No. _____

In the
Supreme Court of the United States

STEVEN DUARTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. §922(g)(1)'s categorical ban on the possession of firearms by felons is unconstitutional as applied to a defendant with non-violent predicate offenses underlying his conviction.

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 14.1(b)(i), petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

Petitioner Steven Duarte was the defendant in the district court and the appellant below. Respondent United States of America was the plaintiff in the district court and the appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit:

United States v. Steven Duarte, No. 2:20-cr-00387 (C.D. Cal.) (Feb. 28, 2022);

United States v. Steven Duarte, No. 22-50048 (9th Cir.) (May 9, 2024);

United States v. Steven Duarte, No. 22-50048 (9th Cir.) (July 17, 2025);

United States v. Steven Duarte, No. 22-50048 (9th Cir.) (May 9, 2025).

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PETITION FOR WRIT OF CERTIORARI

In 2022, petitioner Steven Duarte was convicted of possessing a firearm after having committed non-violent felonies years earlier, in violation of 18 U.S.C. §922(g)(1). He challenged his §922(g)(1) conviction under the Second Amendment, arguing that no historical tradition supports permanently disarming him based on his non-violent convictions. The en banc Ninth Circuit upheld his conviction, holding that all felons, regardless of conduct or circumstances, may be permanently disarmed if the legislature so chooses. The court did not identify a Founding-era analogue for that rights-denying view. Instead, it concluded that *District of Columbia v. Heller*, 554 U.S. 570 (2008), already decided that laws like §922(g)(1) are valid as to all felons. As a fallback, the court upheld §922(g)(1) as applied to Duarte under a kind of rational-basis review cloaked in history—(mis)understanding this Nation's historical tradition of firearms regulation to give legislators carte blanche to categorically ban from possessing arms any group they deem "dangerous."

All of that is wrong. "The constitutionality of felon dispossession was not before the Court in *Heller*," so the case cannot be said to have decided the issue. *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting). And *New York State Rifle & Pistol Association v. Bruen* made crystal clear that "judicial deference to legislative interest balancing" is fundamentally inconsistent with the very notion that the Second Amendment protects a fundamental right. 597 U.S. 1, 26 (2022). Under this Court's precedents, the decision below cannot pass muster. Even the Ninth Circuit agreed that Duarte is part of "the

people" and that the conduct §922(g)(1) prevents him from engaging in (keeping and bearing a firearm for self-defense) is covered by the Second Amendment's plain text. At that point, the government should have had to identify a historical tradition of disarming people *like Duarte*, whose prior convictions were all for non-violent crimes and whom the government had never claimed was violent towards others. Instead, the Ninth Circuit leaned on disanalogous felony punishments that were abandoned even before the Founding and abhorrent colonial-era laws that disarmed disfavored groups like slaves, Catholics, and Native Americans.

The Ninth Circuit's decision affirming §922(g)(1)'s application to Duarte and all felons, regardless of their underlying offenses, joins the long side of an acknowledged circuit split. Six other circuits have embraced a similar approach, demanding judicial deference to legislative interest-balancing and elevating this Court's dicta in *Heller* over its holding and reasoning in *Bruen* and *Rahimi*. On the flip side, three circuits have taken the opposite (i.e., correct) approach, requiring the government to justify its applications of §922(g)(1) by reference to longstanding historical tradition that justifies disarming citizens based on their particular predicate convictions. That division underscores the need for this Court's intervention. Indeed, lower courts themselves have recognized that "there is significant disagreement about" how to analyze §922(g) challenges "that the Supreme Court should resolve." *United States v. Morton*, 123 F.4th 492, 498 n.2 (6th Cir. 2024).

The Court should grant certiorari and hold that §922(g)(1) is unconstitutional as applied to non-violent felons like Duarte. At the very least, the Court should grant, vacate, and remand with instructions for the Ninth Circuit to conduct a proper Second Amendment analysis by asking whether historical tradition supports disarming Duarte based on the felony offenses underlying his §922(g)(1) charge.

OPINIONS BELOW

The decision below, 137 F.4th 743, is reproduced at App.1-129. The order granting rehearing and vacating the three-judge panel opinion, 108 F.4th 786, is reproduced at App.130-41. The initial panel opinion, 101 F.4th 657, is reproduced at App.142-218.

JURISDICTION

The Ninth Circuit issued the decision below on May 9, 2025. Justice Kagan extended the deadline to file a petition for writ of certiorari to October 6, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment is reproduced at App.225. 18 U.S.C. §922(g) is reproduced at App.225-26.

STATEMENT OF THE CASE

A. Legal Background

In its seminal decision in *Heller*, this Court held that there is "no doubt … that the Second Amendment confer[s] an individual right to keep and bear arms." 554 U.S. at 595. While the Court acknowledged that the right is not "unlimited," it looked to historical

restrictions on firearm possession to inform its analysis of the constitutionality of the law at hand. *Id.* at 626-27, 631-34. But the Court left a full-throated exposition of that historical analysis for another day.

Over the next decade, lower courts "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Bruen*, 597 U.S. at 17. But this Court ultimately rejected that approach in *Bruen*, explaining that a "judge-empowering 'interest-balancing inquiry'" would not sufficiently safeguard individuals' constitutional rights. *Id.* at 22. After all, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* at 23 (quoting *Heller*, 554 U.S. at 634). So the Court laid out a more robust constitutional framework steeped in "the Nation's historical tradition of firearm regulation." *Id.* at 24. Under that approach, if regulated conduct is covered by the text of the Second Amendment, then it is presumptively protected, and the burden shifts to the government to justify its regulation with historical firearm restrictions that are analogous to the challenged law in their "how and why"—i.e., the "modern and historical regulations" must "impose a comparable burden on the right of armed self-defense" that "is comparably justified." *Id.* at 29.

This Court provided additional guidance on how to implement *Bruen*'s methodology in *United States v. Rahimi*, 602 U.S. 680 (2024). *Rahimi* reiterated that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition"

as evidenced by the government's proffered historical analogues. *Id.* at 692. This Court clarified that those analogues "need not be a 'dead ringer' or a 'historical twin.'" *Id.* But it repeated *Bruen*'s directive that "[w]hy and how the [challenged] regulation burdens the right are central" to the Second Amendment inquiry. *Id.* In other words, the focus remains on whether the challenged law "impos[es] similar restrictions for similar reasons." *Id.* Applying that framework, this Court held that §922(g)(8)(C)(i) is constitutionally sound, as it is grounded in a historical tradition of temporarily disarming individuals who have been found to pose "a credible threat to the physical safety of another." *Id.* at 702.

In short, as exemplified in *Rahimi*, *Bruen* tasks courts with conducting a categorical comparison of the mechanics of the challenged provision and the government's historical analogues to assess whether the challenged law passes constitutional muster.

B. Factual Background

1. In 2020, a grand jury indicted petitioner Steven Duarte on one count of violating 18 U.S.C. §922(g)(1) for knowingly possessing a firearm despite having previously been convicted of crimes punishable by more than a year in prison. App.5. The indictment was predicated on Duarte's five prior non-violent state-law convictions for vandalism (2013), possession of a firearm as a felon (2016), possession of a controlled substance for sale (2016), and two counts of evading a peace officer (2016, 2019). App.5-6. Duarte pleaded not guilty. App.146.

Duarte's case proceeded to trial, where a jury returned a guilty verdict. App.6. Duarte did not raise

a Second Amendment challenge to §922(g)(1) before or during trial, because binding Ninth Circuit precedent squarely rejected any such argument at the time. App.6, 145; *see United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (holding post-*Heller* that "922(g)(1) does not violate the Second Amendment," full stop). After trial, the court imposed a below-guidelines sentence of 51 months' imprisonment, and Duarte filed a timely notice of appeal. App.6.

