been considered felons at the Founding" and "[s]uch a shifting benchmark should not define the limits of the Second Amendment, without further consideration of how that right was understood when it was first recognized." *Id.* at 469.

The Sixth Circuit reached a similar result in *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024). The court held that "history shows that § 922(g)(1) might be susceptible to an as-applied challenge in certain cases," because history demonstrated only that governments could "disarm[] groups that they deemed to be dangerous" and that individuals in those groups "could demonstrate that their particular possession of a weapon posed no danger to peace." *Id.* at 657. An analysis of whether Section 922(g)(1) was constitutional in a given case should "focus on each individual's specific characteristics," and the court acknowledged that "certain categories of past convictions are highly probative of dangerousness, while others are less so." *Id.* at 657–58; *see also id.* at 658 ("[V]iolent crimes are at least strong evidence that an individual is dangerous, if not totally dispositive on the question."). The Sixth Circuit explained that while

"crimes of violence" will almost always demonstrate dangerousness, so will other crimes that though "not strictly crimes against the person, may nonetheless pose a significant threat of danger," like drug trafficking. *Id.* at 659. The category of serious crimes that likely did not bespeak dangerousness was the category at issue here: fraud. For those crimes, the Sixth Circuit "trust[ed] district courts will have no trouble concluding that many … don't make a person dangerous." *Id.* Because Williams himself was dangerous under this rubric (he had, among other things, robbed two people at gunpoint, attempted murder, and "agreed to stash a pistol that was used to murder a police officer)," the court denied his Second Amendment challenge. *Id.* at 662. But it nevertheless opened the door to as-applied challenges by individuals like Petitioner in the Sixth Circuit.

II. The Second Circuit's opinion below is incorrect and inconsistent with this Court's Second Amendment caselaw.

This case provides a good vehicle for this Court to definitively resolve whether Section 922(g)(1) is susceptible to as-applied challenges because unlike many of the courts that have come out the wrong way on this issue, the panel below attempted to apply *Bruen*. The ways in which it erred in doing so are representative of other errors the lower courts have made and on which this Court's guidance is critically important.

A. The Second Circuit's "nuanced approach" was incompatible with the Second Amendment's "historically fixed meaning."

To begin, the Second Circuit essentially reasoned backward from modern times rather than forward from the Founding. Despite acknowledging that the period surrounding the Second Amendment's ratification in 1791 was the critical time for understanding the Second Amendment's scope, *see* Pet.App. 20a–21a & n.14, the Second Circuit began its analysis with the creation of the first federal felon prohibitor in 1938. Dating to nearly 30 years after the law at issue in *Bruen*, such a law could have no relevance to the historical analysis. Indeed, the Second Circuit acknowledged (with no small understatement) that such "laws alone may not be sufficient to establish a historical tradition of firearms regulation," but it justified beginning with them because "the modern concerns that they addressed, and continue to address, diminish the government's burden of drawing a tight historical analogy." Pet.App. 22a.

The court of appeals artificially lightened the historical burden placed on the Government because of the "unprecedented scale of gun violence" both "in the years around [the FFA and Gun Control Act's] adoption," or 1938 and 1968 respectively, as well as "today." Pet.App. 23a. But this does not work for several reasons.

1. *Bruen* did not suggest that the Government's burden is lessened in a case "implicating unprecedented societal concerns or dramatic technological changes." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597

U.S. 1, 27 (2022). "[I]n the same sentence discussing 'unprecedented societal concerns or dramatic technological changes,' *Bruen* characterizes itself and *Heller* as engaged in an analysis of 'historical analogies,' which strongly suggests that *all* [historical analysis]—even the 'relatively simple' ones like *Heller* and *Bruen*—involve analogical reasoning." J. Joel Alicea, *Bruen Was Right*, 174 U. PA. L. REV. 1, 18–19 n.143 (forthcoming 2025). All *Bruen* did was recognize the obvious reality that, in a situation where an aspect of the modern world was significantly different the Founding era, the apparent analogy "will necessarily be looser than an analogy between modern regulations and predecessors that addressed similar technology or social problems." *Id.*

But contrary to the Second Circuit's description of the test, the burden remains on the Government to establish a historical principle delimiting the scope of the right to keep and bear arms, and that principle is not easier to derive or more loosely defined merely because the Government claims a case involves an "unprecedented" modern development. It only means that the same principle's *application* may look different today than it did in 1791, else the Second Amendment's "historically fixed meaning" would in fact be subject to degradation as we get further from the world of the Founding. *Bruen*, 597 U.S. at 28; *see also United States v. Rahimi*, 602 U.S. 680, 740 ("Historical regulations reveal a principle, not a mold.") (Barrett, J., concurring).

The Second Circuit misread *Rahimi* as authorizing its mode of analysis, because "no precise historical precedent for … a criminal prohibition [on firearm

possession by domestic abusers] existed," yet this Court upheld that law based on "laws that regulated gun possession by individuals and groups identified as dangerous to the community in general and/or to particular individuals," Pet.App. 25a. But that is strikingly unlike the analysis the Second Circuit conducted here. Where in *Rahimi* the principle was the disarmament of the *dangerous* and the modern and historical laws pursued that goal in similar if not identical ways, *see* 602 U.S. at 698, here the Second Circuit went on to analyze (1) rejected proposals for the Bill of Rights, (2) historical punishments for felonies, and (3) historical "status-based disarmament laws" targeting "[r]eligious minorities, political dissenters, Native Americans, and persons of color," all leading it to the expansive conclusion that "legislatures could disarm classes of people that they perceived as dangerous, without any judicial scrutiny of the empirical basis for that perception." Pet.App. 36a. That conclusion flowed directly from its conclusion that the Government was relieved from the "burden of drawing a tight historical analogy." Pet.App. 22a. Unlike the narrow principle in *Rahimi*, that historical principle does not "comport with the principles underlying the Second Amendment." 602 U.S. at 692.

2. There is a second critical error in the Second Circuit's mode of analysis. Even assuming arguendo that there is some meaningful distinction between the type of analysis *Bruen* requires in cases involving "unprecedented societal changes" and those that do not, the existence of violent crime, even violent crime with firearms, *cannot* support loosening the analysis at all from where it stood in *Heller* or *Bruen*. Indeed, if it did

Bruen could not have described *Heller* as "exemplif[ying] [a] kind of straightforward historical inquiry" when it invalidated the District of Columbia's 1976 handgun ban. *Bruen*, 597 U.S. at 27; *see Heller*, 554 U.S. at 693 (Breyer, J., dissenting). Indeed, in both *Heller* and *Bruen* the problem of gun violence was emphasized by the dissents as a reason for upholding the regulation in question, *see, e.g.*, *Bruen*, 597 U.S. at 84 (Breyer, J., dissenting) ("In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms."), but the majority in both decisions rejected the possibility that such a fact could at all reduce the scope of the Second Amendment's protections. As this Court explained in *Heller*, "[w]e are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. … But the enshrinement of constitutional rights necessarily takes certain policy choices off the table," 554 U.S. at 636.

Deciding which choices are permissible is impossible without a thorough analysis of history and a careful review of any historical conclusions to ensure that they do not contravene "the principles underlying the Second Amendment." *Rahimi*, 602 U.S. at 692. For instance, few principles are as firmly established in this Court's caselaw and in the historical sources as the fact that the Second Amendment enshrines an individual right to self-defense "against both public and private violence." *Heller*, 554 U.S. at 594; *see also id.*

at 599 ("[S]elf-defense … was the *central component* of the right itself" at the Founding.); *id.* at 606 ("St. George Tucker's version of Blackstone's Commentaries … conceived of the Blackstonian arms right as necessary for self-defense."); *id.* at 609 ("Antislavery advocates routinely invoked the right to bear arms for self-defense."). While the right is unquestionably *broader* than individual self-defense alone, *see id.* at 599, any historical analogy that is drawn so broadly, even in a "nuanced approach" case, that it is inconsistent with that fundamental principle must be rejected. And here, the Second Circuit's jump from the claim that "gun violence persists today at an unprecedented scale," Pet.App. 23a, to the conclusion that legislatures had total freedom to "disarm classes of people that they perceive as dangerous, without any judicial scrutiny" regardless of how overbroad that classification is, is entirely contrary to that principle. Pet.App. 36a; *see Williams*, 113 F.4th at 660 (rejecting the notion that "courts should simply defer to Congress" as "inconsistent with *Heller*" and its rejection of rational basis review").

While history suggests that those whose convictions *actually demonstrate* dangerousness, like those who have behaved violently or who participate in the drug trade, *see Williams*, 113 F.4th at 659–60 (noting that drug trafficking "often leads to violence"), mere conviction of a fraud offense does not demonstrate any proclivity for violence, and yet a person suffering such a conviction is faced with the substantial *threat* of violence from those who perpetuate the gun violence problem. For such individuals swept into the overbroad net cast by Section 922(g)(1), the Second

Circuit's attempt to provide the Government greater leeway in justifying its regulation does not help ensure that the right to keep and bear arms is applied in a way that is consistent with the modern world, it deprives them of it, at a time when it is needed more than ever on the court's own telling.

B. The Second Circuit's analysis flipped the burden under *Bruen* by crediting historical silence to the Government.

Applying *Bruen*, the text of the Second Amendment establishes a presumption: any law that falls within its ambit is presumptively unconstitutional unless and until the Government proves otherwise. 597 U.S. at 17. That is why "the lack of a distinctly similar historical regulation" addressing a historical problem "is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 26. It shows that the constitutional description of the right is, in relevant aspects, as broad as it appears. That is not how the Second Circuit saw things below.

Following its discussion of the modern felon-in-possession regime and its roots in the 20th century, the Second Circuit turned to the Founding, which it acknowledged as the critical period for understanding the Second Amendment's scope. *See* Pet.App. 19a. But its initial search for support was unavailing. First, it looked to the historical punishment for felonies, and found that, in the colonial period, felonies (which included some nonviolent crimes like counterfeiting or desertion) were often punished with death or total estate forfeiture. Pet.App. 26a–27a; *see also id.* at 28a n.27 (noting instances of the death penalty being

given for horse theft and forgery). Given those punishments' availability, the court concluded that "the Founders had no occasion to consider whether the collateral consequences of a felony conviction should include disarmament" since felons were being executed. Pet.App. 28a–29a.

The first of many problems with this is that it is simply not true, because, as the Second Circuit went on to acknowledge, the Founding was accompanied by a significant break from the English treatment of felonies and "[w]ithin two decades of gaining independence from England, the states of the Union had replaced execution with incarceration as the punishment for all but a few crimes." Pet.App. 31a (quoting Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 468 (2009)); *see also Range*, 124 F.4th at 231 ("[B]y the early Republic, many states assigned lesser punishments" than death for nonviolent crimes.). That means the Founders *did* in fact confront the same problem: that felons would not simply be put to death but would be incarcerated for a time and then eventually released, and they lacked a similar system of group-wide disarmament. Rather, the Founders favored, as this Court detailed in *Rahimi*, a system that singled out for disarmament those who "pose[d] a clear threat of physical violence to another," 602 U.S. at 698, but left those who did not and had served their sentence free to own arms. This stands in marked contrast to how the Founders treated voting rights of felons. "By 1820, ten states' constitutions included provisions excluding or authorizing the exclusion of those who had committed crimes, particularly felonies or so-

called infamous crimes from the franchise," but "[s]tate constitutions protecting the right to bear arms do not follow a similar pattern," *Kanter v. Barr*, 919 F.3d 437, 463 (7th Cir. 2019) (Barrett, J., dissenting) (internal quotation marks omitted). The plain conclusion, therefore, is not that there was no occasion to regulate the rights of those convicted of felonies, but rather that a bare felony conviction was not understood to result in forfeiture of the right to keep and bear arms.

Second, even ignoring the ahistorical conjecture at the base of the Second Circuit's opinion, the Second Circuit was wrong to suppose that, because of the availability of the death penalty, "the Founders likely would have considered disarmament permissible as punishment for a felony conviction." Pet.App. 29a. Contrary to the Second Circuit, *Rahimi* did not bless this sort of "greater-includes-the-lesser" reasoning. While *Rahimi* did state that "if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible," 602 U.S. at 699, that analysis is distinct from the Second Circuit's here. While in *Rahimi*, the "how" of the historical and modern laws' responses to "the use of guns to threaten the physical safety of others" were different in degree, they were motivated by precisely the same concern with the unlawful use of firearms. *Id*. In contrast, here, the reason for historically punishing felonies with death—retributive justice and deterrence for crimes judged to be sufficiently serious, *see* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF

ENGLAND 13–14, 94 (1770)—is different from the stated public safety rationale that the Second Circuit found supported Section 922(g)(1).

Despite a superficial similarity to *Rahimi*'s analysis, the greater-includes-the-lesser reasoning employed by the Second Circuit here is entirely unmoored from the "how" and "why" guideposts that were critical to this Court's reasoning in *Rahimi*. It is, instead, predicated on the ahistorical idea that a lifetime deprivation of Zherka's constitutional right to own a firearm is justifiable as a *punitive* measure, excused by the State's forbearance in not simply executing him for committing fraud. If such logic is accepted, there is no reason why Congress could not equally well deprive felons of their Fourth Amendment rights for as long as they live (and doing so would undoubtedly make a lot of police work much easier). But such logic cannot be accepted because there is not one shred of historical evidence that would support such a principle.

The second type of Founding era evidence on which the panel focused is no better than the first. The Second Circuit pointed to examples, from debates over the ratification of the Constitution, of unadopted proposals that would have permitted restricting the right to keep and bear arms to at least some criminal offenders. *See* Pet.App. 31a–32a. The most important of these, and the focus of the decision below because it allegedly "most clearly supports the view that some Founders believed that it was permissible for Congress to disarm convicted felons," Pet.App. 32a, was the Pennsylvania Dissent of the Minority, an Anti-Federalist proposal from the Pennsylvania ratifying

convention that suggested adding language to the Constitution specifying that "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*." 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665 (1971) (emphasis added). But even accepting the Second Circuit's dubious assumption that such a proposal *could* provide useful information about the scope of the right under *Bruen*, it is unlikely the Founding generation would not have considered the phrase "crimes committed" in the proposal "to support the disarmament of literally all criminals, even nonviolent misdemeanants." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting). A more reasonable interpretation of the phrase, which is "both internally coherent and consistent with founding-era practice," would read it to "refer[] only to a subset of crimes," defined by the succeeding language of "real danger of public injury," *i.e.*, those who have committed *dangerous* crimes. *Id.* (internal quotation marks omitted). Indeed, both Blackstone and Webster demonstrate that the word "crime" at the Founding could be understood to refer not to all criminal offenses but rather to those "of a deeper and more atrocious" kind. 4 BLACKSTONE, *supra*, at 5; *Crime*, WEBSTER'S DICTIONARY (1828). The Second Circuit's reading of the phrase as "most clearly support[ing] the view that some Founders believed that it was permissible for Congress to disarm convicted felons" is thus wrong on its own terms. Pet.App. 32a.

Perhaps more importantly, the Second Circuit's premise, that such a proposal can itself ground a historical tradition should not be granted. In *Bruen* and

in *Rahimi*, the Court looked to actual legal restrictions (whether grounded in the common law or in statute), that had actually been enforced, to inform its understanding of the scope of the right. *See Bruen*, 597 U.S. at 57–58; *Rahimi*, 602 U.S. at 695–97. And in *Heller*, the Court expressly reasoned that it was "dubious" to rely on "the various proposals in the state conventions" to interpret the Second Amendment, which codified "a pre-existing right." 554 U.S. at 603. A proposal that "was suggested by a minority of the Pennsylvania ratifying convention that failed to persuade its own state, let alone others. . . is too dim a candle to illumine the Second Amendment's scope," *Folajtar v. Attorney General*, 980 F.3d 897, 915 (3d Cir. 2020) (Bibas, J., dissenting) (emphasis omitted), especially when there is no corroborating evidence supporting a tradition of disarming all criminal offenders.

The fact of the matter is that neither the history of felony punishment nor these unadopted constitutional proposals demonstrates anything like a tradition of disarming all felons, much less all individuals convicted of a crime punishable by over a year in prison. The Second Circuit did not purport to find otherwise. For example, it described the ratifying convention proposals as "inconclusive." Pet.App. 33a. But "inconclusive" evidence from the Founding cannot carry the Government's burden to establish a tradition of regulation. The text of the Second Amendment that was adopted, without the caveats contained in the Dissent of the Minority or any other state proposal, is the starting place, and it establishes a presumption that Section 922(g)(1) is unconstitutional. Given this

starting place, and as *Bruen* makes clear, ambiguities in the historical record therefore must be resolved *against* the Government, not in its favor. *See Bruen*, 597 U.S. at 44 n.11; *id.* at 58 n.25 *see also* Alicea, *supra*, at 30–31.

C. Status based disarmament laws do not provide historical cover for non-dangerous individuals.

The Second Circuit's conclusion that Section 922(g)(1) is constitutional ultimately turned on the existence of certain status-based restrictions that the court thought showed that legislatures have authority, consistent with the Second Amendment, to pass "laws disarming broad classes of people," and that a legislature's determination that a class of people should be disarmed is immune from any form of judicial review. Pet.App. 36a. But to reach that broad conclusion, the Court accepted a wide variety of putative "analogues" that should have no role in determining the contours of our constitutional rights: historical laws disarming "[r]eligious minorities, political dissenters, Native Americans, and persons of color." Pet.App. 35a–36a. While the Second Circuit was sufficiently embarrassed of these laws that it noted that many of them "are offensive to contemporary moral sensitivities, or might well be deemed unconstitutional today" it insisted that they are "relevant to the Second Amendment historical analysis that *Bruen* requires we conduct." Pet.App. 36a.

The Second Circuit was wrong to rely on these "offensive" laws. They notably were not even discussed by the majority in *Rahimi* and the Solicitor General disclaimed reliance on them, stating that "they were

applications of a separate principle under the Second Amendment, which is that those who are not considered among the people can be disarmed." Transcript of Oral Argument at 53:22–25, *United States v. Rahimi*, 602 U.S. 680 (22-915) (Nov. 7, 2023). In dissent, Justice Thomas did discuss these laws, calling them "cautionary tales," "warn[ing] that when majoritarian interests alone dictate who is 'dangerous,' and thus can be disarmed, disfavored groups become easy prey." *Rahimi*, 602 U.S. at 776 (Thomas, J., dissenting). Just a few examples of the Second Circuit's historical work here suffice to show how correct Justice Thomas's read on these laws was.

Start first with the 1689 English Declaration of Right, which guaranteed only a right to keep and bear arms by Protestants and then only "*as allowed by law*." Pet.App. 37a (quoting 1 W. & M., Sess. 2, ch. 2, § 7 (1689), *in* 3 ENG. STAT. AT LARGE 441 (London, Mark Baskett, Henry Woodfall, & William Strahan 1763)). Although adoption of the Declaration was a "watershed in English history," *Bruen*, 597 U.S. at 44, it is inappropriate to read the textual limitations it included forward into our Second Amendment. While the English right "was initially limited—it was restricted to Protestants and held only against the Crown, but not Parliament," no such limitations are present in this Nation's constitution. The English right represents a starting point for our Second Amendment, but to the extent it shows a more limited view of that right, it should serve as evidence that the Founders rejected attempts at broad disarmaments of rights holders.

The Second Circuit also relied on various wartime measures, like a 1775 Connecticut law "that disarmed any person convicted of 'libel[ing] or defam[ing] any of the resolves' " of the Continental Congress or the Connecticut General Assembly." Pet.App. 39a (quoting 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM MAY, 1775, TO JUNE, 1776, at 193 (Charles J. Hoadley ed., 1890)) (alterations in original). But that law targeted individuals who *indisputably* posed a danger because they were openly antagonistic to the Revolutionary cause and "were likely to aid the British, or possibly even join their ranks" and "use their arms to kill others, including their fellow citizens." *United States v. Jackson*, 85 F.4th 468, 472 (8th Cir. 2023) (Stras, J., dissental); *see also Kanter*, 919 F.3d at 457 (Barrett, J., dissenting). Such a law has nothing to do with disarming someone with a nonviolent, non-dangerous predicate conviction, and it certainly does not suggest that legislatures have carte blanche to suggest *any* group of people is dangerous.

Finally, and most egregiously, the Second Circuit relied on a series of race-based laws that targeted "Black people, mixed-race people, and Native Americans." Pet.App. 41a. It is truly bizarre to suggest that these reprehensible historical regulations can tell us anything about the legitimate scope of the Second Amendment. Take for instance, the Second Circuit's reliance on an 1852 law by which "Black people in Mississippi were prohibited from owning guns with no exceptions" because magistrates were specifically prohibited "from issuing licenses to carry and use firearms to any Black person." Pet.App. 42a.

The explanation for why this law was not declared unconstitutional is as straightforward as it is problematic for the Second Circuit's opinion: it disarmed people *who were not understood to have rights*. Indeed, in his infamous opinion in *Dred Scott v. Sandford*, issued just 5 years after Mississippi passed this putative analogue, Chief Justice Taney offered as one reason for treating Black people as not being citizens, that if they *were* citizens, then they would have to be accorded full rights, including the right "to keep and carry arms wherever they went." 60 U.S. 393, 417 (1857). That fully explains both how these laws were not subject to historical challenges and why they are utterly irrelevant to any law today that attempts to disarm a member of "the people" whose rights *are* protected.

More concerningly, even if, counterfactually, Black Mississippians of the 1850s had been understood at the time to have rights, it is puzzling how the Second Circuit could view a law totally depriving them, on account of their race, of the right to keep and bear arms, as anything other than a *violation* of the right. That the court looked to a law passed by a state that would, nine years later, secede from the Union with the statement that "[o]ur position is thoroughly identified with the position of slavery" and objecting that the Union cause "advocates negro equality," *see* AN ADDRESS SETTING FORTH THE DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF MISSISSIPPI FROM THE FEDERAL UNION 3–4 (1861), speaks to a troubling indiscriminate quality that has pervaded the courts of appeals' historical analyses. Several courts have, in conducting the

Bruen analysis, relied on overtly discriminatory antebellum laws of states that were on the verge of secession or laws that were part of the post-Reconstruction "Black codes" that sought to keep newly freed African Americans in a state of subjugation. *See, e.g.*, *Wolford v. Lopez*, 125 F.4th 1230, 1232 (9th Cir. 2025) (VanDyke, dissental) ("[T]he panel … justified its conclusion by pointing to just two outlier laws—one an anti-poaching colonial law and the other a discriminatory Reconstruction era Black Code."). That Courts often apologize, as the Second Circuit did here, for such reliance, while insisting that *this Court* has instructed them to hold their nose and treat them as a legitimate part of the American civil rights tradition, *see, e.g.*, *Nguyen v. Bonta*, 140 F.4th 1237, 1246 n.3 (9th Cir. 2025), is perverse and *not* what this Court ever instructed them to do. "[N]ot all history is created equal," *Bruen*, 597 U.S. at 34, and a temporal distance from the Founding is not the only thing that can make a historical analogue less valuable. Just as legislatures sometimes pass unconstitutional laws today, they did so in the past as well, and some courts' continued assumption that all history is good history if it restricts the Second Amendment is a persistent point of misunderstanding that this Court should correct.

The Second Circuit's reliance on these historical laws was highly consequential. It forced the Second Circuit, to explain such dubious laws, to reach the conclusion that a "dangerous person" was, in effect, whoever the legislature said was dangerous. But excluding those laws, the real historical tradition is the same one that this Court identified in *Rahimi*, that "individual[s] [who] pose[] a clear threat of physical

violence" may be disarmed. 602 U.S. at 698; *see also* Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibition*, 16 DREXEL L. REV. 1, 3 (2024); *see also Kanter*, 919 F.3d at 464 (Barrett, J., dissenting); *Folajtar*, 980 F.3d at 913 (Bibas, J., dissenting) ("Historically, limitations on the right were tied to dangerousness.").

III. The availability of discretionary relief has no bearing on the well-established circuit split at issue in this case.

At issue here is the deprivation of a fundamental right. *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010). What is more, the specific federal statute here, which has deprived Zherka of his fundamental rights, is among the most enforced criminal prohibitions in the country. *See Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses*, U.S. SENTENCING COMM'N (2024), https://perma.cc/VP5L-D5MJ (over 10% of federal criminal sentences reported in fiscal year 24 involved convictions under Section 922(g)(1)). This case provides a good vehicle for resolving an entrenched circuit split. In an ordinary case, a clear divide over the constitutionality of such an important federal statute would unquestionably merit this Court's attention. Indeed, the Government might well be expected to join Petitioners in seeking review, as it has done with respect to this issue in the past. *See* Supplemental Brief for the Federal Parties at 2, 4, *Garland v. Range*, No. 23-374 (U.S. June 24, 2024) (calling for this Court to "grant plenary review" of several petitions raising the constitutionality of Section 922(g)(1), noting that the circuit split was likely to deepen and warning that the issue had also "deeply divided district courts").

And yet, Petitioner expects that, as it has done in another case seeking review of this same issue, the Government will oppose certiorari here because it believes Zherka should instead seek redress under 18 U.S.C. § 925(c). *See* Brief for the Respondent in Opposition at 14, *Vincent v. Bondi*, No. 24-1155 (U.S. Aug. 11, 2025). Indeed, in *Vincent* the government went so far as to suggest that the revitalization of Section 925(c) means that the split "lacks prospective importance—and may even evaporate entirely." *Id.* But that assertion is wrong.

Section 925(c) permits a person who is disqualified under Section 922(g)(1) to "make application to the Attorney General for relief," which the Attorney General "may grant" if she is satisfied that "the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). If the Attorney General denies an application, the applicant may seek review in a district court which "may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice." *Id.* Courts review denials only for arbitrary and capricious decision making on the part of the Attorney General. *See Bradley v. ATF*, 736 F.2d 1238, 1240 (8th Cir. 1984).

For a long time, Section 925(c) has been inoperable because authority to review applications was delegated to the Bureau of Alcohol, Tobacco, Firearms and Explosives, and since 1992, appropriations bills have prohibited ATF from using appropriated funds

to review and grant any such applications. *See United States v. Bean*, 537 U.S. 71, 74–75 (2002). That recently changed, as Attorney General Bondi has withdrawn the delegation of authority to ATF, *see Withdrawing the Attorney General's Delegation of Authority*, 90 Fed. Reg. 13,080 (Mar. 20, 2025), and begun processing applications and granting relief to a few applicants under the statute, *see Granting of Relief; Federal Firearms Privileges*, 90 Fed. Reg. 17,835 (Apr. 29, 2025).

But the existence of Section 925(c) does not matter for this case. In placing the burden on the applicant and providing for the granting of relief only upon a special showing that he is not dangerous, Section 925(c) takes as a given that it was valid to disarm an applicant *initially* and only asks whether the disarmament should *continue*. The thrust of Zherka's challenge here is that there are some people who fall within the scope of Section 922(g)(1) whose *initial* disarmament should never have happened.

To be sure, Section 925(c) may be relevant to individuals convicted of offenses that are sufficiently connected to violence to justify presumptive disarmament—e.g., violent crimes like rape or murder or crimes inherently connected to violence like drug trafficking. *See Williams*, 113 F.4th at 658–59. Section 925(c) at least addresses the potential constitutional infirmity of applying Section 922(g)(1) to such individuals—permanent disarmament without any avenue for relief. And offenses of this type may make up a large portion of those covered by Section 922(g)(1), given that the statute exempts certain white collar business offenses (like unfair trade practices or

antitrust violations) and state offenses that are classed as misdemeanors and punishable by a term of imprisonment of two years or less), *see* 18 U.S.C. § 921(a)(20)(B). But none of that changes the fact that Section 925(c) does not cure the constitutional violation caused by disarming fraud offenders like Zherka whose disarmament was never valid to begin with.

For individuals whose convictions fall into that category—a group that also includes the plaintiffs in *Range* and *Vincent*, *see Range*, 124 F.4th at 230 ("food-stamp fraud"); *Vincent*, 127 F.4th at 1264 ("bank fraud")—the existence of Section 925(c) does not reduce the imperative of this Court's settling the constitutional scope of Section 922(g)(1)'s application *at all*. It is of no moment that such individuals can make an application that the Attorney General "may grant" in her discretion if she is sufficiently convinced that the applicant deserves to possess arms, because they should have never lost their rights to begin with. "The very premise of constitutional rights is that they don't spring into being at the legislature's grace." *Williams*, 113 F.4th at 661. This Court should, therefore, grant certiorari to review this important issue in this case or another similar case such as *Vincent*. And if it does the latter, it should hold this petition pending resolution of that case and then dispose of it accordingly.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED JUNE 9, 2025

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Docket No. 22-1108-cv

SELIM ZHERKA, "SAM,"

Plaintiff-Appellant,

v.

PAMELA BONDI, ATTORNEY GENERAL OF THE UNITED STATES, IN HER OFFICIAL CAPACITY,

*Defendant-Appellee.**

August Term, 2022
|
Argued: May 08, 2023
|
Decided: June 9, 2025

Before: Newman, Lynch, and Pérez, Circuit Judges.

OPINION

Gerard E. Lynch, Circuit Judge:

Plaintiff-appellant, Selim Zherka, filed a lawsuit in the United States District Court for the Southern District

* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

of New York against the Attorney General (the "government"), alleging violations of his Second and Fifth Amendment rights. He asserts that 18 U.S.C. § 922(g)(1)'s prohibition of the possession of firearms by a convicted felon is unconstitutional as applied to him because he was not convicted of a violent felony. He also argues that because he has a constitutional right to bear arms, the federal government cannot, without an individualized assessment of his dangerousness, deprive him of firearms. Appellant seeks a declaration that Section 922(g)(1) is unconstitutional as applied to him and a permanent injunction enjoining the government from preventing him from possessing a firearm in his home.

The district court (Philip M. Halpern, *J.*) dismissed Appellant's claims, concluding that Section 922(g)(1) is constitutional as applied to him and that he has no right to a hearing prior to the adoption or application of a categorical prohibition. We agree and therefore AFFIRM the judgment of the district court.[1]

BACKGROUND

We take the following facts from documents of which we can take judicial notice and the operative complaint, which we accept as true, and we draw all reasonable inferences in Zherka's favor. *See, e.g.*, *Collymore v. Myers*, 74 F.4th 22, 30 (2d Cir. 2023).

1. Zherka filed a notice of appeal on May 20, 2022. We delayed adjudication of this case pending the Circuit's resolution of *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024), which was not completely resolved until this Court's second decision, on remand from the Supreme Court on October 24, 2024.

Appendix A

I. The Underlying Felony Conviction

On December 22, 2015, Zherka pleaded guilty to one count of conspiracy to make a false statement to a bank and to sign and file a false federal income tax return in violation of 18 U.S.C. § 371.[2] Although Zherka's offense conduct was nonviolent, his crime was serious; he defrauded federally insured banks of tens of millions of dollars and flouted the tax laws of this country to the tune of over one million dollars in tax loss. Zherka was sentenced to 37 months' imprisonment and three years of supervised release, and ordered to pay approximately $8.5 million in fines, restitution, and forfeiture. As a condition of his supervised release, he was prohibited from possessing a firearm. He completed his term of incarceration on May 26, 2017, and his term of supervised release expired on May 26, 2020. Accordingly, Section 922(g)(1), and the New York State licensing regime,[3] which Zherka does not challenge, are the only legal impediments to his possession of a firearm.

II. Procedural History

On September 11, 2020, Zherka sued the Attorney General seeking declaratory and injunctive relief from

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2. A violation of 18 U.S.C. § 371 is a class D felony.

3. Zherka alleges that prior to his conviction, he "was licensed to carry a firearm in New York, Connecticut, Florida and Pennsylvania," but that after his conviction he has no "recourse to obtain a firearms license." App'x at 10–11. We therefore assume that Zherka does not currently have a valid New York firearms license. For an account of the New York licensing regime, see *Antonyuk v. James*, 120 F.4th 941, 955–58 (2d Cir. 2024).

claimed violations of his constitutional rights. First, he asserts that Section 922(g)(1) is unconstitutional as applied to someone like him who has been convicted only of a nonviolent felony. Second, he alleges that because he has a constitutionally protected liberty interest in the right to bear arms, the federal government must provide an opportunity for him to restore that interest by an individualized assessment of his dangerousness. As an example of the type of process that he claims is due to him, Appellant points to 18 U.S.C. § 925(c), which permitted a convicted felon to apply to the Attorney General to restore his right to bear arms by showing that he is not dangerous to public safety.[4]

On the government's motion, the district court dismissed Zherka's complaint. *See Zherka v. Garland*, 593 F. Supp. 3d 73, 82 (S.D.N.Y. 2022). On the Second Amendment issue, it applied our then-prevailing two-step test for assessing the constitutionality of gun restrictions. *Id.* at 77–80. Under that test, a court first had to "determine whether the challenged legislation impinges upon conduct protected by the Second Amendment," as informed by the Amendment's text and history. *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018) (internal quotation marks omitted). Only if the challenged legislation impinged upon protected conduct would the court then "determine the appropriate level of scrutiny to apply and evaluate the constitutionality of the law

4. Section 925(c) has not been repealed. Nevertheless, it is currently without practical effect because, as described more fully below, Congress has repeatedly defunded the administrative apparatus necessary to implement the statute since 1992.

using that level of scrutiny." *Id.* Relying on the Supreme Court's assurance that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful," *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), the district court concluded, at the first step of the test, that Section 922(g)(1) is constitutional as applied "to individuals convicted of non-violent financial felonies," *Zherka*, 593 F. Supp. 3d at 77–80.