2. This Court decided *Bruen* three months later. Relying on *Bruen*, Duarte argued in his opening brief on appeal that §922(g)(1) is unconstitutional as applied to individuals like himself whose prior felony convictions are non-violent. App.6. Duarte also argued that the Ninth Circuit's earlier decision in *Vongxay* was irreconcilable with *Bruen*, and that he had good cause under Federal Rule of Criminal Procedure 12(c)(3) to raise his challenge for the first time on appeal given *Bruen*'s watershed status. App.6, 145-46.

A divided three-judge panel agreed with Duarte. App.142-46. The majority concluded that Duarte had shown good cause for failing to raise his constitutional objection in the district court, given that binding circuit precedent foreclosed his argument at the time. App.145-46. It then held that *Vongxay* was "clearly irreconcilable" with *Bruen*, and therefore no longer controlling. App.150-54. Finally, it held that Duarte is part of "the people" the Second Amendment protects, that his desire to possess a firearm for self-defense is presumptively protected conduct, and—after an in-depth review of the historical record—that there is no deeply rooted tradition of forever stripping

non-violent individuals of their right to keep and bear arms after they have served time for their felonies and re-entered society. App.162-206.

3. A majority of active judges on the Ninth Circuit voted to rehear the case en banc and vacated the panel's decision. App.130. An en banc panel then reversed course and held that, while Duarte had demonstrated good cause under Rule 12(c)(3) to raise his as-applied challenge on appeal, *Bruen* did not change the Ninth Circuit's decade-earlier conclusion that §922(g)(1) is constitutional as to all felons, including non-violent ones like Duarte. App.1-5.

Although the en banc majority mouthed *Bruen*'s words, it ultimately defaulted to pre-*Bruen* business as usual. At the outset, the majority acknowledged that *Bruen* rejected "the analytical framework that the federal courts had developed since *Heller*"—which the Ninth Circuit had applied in *Vongxay*—and reiterated that, under *Bruen* and *Rahimi*, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," and "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." App.3 (quoting *Bruen*, 597 U.S. at 24). But it immediately left *Bruen* behind. Instead of looking to the Second Amendment's text or this Nation's historical tradition of firearm regulation, the majority started its analysis with dictum from *Heller*.

Heller caveated that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." App.9 (emphasis omitted) (quoting *Heller*, 554 U.S. at

626-27). Relying on that single sentence, the Ninth Circuit reaffirmed its pre-*Bruen* precedent that "felons are categorically different from the individuals who have a fundamental right to bear arms," and that "922(g)(1) constitutionally prohibits the possession of firearms by felons," even as to non-violent offenders like Duarte. App.9-10 (quoting *Vongxay*, 594 F.3d at 1114). Never mind that *Heller* did "not undertake an exhaustive historical analysis" of the issue and described such laws as only "*presumptively* lawful," *see Heller*, 554 U.S. at 626-27 & n.26 (emphasis added), or that "*Bruen* … worked a sea change in the analytical framework" for Second Amendment challenges, App.2-3. All that mattered to the majority was that *Heller* said (and *Rahimi* "repeated") that felon-in-possession laws are "presumptively constitutional." App.13. *Heller*'s dicta was thus all the "historical tradition" the court deemed necessary to "support[] the categorical application of §922(g)(1) to felons like Duarte." App.13-14.

From there, the majority proceeded to opine that an "application of *Bruen*'s constitutional test" (or at least the Ninth Circuit's version of it) "to Duarte's conduct confirm[ed]" its holding. App.14. At the threshold, the Ninth Circuit correctly—but in apparent contradiction to its earlier reassertion that "felons are categorically different from the individuals who have a fundamental right to bear arms," App.9-10—reasoned that Duarte "is part of 'the people' and the 'Constitution presumptively protects' his right to possess a firearm," App.15. As to historical tradition, however, the court largely declined to address whether depriving Duarte of the fundamental constitutional right to keep and bear arms based on prior non-violent

felony convictions imposed "a comparable burden" on the right to the government's proffered historical analogues that was also "comparably justified." *See Bruen*, 597 U.S. at 29.

Instead, the majority deployed the very "legislative interest balancing" *Bruen* eschewed—by recasting that interest-balancing as a historical tradition. *See id.* at 26. The majority identified two supposedly deeply rooted "regulatory principles" that guided its decision. App.21. First, "legislatures may disarm" anyone they believe to have "committed the most serious crimes." App.21. Second, "legislatures may categorically disarm" any class of persons "they deem dangerous," even "without an individualized determination of dangerousness." App.21.

On the first principle, the court reasoned that because some historical felonies were punished with "death and estate forfeiture," any action that a modern legislature might define as a felony can be used as grounds to justify the deprivation of Second Amendment rights. *See* App.21-27. The court highlighted "[t]he 1689 English Bill of Rights" that repulsed our Founders, a draft proposal penned by Pennsylvania anti-federalists that never made it out of convention, and a draft of Louisiana criminal codes from 1820 that "were ultimately not adopted." App.23-25. Because those laws (or proposed laws) were devised to "bar possession of a firearm from persons whose prior behaviors ha[d] established their violent tendencies," the court concluded—without explanation—that they matched the "how" and "why" of §922(g)(1)'s bar on firearm possession as applied to

individuals *without* a history of violent crime too. App.25.

With respect to the second principle, the court purported to divine a longstanding tradition of "disarm[ing] those whom the legislature deem[s] dangerous on a categorical basis," no matter the legislature's justification. App.28. The laws the court invoked in support of that purported tradition included bans against "Catholics," "Native Americans," "slaves," "free Black people," "those who refused to swear oaths of loyalty to the emerging nation," and, finally, "tramps." App.28-30. While the court conceded that most of those laws "reflect overgeneralized and abhorrent prejudices that would not survive legal challenges today," it saw no problem relying on them to justify §922(g)(1)'s overgeneralized prejudices against felons today. App.31-32.

Judge Nelson, joined by Judge Ikuta, concurred only in the judgment. They agreed that Duarte's conviction should be affirmed—but only because, in their view, the appropriate standard of review was plain error, not de novo, since Duarte had not raised his constitutional claim in the district court. App.35.

Judge Collins also concurred only in the judgment. App.36. He lamented that the majority's decision turned *Bruen* into "rational basis review" under which "Second Amendment rights effectively exist only at the sufferance of the legislature." App.45, App.47. Nevertheless, he concluded that if the historical traditions to which the majority pointed were "taken together" and considered in tandem, then they would provide sufficient historical basis to support §922(g). App.56-57.

Finally, Judge VanDyke filed a separate opinion, concurring in part and dissenting in part. App.60. He first reasoned that the en banc court should have applied plain-error review, given Duarte's failure to raise his Second Amendment claim in the district court.[1] App.62-72. On the merits, he rejected the majority's broad endorsement of §922(g)(1), criticizing its reliance on flawed historical analogues "using 'cherrypicked language' that is 'mis- and over-applied from the Court's prior precedents' to uphold any firearms regulation that comes before it," which, he argued, grants legislatures excessive discretion to disarm individuals without requiring a showing of dangerousness. App.78. Like Judge Collins, he lambasted the majority for skipping past even "the old interest-balancing regime" of intermediate scrutiny and applying a "*rational basis*" regime under which courts must defer to legislatures' decisions to disarm disfavored groups. App.100-20. But he disagreed with Judge Collins that §922(g)(1) could be justified by combining disparate historical traditions in a manner that lacks any limits. App.120-28.