The district court also rejected Zherka's due process claim, reasoning that it was foreclosed by *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). *See Zherka*, 593 F. Supp. 3d at 80–81. In that case, the Supreme Court determined that Connecticut did not violate the plaintiffs' procedural due process rights when it required them, as convicted sex offenders, to enroll in a publicly available registry without first receiving an individualized hearing on whether they were dangerous to the public. *See Conn. Dep't Pub. Safety*, 538 U.S. at 4–8, 123 S.Ct. 1160. The Court explained that the registration requirement was based "on the fact of previous conviction, not the fact of current dangerousness" and that procedural due process does not require a hearing to prove or disprove a particular set of facts that are ultimately irrelevant under the challenged statute. *Id.* at 4, 123 S.Ct. 1160. Likewise in this case, the district court concluded that Zherka has no procedural due process right to a hearing on the risk of danger he poses because Section 922(g)(1) applies based on the fact of his previous conviction, rather than on an individualized finding that he poses a current danger to the public. *See Zherka*, 593 F. Supp. 3d at 80–81.

Zherka filed his appeal on May 20, 2022. Shortly thereafter, on June 23, 2022, the Supreme Court issued its decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022), repudiating the two-step framework for analyzing Second Amendment challenges that this circuit, and every other regional circuit, had applied. *Id.* at 17, 142 S.Ct. 2111. In response, Zherka argues that we should vacate the district court's decision and remand the case for further consideration under the *Bruen* standard. He alternatively asserts that the government has failed to meet its *Bruen* burden of demonstrating that there is a history and tradition of regulating firearms in this country in a manner that is analogous to Section 922(g)(1). In other words, he contends that there is no historical analogy to Section 922(g)(1). The government, in response, argues that nothing in *Bruen* alters the district court's conclusion that Zherka, by virtue of his felony conviction, falls outside the scope of the Second Amendment's protections and that we should, therefore, affirm the lower court's decision.

LEGAL STANDARDS

I. Standard of Review

"We review *de novo* a district court's grant of a defendant's motion to dismiss, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011) (internal quotation marks omitted).

II. Second Amendment Principles

In a quartet of cases starting with *Heller* in 2008, the Supreme Court has interpreted the Second Amendment right to keep and bear arms in the context of challenges to firearm regulations. *See Antonyuk v. James*, 120 F.4th 941, 960–68 (2d Cir. 2024). Three of those four cases have limited applicability to this case because they concerned regulations that were outliers in the breadth of their restrictions on the rights of law-abiding citizens to possess and carry firearms.[5] Only *United States v. Rahimi*, 602 U.S. 680, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024), dealt with an arguably analogous statute that restricted the possession of firearms by a category of putatively

5. *See Heller*, 554 U.S. at 573, 629, 635, 128 S.Ct. 2783 (determining that a District of Columbia "prohibition on the possession of usable handguns in the home violates the Second Amendment" and explaining that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban"); *McDonald v. City of Chicago*, 561 U.S. 742, 749–50, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (holding that the "Second Amendment right is fully applicable to the States" and striking down a Chicago regulation that was similar to the D.C. firearm regulation in *Heller*); *Bruen*, 597 U.S. at 8–11, 14, 142 S.Ct. 2111 (striking down New York's former "may-issue" firearm licensing regime pursuant to which an applicant could obtain a public-carry license only if he "demonstrate[d] a special need for self-defense" and explaining that only five other states had similar licensing regimes, whereas 43 states had licensing regimes that did not require demonstrating a special need); *id.* at 79, 142 S.Ct. 2111 (Kavanaugh, J., concurring) (characterizing New York's licensing regime as "unusual").

non-law-abiding persons.[6] We provided a detailed and comprehensive summary of all four cases in *Antonyuk*, 120 F.4th at 960–68. Here, we briefly summarize the *Bruen* standard for analyzing Second Amendment challenges and note the most relevant lessons derived from the Supreme Court's other twenty-first century Second Amendment cases.

Under *Bruen*, a court assessing firearm regulations must first consider whether "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 597 U.S. at 24, 142 S.Ct. 2111. If it does, "the Constitution presumptively protects that conduct." *Id.* The burden then shifts to the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* At this step of the *Bruen* analysis, the government is tasked with identifying historical analogues that demonstrate a "tradition of regulation" that is comparable to the challenged law. *Id.* at 27, 142 S.Ct. 2111. In short, the text of the Second Amendment and the history of firearms regulation in this country are the guiding lights for adjudication of a Second Amendment challenge to a firearm regulation. *Id.* at 19, 142 S.Ct. 2111.

A few other principles from the quartet of Second Amendment cases are worth highlighting. First, the Supreme Court has never repudiated *Heller*'s assurance

6. In *Rahimi*, the Supreme Court upheld 18 U.S.C. § 922(g)(8), a federal statute that criminalizes the possession of firearms by an individual subject to a particular type of restraining order. 602 U.S. at 684–86, 702, 144 S.Ct. 1889.

that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful." 554 U.S. at 626–27, 627 n.26, 128 S.Ct. 2783.[7] Second, the Court has struck down only firearms laws that overly restrict the rights of "law-abiding, responsible citizens" to own and possess guns. *Id.* at 635, 128 S.Ct. 2783; *see also McDonald v. City of Chicago*, 561 U.S. 742, 749–50, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010); *Bruen*, 597 U.S. at 8–11, 15, 26, 29, 142 S.Ct. 2111. *Rahimi* is the only instance in which the Court has reviewed a law that criminalizes firearms possession by potentially dangerous individuals, and there, the Court upheld the constitutionality of Section 922(g)(8) both facially and as applied. *See* 602 U.S. at 690, 144 S.Ct. 1889. And third, the historical analogues that could support a tradition of firearm regulation do not have to be "dead ringer[s]" for the challenged regulation, especially when the challenged regulation addresses new circumstances. *Id.* at 692, 144 S.Ct. 1889 (internal quotation marks omitted).

7. Indeed, several Justices who joined the *Bruen* majority opinion emphasized, in separate opinions, that they did not regard that decision as inconsistent with *Heller*'s assurance. *See Bruen*, 597 U.S. at 72, 142 S.Ct. 2111 (Alito, J., concurring); *id.* at 80–81, 142 S.Ct. 2111 (Kavanaugh, J., joined by Roberts, C.J., concurring). The dissenters also posited that the Court's opinion cast no doubt on *Heller*'s assurance. *See id.* at 129–30, 142 S.Ct. 2111 (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting).

Appendix A

DISCUSSION

I. This Appeal Is Ripe for Decision.

Zherka first argues that we should vacate and remand for the district court to consider his claims under the *Bruen* standard, since that case repudiated the former two-step standard that the district court applied. "While generally we decline considering arguments not addressed by the district court, this is a prudential rule we apply at our discretion." *Bacolitsas v. 86th & 3rd Owner, LLC*, 702 F.3d 673, 681 (2d Cir. 2012) (internal citation omitted). "In determining whether to consider such issues, we rely on a number of factors, including the interests of judicial economy, and whether the unaddressed issues present pure questions of law." *Id.* (internal citation omitted).

Zherka points, in part, to *Taveras v. New York City*, No. 21-398, 2022 WL 2678719 (2d Cir. July 12, 2022) and *Sibley v. Watches*, No. 21-1986, 2022 WL 2824268 (2d Cir. July 20, 2022), two non-precedential summary orders, to support his argument for vacatur and remand. In both *Taveras* and *Sibley*, we vacated and remanded Second Amendment challenges to gun regulations, with little to no analysis, for the district courts to reconsider in light of *Bruen*. *See Taveras*, 2022 WL 2678719, at *1; *Sibley*, 2022 WL 2824268, at *1.

In both of those cases, however, the parties had fully briefed their positions and we had held oral argument prior to *Bruen*. Here, in contrast, the parties submitted their briefs and offered oral argument after the Supreme

Court decided *Bruen*. We therefore have the full benefit of the parties' respective *Bruen*-based arguments before us. It would be inconsistent with the interests of judicial economy to remand this case to the district court, only for the parties to brief the same legal issues again.

Moreover, there are no relevant unsettled questions of fact in this case.[8] The parties dispute only whether certain historical analogues establish a history and tradition of firearms regulation in this country sufficient to uphold Section 922(g)(1). That dispute raises only questions of constitutional interpretation, which we review *de novo*. *See United States v. Doka*, 955 F.3d 290, 293 (2d Cir. 2020) ("We review *de novo* questions of law, including questions of constitutional interpretation."). In the absence of material questions of fact, we are just as well equipped as the district court to resolve the outstanding legal issues in this case. Accordingly, we decline to vacate and remand. *See Booking v. Gen. Star Mgmt. Co.*, 254 F.3d 414, 418–19 (2d Cir. 2001) (declining to vacate and remand a case that presented a purely legal issue, even though the district court had not reached that legal issue).

II. *Bogle* Remains Good Law After *Bruen*.

Prior to the Supreme Court's decision in *Bruen*, we had upheld Section 922(g)(1) as facially constitutional. *See United States v. Bogle*, 717 F.3d 281, 281–82 (2d Cir. 2013).

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8. The parties disagree about whether Zherka is currently dangerous. Because we conclude that Congress has the authority to disarm all felons, we need not resolve that factual dispute.

In *Bogle*, we rejected a facial challenge to Section 922(g)(1), relying on the assurances in *Heller* and *McDonald* that "longstanding prohibitions on the possession of firearms by felons" are presumptively constitutional. *Id.* at 281, quoting *Heller*, 554 U.S. at 626, 128 S.Ct. 2783, and citing *McDonald*, 561 U.S. at 786, 130 S.Ct. 3020. Contrary to the government's assertion here, we did not conclude that "felons as a class are not among the law-abiding citizens protected by the Second Amendment." Appellee's Br. 11. We simply held that Section 922(g)(1) is a "constitutional restriction on the Second Amendment rights of convicted felons." *Bogle*, 717 F.3d at 281–82.

Our holding in *Bogle* survives *Bruen*. "To mount a successful facial challenge" to Section 922(g)(1), a litigant "must establish that no set of circumstances exists under which the law would be valid, or show that the law lacks a plainly legitimate sweep." *Antonyuk*, 120 F.4th at 983 (alterations adopted) (internal quotation marks omitted). As we determined in *Bogle*, that cannot be done.

In *Antonyuk*, a case that post-dated *Bruen*, we upheld New York's "good moral character" licensing requirement, which required licensees to possess the character necessary to "be entrusted with a weapon and to use it only in a manner that does not *endanger oneself or others*." 120 F.4th at 985 (emphasis in original), quoting N.Y. Penal L. § 400.00(1)(b). In that decision, we explained that the Supreme Court in *Bruen* had expressly approved licensing regimes that defined "good moral character" similar to New York's definition. *Id.* at 983–85. By that same reasoning, Section 922(g)(1) is

capable of constitutional application to a broad range of felons, whose record of *violent* behavior or prior misuse of firearms would manifestly make them liable to being disarmed under that standard.[9] It therefore cannot be said that "no set of circumstances exists under which the law would be valid," *id.* at 983, and *Bogle*'s rejection of a facial challenge to the statute remains good law in this Circuit.

Other Circuit Courts have also held that neither *Bruen* nor *Rahimi* abrogated their prior precedent holding Section 922(g)(1) facially constitutional on the basis of the continued vitality of *Heller* and *McDonald*'s assurances. *See United States v. Duarte*, 137 F.4th 743, 749–53 (9th Cir. 2025) (en banc); *Vincent v. Bondi*, 127 F.4th 1263, 1264–66 (10th Cir. 2025); *United States v. Hunt*, 123 F.4th 697, 703–04 (4th Cir. 2024); *United States v. Hester*, No. 23-11938, 2024 WL 4100901, at *1 (11th Cir. Sept. 6, 2024) (unpublished).

Zherka, however, raises a different challenge; he questions the constitutionality of § 922(g)(1) as applied to him. We have not previously resolved the discrete questions at issue in this as-applied challenge, and we therefore must conduct a *Bruen* analysis of that claim.

III. *Bruen* Step One: Felons Are Part of "the People."

We begin our *Bruen* analysis with the first step: does the plain text cover Appellant's conduct? It clearly does.

9. Bogle had been convicted of categorically violent felonies, including attempted robbery in the second degree and assault in the second degree. *See United States v. Bogle*, 522 F. App'x 15, 19–20 (2d Cir. 2013).

We construe Zherka's complaint as asserting his desire to possess firearms only in a manner that the Second Amendment protects.[10] 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." U.S. CONST. amend. II. And the Second and Fourteenth Amendments protect an individual's right to "possess a handgun in the home for self-defense" and "carry handguns publicly for [] self-defense." *Bruen*, 597 U.S. at 8–10, 142 S.Ct. 2111. Section 922(g)(1), however, prohibits convicted felons from "possess[ing] in or affecting commerce, any firearm or ammunition," including for self-defense inside and outside the home. 18 U.S.C. § 922(g)(1).

Because Section 922(g)(1) clearly covers conduct that the Second Amendment presumptively protects, the only remaining question is whether Zherka, as a nonviolent felon, is included among "the people" protected by the Second Amendment. U.S. CONST. amend II. The government argues that Zherka is not. It contends that the Supreme Court has consistently "defined the right to bear arms as limited to 'law-abiding, responsible citizens.'" Appellee's Br. 10, quoting *Heller*, 554 U.S. at 635, 128 S.Ct. 2783; *see also Bruen*, 597 U.S. at 31–32, 142 S.Ct. 2111 ("It is undisputed that petitioners . . . —two ordinary,

10. Zherka asserts that Section 922(g)(1) permanently prohibits him from possessing firearms even though "he is entitled to exercise his right to bear arms under the Second Amendment." App'x at 12. He also requests a permanent injunction that would enjoin the government from preventing him from possessing a firearm in his home.

law-abiding, adult citizens—are part of the people whom the Second Amendment protects.") (internal quotation marks omitted). The government also asserts that the Court's repeated assurance that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful," *Heller*, 554 U.S. at 626–27, 627 n.26, 128 S.Ct. 2783, further suggests that felons as a class are not among "the people" that the Second Amendment protects.

The government's arguments are unavailing for several reasons. First, the argument that the Supreme Court has limited the Second Amendment right to "law-abiding, responsible citizens," *id.* at 635, 128 S.Ct. 2783, does not definitively place law breakers, or even felons, outside the protection of the Constitution. "Though the Supreme Court has suggested that law-abiding, responsible, and/or ordinary individuals are protected by the Second Amendment, it is far from clear whether the negative of those adjectives describe[s] individuals who stand *outside* the Second Amendment or instead those who may be disarmed *consistent with* that Amendment." *Antonyuk*, 120 F.4th at 981–82 (emphasis in original) (internal quotation marks omitted). Further, the Supreme Court's assurance that longstanding prohibitions on the possession of firearms by felons are lawful does not suggest that felons are not part of "the people" protected by the Second Amendment. That assurance instead suggests that although felons, like other Americans, are presumptively protected by the Second Amendment, Congress nevertheless has the authority to disarm them.

As Justice Barrett explained when she was a judge on the Seventh Circuit

> [t]here are competing ways of approaching the constitutionality of gun dispossession laws. Some maintain that there are certain groups of people—for example, violent felons—who fall entirely outside the Second Amendment's scope. Others maintain that all people have the right to keep and bear arms but that history and tradition support Congress's power to strip certain groups of that right.

Kanter v. Barr, 919 F.3d 437, 451–52 (7th Cir. 2019) (Barrett, J., dissenting) (internal citation omitted). For the reasons that then-Judge Barrett articulated, we agree that the latter is the better way to approach the question. *Id.* at 451–53.

Moreover, a decision that Zherka does not belong to "the people" and therefore does not have Second Amendment rights would be at odds with *Heller*. The Court in that case defined "the people" broadly to include "*all* Americans." *Heller*, 554 U.S. at 581, 128 S.Ct. 2783 (emphasis added). It elaborated that "the people," as referred to throughout the Constitution, "unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580, 128 S.Ct. 2783. The government does not assert that Zherka is not an American nor that he does not, as a felon who has completed his sentence, belong to the political community.

Finally, other constitutional provisions grant rights to "the people" including, for example, the right to "peaceably [] assemble, and to petition the Government for a redress of grievances," U.S. CONST. amend. I, and the right to be free of "unreasonable searches and seizures," *id.* amend. IV. Excluding felons from "the people" for purposes of the Second Amendment would be inconsistent with our understanding of the scope of other constitutional rights because "even felons . . . may invoke the protections of [the First and Fourth Amendments]." *Heller*, 554 U.S. at 644, 128 S.Ct. 2783 (Stevens, J., dissenting). The Supreme Court's broad definition of "the people" in *Heller*, moreover, betrays no intent to carve certain classes from "the people" only in the context of the Second Amendment. *See id.* at 580–81, 128 S.Ct. 2783. We will neither jeopardize the scope of other rights nor demean the status of Second Amendment rights by narrowly circumscribing the classes of Americans to whom those rights belong. Accordingly, we conclude that Zherka, notwithstanding his felony conviction, is among "the people" protected by the Second Amendment.[11]

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11. For examples of other circuit courts concluding the same, see, for example, *Duarte*, 137 F.4th at 755 (concluding that the defendant's "status as a felon does not remove him from the ambit of the Second Amendment; he is one of 'the people' who enjoys Second Amendment rights"); *Range v. Att'y Gen. United States*, 124 F.4th 218, 222 (3d Cir. 2024) (en banc) (concluding that the appellant, "despite his false statement [felony] conviction, [] remains among the people protected by the Second Amendment" (internal quotation marks omitted)); *United States v. Williams*, 113 F.4th 637, 649 (6th Cir. 2024) (concluding that the appellant felon was "a member of the people claiming the right to possess a gun" (internal quotation marks omitted)); *Rocky Mountain Gun*

IV. *Bruen* Step Two: The Historical Tradition of Firearm Regulation in the United States Supports the Constitutionality of Section 922(g)(1).

Because the Second Amendment protects Zherka and his proposed conduct, we must now determine whether Congress can constitutionally disarm him. "[T]he Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others." *Rahimi*, 602 U.S. at 693, 144 S.Ct. 1889. Zherka asserts, however, that *Rahimi* does not apply to him because unlike in that case, there has been no finding that he poses a credible threat to the physical safety of others and because his commission of a nonviolent financial felony is an insufficient proxy for his dangerousness. We agree that, while the analysis in *Rahimi* is relevant in several ways to the present case, it does not directly control it. The operative question, therefore, is whether the government has justified Section 922(g)(1)'s application to Zherka by demonstrating that disarmament of nonviolent felons, *as a class or category of persons*, is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24, 142 S.Ct. 2111. We conclude that it has.

Owners v. Polis, 121 F.4th 96, 116 (10th Cir. 2024) (explaining that American citizens with felony convictions are "both persons and citizens, and thus, must also be included in the people" protected by the Second Amendment (alterations adopted and internal quotation marks omitted)); see also *Kanter*, 919 F.3d at 451–52 (Barrett, J., dissenting) (maintaining that "all people have the right to keep and bear arms [including violent felons] but that history and tradition support Congress's power to strip certain groups of that right").

We start with a discussion of modern felon-in-possession laws. Congress passed the first felon-in-possession law in the early twentieth century. The modern statutes are too temporally distant from 1791 to provide much insight into the original meaning of the Second Amendment. *See Antonyuk*, 120 F.4th at 973 ("[T]he farther we depart from [1791], the greater the chance we stray from the original meaning of the constitutional text."). Such laws, however, are relevant to the *Bruen* step two analysis. To the extent that the felon-in-possession laws were designed to address "unprecedented societal concerns," the Supreme Court instructs that we apply "a more nuanced approach" to assessing relevant historical analogues. *Bruen*, 597 U.S. at 27, 142 S.Ct. 2111.

After analyzing modern felon-in-possession laws, we turn to a discussion of the historical tradition of disarmament laws in this country. There are no twins of the modern felon-in-possession laws from the pre-Founding and Founding periods.[12] That the relevant historical record lacks a historical twin is unsurprising, because before and during the Founding periods, felons were typically subject to execution. We discuss below what that fact suggests about the Founders' perceptions of felons' right to bear arms.

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12. As we have noted above, the absence of a twin in the historical record is not fatal to the government's case. *See Rahimi*, 602 U.S. at 692, 144 S.Ct. 1889 ("The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'"), quoting *Bruen*, 597 U.S. at 30, 142 S.Ct. 2111.

Shortly after the Founding, attitudes about appropriate punishment for felons began to change. Evidence in the historical record from that time, including the debates over the ratification of the Constitution, reflects that some Founders believed that felons could be disarmed constitutionally. Although the ratification debates are not specific historical legislative analogues to modern felon in possession laws, we discuss them next because they inform the background tradition of constitutional gun regulation in this country.

Finally, we turn directly to the historical analogues, which establish that there is a tradition of regulating firearms in a manner that is analogous to Section 922(g)(1). Like Section 922(g)(1), laws from seventeenth century England, the American Colonies,[13] and the early United States,[14] establish that it has long been permissible

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13. Both English and American colonial history are relevant to our analysis. *See Bruen*, 597 U.S. at 20, 142 S.Ct. 2111 (explaining that because the Second Amendment "codified a pre-existing right. . . . English history dating from the late 1600s, along with American colonial views leading up to the founding" are relevant considerations (emphasis omitted)).

14. The "time periods in close proximity to 1791," are "relevant to our analysis." *Antonyuk*, 120 F.4th at 973. "[S]ources from the time periods close around [that] date[] illuminate the understanding of those steeped in the contemporary understanding of a constitutional provision." *Id.* (alteration adopted) (internal quotation marks omitted). The Supreme Court has, however, left open the relevance of Reconstruction to the constitutionality of state regulations affecting firearms. *See Rahimi*, 602 U.S. at 692 n.1, 144 S.Ct. 1889 (declining to resolve the "ongoing scholarly

to regulate firearms possession through legislative proscription on a class-wide basis, without a particularized finding that the individuals disarmed pose a threat to society.

A. Section 922(g)(1)

Although the Supreme Court characterized laws prohibiting felons from possessing firearms as "longstanding," *Heller*, 554 U.S. at 626, 128 S.Ct. 2783, they are, in fact, relatively recent creations, at least in relation to the period immediately surrounding the adoption of the Bill of Rights. Congress first prohibited felons from obtaining firearms in the Federal Firearms Act of 1938 ("FFA"), the predecessor to Section 922(g)(1). FFA, ch. 850, § 2(f), 52 Stat. 1250, 1251 (1938). That statute differed from Section 922(g)(1) in that it criminalized receipt of guns in interstate commerce only for felons convicted of a "crime of violence," which did not include crimes similar to the one that Zherka committed. *Id.* §§ 1(6), 2(f). About two decades later, in 1961, Congress amended the law to prohibit felons from receiving guns traveling in

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debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government")) (internal quotation marks omitted). In *Antonyuk*, we decided that Reconstruction *was* relevant to *state* regulations. 120 F.4th at 973–74. We need not decide whether historical traditions post-dating 1791 are relevant to the Amendment's restrictions on Congress because we conclude that the tradition as of that date validates Section 922(g) as applied here.

interstate commerce regardless of their underlying crime by replacing the term "crime of violence" with "crime punishable by imprisonment for a term exceeding one year." An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757, 757 (1961). And finally, in 1968 Congress passed the Gun Control Act, which is currently codified as 18 U.S.C. § 922(g). Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

Those laws alone may not be sufficient to establish a historical tradition of firearms regulation, but the modern concerns that they addressed, and continue to address, diminish the government's burden of drawing a tight historical analogy to Section 922(g)(1). The Supreme Court has admonished that the "Founders created a Constitution – and a Second Amendment – 'intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.'" *Bruen*, 597 U.S. at 27–28, 142 S.Ct. 2111, quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415, 4 L.Ed. 579 (1819). In line with the Court's precedent, we have similarly acknowledged that "'[a] more nuanced approach' [to analogizing to history] will often be necessary in . . . cases concerning 'new circumstances' or 'modern regulations that were unimaginable at the founding,' such as regulations addressing 'unprecedented societal concerns or dramatic technological changes.'" *Antonyuk*, 120 F.4th at 970 (alterations adopted), quoting *Bruen*, 597 U.S. at 27–28, 142 S.Ct. 2111. We turn, therefore, to the concerns animating Section 922(g)(1) and its precursors.

Although gun violence is hardly a new social concern,[15] Congress passed both the FFA and the Gun Control Act to address the unprecedented scale of gun violence in the years around their adoption. It passed the FFA in response to rising gang violence that grew from Prohibition.[16] And, the Supreme Court has concluded, it passed the Gun Control Act "in response to the precipitous rise in political assassinations, riots, and other violent crimes involving firearms, that occurred in this country in the 1960's." *Lewis v. United States*, 445 U.S. 55, 63, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980).

The problem of gun violence persists today at an unprecedented scale. In 2020, the number of gun-related

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15. *See, e.g.*, Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 567, 578 (2006) (explaining that "[a] profound change occurred in American gun culture in the early decades of the [nineteenth] century: the supply and demand for hand guns increased dramatically," which prompted "new social problems"); Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55, 63, 65 (2017) (explaining that gun carry restriction laws proliferated in the 1800s "as interpersonal violence and gun carrying spread" and that after the Civil War the South "witnessed violence at rates greater than the rest of the country," and therefore "turned in part to stronger gun laws as a remedy").

16. *See* JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, & THE FUTURE OF HELLER 43–45 (2018); *see also* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?, 32 HARV. J. L. & PUB. POL'Y* 695, 701 (2009) (explaining that efforts at firearms regulation after World War I were "fed by . . . growing crime after Prohibition began in 1920").

deaths in the United States reached the highest level ever recorded up to that point, and the rate has remained high ever since.[17] Over half of adults surveyed in the United States "report that either they, or a family member, have experienced a firearm-related incident."[18] And for children and adolescents in the United States, "firearm-related injury has been the leading cause of death [since 2020], . . . surpassing motor vehicle crashes, cancer, and drug overdose and poisoning."[19] That evolving public health crisis necessitates that we take the "more nuanced approach" that *Bruen* set forth for assessing historical analogies to Section 922(g)(1).

That approach is plainly illustrated in *Rahimi*. There, the Supreme Court upheld a further expansion of the

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17. *See* Center for Gun Violence Solutions, *A Year in Review: 2020 Gun Deaths in the U.S.*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH 4 (Apr. 28, 2022); Center for Gun Violence Solutions, *U.S. Gun Violence in 2021: An Accounting of a Public Health Crisis*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH 4 (June 2023); Center for Gun Violence Solutions, *Gun Violence in the United States 2022: Examining the Burden Among Children and Teens*, JOHN HOPKINS BLOOMBERG SCH. OF PUB. HEALTH 3 (Sept. 2024); *Continuing Trends: Five Key Takeaways from 2023 CDC Provisional Gun Violence Data*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Sept. 12, 2024), https://publichealth.jhu.edu/center-for-gun-violence-solutions/2024/continuing-trends-five-key-takeaways-from-2023-cdc-provisional-gun-violence-data.

18. *See The United States Surgeon General's Advisory on Firearm Violence: A Public Health Crisis in America*, OFFICE U.S. SURGEON GEN. 5 (2024).

19. *Id.* at 3.

firearms limitations contained in 18 U.S.C. § 922. *Rahimi*, 602 U.S. at 693, 144 S.Ct. 1889. That case involved a prohibition on possession of firearms by persons under a protective order occasioned by incidents of (not necessarily gun-related) domestic violence. *Id.* at 684–86, 144 S.Ct. 1889; *see also* 18 U.S.C. § 922(g)(8). That prohibition was adopted several decades later than the FFA, in the Violence Against Women Act of 1994.[20]

As the Supreme Court acknowledged, no precise historical precedent for such a criminal prohibition existed. *See Rahimi*, 602 U.S. at 698, 700–01, 144 S.Ct. 1889. The statute was a novel response to the problem of domestic violence, primarily against women and children, that had not been the direct object of governmental concern or of firearms regulation until the late 20th century. Nevertheless, the Court upheld that law, analogizing to pre-Bill of Rights laws that regulated gun possession by individuals and groups identified as dangerous to the community in general and/or to particular individuals. *Id.* at 693–700, 144 S.Ct. 1889. We look to similar aspects of that tradition here.

B. Historical punishments for felonies

There are no historical twins for Section 922(g)(1) from the colonial era.[21] The absence in the historical record

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20. *See* Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J. F. 946, 957 (2024) (discussing the legislative history of Section 922(g)(8)).

21. We are, however, aware of at least two examples in the historical record in which disarmament was a punishment for

of a dead ringer for felon-in-possession laws does not, however, support that Section 922(g)(1) is unconstitutional as applied to Zherka; rather, it is largely attributable to how the English and early Americans punished felons. Between the seventeenth and nineteenth centuries, legislatures imposed the death penalty and total estate forfeiture as punishments for the commission of felonies.

In feudal England, the term "felony" referred to "a breach of the feudal obligations between lord and vassal," the consequence of which was "forfeiture of goods and the escheat of the fief." Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 463 (2009). As the feudal order passed, felony later came to mean a "serious crime punishable by death." *Id.* at 464.[22] Indeed, William

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lesser offenses. An English statute from the early seventeenth century disarmed "Popish recusants, convicted in a court of law of not attending the service of the church of England." 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 55 (London, A. Strahan 1825); An Act to Prevent & Avoid Dangers which May Grow by Popish Recusant, 3 Jac. 1, c. 5, § 16 (1605) (Eng.). And in 1624, a Virginia adjudicative body disarmed an individual who engaged in "base" and "opprobrious" speech. David Thomas Konig, *"Dale's Laws" and the Non-Common Law Origins of Criminal Justice in Virginia*, 26 AM. J. LEGAL HIST. 354, 371 (1982). These two examples are insufficient by themselves to establish a tradition of firearms regulation analogous to Section 922(g)(1), but their existence suggests that the English and early Americans were not entirely opposed to laws disarming felons.

22. *See also* Blackstone, *supra* note 21, at 97 ("The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them.").

Blackstone defined a felony as "an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt." 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 95 (London, A. Strahan 1825).

Although the traditional common-law felonies included murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny,[23] the category of offenses classified as felonies, and therefore punishable by death, included some nonviolent crimes. By the eighteenth century, the list of felonies had expanded to encompass some 160 crimes, including "counterfeiting currency, embezzlement, and desertion from the army." *Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019).[24] Thus, while the list of felonies under the modern definition has grown to encompass all crimes punishable by more than a year in prison, the Founding-era concept was not limited to violent crimes. Rather, it included some "white collar" crimes[25]—like Zherka's—and many other

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23. Tress, *Unintended Collateral Consequences*, 57 CLEV. ST. L. REV. at 464.

24. *See* Blackstone, *supra* note 21, at 18; *see also* Francis Bacon, *Preparation Toward the Union of Laws of England and Scotland*, *in* 2 THE WORKS OF FRANCIS BACON 163–64 (Basil Montagu ed., Cary & Hart 1844) (listing the nonviolent crimes of unlawful hunting and repeated forgery as felonies punishable by death).

25. That term is generally understood not to have entered common use until Edwin Sutherland's Presidential Address to the American Sociological Society, *White-Collar Criminality*, 5 AM.

offenses that today are punished neither by death nor even extremely long prison sentences, and even some conduct, such as consensual same-sex relations, that may not constitutionally be criminalized at all.[26] Like the English, the American colonists employed that concept of felony in their burgeoning legal systems and imposed the death penalty for a number of nonviolent crimes.[27] In fact, the death penalty as punishment for felonies remained ubiquitous in America during the Founding era and until the nineteenth century.[28]

We conclude from this history that the lack of historical laws prohibiting felons from possessing firearms is not dispositive of Section 922(g)(1)'s constitutionality. "[T]he absence of a distinctly similar historical regulation . . . can only prove so much," *Antonyuk*, 120 F.4th at 969, and here it proves next to nothing. Although felons and firearms existed at the Founding, the Founders had no

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SOCIO. REV. 1 (1940), and his later textbook, WHITE COLLAR CRIME (1949).

26. *See Criminalization of Homosexuality in American History*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/policy-issues/biases-and-vulnerabilities/lgbtq-people/criminalization-of-homosexuality-in-american-history [https://perma.cc/GMZ2-6ZBK] (last visited May 6, 2025).

27. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 18, 23–24 (2002) (describing instances in which men sentenced to death for committing forgery and horse theft in Georgia during the late eighteenth and early nineteenth centuries attempted to escape jail).

28. *Id.*

occasion to consider whether the collateral consequences of a felony conviction should include disarmament since, as previously discussed, the standard punishment for a felony was death and the forfeiture of all property. The collateral consequences of a felony conviction that we now recognize, including the loss of civil rights and the prohibition of firearm possession, are the results of the nineteenth century criminal reform efforts to reduce the use of the death penalty and the growth of the federal government during the twentieth century.[29] Accordingly, the lack of felon-in-possession laws at the time of the Founding is not probative of the Founders' perception of the scope of the Second Amendment right.