REASONS FOR GRANTING THE PETITION

The decision below entrenches an acknowledged circuit split. Nearly every circuit has squarely confronted as-applied challenges to §922(g)(1), yet the circuits have splintered on the question of how to analyze them. Seven circuits have adopted a categorical rule barring as-applied challenges to §922(g)(1), effectively giving legislatures

[1] Judges Ikuta and R. Nelson joined this part of Judge VanDyke's opinion. App.60.

unreviewable discretion to disqualify entire categories of people from possessing firearms. Three circuits have rejected that rights-denying approach, demanding—in accordance with this Court's precedent—that the government justify even categorical bans as applied to non-violent felons. And even among those two camps, there are internal divisions. That widespread disarray warrants this Court's attention. Indeed, multiple court-of-appeals judges have implored this Court for further guidance on this issue. And this is a good vehicle to answer the methodological question in addition to the merits, as the Ninth Circuit clearly erred on both fronts while sitting en banc. The Court should grant certiorari and resolve this entrenched circuit split once and for all.

I. The Decision Below Deepens A Circuit Split.

1. Seven circuits—the First, Second, Fourth, Eighth, Tenth, and Eleventh Circuits, plus now the Ninth Circuit—have held post-*Bruen* "that §922(g)(1) is constitutional as applied to *all* felons." *United States v. Mancilla*, --- F.4th ----, 2025 WL 2610452, at *4 n.5 (5th Cir. Sept. 10, 2025) (Elrod, J., concurring). These seven circuits eschew as-applied challenges entirely, deeming 18 U.S.C. §922(g)(1) constitutional in *all* applications, even as to non-violent offenders.

Zherka v. Bondi, 140 F.4th 68 (2d Cir. 2025), is illustrative. Despite reviewing "the historical tradition of disarmament laws" and finding nothing like "modern felon-in-possession laws" in "the pre-Founding and Founding periods," *id.* at 78-79, the Second Circuit reasoned that historical "[c]lass-wide … legislative disarmament" laws against Catholics, Native Americans, Blacks, and the

homeless immunize §922(g)(1) from any constitutional attack. *Id.* at 86-91. The Second Circuit thus held, as the Ninth Circuit did here, that the judiciary must defer to a legislature's views of which groups are too "dangerous" to keep and bear arms. *Id.* at 90.

The Fourth Circuit reached the same conclusion in *United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024). After it too reviewed a few historical examples of disarmament, the court purported to derive from them a tradition of "disarm[ing] categories of people based on a legislative determination that such people 'deviated from legal norms.'" *Id.* at 707. Applying this principle, the court saw no constitutional problem with *any* application of §922(g)(1), deeming it a permissible exercise of the legislature's supposedly broad discretion to disarm categories of persons of its choosing. *Id.*

The Eighth Circuit has likewise adopted a categorical rule barring as-applied challenges to §922(g)(1), concluding that "legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms." *United States v. Jackson*, 110 F.4th 1120, 1127 (8th Cir. 2024). Much like the decision below, the Eighth Circuit "ma[de] no attempt to explain how the burden imposed by the felon-in-possession statute, which lasts for a lifetime, is comparable to any of the Founding-era laws it discusses." *United States v. Jackson*, 121 F.4th 656, 660 (8th Cir. 2024) (Stras, J., dissenting from the denial of rehearing en banc).

The Tenth and Eleventh Circuits have similarly foreclosed as-applied challenges to §922(g)(1), but they

have taken a slightly different approach, rejecting *any* consideration of the historical record. *See Mancilla*, 2025 WL 2610452, at *4 n.5 (Elrod, J., concurring). While the Ninth Circuit sung from a similar hymnal, describing historical tradition as merely "confirm[ing]" its holding, App.14, the Tenth and Eleventh Circuits have gone even further in absolving the government of its historical-tradition burden. In *Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025), for example, the Tenth Circuit relied exclusively on pre-*Rahimi* precedent that (like the first half of the decision below) rested entirely on *Heller*'s dicta about felon-in-possession laws being "presumptively lawful." *See id.* at 1265. The Eleventh Circuit has taken the same tack, holding that neither *Bruen* nor *Rahimi* displaced prior circuit precedent upholding §922(g)(1) based solely on *Heller*'s "presumptively lawful" dicta. *See, e.g.*, *United States v. Dubois*, 139 F.4th 887, 893 (11th Cir. 2025). Much like in the Ninth Circuit, then, felons in the Tenth and the Eleventh Circuits are "exclud[ed]" from keeping or bearing arms as a "categori[cal]" matter based on the (il)logic that *Heller* "limit[ed]" the Second Amendment "right to 'law-abiding and qualified individuals.'" *Id.*; *Vincent*, 127 F.4th at 1264-65; *accord* App.9-10 (reaffirming pre-*Bruen* caselaw holding that "felons are categorically different from the individuals who have a fundamental right to bear arms" (quoting *Vongxay*, 594 F.3d at 1115)).

The First Circuit, for its part, has largely followed suit. In *United States v. Langston*, 110 F.4th 408 (1st Cir. 2024), it held that the government need not provide any "historical evidence" to justify §922(g)(1) because *Heller* said "that felon-in-possession laws are

presumptively lawful." *Id.* at 419-20. While that decision was made on "plain-error review," it portends the First Circuit's likely approach in future cases. *Id.*

2. On the other side of the ledger are the Third, Fifth, and Seventh Circuits, which have (correctly) held that *Bruen* abrogated their past §922(g)(1) precedent, such that courts now must evaluate as-applied challenges to §922(g)(1) by reference to the Second Amendment's text at the threshold and then to whether historical tradition supports disarming an individual for her predicate felony conviction(s).

In *Range v. Attorney General*, the en banc Third Circuit held that the government could not strip a criminal defendant of his Second Amendment rights based on his underlying, non-violent felony conviction for food-stamp fraud. 124 F.4th 218, 224 (3d Cir. 2024). The court started off by recognizing that *Bruen* abrogated its prior precedent dictating "who" may keep and bear arms and that, in light of *Bruen*, the "focus" in answering that question in the §922(g)(1) context—like all others—must be on text and historical tradition. *Id.* at 225. *Range* thus rejected any approach that "devolves authority to legislatures to decide whom to exclude from 'the people'" because "such 'extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label.'" *Id.* at 228.

That guiding principle informed the court's historical-tradition analysis, where it rejected the government's reliance on *Heller*'s dicta regarding "presumptively lawful" felon-in-possession laws. *Id.* at 228-30. Rather than "defer blindly to" Congress' interest-balancing in §922(g)(1), the Third Circuit

required the government to justify the sweeping scope of the law as analogous to Founding-era and later traditions. *Id.* at 230-31. But the government's analogies to (clearly unconstitutional) categorical disarmament laws based on class, race, and religion were "far too broad," in the Third Circuit's view, and in any event were not comparably justified with respect to §922(g)(1)'s application to Range—who, like Duarte here, lacked any demonstrated propensity for violence, much less violence with a firearm. *Id.* at 229-30. "For similar reasons," the Third Circuit found that neither "Founding-era laws that forfeited felons' weapons or estates" nor those that prescribed death as punishment for serious crimes constitute "analogues" to §922(g)(1). *Id.* at 231-32. The Third Circuit thus rejected essentially every premise and conclusion that the First, Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits reached before and after it.