We further note that several of our sister circuits have concluded that the Founders likely would have considered disarmament permissible as punishment for a felony conviction since they passed laws instituting the death penalty and forfeiture of a perpetrator's entire estate as punishments for both nonviolent and violent felonies. *See United States v. Jackson*, 110 F.4th 1120, 1127 (8th Cir. 2024) (explaining that early legislatures "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" and collecting examples); *Hunt*, 123 F.4th at 706 (same). The logic is that the greater punishment of death and estate forfeiture includes the lesser punishment of disarmament.

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29. *See* BLOCHER & MILLER, *supra* note 16, at 43–47 (explaining that the federal government's involvement in gun regulation in the 1930s was in part a reflection of the "general growth in the scope and power of the federal government").

The Supreme Court, too, has embraced the greater-includes-the-lesser logic in the Second Amendment context when it concluded that "the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is [] permissible" because a historical analogue to that law imposed the greater punishment of imprisonment. *Rahimi*, 602 U.S. at 699, 144 S.Ct. 1889. We are reluctant to place much weight on this argument, however. That felons could be executed when the Bill of Rights was enacted does not mean that anyone convicted of a felony today forfeits all civil rights. *See Kanter*, 919 F.3d at 461–62 (Barrett, J., dissenting) ("[W]e wouldn't [necessarily] say that the state can deprive felons of the right to free speech because felons lost that right via execution at the time of the founding."). Indeed, the Supreme Court in *Rahimi* made no such extreme claims. Instead, it pointed out that specific early weapons regulations (the "going armed" laws) imposed more severe penalties than the disarmament statutes at issue in that case. 602 U.S. at 699, 144 S.Ct. 1889. It made no blanket reliance on eighteenth century capital punishment practice to validate any lesser deprivation later imposed on felons.

Ultimately, the severe punishment of felons, including those who committed nonviolent crimes, in colonial times provides at least some reason to be skeptical that the drafters of the Second Amendment intended to prohibit Congress from disarming felons who were spared execution, but we do not consider it conclusive.

C. Debates over Ratification of the Constitution

Although the death penalty was the primary punishment for felonies during the Founding generation, various efforts at penal reform mobilized in states across the nation during the late 18th and early 19th centuries. Those efforts often resulted in the passage of laws that imposed imprisonment for crimes that had formerly been capital crimes. Tress, *Unintended Collateral Consequences*, 57 CLEV. ST. L. REV. at 468–70. "Within two decades of gaining independence from England, the states of the Union had replaced execution with incarceration as the punishment for all but a few crimes." *Id.* at 468.

Debates over the right to bear arms in state ratification conventions that occurred at around the same time as efforts at penal reform reflect the evolving attitudes about the treatment of felons. Those debates also support a historical tradition of firearms regulation through legislative disarmament and illustrate some Founders' views of the scope of the Second Amendment right.

The right to bear arms proposals most often cited to support Congress's authority to disarm felons include: the New Hampshire Proposal, Samuel Adams's proposal to the Massachusetts convention, and the Pennsylvania Dissent of the Minority ("the Dissent"). *See Kanter*, 919 F.3d at 454–55 (7th Cir. 2019) (Barrett, J., dissenting).[30]

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30. The New Hampshire proposal prohibited Congress from "disarm[ing] any citizen, unless such as are or have been in actual

We focus principally on the Dissent, which most clearly supports the view that some Founders believed that it was permissible for Congress to disarm convicted felons.[31]

The Dissent provides that "the people have a right to bear arms for the defence of themselves and their own State or the United States, or for the purpose of killing game; 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." 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORy 662, 665 (1971). On its face, the last proviso of the Dissent clearly permits disarmament of individuals who commit crimes.[32]

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rebellion." 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1891). Similarly, Samual Adams's proposal to the Massachusetts convention forbade Congress from "prevent[ing] the people of the United States, who are peaceable citizens, from keeping their own arms." *See* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675, 681 (1971).

31. The Dissent is not a minority view expressing a dissent from a majority committed to a broader view of the right to bear arms; rather, it was a dissent from the majority's vote to ratify the original Constitution. *See* 2 SCHWARTZ, *supra* note 30 at 627–28. The Antifederalists authored the Dissent in objection to the Constitution's "lack of a Bill of Rights." *Id.* at 627. Although the dissenters failed to persuade the majority of the convention to reject ratification, their main objections were ultimately vindicated by the adoption of the Bill of Rights four years later. *Id.* at 628.

32. We note that others have proposed an interpretation of the Dissent that would not necessarily support felon disarmament laws; under that view, the catchall phrase "or real danger of

The Dissent was also "highly influential" in the debates that led to the Bill of Rights, *Heller*, 554 U.S. at 604, 128 S.Ct. 2783, and was among the most "widely distributed of any essays published during ratification," Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 227 (1999). It is therefore illustrative of what at least some Founders believed should be Congress's authority to disarm individuals who committed crimes and, as a result, informs the historical tradition of gun regulation in the United States. Nevertheless, the proposal that entered the Constitution as the Second Amendment did not contain the proviso permitting firearms restrictions on criminals, and so the Dissent too, while reflecting at least some ambivalence about the scope of the Amendment, is inconclusive.

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public injury from individuals," modifies the type of crimes that would constitutionally authorize Congressional disarmament. *See Kanter*, 919 F.3d at 456 (Barret, J., dissenting) (stating that the phrase "or real danger of public injury from individuals" suggests that only individuals who have committed "the subset of crimes suggesting a proclivity for violence" could be disarmed). We are not persuaded by this strained, alternative reading of the Dissent. The Dissent clearly proposes permitting disarmament in the disjunctive, for either "crimes committed *or* real danger of public injury." 2 SCHWARTZ, *supra* note 30 at 665 (emphasis added). Nothing in the text of the dissent suggests that we should read "or" other than how it is usually employed – to present two alternative bases for permissible firearm restrictions.

D. English, American Colonial, and Early American Status-Based Disarmament Laws

The absence, for understandable reasons, of an eighteenth century "historical twin" for contemporary felon in possession laws has not prevented the Supreme Court, or this Court, from recognizing "what common sense suggests," *Rahimi*, 602 U.S. at 692, 698, 144 S.Ct. 1889, that persons who present a clear danger to others if permitted to possess firearms may be disarmed. *See also Antonyuk*, 120 F.4th at 983–84. It is presumably for that reason that, as noted above, the Supreme Court has consistently disavowed the notion that its rejection of state and federal laws prohibiting ownership and carrying of guns by law-abiding members of the community calls into question the general constitutionality of laws disarming felons. *See Heller*, 554 U.S. at 626–27, 627 n.26, 128 S.Ct. 2783; *McDonald*, 561 U.S. at 786, 130 S.Ct. 3020. Indeed, the Supreme Court and this Court have affirmed that dangerous people can be disarmed.[33] As also noted above,

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33. *See Rahimi*, 602 U.S. at 684–86, 690, 144 S.Ct. 1889 (holding that persons subject to domestic-violence restraining orders based on a finding of dangerousness can be prohibited, on pain of criminal penalties, from possessing firearms); *Bruen*, 597 U.S. at 13 n.1, 38 n.9, 142 S.Ct. 2111 (contrasting New York's unconstitutional "may issue" firearm licensing regime with state licensing regimes that denied firearms licenses to "individuals whose conduct has shown them to be lacking the essential character o[r] temperament necessary to be entrusted with a weapon," which the Court confirmed were constitutional), quoting Conn. Gen. Stat. § 29–28(b); *Antonyuk*, 120 F.4th at 994–99 (upholding New York's "character" requirement which requires firearms licensing officials to assess an applicant's "potential dangerousness").

that commonsense conclusion easily supports the facial validity of Section 922(g)(1), because it can hardly be assumed that the Framers contemplated an unqualified right on the part of persons convicted of violent crimes to carry guns.

Zherka argues, however, that his case differs from those precedents. *Antonyuk* addressed a licensing regime in which the question was whether an applicant for a permit was, individually, a person whose conduct had shown him to be too dangerous to be trusted to use a firearm in a lawful and prudent manner. And while *Rahimi*, like this case, addressed a criminal statute prohibiting firearms possession by a category of persons, the category in question included only individuals whom a court had specifically found to be dangerous to one or more other persons. Most of the historical analogues that the Supreme Court identified in *Rahimi* similarly involved firearms restraints imposed on specific individuals. 602 U.S. at 695–700, 144 S.Ct. 1889.

In contrast, Section 922(g)(1) prohibits firearms possession by a broad category of persons whose conduct violated a wide range of criminal statutes. Zherka argues both that the statute is unconstitutional as applied to persons convicted, as was he, of a nonviolent felony, and that, in any event, he should be entitled to some kind of individualized process to decide whether he himself presents the kind of danger referenced in *Rahimi* and *Antonyuk*. The historical inquiry for us, therefore, is whether our tradition encompasses not only laws permitting disarmament of particular individuals on a

case-by-case basis, but also laws disarming broad classes of people.

The answer is unequivocally yes. English, American colonial, and early American histories abound with examples of laws demonstrating that legislatures had broad authority to regulate firearms, including by disarming large classes of people based on their status alone. Religious minorities, political dissenters, Native Americans, and persons of color were among the disfavored groups that historical legislatures disarmed based on a perception that persons in those categories were inherently dangerous or non-law-abiding. Many of those laws are offensive to contemporary moral sensitivities, or might well be deemed unconstitutional today on First and Fourteenth Amendment grounds. They are, however, relevant to the Second Amendment historical analysis that *Bruen* requires we conduct. As we discuss in greater detail below, the status-based disarmament laws show that at the time of the adoption of the Second Amendment, legislatures had the authority to use status as a basis for disarmament. Moreover, those laws demonstrate that legislative disarmament did not always turn on a particularized finding of a propensity for violence. Instead, legislatures could disarm classes of people that they perceived as dangerous, without any judicial scrutiny of the empirical basis for that perception.

We start with English history. The 1689 English Bill of Rights, enacted by Parliament and considered the "predecessor to our Second Amendment," *Bruen*, 597 U.S. at 44, 142 S.Ct. 2111 (internal quotations marks omitted),

guaranteed that "Protestants . . . may have Arms for their Defence suitable to their Conditions, and *as allowed by law*," 1 W. & M., Sess. 2, ch. 2, § 7 (1689), *in* 3 ENG. STAT. AT LARGE 441 (London, Mark Baskett, Henry Woodfall, & William Strahan 1763) (emphasis added). On its face, that statute supports the proposition that Parliament could limit the right of Protestants to bear arms "by law" and that non-Protestants had no right to bear arms at all. *Id.* In fact, Parliament explicitly forbade Catholics from owning firearms unless a justice of the peace gave them permission to do so.[34]

Legislatures in the American colonies also disarmed Catholics, largely in response to the French and Indian War, which many perceived as a religious war between Protestants and Catholics.[35] For example, in Virginia in 1756, Catholics and suspected Catholics could not possess arms unless they took an oath authorized by Parliament.[36] Likewise in Pennsylvania, the legislature required

34. *See* An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W & M., Sess. 1, ch. XV, § 3 (1688), *in* 6 THE STATUTES OF THE REALM 71–72 (London, Dawsons of Pall Mall 1963).

35. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 263 (2020).

36. *See* An Act for Disarming Papists, and Reputed Papists, Refusing to Take the Oaths to the Government, ch. IV, §§ I–III (1756), *in* 7 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 35–36 (William Waller Henin ed., Richmond, Franklin Press 1820) ("1756 Virginia Act").

colonial officials to take firearms from any "papist or reputed papist."[37] The legislature of Maryland—a state founded by and for Catholics[38]—did similarly.[39]

In another example of religious status-based disarmament, the Massachusetts Bay Colony, during the late 1630s, disarmed at least 58 individuals who were accused of following the religious views preached by Anne Hutchinson. *See Range v. Att'y Gen. United States*, 69 F.4th 96, 122–23 (3d Cir. 2023) (Krause, J., dissenting), *cert. granted, judgment vacated sub nom Garland v. Range*, — U.S. —, 144 S. Ct. 2706, 219 L.Ed.2d 1313 (2024).[40] Anne Hutchinson was a Boston preacher who

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37. An Act for Forming and Regulating the Militia of the Province of Pennsylvania, § VI, pt. 2 (1759) ("1759 Pennsylvania Act"), *in* THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 609, 627 (James T. Mitchell & Henry Flanders eds., WM Stanley Ray 1898).

38. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARVARD L. REV. 1409, 1424 (1990) ("Maryland ... was founded ... to provide a place for English Catholics to escape the persecution they suffered in the mother country.")

39. *See* An Act for Regulating the Militia of the Province of Maryland (1756), *in* 52 ARCHIVES OF MARYLAND 450, 454 (J. Hall Pleasants ed., 1935); *see also* Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. 1, 46 (2024) ("[I]t appears that the governor [of Maryland] never signed the bill.").

40. After the Supreme Court remanded the *Range* decision for reconsideration in light of *Rahimi*, the Third Circuit issued a materially identical opinion to the one that it issued before the Supreme Court's vacatur and remand. *Range*, 124 F.4th 218. On

challenged religious orthodoxy in the Massachusetts Bay Colony by advocating for "direct, personal relationships with the divine." *Id.* Governor John Winthrop found those views threatening and accused Hutchinson and her followers of "being Antinomians—those who viewed their salvation as exempting them from the law." *Id.* at 123. He banished Hutchinson and, to "embarrass" her followers, forced them to personally deliver their firearms to the authorities. *Id.*, quoting James F. Cooper, Jr., *Anne Hutchinson and the "Lay Rebellion" Against the Clergy*, 61 NEW. ENG. Q. 381, 391 (1988).

In addition to Catholics and members of minority Protestant sects, American legislatures during the Revolutionary War passed laws disarming individuals that they perceived as dangerous to the revolutionary cause. In an early example, the Connecticut Colony General Assembly passed a law in 1775 that disarmed any person convicted of "libel[ing] or defam[ing] any of the resolves of the Honorable Congress of the United Colonies, or the acts and proceedings of the General Assembly of this Colony."[41] In a letter to the Governor of Rhode Island,

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remand and in light of *Rahimi*, Judge Krause agreed with the majority's decision that Section 922(g)(1) was unconstitutional as applied to the appellant in that case. She filed a concurring opinion explaining that her reasoning differed from the majority's but that she was no longer dissenting. *Id.* at 250–85 (Krause, J., concurring). The history that Judge Krause cited to support her initial dissenting opinion still persuasively supports our conclusion, despite her change of position.

41. An Act for the Restraining and Punishing Persons Who are Inimical to the Liberties of this and the Rest of the United Colonies, and for Directing Proceedings Therein § 527 *in* THE

George Washington discussed that Connecticut law and remarked that "the other Colonies ought to adopt similar ones."[42] Shortly thereafter in March 1776, the Continental Congress passed a resolution recommending that assemblies in the colonies "cause all persons to be disarmed . . . who are notoriously disaffected to the cause of America."[43] Several colonies heeded that recommendation and passed their own laws disarming the disloyal.[44]

Legislative bans on firearm possession in the American colonies were not limited to religious minorities and political dissenters. Laws in various colonies also prohibited Native Americans, people of African descent, and mixed-race people from owning firearms.[45] Virginia,

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PUBLIC RECORDS OF THE COLONY OF CONNECTICUT FROM MAY, 1775 TO JUNE, 1776, at 193 (Hartford, The Case, Lockwood & Brainard Co. 1890).

42. Letter from George Washington to Nicholas Cooke (Jan. 6, 1776), NATIONAL ARCHIVES, https://founders.archives.gov/documents/Washington/03-03-02-0025 [https://perma.cc/R9J3-XX6Y] (last visited May 20, 2025).

43. *See* 4 *Journals of the Continental Congress*, 1774-1789, at 205 (Worthington Chauncey Ford ed., Washington, 1906).

44. *See Jackson*, 110 F.4th at 1126–27 (listing laws from the colonies of Massachusetts, Virginia, Pennsylvania, Rhode Island, North Carolina, and New Jersey that "prohibited possession of firearms by people who refused to declare an oath of loyalty").

45. *See, e.g.*, An Act for Regulating the Indian Trade and Making it Safe to the Publick, No. 269, § IV (1707), *in* 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 310 (Thomas Cooper, ed., Columbia, A.S. Johnston, 1837) (prohibiting the sale

for example, passed a law in 1723 that prohibited Black people, mixed-race people, and Native Americans from "keep[ing], or carry[ing] any gun, powder, shot, or any club, or other weapon whatsoever, offensive or defensive."[46] The law allowed those classes of people to possess guns only if they were "house-keeper[s]," "listed in the militia," or if they lived on a "frontier plantation" and obtained a license to possess from a "justice of the peace" in their county.[47]

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of firearms to Native Americans on penalty of death); *Williams*, 113 F.4th at 652–53 (describing colonial laws from Virginia and New Netherland that prohibited citizens from providing arms to Native Americans on penalty of death); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HISTORY REV. 139, 148 (2007) (describing a North Carolina 1741 slave code that prohibited slaves from possessing firearms). Even if racial minorities would not have been considered full-fledged members of the political community as it then existed, those laws remain relevant to the *Bruen* inquiry because, as explored in greater detail below, they are relevantly similar to Section 922(g)(1). *See infra* pp. 89-90. Nevertheless, as previously explained, legislatures in the colonies and states repeatedly disarmed groups of fully fledged members of the political community—free, Christian, white men. *See supra* pp. 85-87.

46. An Act Directing the Trial of Slaves, Committing Capital Crimes; and for the More Effectual Punishing Conspiracies and Insurrections of Them; and for the Better Government of Negros, Mulattos, and Indians, Bond or Free ("1723 Virginia Act"), ch. IV, § XIV (1723), *in* 4 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 131 (Richmond, R.W. & G. Bartow 1823).

47. *Id.* § XV.

Class-wide, race-based legislative disarmament continued in the United States after the American Revolution and often took the form of "complete bans on gun ownership by free blacks, slaves, Native Americans, and those of mixed race."[48] In Mississippi, for example, slaves were prohibited from keeping or carrying guns unless a justice of the peace granted a license upon application *of the slaveholder*.[49] By 1852, however, Black people in Mississippi were prohibited from owning guns with no exceptions; the Mississippi legislature passed a law that prohibited magistrates in the state from issuing licenses to carry and use firearms to any Black person.[50]

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48. *See* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1562 (2009), citing Saul Cornell, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 28-29 (2006).

49. An Act Respecting Slaves, ch. XVII, § 4 (1805), *in* THE STATUTES OF THE MISSISSIPPI TERRITORY 379 (Harry Toulmin ed., Natchez, Samuel Terrell 1807).

50. *See* An Act to Prohibit Magistrates from Issuing License to Negroes to Carry and Use Firearms, 1852 Miss. Laws 328, ch. 206, § 1. For other examples of race-based restrictions on gun possession, *see, e.g.,* 1806 Md. Laws 298, ch. 81, § II (prohibiting any Black or mixed race person from carrying a gun unless that person was free and had a certificate from a justice of the peace certifying that he was an "orderly and peaceable person"); 8 Del. Laws 208, ch. 176, § 1 (1832) (prohibiting freedmen from possessing firearms unless approved to do so by a justice of the peace); An Act Concerning Slaves § 6 (1840), *in* 2 LAWS OF TEX. 1822–1897, 345–46 (H.P.N. Gammel ed., Austin, The Gammel Book Co. 1898) (prohibiting slaves from using firearms without permission of the slave's owner); An Act to Amend an Act Entitled "An Act Reducing Into One the Several Acts Concerning Slaves, Free Negroes and Mulattoes, and for Other Purposes," Ch. 187, § 4 (1832), *in*

These examples demonstrate that before, during, and shortly after the Founding, legislative bodies regulated firearms by prohibiting their possession by categories of persons perceived to be dangerous. And those regulations were accepted as lawful. We are not aware of challenges to those restrictions under state and federal constitutional protections of the right to bear arms.

Nor did that tradition disappear after the adoption of the Fourteenth Amendment guaranteed federal constitutional rights against state governments. In the latter half of the nineteenth century, various jurisdictions prohibited so-called "'tramps'—typically defined as males begging for charity outside of their home county"—from possessing firearms.[51] Those jurisdictions included New Hampshire and Vermont in 1878, Rhode Island, Ohio, and Massachusetts in 1880, Wisconsin as early as 1883, and Iowa in 1897.[52] The Ohio Supreme Court, moreover,

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SUPPLEMENT TO THE REVISED CODE OF THE LAWS OF VIRGINIA 246–47 (Richmond, Samuel Sheperd & Co. 1833) (repealing a law that allowed Black people to possess firearms with a license and enacting instead a total prohibition on Black people possessing firearms); Of the Laws Relative to Indians within This State, Tit. V, Ch. 1, § 1 (1847), *in* A MANUEL OR DIGEST OF THE STATUTE LAW OF THE STATE OF FLORIDA, OF A GENERAL AND PUBLIC CHARACTER 547 (Leslie A. Thompson ed., Boston, Charles C. Little & James Brown 1847) (authorizing justices of the peace in Florida to confiscate firearms from Native Americans who had ventured off their reservation).

51. Greenlee, *Historical Justification*, *supra* note 35 at 270.

52. *See* 1878 N.H. Laws 612, ch. 270 § 2; 1878 Vt. Acts & Resolves 30, ch. 14 § 3; 1880 R.I. Acts & Resolves 110, ch. 806 § 3;

upheld the Ohio tramp disarmament law against a state constitutional challenge in *State v. Hogan*, where it explained that the right to bear arms "was never intended as a warrant for vicious persons to carry weapons with which to terrorize others." 63 Ohio St. 202, 219, 58 N.E. 572 (1900). Importantly, the Ohio law, and all the other "tramp laws," did not narrowly apply only to those who were found to have terrorized others; instead, it applied to any covered person who possessed a firearm, based on the prospective legislative judgment that such persons were dangerous.[53]

The "tramp" laws may be too distant from 1791 to inform us of the Founders' beliefs about the scope of Second Amendment rights. They illustrate, however, that the tradition of legislative disarmament of classes of persons based on a perception of dangerousness has

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Miscellaneous Offenses Against Public Policy, tit. I, ch. 8 § 6995, *in* 2 THE REVISED STATUTES AND OTHER ACTS OF A GENERAL NATURE OF THE STATE OF OHIO IN FORCE JAN. 1, 1880, 1654 (M.A. Daugherty, John S. Brasee, & George B. Okey eds., Columbus, H.W. Derby & Co. 1879); 1880 Mass. Acts 232, ch. 257 § 4; Of Tramps, tit. 17, ch. 65a., § 4, *in* SUPPLEMENT TO THE REVISED STATUTES OF THE STATE OF WISCONSIN, 1878, 332-33 (A.L. Sanborn & J.R. Berryman eds., Chicago, Callaghan & Co. 1883); Of Vagrants, tit. 25, ch. 5, § 5135 (1897), *in* ANNOTATED CODE OF THE STATE OF IOWA 1981 (Des Moines, F.R. Conway 1897).

53. *See* Greenlee, *Historical Justification*, *supra* note 35, at 269–70 (describing that the tramp disarmament laws were "enacted for the purpose of promoting public safety by disarming dangerous persons").

survived generations, even if the laws' targets have shifted. Over time, the categories of persons perceived as dangerous evolved from political and religious dissenters or enslaved or formerly enslaved persons in the eighteenth and early nineteenth centuries, to "tramps" in the latter nineteenth century, to convicted criminals in the twentieth.[54] But the tradition that legislatures could make such judgments, consistent with the Second Amendment "right to bear arms," has persisted.

For most of our history, moreover, such prohibitions met with little or no constitutional resistance. As we have noted above, the tradition is so strongly rooted that even after the Supreme Court, early in this century, reinvigorated the Second Amendment and detached its meaning from its "well-regulated militia" prologue, the Court has consistently assured that its decisions did not threaten "longstanding prohibitions on the possession of firearms," by felons, *Heller*, 554 U.S. at 626, 128 S.Ct. 2783, or state licensing regimes that denied firearms to persons whose conduct showed that they were not "law-abiding, responsible citizens," *Bruen*, 597 U.S. at 38 n.9, 142 S.Ct. 2111 (internal quotation marks omitted).

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54. While the first federal prohibition on possession of firearms by persons convicted of violent felonies was passed in 1938, *see* Federal Firearms Act, ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 1250-51 (1938), state statutes forbidding possession of all or certain firearms by felons were already in existence, *see* Act of Mar. 7, 1923, ch. 266 § 5, 1923 N.D. Laws 380; Act of May 4, 1923, ch. 118, § 3, 1923 N.H. Laws 138; Act of June 13, 1923, ch. 339, § 2, 1923 Cal. Stat. 696; Act of Mar. 12, 1925, ch. 207, § 4, 1925 Ind. Laws 495-96; Act of Feb. 26, 1925, ch. 260 § 2, 1925 Or. Gen. Laws 468.

There is some disagreement over why legislatures passed those laws. Some argue that legislatures disarmed disfavored groups out of fear that they were presently dangerous to the polity and would incite rebellion if armed; others argue that legislatures were motivated to assert broad disarmament authority by a more generalized fear that members of those groups were not law-abiding or trustworthy.[55] We decline to engage in conjecture about the finer motivations of legislative bodies that sat centuries ago. *See generally South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) ("Determining the subjective intent of legislators and the collective motivation of legislatures is a perilous enterprise indeed."). We leave that task to trained historians.

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55. For the debate over the motivating forces behind disarmament of Catholics *compare Range*, 69 F.4th at 121 (Krause, J., dissenting) (arguing that the English prohibition on Catholic armament "was not based on the notion that every single Catholic was dangerous" but was rather based on "the categorical argument English Protestants made ... that Catholics' faith put the dictates of a 'foreign power,' namely the Vatican, before English law"), citing Diego Lucci, *John Locke on Atheism, Catholicism, Antinomianism, and Deism*, 20 ETICA & POLITICA 201, 228–29 (2018) *with Williams*, 113 F.4th at 651, 653 (explaining that Parliament disarmed Catholics based on its perception of "what people were dangerous" and that colonial officials did the same because "Protestant settlers feared the Catholics would side with France, a Catholic kingdom" in the French and Indian War), citing Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 DREXEL L. REV. 1, 7–21, 35–46 (2024); *see also Kanter*, 919 F.3d at 458 (Barrett, J., dissenting) (explaining that disarmament laws prevented slaves and Native Americans from possessing firearms "as a matter of course" because those groups "were thought to pose more immediate threats to public safety and stability").

It does not matter whether legislatures believed that members of the targeted groups had a specific propensity for violence or were, more broadly, unable to follow the law, because it is at least clear from the historical evidence and from the text of the disarmament laws that legislatures could disarm people as long as they belonged to an identity group that the legislature perceived as dangerous. The status-based disarmament statutes are "relevantly similar" historical analogues, *Bruen*, 597 U.S. at 29, 142 S.Ct. 2111 (internal quotation marks omitted), to Section 922(g)(1). Section 922(g)(1), too, operates by class-wide, status-based disarmament, and it disarms felons because Congress perceives them, broadly, as dangerous. *See Barrett v. United States*, 423 U.S. 212, 218, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976) ("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."). As history demonstrates, Congress has no constitutional obligation to more rigorously justify its blanket disarmament of convicted felons.

We acknowledge that many of the historical precedents for class-based prohibitions on firearms are, to say the very least, offensive to contemporary morals and rooted in prejudiced stereotypes and racial, religious, or class bigotry. We cite them not as examples to be followed but rather, according to the analysis the Supreme Court has directed we undertake, as examples of a historical tradition of broad categorical restrictions on firearms possession. The tradition of status-based, categorical restrictions on firearms possession is indicative of an

understanding, before, during, and after the period of the Founding and continuing to the present day, of a legislative power, consistent with the Second Amendment, to disarm categories of persons presumed to be dangerous.

We note, however, that while prior discrimination against religious, political, or racial minorities, or the law-abiding poor, would undoubtedly offend other constitutional provisions today, the prohibition of firearms possession by persons convicted of felonies is based neither on immutable characteristics nor innocent impoverishment. Rather, it is based on those persons' prior *conduct*, formally admitted or proven beyond a reasonable doubt, that constitutes a serious violation of the law. Such violations of the social compact indicate a serious disregard for fundamental legal norms. Congress's conclusion that a felony conviction demonstrates a character or temperament inconsistent with the safe and prudent possession of deadly weapons is an appropriate exercise of its longstanding power to disarm dangerous categories of persons.

V. Zherka's As-Applied Challenge.

Despite the historical tradition of legislative disarmament, Zherka argues that Section 922(g)(1) cannot "constitutionally be applied to an individual whose only prior convictions were for nonviolent crimes, because the historical principles underlying the Second Amendment indicate that only individuals who have been shown to be *dangerous* can be disarmed." *See* Appellant's Letter Br., Doc. 172 at 1 (Nov. 15, 2024). Put differently, he contends that Section 922(g)(1)'s disarmament of all felons sweeps

too broadly because it does not provide an exception for nonviolent felons.

The Sixth Circuit recently embraced this view in dicta. *See United States v. Williams*, 113 F.4th 637, 659–63 (6th Cir. 2024). It pointed out that some of the categorical disarmament laws vested the discretion to make a finding that someone was too dangerous to possess firearms "in the officials on the ground," not the legislature. *Id.* at 660. It further asserted that even when the "disarmament legislation itself created the exception regime, the fact remained that individuals had the opportunity to demonstrate that they weren't dangerous." *Id.* From that background the Sixth Circuit concluded that "[t]he relevant principle from our tradition of firearms regulation is that, when the legislature disarms on a class-wide basis, individuals must have a reasonable opportunity to prove that they don't fit the class-wide generalization." *Id.* at 661. Because no such opportunity exists under Section 922(g)(1), or any related law, the Sixth Circuit suggested that it would likely be unconstitutional as applied to a non-dangerous person convicted of only a nonviolent felony. *Id.* at 661–63.

Zherka's argument and the Sixth Circuit's analysis are flawed for several reasons. First, history does not support the proposition that status-based disarmament laws were permissible *only* if they also provided a mechanism for individuals to prove that they were not too dangerous to own a firearm. Although some of the

historical laws created such an exemption structure,[56] not all of them did. Some provided for exceptions unlinked to an individualized dangerousness finding, whereas others provided for no exceptions at all. The 1723 Virginia law prohibiting persons of color from possessing firearms, for example, allowed possession only if those persons were "house-keeper[s]," "listed in the militia," or if they lived on a "frontier plantation" and obtained a license from a justice of the peace.[57] Those exceptions were not based on an individualized assessment of dangerousness. Further, neither the 1759 Pennsylvania law disarming Catholics nor the 1852 Mississippi law disarming Black people provided for exceptions.[58] Likewise, none of the "tramp" laws discussed above, *see supra* pp. 88-89, permitted non-dangerous "tramps" to possess firearms.

Second, a convicted felon can be exempted from Section 922(g)(1). Persons convicted of a nonviolent felony, or *any* felony for that matter, may regain their right to possess firearms if their conviction has been "expunged," if they have been "pardoned," or if they have "had [their] civil rights restored." 18 U.S.C. § 921(a)(20). Those exemptions may not necessarily turn on a particularized finding of dangerousness, or a lack thereof, but their existence is relevant when the Second Amendment test under which

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56. *See, e.g.*, An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W & M., Sess. 1, ch. XV, § 3 (1688), *in* 6 THE STATUTES OF THE REALM 71–72 (London, Dawsons of Pall Mall 1963); 1756 Virginia Act.

57. 1723 Virginia Act §§ XIV, XV.

58. *See* 1759 Pennsylvania Act; 1852 Laws of Miss., ch. 206, § 1.

we assess the constitutionality of gun regulations requires only "relevant[] similar[ity]" between historical analogues and current regulations, not that they be "dead ringer[s]." *Rahimi*, 602 U.S. at 692, 144 S.Ct. 1889 (internal quotation marks omitted).

Most importantly, Zherka's as-applied argument fails on a foundational level because the Supreme Court cautioned that the search for historical analogues is not a quest for a "historical twin." *Id.* (internal quotation marks omitted). Instead, a "well-established and representative historical analogue" is sufficient. *Bruen*, 597 U.S. at 30, 142 S.Ct. 2111 (emphasis omitted). Contrary to Zherka's argument and the Sixth Circuit's dicta, even the historical disarmament statutes that permitted members of the disfavored group to possess firearms under narrow circumstances not always including a generalized showing of non-dangerousness are relevantly similar to Section 922(g)(1). "[H]ow and why the [historical] regulations burden[ed] a [person's] right to armed self-defense" are sufficiently similar to "how and why" Section 922(g)(1) burdens an individual's Second Amendment right. *Bruen*, 597 U.S. at 29, 142 S.Ct. 2111. Those statutes, like Section 922(g)(1), disarmed whole classes of individuals based on a status that the legislature perceived as dangerous.

At times the legislature has crafted exceptions, at others, it has not. As Zherka points out, under Section 925(c), a felon previously could regain his right to bear arms, despite Section 922(g)(1), if he could establish, upon application to the Attorney General, that he was not dangerous to public safety. Every year since 1992, however,

Congress has declined to fund the program implementing this provision.[59] As the historical record discussed above

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59. *See* Withdrawing the Attorney General's Delegation of Authority, 90 Fed. Reg. 13080, 13082 (Mar. 20, 2025) (to be codified at 27 CFR pt. 478); *see also, e.g.*, Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732; Treasury, Postal Service and General Government Appropriations Act, 1994, Pub. L. No. 102-123, 107 Stat. 1226, 1228; Treasury, Postal Service and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385; Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471; Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009–319; Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277; Omnibus Consolidated Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-85; Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430, 434; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-129; Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 514, 519; Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 433; Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 53; Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2859; Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2295; Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1903; Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 575; Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3128; Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609; Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198, 248; Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128

demonstrates, the courts have left the decision to establish an exemption structure, and the decision not to fund one, to the sound discretion of the legislative branch.[60] There is no historical basis upon which we could declare Section 922(g)(1) unconstitutional because it sweeps too broadly. Zherka's as-applied challenge, therefore, fails.