The Fifth Circuit walked a similar path to the Third in *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024). *Diaz* involved an as-applied challenge raised by a defendant who previously was convicted of various non-violent felonies, including grand theft auto. *Id.* at 467. Rather than defer to pre-*Bruen* circuit precedent that foreclosed Second Amendment challenges to §922(g)(1) based on a combination of interest-balancing and *Heller*'s "presumptively lawful" dicta, the Fifth Circuit held that the relevant question is whether there is "a longstanding tradition of disarming someone with a [felony] history analogous to [the defendant's]." *Id.*; *accord, e.g.*, *Mancilla*, 2025 WL 2610452 (per curiam); *United States v. Bullock*, 123 F.4th 183, 185 (5th Cir. 2024). In the Third and Fifth Circuit, then, *Heller*'s "dicta

cannot supplant the most recent analysis set forth by [this] Court in *Rahimi* [and] *Bruen*." *Diaz*, 116 F.4th at 466. And that analysis does not justify applying §922(g) to anyone and everyone who was ever convicted of any kind of felony.[2]

The Seventh Circuit reasoned similarly in *Atkinson v. Garland*, 70 F.4th 1018 (7th Cir. 2023). The defendant there filed an as-applied challenge to §922(g)(1), arguing that his 24-year-old non-violent felony conviction for mail fraud should not forever strip him of his Second Amendment rights. *Id.* at 1021-22. The district court dismissed the case based on then-binding Seventh Circuit precedent that foreclosed as-applied challenges to §922(g)(1). *Id.* at 1022. On appeal, the Seventh Circuit vacated that decision in light of *Bruen*. *See id.* But before it remanded for the district court to consider *Bruen* in the first instance, it rejected the argument that *Heller*'s "presumptively lawful" dicta empowers courts "to sidestep *Bruen*." *Id.* at 1022. The Seventh Circuit also took the opportunity to reject the government's analogy to Founding-era laws that subjected felons to "execution and estate forfeiture." *Id.* Finally, it warned the government that on remand it would need "to focus on how the substance of historical examples

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[2] While the Fifth Circuit ultimately upheld §922(g)(1) as applied to Diaz, it did so only because the government had produced historical "evidence … specifically targeted to Diaz's circumstances," including a tradition of "authorizing severe punishments for thievery and permanent disarmament in [analogous] cases." 116 F.4th at 468-71. And the court clarified that its "holding is not [simply] premised on the fact that Diaz is a felon," as any such reasoning would fail "the level of historical rigor required by *Bruen* and its progeny." *Id.* at 469.

compares to §922(g)(1)"; blind deference to legislative judgment will not do. *Id.* at 1023-25.

3. Rounding out the circuits to have addressed the issue is the Sixth, which is betwixt and between. In *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024), the Sixth Circuit firmly rejected application of its prior precedent upholding §922(g)(1), holding that "*Bruen* requires a history-and-tradition analysis that our circuit hasn't yet applied to this statute." *Id.* at 645. Writing for a majority, Judge Thapar found that "other circuits have read too much into the Supreme Court's repeated invocation of 'law-abiding, responsible citizens,'" and that "construing the Second Amendment to apply only to such citizens," to the categorical exclusion of felons, "is inconsistent with both *Heller* and the individualized nature of the right to keep and bear arms." *Id.* at 646-47. But in applying *Bruen*'s historical-tradition test, the Sixth Circuit did not analyze the §922(g)(1) challenge before it by focusing on whether the government had proven that historical tradition supports depriving people of their Second Amendment rights based on the predicate offenses underlying the defendant's conviction. Instead, it concluded that because some historical regulations allowed "individuals [to] demonstrate that their particular possession of a weapon posed no danger to peace," a defendant challenging §922(g)(1) as applied to himself must make an individualized showing "that he is not dangerous." *Id.* at 657. According to the court, because "officials of old" made individualized assessments of dangerousness, courts today must "focus on each individual's *specific characteristics*," including not only his "entire criminal

record" but any "information beyond [his] criminal convictions" as well. *Id.* at 657- 58, 658 n.12.

* * *

In sum, multiple circuits have embraced the flawed logic the Ninth Circuit employed below, other circuits have explicitly rejected it, and courts generally are hopelessly fractured on how to assess as-applied challenges to §922(g)(1). This clear and intractable conflict and confusion "about [key aspects] of the analysis" calls out for this Court's resolution. *Morton*, 123 F.4th at 498 n.2.

II. The Decision Below Is Wrong.

1. Under this Court's precedents, all Second Amendment challenges are subject to the same burden-shifting analysis, steeped in "the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. Under that constitutional framework, if the conduct in which someone wants to engage is covered by the text of the Second Amendment, then it is presumptively protected, and the government bears the burden to justify its regulation. *Id.* To do so, the government must identify historical firearm restrictions that are analogous to the modern challenged regulation in their "how and why"—i.e., the "modern and historical regulations" must "impose a comparable burden on the right of armed self-defense" that "is comparably justified." *Id.* at 29.

The Ninth Circuit's analysis in this case should therefore have been simple. The Second Amendment no doubt covers Duarte's proposed conduct—i.e., "to keep and bear arms for self-defense." *Id.* at 17. And Duarte is undeniably part of "the people" the Second Amendment protects. As *Heller* explained, that term

"unambiguously refers to all members of the political community,"—i.e., "all Americans"—"not an unspecified subset." 554 U.S. at 580-81. That means that the Second Amendment presumptively protects Duarte's right to keep and bear arms regardless of his non-violent felony convictions, as he is an American citizen who is "part of [our] national community." *Id.* at 580.

Answering the historical-tradition question here should have been equally straightforward. As then-Judge Barrett noted, "[h]istory does not support the proposition that felons lose their Second Amendment rights solely because of their status as felons." *Kanter*, 919 F.3d at 464 (Barrett, J., dissenting). Nor does it support applying §922(g)(1) to strip Duarte in particular of his Second Amendment rights based on his *non-violent* offenses. Indeed, not even the earliest version of §922(g)(1) itself—adopted in 1938—justifies its application here. Of course, one law from 1938 could not demonstrate a "longstanding" tradition under *Rahimi*, 602 U.S. at 693-97 (focusing on Founding-era sources), or *Bruen*, 597 U.S. at 34 (focusing on Founding- and Reconstruction-era sources). Even so, the earliest version of §922(g)(1) "applied only to *violent* criminals," such as those convicted of "murder, rape, kidnapping, and burglary." *Range*, 124 F.4th at 229. While that version (or application) of the law may be justified by our Nation's historical tradition of disarming individuals who have been "judge[d] dangerous," *Rahimi*, 602 U.S. at 694, 698, there is no analogous tradition justifying the categorical disarmament of citizens convicted of *non-violent* misconduct just because it happens to be punishable as a felony.

2. Rather than follow *Bruen*'s framework to that straightforward conclusion, the Ninth Circuit dodged it. According to the Ninth Circuit, this Court already blessed §922(g)(1) in *Heller* by caveating that it did not mean "to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." App.9 (quoting *Heller*, 554 U.S. at 626-27). Because *Heller* also suggested in a footnote that such "regulatory measures" are "presumptively lawful," *Heller*, 554 U.S. at 627 n.26, the Ninth Circuit held that there is no need to evaluate "historical tradition" to determine §922(g)(1)'s constitutionality. App.9-14. This Court's dictum in *Heller* and later "assurances" regarding the "presumptively lawful regulatory measures" in *Rahimi* were all the Ninth Circuit needed "to recognize a historical tradition of firearm regulation that supports the categorical application of §922(g)(1) to felons like Duarte." App.9-14.

The problems with that shortcut approach are legion. For one thing, *Heller* described such measures as "*presumptively* lawful," *Heller*, 554 U.S. at 627 n.26 (emphasis added), which makes sense only if they could still be subject to challenge on (at the very least) an as-applied basis. For another, *Heller* cited no "longstanding prohibitions on the possession of firearms by felons," *see id.* at 626-27, so it betrays reason to suggest that it supplied the "historical tradition" necessary to justify all such laws, *see* App.13. Indeed, *Heller* expressly disclaimed any such inquiry, noting that it did "not undertake an exhaustive historical analysis today of the full scope of the Second Amendment." 554 U.S. at 624, 635. And *Heller* acknowledged that the Court would need to "expound upon the historical justifications for" those

"regulatory measures" should they present themselves in future cases. *Id.* at 635; *see also Kanter*, 919 F.3d at 453 (Barrett, J., dissenting) (*Heller* "explicitly deferred analysis of this issue").

If this Court *had* examined the history of felon-in-possession laws in any of its past cases, it would have discovered that they simply are not "longstanding"—at least not as *Bruen* and *Rahimi* defined that term. *See Rahimi*, 602 U.S. at 693-95 (focusing on Founding-era sources); *Bruen*, 597 U.S. at 34, 59-60 (Founding- and Reconstruction-era sources). "Prohibitions on the possession of firearms by felons" were not adopted in any state until the 1920s and 1930s, and not by the federal government until 1938. *Range*, 124 F.4th at 228-29, 229 n.9. And, as noted above, the 1938 prohibition applied *only* to felons convicted of *violent* crimes. It was not until 1968 that the current version of §922(g)(1)—which applies to violent and non-violent felons alike—was enacted. *See* Gun Control Act of 1968, Pub. L. No. 90-618, §922(g)(1), 82 Stat. 1213, 1220 (1968). None of those twentieth-century laws is "longstanding." *See Bruen*, 597 U.S. at 66 & n.28.

But even if §922(g)(1) itself *were* "longstanding," that would not excuse the decision below, as *Bruen* and *Rahimi* were emphatic that "a court [may] conclude that" a restriction on arms-bearing conduct "falls outside the Second Amendment's 'unqualified command'" "[*o*]*nly* if" the government proves that it "is consistent with this Nation's historical tradition." *Id.* at 17 (emphasis added); *see also Rahimi,* 602 U.S. at 691-92 ("[W]hen the Government regulates arms-bearing conduct, … it bears the burden to 'justify its regulation'" by showing that it "is consistent with the

principles that underpin our regulatory tradition."). And far from exempting the categories discussed in *Heller*'s dicta from that rule, *Bruen* expressly applied it to one of them. New York argued that the Sullivan Law could be justified as a "law[] forbidding the carrying of firearms in sensitive places." *Bruen,* 597 U.S. at 30 (quoting *Heller,* 554 U.S. at 626). Yet the Court did not treat the law as presumptively constitutional just because New York made that argument. Nor did it conclude that it must decide whether that was a fair characterization to determine whether it fell into a special "presumptively lawful" category under *Heller*. The Court instead rejected New York's argument by scrutinizing it against historical tradition, explaining that "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department." *Id.* at 31.

As that analysis reflects, the far more sensible understanding of *Heller*'s dicta is that the Court was simply recognizing the practical reality that certain measures are more likely to be consistent with historical tradition, not that there is no need to assess whether they actually are. 554 U.S. at 627. It blinks reality to suggest, as the decision below holds, that *Heller* meant to immunize a host of "regulatory measures" including §922(g)(1), in passing and without any analysis. Again, that much should be obvious given the Court's "*presumptively* lawful" description itself, which "implies that felon-in-possession laws [could] be unlawful in at least *some* instances." App.79 (Van Dyke, J., dissenting); *Kanter*, 919 F.3d at 453 (Barrett, J., dissenting) (suggesting

that *Heller*'s dictum could "mean that as-applied challenges are available").

To get around *Bruen*, the Ninth Circuit suggested that this Court "limited the scope of its opinion to 'law-abiding citizens,'" because this Court penned the phrase "fourteen times" in its 63-page-long decision. App.10-11. But this Court already rejected a similar argument in *Rahimi*, where it explained that *Heller* and *Bruen* "used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right," not to opine on what makes someone "responsible" or to address the Second Amendment "status of citizens who" are not. *Rahimi*, 602 U.S. at 701-02. So too with "law-abiding": The Court "did not define the term and said nothing about the status of citizens who" do not fit within it. *Id.* at 702. As with "responsible," "[t]he question was simply not presented." *Id.* This Court thus has not even identified what makes someone "law-abiding," let alone decided what significance that label has for disarmament laws.

3. After holding that *Heller*'s dicta immunized §922(g)(1), the Ninth Circuit paid lip-service to *Bruen* and *Rahimi*, suggesting that they "confirm[]" the propriety of its shortcut. App.13-14. Wrong again.

Unable to find any actual historical tradition to support its application of §922(g)(1) to disarm Duarte based on his non-violent offenses, the court purported to divine, from two disparate categories of laws, two broad "principle[s]" that it (mis)characterized at such a "high level of generality" as to completely "water[] down the [Second Amendment] right," *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring).

a. First, the court surmised that "legislatures may disarm those who have committed the most serious crimes"—by which it meant anything punishable as a felony—because "the greater punishment of death and estate forfeiture was permissible to punish felons" in colonial times and the early Republic. App.21-23. That reasoning suffers from a basic logic problem: That "the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society." *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting). After all, "we wouldn't say that the state can deprive felons of the right to free speech," the "right to a jury trial, or [the right to] be free from unreasonable searches and seizures" "because felons lost that right via execution at the time of the founding." App.95 (VanDyke, J., dissenting) (quoting *Williams*, 113 F.4th at 658, and *Kanter*, 919 F.3d at 461-62 (Barrett, J., dissenting)). The Ninth Circuit's contrary approach turns the Second Amendment into "a second-class right." *Bruen*, 597 U.S. at 70.

The historical support for the Ninth Circuit's "premise" is also "shaky" at best. *Kanter*, 919 F.3d at 459 (Barrett, J., dissenting). For one thing, what constitutes a felony today has ballooned, and is thus nothing like it was at the Founding. *See id.* at 458-60; App.96-100 & n.7 (Van Dyke, J., dissenting). So the "most serious crimes" principle elides the critical question of what kinds of crimes today can be considered the "most serious" consistent with historical tradition. Moreover, as Judge VanDyke's dissenting opinion thoroughly lays out—with assistance from then-Judge Barrett's dissent in

Kanter and Judge Bibas's dissent in *Folajtar v. Attorney General*, 980 F.3d 897 (3d Cir. 2020)—the severe punishments of "death and estate forfeiture" for felony convictions at English common law were "frayed" "[e]ven before the Founding," and ultimately severed by the time of the Constitution's ratification. App.90-96. That is thus not a "longstanding" tradition in any sense of the word.

To boot, the court's "evidence of the 'unbroken understanding that the legislature could permanently disarm those who committed the most serious crimes' is just one Colonial-era English enactment and two *draft* proposals from the Founding-era and succeeding decades." App.85 (VanDyke, J., dissenting). If "*three* colonial regulations" (that at least were enacted) did not "suffice to show a tradition of public-carry regulation" in *Bruen*, 597 U.S. at 46, it is a mystery how the Ninth Circuit could credit the government's far lesser showing here.