* * *

Stat. 5, 57; Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2187; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2302; Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, 198; Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 415; Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13, 107; Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2401; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 1251; Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 118; Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 4527; Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, 138 Stat. 25, 139.

60. Section 925(c) may not remain defunct for long. Previously, the Attorney General had delegated the authority to adjudicate requests for a restoration of rights to the ATF. *See* Withdrawing the Attorney General's Delegation of Authority, 90 Fed. Reg. 13080 (proposed Mar. 20, 2025) (to be codified at 27 CFR pt. 478). To "give full effect to 18 U.S.C. § 925(c)," the Attorney General recently proposed withdrawing from the ATF that delegation of authority to implement Section 925(c). *Id.* at 13083. We of course express no views on the compatibility of any hypothetical effort to reinstate Section 925(c) through rulemaking with Congress's repeated defunding.

Because legislatures at or near the Founding had the authority to pass laws disarming large classes of people based on status alone, we conclude that the Second Amendment does not bar Congress from passing laws that disarm convicted felons, regardless of whether the crime of conviction is nonviolent.

We acknowledge and are sympathetic to the fact that felon-in-possession laws have contributed to the mass incarceration crisis and its associated racial inequalities.[61] It may well be that there are sound policy reasons for restoring Section 925(c), or some similar regime, to effective operation. But that judgment is for Congress. The test that *Bruen* requires us to apply uses history as its guide, not policy concerns. Our task here is solely to follow the history.[62]

Because history reveals a tradition of categorical legislative bans on firearms possession by classes of people perceived as dangerous, a prohibition directed at persons convicted of serious crimes is among the easiest classifications to justify. First, it is consistent with the Supreme Court's assurance in *Heller* that

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61. *See* Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637 (2021).

62. We therefore do not attempt to assess whether, applying one traditional test for assessing whether legislation is consistent with individualized constitutional rights, the prohibition on possession of firearms by persons convicted of "nonviolent" felonies are narrowly tailored to accomplish a compelling governmental purpose. *Bruen* explicitly prohibits us from engaging in such a "means-end" analysis. 597 U.S. at 18–24, 142 S.Ct. 2111.

"longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful." *Heller*, 554 U.S. at 626–27 n.26, 128 S.Ct. 2783. It is also consistent with our binding precedent in *Bogle*, in which we upheld the constitutionality of Section 922(g)(1) against a facial Second Amendment challenge based on that assurance. *Bogle*, 717 F.3d at 281–82.

Such a prohibition also aligns with the Supreme Court's insistence that "shall-issue" licensing regimes are constitutional because they are "designed to ensure only that those bearing arms in the jurisdiction are, in fact, law-abiding, responsible citizens." *Bruen*, 597 U.S. at 38 n.9, 142 S.Ct. 2111 (internal quotation marks omitted). "Shall-issue" licensing regimes "contain only narrow, objective, and definite standards guiding licensing officials," and often require "applicants to undergo a background check." *Id.* (internal quotation marks omitted). That it is permissible for a state to decline an applicant a firearms license based on information discovered in a background check, which will often disclose prior criminal convictions, suggests that it is also permissible for the federal government to prohibit felons from possessing firearms.

Second, unlike the historical prohibitions of the eighteenth and nineteenth centuries, the ban on possession by convicted felons is based on the prohibited person's actual behavior, as admitted in a formal plea of guilt, entered with the guaranteed right to the advice of a lawyer or found by a unanimous jury beyond a reasonable doubt after a trial with vigorous procedural safeguards. Perhaps

someday these prohibitions too will be looked back on with dismay. But unlike bans directed at minority racial, political, or religious groups, or at victims of economic misfortune, solely because of their group characteristics, the felon ban is based on actual past behavior.

That behavior, moreover, consists in the violation of basic terms of the social contract. That is true of all felony crimes, not just violent crimes. Zherka, for example, pleaded guilty to criminal conspiracy to make a false statement to a bank and to sign and file a false federal-income tax return, resulting in $8.5 million in fines, restitution, and forfeiture. That conduct is reasonably regarded as an indication that such a person lacks the "character of temperament necessary to be entrusted with a weapon." *Bruen*, 597 U.S. at 13 n.1, 142 S.Ct. 2111 (internal quotation marks removed).

Finally, any effort by the courts to craft a line that would separate some felons from others is fraught with peril. The idea that every felon, regardless of the crime of conviction, is entitled to some form of hearing as to whether that particular individual should be subject to a lifetime ban on firearms possession is inconsistent with the historical tradition permitting class-based legislative judgments.

Zherka also suggests that we should unilaterally narrow the category of offenses that Congress has subjected to the prohibition, arguing that "nonviolent" felons should be exempted from the category defined by Congress. Such a judicial exemption would usurp

the legislative function. It would also embark on a line-drawing process that would raise endless questions with which the courts have had difficulty in other contexts.

Were we to decide that nonviolent felons are exempt from Section 922(g)(1), we would have to decide what would qualify a felon as violent or nonviolent. Would the sentencing court for a count adjudicating a later prosecution under Section 922(g)(1) look only at the underlying felony conviction, or would it consider other, unadjudicated facts about the individual's background? If the court were to consider the individual's background, which evidentiary standards would apply to prove those background facts and which background facts are relevant? If only the underlying felony conviction mattered, would the court look only at the elements of the crime to determine whether it qualifies as violent, or would it look at the facts of the underlying offense?

To distinguish between violent and nonviolent crimes in the Second Amendment context, courts could employ the categorical approach, which is used to determine whether an offense is a crime of violence in the context of the Armed Career Criminal Act, and draw lines based on the elements of the crime of conviction. *See United States v. Evans*, 924 F.3d 21, 25 (2d Cir. 2019). That approach has, however, proven largely "unworkable." *Mathis v. United States*, 579 U.S. 500, 521, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016) (Kennedy, J., concurring); *see also* Transcript of Oral Argument at 26, *United States v. Stitt*, 586 U.S. 27, 139 S.Ct. 399, 202 L.Ed.2d 364 (2018) (Alito, J.) (describing categorical approach jurisprudence as "one royal mess").

The categorical approach requires courts to resolve cases by "embark[ing] on an intellectual enterprise grounded in the facts of *other* cases not before them, or even *imagined* scenarios." *Evans*, 924 F.3d at 31 (emphasis in original). Whatever the merits of that approach in the context of a statute that has been deemed to require it, it is difficult to see how such a rule could be rooted in the text of the Second Amendment. It is also difficult to imagine, moreover, why the courts should embark on an enterprise that has consumed years of judicial effort, culminating in a solemn argument in the Supreme Court about whether murder under New York's fairly typical definition was or was not categorically a "crime of violence." (It is, but the decision divided the Court.). *See Delligatti v. United States*, — U.S. —, 145 S. Ct. 797, 221 L.Ed.2d 303 (2025). That does not seem a promising way to proceed.[63]

On the other hand, were we to instead determine whether a felon qualifies as nonviolent by assessing that person's background, including the facts of particular offenses, we would have to face head-on the "practical difficulties and potential unfairness" that such a factual

63. Courts applying such an approach would also have to consider whether convictions for large-scale distribution of narcotics, an enterprise that is fraught with gun violence, but is not a categorically violent offense, should disqualify defendants from gun possession. In the context of sentence enhancements, Congress and the Sentencing Commission have chosen to lump such crimes together with categorically violent crimes. Such line-drawing is appropriate for legislatures but is impossible to root in the text of the Second Amendment or in historical practice. Nor is it a promising avenue for case by case as-applied determinations.

approach would present and which the categorical approach was developed to avoid. *See Taylor v. United States*, 495 U.S. 575, 601, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).[64]

Finally, we note that Congress has considered and rejected, after what it clearly regarded as a failed experiment, an approach that would have set up an administrative system of case-by-case, "as-applied" exceptions. In conjunction with the 1968 Gun Control Act, Congress authorized the restoration of a convicted felon's Second Amendment rights, upon the felon's application, as long as that person was not convicted of a crime involving the use of a firearm or other weapon. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 233. After several years, Congress, finding the project unsuccessful,[65] effectively repealed this effort

64. This case would raise those various "practical difficulties." *See Taylor*, 495 U.S. at 601, 110 S.Ct. 2143. The government contends that although Zherka was convicted of a nonviolent felony, he would be unlikely to qualify for relief under a hypothetical rights restoration program implemented pursuant to Section 925(c) because he has committed violent acts in the past. We do not rely on that assertion to resolve this appeal, but we offer it as an example of the type of fact that could be considered when determining whether a felon is nonviolent and to demonstrate the difficult line-drawing that such a system of adjudication would require.

65. *See* S. Rep. No. 102-353, at 19 (1992) (noting that reviewing applications was a "very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made").

by defunding the administrative apparatus charged with applying it. That was not a one-time decision – Congress has repeated the defunding as a budgetary decision annually from 1992 to the present.[66] There is no reason to think that the judiciary could do a better job.

For all these reasons, we join the majority of our sister circuits that have considered similar arguments, and we reject Zherka's contention that the prohibition on possession of firearms by convicted felons violates the Second Amendment as applied to "nonviolent" felons.

VI. Appellant Does Not Have a Procedural Right to More Process to Determine Whether He is Too Dangerous to Possess a Firearm.

What has been said above effectively disposes of Zherka's alternative contention that he has a due process right to a mechanism for relief from Section 922(g)(1). Because Section 922(g)(1) constitutionally disarms felons as a class, without need to find individual present dangerousness, there is no set of facts that Zherka could establish that would result in the restoration of his right to bear arms. He is therefore not entitled to the process that he seeks. *See Conn. Dep't Pub. Safety*, 538 U.S. at 7, 123 S.Ct. 1160 ("[E]ven assuming, arguendo, that respondent has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the [challenged] statute.").

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66. *See supra* note 59; *see also supra* note 60 (explaining the Attorney General's proposed rulemaking related to Section 925(c)).

Appendix A

CONCLUSION

For the reasons stated above, we affirm the judgement of the district court dismissing Zherka's complaint.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, SIGNED MARCH 23, 2022

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

20-CV-07469 (PMH)

SELIM "SAM" ZHERKA,

Plaintiff,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY,

Defendant.

Signed 03/23/2022

MEMORANDUM OPINION AND ORDER

PHILIP M. HALPERN, United States District Judge:

Selim "Sam" Zherka ("Plaintiff") brings this action against Merrick B. Garland ("Defendant"), in his official capacity as the Attorney General,[1] alleging violations of

1. Merrick B. Garland is automatically substituted for William P. Barr as the Defendant in this action, in accordance with Fed. R. Civ. P. 25(d); and the Court hereby confirms that substitution as an order of the Court.

his Second and Fifth Amendment rights. Specifically, Plaintiff claims that: (1) 18 U.S.C. § 922(g)(1), as applied to him—an individual convicted of a non-violent financial felony—violates the Second Amendment; and (2) his inability to seek relief under 18 U.S.C. § 925(c) violates his Fifth Amendment due process rights.[2]

On September 11, 2020, Plaintiff filed his Complaint. (Doc. 1, "Compl."). The Court held a telephonic pre-motion conference on January 13, 2021 to address Defendant's contemplated motion to dismiss and set a briefing schedule. (Jan. 13, 2021 Min. Entry). All motion papers were filed on April 9, 2021. (Doc. 12; Doc. 13, "Def. Br."; Doc. 14, "Pl. Opp."; Doc. 15, "Reply"). After the motion was fully submitted, both parties filed several letters addressing recent Second Amendment cases that were decided after the briefing had concluded in this case. (Docs. 16-21).

BACKGROUND

On or about December 22, 2015, Plaintiff pled guilty in the United States District Court for the Southern District of New York to one count of criminal conspiracy, 18 U.S.C. § 371, the objects of which were to make a false statement to a bank and to sign and file a false federal

2. Plaintiff includes a third claim for declaratory and injunctive relief. (Compl. ¶¶ 35-42). Although it is pled as a distinct claim for relief, this claim merely states the relief sought for Plaintiff's first and second claims for relief (the alleged violations of Plaintiff's Second and Fifth Amendment rights). Taken together, the Court considers Plaintiff's two constitutional attacks spread over these claims for relief.

income tax return. (Compl. ¶ 4).[3] Plaintiff's fraud caused tens of millions of dollars in losses. *See United States v. Zherka*, No. 14-CR-00545 (S.D.N.Y. 2014) ("*Zherka*"), Doc. 194 at 10:11-18. On December 22, 2015, Plaintiff was sentenced to 37 months' imprisonment, along with a fine of $1.5 million, over $1.8 million in restitution, and over $5.2 million in forfeiture. (Compl. ¶ 5); *see also Zherka*, Doc. 168. Plaintiff was released from prison on or about January 4, 2017 and served the remainder of his sentence in home confinement until on or about May 26, 2017. (Compl. ¶ 5). Plaintiff then commenced a three-year term of supervised release, which concluded on or about May 26, 2020. (*Id.* ¶ 12). Plaintiff acknowledges that, notwithstanding the non-violent nature of his crime, 18 U.S.C. § 922(g)(1) categorically bars him from acquiring, receiving, or possessing a firearm.[4] (*Id.* ¶¶ 6, 13).

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3. The Court, in this Memorandum Opinion and Order, takes judicial notice of court documents and legislative histories, which is permissible on a Rule 12(b)(6) motion. *See Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000) (stating that courts may take judicial notice of court documents); *Graham v. Select Portfolio Servicing, Inc.*, 156 F. Supp. 3d 491, 502 n.1 (S.D.N.Y. 2016) ("In deciding a motion to dismiss under Rule 12(b)(6), a court can take judicial notice of court documents."); *Wang v. Pataki*, 396 F. Supp. 2d 446, 453 n.1 (S.D.N.Y. 2005) ("The Court may also take judicial notice of public documents, such as legislative histories.").

4. Section 922(g)(1) makes it "unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[] . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Appendix B

At the time Section 922(g)(1) was enacted, in 1968, Congress provided a mechanism through which a convicted felon, like Plaintiff, could seek relief from Section 922(g)(1)'s prohibition by applying to a program administered by the Bureau of Alcohol Tobacco, Firearms and Explosives ("ATF") (as delegated by the Attorney General) to demonstrate that "'the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.'" (*Id.* ¶ 14) (quoting 18 U.S.C. § 925(c)). Since 1992, however, Congress has prohibited the federal funds appropriated for the ATF to be used for investigating and reviewing applications made under Section 925(c). (*Id.* ¶ 16). Congress abandoned this approach after finding that "too many . . . felons whose gun ownership rights were restored went on to commit violent crimes with firearms." H.R. Rep. No. 104-183, at 15.

As a result of the lack of process and/or decision-making, any application for relief made under Section 925(c) "would be returned, not acted upon and neither granted nor denied." (Compl. ¶ 16). This inaction would cause any petition for review of such application filed in a United States District Court to be dismissed for lack of statutory subject matter jurisdiction, thereby rendering futile any application made under Section 925(c). (*Id.* ¶¶ 17-18).

Appendix B

STANDARD OF REVIEW[5]

A Rule 12(b)(6) motion enables a court to consider dismissing a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible on its face "when the ple[d] factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant acted unlawfully." *Id.* The factual allegations pled "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955.

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5. Plaintiff, in his opposition, argues that the Complaint satisfies the *Iqbal/Twombly* pleading standard because, *inter alia*, it "present[s] a question of law that is one of first impression in this Circuit." (Pl. Opp. at 4). Plaintiff cites no case law, however, to support this reading of the well-worn standard on a Rule 12(b)(6) motion. That the Complaint raises a pure legal question that has yet to be decided in this Circuit is, alone, insufficient to overcome Defendant's motion to dismiss, especially where, as here, Plaintiff concedes that the "salient facts in this action are not in dispute." (Pl. Opp. at 3). The ultimate question of plausible pleading is a distinct analysis from whether there is a question of law of first impression.

"When there are well-ple[d] factual allegations [in the complaint], a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. Thus, a court must "take all well-ple[d] factual allegations as true, and all reasonable inferences are drawn and viewed in a light most favorable to the plaintiff." *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996). However, the presumption of truth does not extend to "legal conclusions, and threadbare recitals of the elements of the cause of actions." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Iqbal*, 556 U.S. 662, 129 S.Ct. 1937). Therefore, a plaintiff must provide "more than labels and conclusions" to show entitlement to relief. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955.