The three historical analogues the court referenced also fail on their own terms. "The 1689 English Bill of Rights"—which made clear that "Parliament" had unquestioned "regulatory power over firearms," App.23-24 (majority)—was *criticized* by our Founders because it was "secured to protestant subjects only" and protected merely "bearing arms for their defence, 'suitable to their conditions, and as allowed by law,'" William Rawle, *A View of The Constitution of The United States of America* 126 (Philip H. Nicklin ed. 1829). The Second Amendment, by contrast, was an "enlargement from the English Bill of Rights," not a privilege subject to the whims of the legislature. *See* Thomas M. Cooley, *The General*

Principles of Constitutional Law in the United States of America 270 (1880). The Ninth Circuit's "indiscriminate[] attribut[ion]" of English law "to the Framers of our own Constitution" is exactly the sort of shoddy historical analysis that *Bruen* explicitly cautioned against. 597 U.S. at 35.

The two other "historical analogues" the Ninth Circuit cited barely merit mention. Both were draft proposals—one from anti-federalist delegates in Pennsylvania and the other from a Louisiana statesman. *See* App.23-24. The former "failed to even obtain a majority of its own convention," and the latter was "never adopted" either. App.88-89 (VanDyke, J., dissenting). They thus provide no evidence of any historical tradition, let alone one that could justify §922(g)(1). And at best, the draft proposal lodged by the Pennsylvania anti-federalists—which would have provided "a right to bear arms 'unless for crimes committed, or real danger of public injury from individuals," App.88—evinced a concern "about threatened violence and the risk of public injury." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting). It was not "about felons in particular or even criminals in general." *Id.*

Oddly, the decision below appears to acknowledge that reality, as it describes the motivations (i.e., the "why") for these measures as to "bar possession of a firearm from persons" with "violent tendencies." App.25. But Duarte, like many and perhaps most people subject to §922(g)(1), was convicted of *non*-violent felonies, and the government has never suggested that he is, or is particularly likely to become, violent. Just as it failed to explain how the

government's "modern and historical regulations impose a comparable burden on the right of armed self-defense," the Ninth Circuit completely failed to explain how §922(g)(1)'s application to Duarte "is comparably justified" to historical draft proposals purposed to disarm *violent* individuals. Accordingly, its conclusion "that the severity of punishment at the founding implicitly sanctions the blanket stripping of rights from all felons," violent or not, "is misguided." *Kanter*, 919 F.3d at 461 (Barrett, J., dissenting).

b. The second tradition the court purported to identify fares even worse. According to the Ninth Circuit, a legislature may disarm without scrutiny any "categories of persons" that it believes "present a special danger" to society, without regard to whether that category bears any resemblance to a category disarmed at the founding. App.28-34. For support, the Ninth Circuit cited laws disarming Catholics, Native Americans, slaves, and free Blacks, in addition to laws disarming minors, those of "unsound mind," drunkards, and "tramps" (i.e., the homeless). App.28-31. Not only do those laws "reflect overgeneralized and abhorrent prejudices that would not survive legal challenges today," App.31-32, but they are also poor historical analogues for §922(g)(1).

As to the latter set of laws, none dates back to the Founding, and in any event none is "relevantly similar" in the "how" to §922(g)(1), which *permanently* strips the right to keep and bear arms; all of the historical laws were temporary restrictions. *See* App.111-14 (VanDyke, J., dissenting). And while the former restrictions dated further back, many of them too were temporary. App.106-07 (VanDyke, J.,

dissenting). What is more, they applied largely to groups that were not considered "persons" at the time, and regardless, were based on the fear that such groups were likely to "take up arms against the government." App.100-02 (VanDyke, J., dissenting); *see also Kanter*, 919 F.3d at 464 (Barrett, J., dissenting). But §922(g)(1) does not serve a remotely similar purpose. The various "abhorrent" and unconstitutional laws the court cited thus fail *Bruen*'s "why" test as well.

The consequences of the Ninth Circuit's decision to invoke those laws to bless any and all applications of §922(g)(1)'s are perverse. As the majority admitted, its decision means that legislatures are "permitted to categorically disarm" any disfavored group "they deem[] dangerous" with impunity. App.31-34. That defies *Bruen*'s clear teaching that "judicial deference to legislative interest balancing … is not deference that the [Second Amendment] demands." 597 U.S. at 26. Of course, the government can regulate the right to keep and bear arms on a non-individualized basis, but it "does not get a free pass simply because [it] has established a 'categorical ban.'" *Kanter*, 919 F.3d at 465 (Barrett, J., dissenting) (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)).

c. Taking the court's two principles of judicial deference to legislative interest-balancing "together" does not fix things. *Contra* App.36-59 (Collins, J., concurring in the judgment). In Judge Collins' view, combining the odious historical tradition of disarming Catholics, Blacks, and Native Americans with the historical tradition of punishing felons with estate forfeiture or death suffices to "cabin" the scope of

deference to legislative disarmament by "tether[ing it] to some group that was actually [disarmed] at the founding," namely "felons." App.120 (VanDyke, J., dissenting). But that distinction makes no difference, as it leaves legislatures free to eliminate Second Amendment rights by defining all manner of things as felonies, without regard to whether they involve the kind of conduct likely to make someone particularly dangerous. *See, e.g.*, Oral Argument, at 16:49-17:19, *United States v. Duarte*, 22-50048 (9th Cir. Dec. 4, 2023), perma.cc/E3PR-782P (government counsel agreeing that cutting off a mattress tag could be a disarmable felony). Judge Collins' position equally ignores the vast difference between felony convictions at the Founding and today, and elides that the pre-Founding practice of levying severe punishments for all felony convictions was frayed and severed long ago—so it is not, in fact, part of this Nation's historical tradition at all, much less its unbroken tradition of firearm regulation. *See* pp.25-26, *supra*.

At bottom, Judge Collins' view does nothing to cure the basic problem with the majority's opinion: Allowing legislatures to disarm any individual who violates any criminal laws *they enact*, without reference to the nature of the conduct in which someone engaged, still subjects "Second Amendment rights" to "the sufferance of the legislature." App.47 (Collins, J., concurring in the judgment).

III. The Question Presented Is Exceptionally Important, And This Case Is An Effective Vehicle For This Court To Address It.

How to resolve §922(g)(1) challenges is an exceptionally important question given the frequency

with which the federal government seeks to dispossess citizens of firearms under §922(g)(1). In fiscal year 2024 alone, over 90% of all §922(g) convictions were under §922(g)(1). U.S. Sent'g Comm'n, *Quick Facts: 18 U.S.C. §922(g) Firearms Offenses* (May 2025), perma.cc/2GZH-ADYB. And yet, "only 18.2 percent of felony convictions in state courts and 4.2 percent of federal felony convictions were for 'violent offenses.'" *Jackson*, 110 F.4th at 1125 n.2 (citation omitted). Adding that data to the increasing volume of constitutional challenges to those convictions, it is critical that courts have a shared (and correct) understanding of how to resolve them. Indeed, the government itself has made precisely this point in seeking review of decisions unfavorable to its maximalist position regarding the constitutionality of §922(g)(1), both in this very case, and in others. *See, e.g.*, PFREB.19-20, *United States v. Duarte*, No. 22-50048 (9th Cir. May 14, 2024), Dkt.72-1; Pet.for.Cert.24-25, *Garland v. Range*, No. 23-374 (U.S. Oct. 5, 2023).

Moreover, there are more than 19 million Americans—a non-trivial proportion of the citizenry—with felony records. *See* Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 Demography 1795, 1806 (2018), perma.cc/6TNR-NEFU. Left standing, the decision below effectively strips a sizable portion of the adult population of Second Amendment protections, based on absolute deference to the legislature's view that they are unworthy of exercising their inalienable rights. *See* App.9-10.

There is no need to await further percolation in the lower courts, as all but two circuits have spoken, and there are no signs that they will all be able to independently reconcile their various disagreements about even the most fundamental aspects of the Second Amendment analysis in this area. To the contrary, the intractable confusion and conflict has already prompted the circuits to implore this Court for guidance. *See, e.g.*, *Morton*, 123 F.4th at 498 n.2 (asking "the Supreme Court [to] resolve" the "significant disagreement" among the circuits on this issue); *Jackson*, 121 F.4th at 660 (Stras, J., dissenting from the denial of rehearing en banc) (underscoring that "[t]he constitutionality of the felon-in-possession statute is as 'exceptionally important' as ever").

This case presents a suitable vehicle for providing much-needed guidance. The Ninth Circuit's en banc decision entrenches a dangerously broad theory of judicial deference to legislative power over constitutional rights, under which courts must defer to modern legislatures' disarmament of disfavored groups. And while there was some debate below regarding the standard of review, "the Government acknowledge[d]" that "under either … de novo … or the plain error [review], … the merits of Duarte's constitutional claim" are squarely presented and ripe for adjudication. App.8. The majority's decision on the merits, moreover, raises the troubling prospect of déjà vu all over again, with the same courts that distorted *Heller* in service of upholding restrictive carry regimes now distorting *Bruen* and *Rahimi* in service of upholding sweeping disarmament laws. Indeed, courts are routinely examining §922(g)(1) challenges as if the only thing this Court has ever said

is that Second Amendment rights are "not unlimited," and that felon-in-possession laws are "presumptively lawful." It is high time to say more, and this case presents an excellent opportunity to do so.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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October 6, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-50048

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
STEVEN DUARTE, AKA Shorty,
Defendant-Appellant.

Argued and Submitted En Banc: Dec. 11, 2024
Filed: May 9, 2025

Before: Mary H. Murguia, *Chief Judge*, and Kim McLane Wardlaw, Johnnie B. Rawlinson, Sandra S. Ikuta, John B. Owens, Ryan D. Nelson, Daniel P. Collins, Lawrence VanDyke, Holly A. Thomas, Salvador Mendoza, Jr. and Roopali H. Desai, *Circuit Judges*.

EN BANC OPINION

WARDLAW, Circuit Judge:

18 U.S.C. § 922(g)(1) prohibits those who have been "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" from

receiving or possessing a firearm. Today, § 922(g)(1) is one of the most significant gun laws in our modem regulatory framework. Section 922(g)(1) accounts for the highest percentage of convictions under § 922(g),[1] and is considered the "cornerstone" of the federal background check system for firearm purchases.[2] Following the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), every circuit to address the facial constitutionality of § 922(g)(1) upheld its categorical constitutionality. *Medina v. Whitaker*, 913 F.3d 152, 155 (D.C. Cir. 2019) (collecting cases). And no circuit, before the Supreme Court issued its decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), had held that the law was unconstitutional as applied to certain felons. *See id.*

This was the state of Second Amendment affairs when Steven Duarte was indicted, tried, convicted, and sentenced as a felon in possession of a firearm in violation of § 922(g)(1). It was only after he filed his notice of appeal to our court, that the Supreme Court issued its decision in *Bruen*, which worked a sea

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[1] The United States Sentencing Commission estimates that 88.5% of convictions under § 922(g) are due to prior felony convictions. *See* U.S. Sent'g Comm'n, Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY23.pdf; *see also Rehaif v. United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting) (noting that § 922(g) "probably does more to combat gun violence than any other federal law").

[2] Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 Cardozo L. Rev. 1573, 1575 (2022); *id.* at 1594-98 (describing § 922(g)(1)'s impact on the federal background check system).

change in the analytical framework that the federal courts had developed since *Heller* issued. The Court in *Bruen* rejected the "two-step framework" Courts of Appeals had "coalesced around" since *Heller* to evaluate whether gun regulations violate the Second Amendment. *Bruen*, 597 U.S. at 17. The Court clarified the standard for analyzing Second Amendment claims:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.

Id. at 24.

Bruen was issued on June 23, 2022; Duarte filed his opening brief in our court on January 27, 2023, and for the first time challenged the constitutionality of § 922(g)(1) as applied to him.

Duarte argues that § 922(g)(1) is unconstitutional as applied to non-violent felons like him under *Bruen*'s analytical framework. While this is an issue of first impression for our court, we do not write on a blank slate, as Courts of Appeals across the nation have been wrestling with fresh challenges to the viability of § 922(g)(1) in the wake of *Bruen.* Four circuits have upheld the categorical application of § 922(g)(1) to all felons. *See United States v. Hunt*, 123 F.4th 697, 707-08 (4th Cir. 2024) (rejecting an as-applied challenge on a categorical basis); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024) (same); *Vincent v. Bondi*, 127 F.4th 1263, 1265-66 (10th Cir. 2025)

(rejecting an as-applied challenge because neither *Bruen* nor *United States v. Rahimi*, 602 U.S. 680 (2024), abrogated circuit precedent foreclosing such a challenge); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, No. 24-5744, 2025 WL 76413 (U.S. Jan. 13, 2025) (holding that *Bruen* did not abrogate circuit precedent foreclosing such challenges).

Other circuits have rejected as-applied challenges, but have left open the possibility that § 922(g)(1) might be unconstitutional as applied to at least *some* felons. *See United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024) (rejecting an as-applied challenge because the defendant's underlying felony was sufficiently similar to a death-eligible felony at the founding); *United States v. Williams*, 113 F.4th 637, 661-62 (6th Cir. 2024) (rejecting an as-applied challenge because the defendant's criminal record sufficiently showed that he was dangerous enough to warrant disarmament). By contrast, the Third Circuit has held that § 922(g)(1) is unconstitutional as applied to a felon who was convicted of making a false statement to secure food stamps. *See Range v. Att'y Gen.*, 124 F.4th 218, 222-23 (3d Cir. 2024) (en banc). And, as of the date of this writing, the First and Second Circuits have declined to address constitutional challenges to § 922(g)(1) on the merits, while the Seventh Circuit has yet to definitively resolve an as-applied challenge. *See United States v. Langston*, 110 F.4th 408, 419-20 (1st Cir. 2024) (rejecting an as-applied challenge because there was no "plain" error); *United States v. Caves*, No. 23-6176-CR, 2024 WL 5220649, at *1 (2d Cir. Dec. 26, 2024) (same); *United States v. Gay*, 98 F.4th 843, 846-47 (7th Cir. 2024)

(assuming for the sake of argument that there is some room for an as-applied challenge, but rejecting the defendant's specific as-applied challenge because his prior felonies included aggravated battery of a peace officer and possession of a weapon while in prison).

Today, we align ourselves with the Fourth, Eighth, Tenth and Eleventh Circuits and hold that § 922(g)(1) is not unconstitutional as applied to non-violent felons like Steven Duarte.

I. Factual and Procedural History

On March 20, 2020, at approximately 9:30 p.m., Inglewood police officers observed a car drive through a stop sign. Duarte was the only passenger in the vehicle. As officers activated their car's lights and sirens, Duarte threw a pistol, without its magazine, out of the car's rear window. After asking the driver and Duarte to step out of the vehicle, officers searched the car and found a magazine loaded with six .380-caliber bullets stuffed between the center console and the front passenger seat, within reach from the passenger compartment. The magazine fit "perfectly" into the discarded pistol. In September 2020, a federal grand jury charged Duarte with a single count of violating § 922(g)(1).