ANALYSIS

I. Second Amendment

A. Legal Framework

Plaintiff insists that Section 922(g)(1), as applied to him—an individual convicted of a non-violent financial felony associated with false bank statement and income tax filings—violates his Second Amendment rights. "Over the past decade, the Second Circuit has built a framework for adjudicating asserted violations of individuals' Second Amendment rights." *United States v. Witcher*, No. 20-CR-00116, 2021 WL 5868172, at *4 (S.D.N.Y. Dec. 10, 2021). "The Second Amendment provides that '[a] well regulated Militia, being necessary to the security of a free State,

the right of the people to keep and bear Arms, shall not be infringed.'" *Id.* (quoting U.S. Const. amend. II.). "The U.S. Supreme Court announced in 2008 that the Second Amendment guarantees 'the individual right to possess and carry weapons in case of confrontation,'" *id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)), "and incorporated that right against the states two years later," *id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 791, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)). "Like most rights," however, "the Second Amendment right is not unlimited." *Heller*, 554 U.S. at 626, 128 S.Ct. 2783. *Heller* identified the right to "use arms in defense of hearth and home" as belonging to "law-abiding, responsible citizens," *id.* at 635, 128 S.Ct. 2783, and stated that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," *id.* at 636, 128 S.Ct. 2783.

Following *Heller* and *McDonald*, the Second Circuit has "articulated a two-step inquiry to adjudicate whether a statute violates an individual's Second Amendment rights." *Witcher*, 2021 WL 5868172, at *4. First, courts "'must determine whether the challenged legislation impinges upon conduct protected by the Second Amendment.'" *Id.* (quoting *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018)). Second, if a court finds "'that a law implicates the Second Amendment as *Heller* instructed [courts] to interpret it,'" then the court must "'determine the appropriate level of scrutiny to apply and evaluate the constitutionality of the law using that level of scrutiny.'" *Id.* (quoting *Jimenez*, 895 F.3d at 232).

B. Application

Because Section 922(g)(1), as a "prohibition on the possession of firearms by felons," is "presumptively lawful" under *Heller*, Plaintiff carries the burden of rebutting that presumption in the first instance. *Heller*, 554 U.S. at 626, 627 n.26, 128 S.Ct. 2783; *see also Jimenez*, 895 F.3d at 235. Plaintiff has not done so here. Drawing all inferences in Plaintiff's favor, he has failed to plausibly allege that he "is among 'the people' to whom the Second Amendment right applies," *Witcher*, 2021 WL 5868172, at *4, namely "*law-abiding responsible citizens*," *Heller*, 554 U.S. at 635, 128 S.Ct. 2783 (emphasis added). Accordingly, Plaintiff's as-applied challenge fails at the first step of the analysis.

Since the Supreme Court's decisions in *Heller* and *McDonald*, the constitutionality of Section 922(g)(1) has confronted several facial and as-applied challenges. Every circuit court to have considered a facial challenge—including the Second Circuit—has rejected it. *See, e.g.*, *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013) (per curiam); *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011), *overruled on other grounds by Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016); *United States v. Moore*, 666 F.3d 313, 318 (4th Cir. 2012); *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011); *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010); *United States v. McCane*, 573 F.3d 1037,

1047 (10th Cir. 2009); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009).

Compared to the complete failure of facial challenges thus far, as-applied challenges, like Plaintiff's here, have had a bit more success (albeit minimal). While the Second Circuit has not yet directly addressed whether Section 922(g)(1) burdens conduct protected by the Second Amendment as applied to non-violent financial felons, this Court does not write on a *tabula rasa* when it comes to addressing this issue. Several other circuit courts—including the D.C. Circuit, the Fourth Circuit, the Fifth Circuit, and the Eleventh Circuit—have already confronted such a challenge, and none have held Section 922(g)(1) unconstitutional as applied to a convicted felon. *See, e.g.*, *Medina v. Whitaker*, 913 F.3d 152, 155 (D.C. Cir. 2019); *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *Rozier*, 598 F.3d at 771. "The Seventh and Eighth Circuits have left open the possibility of a successful felon as-applied challenge, but have yet to uphold one." *Medina*, 913 F.3d at 155 (citing *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *Williams*, 616 F.3d at 693-94). Only the Third Circuit has upheld an as-applied challenge to Section 922(g)(1), but its holding was limited to state-law misdemeanants who nonetheless fell within the scope of Section 922(g)(1). *See Binderup*, 836 F.3d at 353 n.6.

It is against this backdrop of largely unsuccessful constitutional attacks on Section 922(g)(1) that this Court considers—apparently as a matter of first impression in

this Circuit—whether Section 922(g)(1) burdens conduct protected by the Second Amendment as applied to non-violent felons. Absent on-point Second Circuit precedent, the Court, in making this determination, first looks to the reasoning employed by other courts of appeals. The D.C. Circuit's decision in *Medina v. Whitaker* is particularly instructive.

The plaintiff in *Medina*, in a very similar vein to Plaintiff, was convicted of misrepresenting his income on a mortgage finance application to qualify for a loan from a federally insured bank, in violation of 18 U.S.C. § 1014. 913 F.3d at 154. He argued that "evidence of his past 'disregard for the law' [was] insufficient to disarm him," because in his view, "the scope of the Second Amendment only excludes dangerous individuals." *Id.* at 157. The *Medina* panel rejected that argument, and in doing so, held categorically that "those convicted of felonies are not among those entitled to possess arms." *Id.* at 160. The *Medina* panel, in so holding, reasoned that:

> Using an amorphous "dangerousness" standard to delineate the scope of the Second Amendment would require the government to make case-by-case predictive judgments before barring the possession of weapons by convicted criminals, illegal aliens, or perhaps even children. We do not think the public, in ratifying the Second Amendment, would have understood the right to be so expansive and limitless. At its core, the Amendment protects the right of "law-abiding, responsible citizens to use arms in defense of

> hearth and home." Whether a certain crime removes one from the category of "law-abiding and responsible," in some cases, may be a close question. For example, the crime leading to the firearm prohibition in *Schrader*—a misdemeanor arising from a fistfight—may be open to debate. Those who commit felonies however, cannot profit from our recognition of such borderline cases.

Id. at 159-160 (quoting *Heller*, 554 U.S. at 635, 128 S.Ct. 2783). Having established that a felony conviction "removes one from the scope of the Second Amendment," the *Medina* court concluded that the plaintiff's as-applied challenge to Section 922(g)(1) failed at step one of its analysis.[6] *Id.* at 160.

Here, similar to the plaintiff in *Medina*, Plaintiff was convicted of the felony of conspiracy to commit fraud on a bank and in I.R.S. tax filings, and similarly argues that because his crime was "non-violent," he should not be excluded from the Second Amendment's protections. (Compl. ¶¶ 2, 4, 23). Plaintiff's theory, essentially, is that aside from a single brush with the law, he is "an exemplary private citizen" (Pl. Opp. at 9), and therefore, he is no more dangerous with a gun in hand than any other "law-abiding, responsible citizen[]," *Heller*, 554 U.S. at 635, 128 S.Ct. 2783. Here, as in *Medina*, Plaintiff's theory fails, because one need not be dangerous to be

6. The D.C. Circuit applies a two-step Second Amendment analysis that is similar to the analysis applied in this Circuit. *See Schrader v. Holder*, 704 F.3d 980, 988-89 (D.C. Cir. 2013).

removed from the category of "law abiding, responsible citizens" for purposes of the Second Amendment. *Id.*; *see also Folajtar v. Att'y Gen. of the U.S.*, 980 F.3d 897, 904, 906 (3d Cir. 2020) (holding that "felonies are serious enough to ban firearm possession" without considering "dangerousness"); *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (per curiam) ("[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" (quoting *Vongxay*, 594 F.3d at 1118)). Without passing judgment on Plaintiff's allegedly non-violent nature or his post-conviction behavior, the bottom line is that Plaintiff is *not* a law-abiding, responsible citizen for Second Amendment purposes. He is a felon who was convicted just over six years ago of an extremely serious crime. *See Mbendeke v. Garland*, 860 F. App'x 191, 194 (2d Cir. 2021) (finding fraud crimes to be "particularly serious"); *see also Medina*, 913 F.3d at 160 (finding felony fraud to be "a serious crime, *malum in se*, that is punishable in every state"). Indeed, Plaintiff's crime was "not a peccadillo criminalized only by a quirk of state law" (Def. Br. at 12), i.e., the type of offense that may be "open to debate," *Medina*, 913 F.3d at 160—he committed a grave offense demonstrating "no respect for the truth or for his legal, let alone moral obligations to tell it." *Zherka*, Doc. 194 at 91:8-10. Therefore, as in *Medina*, this Court declines to place Plaintiff within the category of people protected by the Second Amendment based on his alleged lack of dangerousness, and instead concludes that his status as a felon, albeit a non-violent one, necessarily removes him from the category of "law-abiding, responsible citizens"

entitled to possess firearms. *Heller*, 554 U.S. at 635, 128 S.Ct. 2783.

This conclusion is further bolstered by the Second Circuit's decision in *Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106 (2020), which addressed an as-applied challenge to a New York State statute. The statute at issue in *Libertarian Party* specified that "no firearm license is to be allowed for *inter alios*, persons convicted of 'serious offense[s],' drug addicts, and 'fugitives from justice.'" *Id.* at 127 (citations omitted). The panel in *Libertarian Party*, applying the first step of this Circuit's Second Amendment analysis, went on to hold that the New York statute's "serious offenses" provision "does not burden the ability of '*law-abiding, responsible* citizens to use arms in defense of hearth and home,'" and therefore, "the conditions placed on the core Second Amendment right are not onerous." *Id.* (citations omitted). Here, like the New York statute in *Libertarian Party*, Section 922(g)(1) prohibits firearm possession based on an individual's felonious history, and therefore, it likewise does not impinge on the Second Amendment rights of law-abiding, responsible citizens.

Accordingly, this Court, guided by the Second Circuit and a chorus of other courts of appeals, holds that the application of Section 922(g)(1) to individuals convicted of non-violent financial felonies, like Plaintiff, does not impinge upon conduct protected by the Second Amendment. Therefore, Plaintiff's claim fails at step one of the analysis. Having concluded that Plaintiff's claim fails at step one, the Court need not and does not reach

the second step of the analysis.[7] *See, e.g.*, *Medina*, 913 F.3d at 161 ("Because the claim fails at the first step of the . . . analysis, we need not reach the second step."); *Hamilton*, 848 F.3d at 629 (concluding analysis after holding that plaintiff's claim fails at step one).

II. Fifth Amendment

The Court next turns to Plaintiff's Fifth Amendment due process claim, by which he asserts that, insofar as he is unable to seek relief from Section 922(g)(1)'s firearms ban through Section 925(c), his due process right as a non-violent felon have been violated.

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7. The Court assumes without deciding that, if it were to reach the second step of the analysis, intermediate scrutiny would apply. *See, e.g.*, *Jimenez*, 895 F.3d at 236; *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012). Defendant, agreeing that intermediate scrutiny would apply, argues that even if Section 922(g)(1) impinges upon conduct protected by the Second Amendment, the law would survive intermediate scrutiny as applied to Plaintiff because Section 922(g)(1)'s prohibition on felons possessing firearms is substantially related to Congress's compelling interest in public safety and crime prevention. (Def Br. at 14-18; Reply at 7-8). Plaintiff does not oppose either of Defendant's arguments that (1) intermediate scrutiny applies; and (2) Section 922(g)(1) survives such scrutiny. (Reply at 7-8). Therefore, even if the Court were to reach step two of the analysis, Plaintiff has abandoned these aspects of his Second Amendment claim. *See, e.g.*, *Capak v. St. Execs Mgmt.*, No. 20-CV-11079, 2021 WL 2666007, at *5 (S.D.N.Y. June 29, 2021) ("Plaintiff did not respond to this argument in opposing the motion to dismiss, and has therefore abandoned the claim.").

Section 925(c) provides an individual who falls within the scope of Section 922(g)(1)'s firearms ban with the opportunity to petition the ATF (via delegation by the Attorney General) to restore his or her right to possess firearms. In 1992, however, Congress ceased funding for this review process, "citing its unworkability and high stakes," *Medina v. Sessions*, 279 F. Supp. 3d 281, 293 (D.D.C. 2017) (citing S. Rep. No. 102-353, at 19 (1992)); and the reality that many of the felons who obtained relief under this section later went back to committing violent felonies with the guns they lawfully possessed, H.R. Rep. No. 104-183, at 15. Therefore, Section 925(c) no longer affords convicted felons, like Plaintiff, an effective mechanism through which to seek relief from Section 922(g)(1)'s bar on firearms possession.

Plaintiff appears to allege that his procedural due process rights have been violated due to his inability to receive a hearing under Section 925(c) to determine whether (i) he is, in fact, currently dangerous; and (ii) he should have his ability to possess firearms reinstated.[8]

8. Plaintiff also argues that "a close reading" of Section 925(c) reveals Congress's due process concerns and its intent, at the time of enactment, to create a "right of recourse" for felons seeking to reinstate their ability to possess firearms. (Pl. Opp. at 16). But Plaintiff provides no legislative history or case law to support his view of Congress's intent. Moreover, Plaintiff argues that the plain text of Section 925(c) "deems the failure to carefully review all the evidence presented by the felon-applicant to be nothing less than 'a miscarriage of justice.'" (*Id.* at 17) (quoting 18 U.S.C. § 925(c)). Plaintiff's textual interpretation, however, contorts the plain language of the statute, which merely states that a court "may in its discretion admit additional evidence where failure to

(Compl. ¶¶ 33-34). Plaintiff's inability to receive such a hearing, however, does not constitute a procedural due process violation.

Indeed, Plaintiff's due process claim is foreclosed by the Supreme Court's decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). A class of convicted sex offenders in *Doe* brought a procedural due process challenge to Connecticut's sex offender registry law, which required all persons convicted of certain sex-related crimes to register with the State following their release from prison. The sex offender class complained that the law, which subjected them to reporting requirements without affording the opportunity of a hearing to demonstrate whether they were likely to be currently dangerous to the community, violated due process. The Supreme Court, in rejecting the sex offenders' challenge, held that individualized hearings were not required because the registration requirement was based "on the fact of previous conviction, not the fact of current dangerousness." *Id.* at 4, 123 S.Ct. 1160. The Supreme Court reasoned that "where the fact to be proven at the hearing is not relevant to the legal scheme responsible for the deprivation (that is, where it is clear that the government would strip the individual of his liberty even if he were able to prove or disprove the particular the fact or set of facts), such a hearing

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do so would result in a miscarriage of justice." 18 U.S.C. § 925(c). The Court agrees with Defendant that nowhere does the text of Section 925(c) suggest that the failure to "carefully review" a felon's application automatically results in a miscarriage of justice or due process violation. (Pl. Opp. at 17; Def. Br. at 9 n.4).

would be an exercise in futility, which is not required by *procedural* due process." *Black v. Snow*, 272 F. Supp. 2d 21, 34 (D.D.C. 2003) (emphasis in original), *aff'd sub nom. Black v. Ashcroft*, 110 F. App'x 130 (D.C. Cir. 2004).

Doe's rationale "dooms any procedural challenge to § 922(g)(1)," as "[t]he plain language of that provision makes clear Congress's decision to bar *all* convicted felons (not merely those with violent tendencies or who otherwise present an ongoing danger to society) from possessing firearms." *Id.* (emphasis in original). Here, as with the sex offender registry law in *Doe*, Section 922(g)(1) "make[s] the deprivation turn solely on the fact of the prior conviction—not the significance of that conviction for future behavior." *Id.* at 34-35. It follows, then, that "due process does not entitle [P]laintiff to a hearing to determine whether he is currently dangerous because the results of such a hearing would have no bearing on whether he is subject to the disability imposed by § 922(g)(1)." *Id.* at 35.

Accordingly, Plaintiff's due process claim premised on his inability to receive a hearing under Section 925(c) is dismissed.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED in its entirety.

SO ORDERED.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED MARCH 23, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20 CIVIL 7469 (PMH)

SELIM "SAM" ZHERKA,

Plaintiff,

-against-

MERRICK B. GARLAND, ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY,

Defendant.

Filed March 23, 2022

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED**: That for the reasons stated in the Court's Memorandum Opinion and Order dated March 23, 2022, Defendant's motion to dismiss is GRANTED in its entirety; accordingly, the case is closed.

Appendix C

Dated: New York, New York
March 23, 2022

RUBY J. KRAJICK
Clerk of Court

BY: /s/ [Illegible]
Deputy Clerk

APPENDIX D — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

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.

18 U.S.C. § 922(g)(1)

* * *

(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.

* * *

Appendix D

18 U.S.C. § 925(c)

* * *

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

* * *