The indictment charged Duarte with knowingly possessing a firearm with knowledge that he had previously been convicted of at least one of five felonies: (1) Vandalism, in violation of California Penal Code Section 594(a), in 2013; (2) Felon in Possession of a Firearm, in violation of California Penal Code Section 29800(a)(1), in 2016; (3) Evading a Peace Officer, in violation of California Vehicle Code Section 2800.2, in 2016; (4) Possession of a Controlled

Substance for Sale, in violation of California Health and Safety Code Section 11351.5, in 2016; and (5) Evading a Peace Officer, in violation of California Vehicle Code Section 2800.2, in 2019.

Following a jury verdict of guilty, the district court sentenced Duarte to a below-guidelines sentence of 51 months in prison. Duarte timely filed his notice of appeal on March 9, 2022. Duarte did not challenge his indictment or conviction as violating his Second Amendment rights before the district court.

On June 23, 2022, during the pendency of Duarte's appeal, the Supreme Court decided *Bruen*. Based on this new authority, Duarte argued in his opening brief to our court that because he has only non-violent prior felony convictions, § 922(g)(1) is unconstitutional as applied to him. He argued that our prior precedent upholding felon-in-possession laws as applied to non-violent felons is clearly irreconcilable with *Bruen.* He further argued that under Federal Rule of Criminal Procedure 12(c)(3) he demonstrated good cause to raise this defect in the indictment now, as it had been previously foreclosed by Ninth Circuit precedent.

A divided panel of our court accepted Duarte's Second Amendment argument. *See United States v. Duarte*, 101 F.4th 657, 661 (9th Cir. 2024), *reh'g en bane granted*, *opinion vacated*, 108 F.4th 786 (9th Cir. 2024). First, the panel majority found that Duarte demonstrated good cause for failing to raise his Second Amendment challenge to the district court as a Rule 12(b)(3) pre-trial motion because at the time our circuit precedent in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), foreclosed his Second

Amendment argument. *Duarte*, 101 F.4th at 663. Second, the panel found that de novo review applied because "[w]e normally review claims of constitutional violations *de novo*," *id.*, and once good cause is shown, permitting our consideration of the argument for the first time, we "apply whatever default standard of review would normally govern the merits," *id.* Third, the majority determined that *Vongxay* was "clearly irreconcilable" with *Bruen*, and thus, its holding that § 922(g)(1) applied to non-violent felons was no longer controlling under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc). *Duarte*, 101 F.4th at 665.[3] Finally, applying the *Bruen* analytical framework, the panel majority held that the plain text of the Second Amendment covered Duarte's conduct and that the Government failed to meet its burden of showing that the application of § 922(g)(1) was consistent with the nation's historical tradition of firearm regulation. *Id.* at 671, 691.

A majority of the active judges of our court voted to rehear this appeal en banc. Having done so, although we agree that Duarte demonstrated good cause under Federal Rule of Criminal Procedure 12(c)(3), we now hold that § 922(g)(1) is not unconstitutional as applied to non-violent felons like Duarte.

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[3] Dissenting, Judge M. Smith contended that *Vongxay* was not clearly irreconcilable with *Bruen*, and thus, foreclosed Duarte's constitutional challenge. *Duarte*, 101 F.4th at 691-92 (M. Smith, J., dissenting).

II. Standard of Review

The parties disagree as to whether the good cause standard in Federal Rule of Criminal Procedure 12(c)(3) or the plain error standard in Federal Rule of Criminal Procedure 52(b) governs our review of Duarte's constitutional challenge. The Government asserts that because Duarte did not raise his constitutional challenge before the district court, we must review his conviction for plain error. By contrast, Duarte contends that de novo review is appropriate, because under our precedent "Rule 12's good-cause standard ... displac[es] the plain-error standard under [Rule] 52(b)." *United States v. Guerrero*, 921 F.3d 895, 897 (9th Cir. 2019). He argues further that once he demonstrates good cause, we should apply the default standard of review that would govern the merits; here, de novo review. *See United States v. Aguilera-Rios*, 769 F.3d 626, 629 (9th Cir. 2014); *United States v. Stackhouse*, 105 F.4th 1193, 1198 (9th Cir. 2024).

However, as the Government acknowledges, under either the good cause/de novo review standard or the plain error standard, we must address the merits of Duarte's constitutional claim. And, because under either standard, the outcome is the same—the district court did not err and § 922(g)(1) is constitutional as applied to non-violent felons—we need not decide which standard applies here. *See United States v. Begay*, 33 F.4th 1081, 1089-90 (9th Cir. 2022) (en banc); *see also Hunt*, 123 F.4th at 702 (assuming for the sake of argument that de novo review applies to a newly raised *Bruen* challenge to a § 922(g)(1) conviction). Therefore, "we assume without deciding that de novo review applies," the standard of

review for which Duarte advocates. *Begay*, 33 F.4th at 1089.

III. The Second Amendment

A. *Bruen* Did Not Alter *Heller*'s Assurances as to Felon-In-Possession Laws.

Although *Heller* recognized "an individual right to keep and bear arms," 554 U.S. at 595, "[l]ike most rights, the right secured by the Second Amendment is not unlimited," *id.* at 626. The Second Amendment does not provide an individual "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* Rather, the Supreme Court in *Heller* clarified that:

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

Id. at 626-27 (emphasis added). The Court further emphasized that such limitations on the right to bear arms were "presumptively lawful regulatory measures." *Id.* at 627 n.26.

Relying on this declaration, we have recognized that "[n]othing in *Heller* can be read legitimately to cast doubt on the constitutionality of § 922(g)(1)" and that "felons are categorically different from the

individuals who have a fundamental right to bear arms." *Vongxay*, 594 F.3d at 1114, 1115. And we have continued to foreclose Second Amendment challenges to § 922(g)(1), regardless of whether an underlying felony is violent or not. *See United States v. Phillips*, 827 F.3d 1171, 1174 (9th Cir. 2016). Indeed, since *Heller*, the Supreme Court has repeated its "assurances" that *Heller* "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill.'" *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (citation omitted).

Bruen did not change or alter this aspect of *Heller*. Rather, *Bruen* and *Rahimi* support *Vongxay*'s holding that § 922(g)(1) constitutionally prohibits the possession of firearms by felons. First, the *Bruen* Court largely derived its constitutional test from *Heller* and stated that its analysis was "consistent with *Heller* and *McDonald*." 597 U.S. at 10; *id.* at 17 ("In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."); *id.* at 26 ("The test that we set forth in *Heller* and apply today requires courts to assess whether modem firearms regulations are consistent with the Second Amendment's text and historical understanding"); *id.* at 31 ("Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement.").

Second, *Bruen* limited the scope of its opinion to "law-abiding citizens," evidenced by its use of the term fourteen times throughout the opinion. *See, e.g.*, *id.* at

8-9 ("In [*Heller* and *McDonald*], we recognized that the Second and Fourteenth Amendments protect the right of *an ordinary*, *law-abiding citizen* to possess a handgun in the home for self-defense." (emphasis added)); *id.* at 26 ("The Second Amendment 'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of *law-abiding*, *responsible citizens* to use arms' for self-defense." (citation omitted and emphasis added)); *id.* at 60 ("None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent *law-abiding citizens* with ordinary self-defense needs from carrying arms in public for that purpose." (emphasis added)).[4]

Third, six justices, including three in the majority, emphasized that *Bruen* did not disturb the limiting principles in *Heller* and *McDonald*. 597 U.S. at 72 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun."); *id.* at 80-81 (Kavanaugh, J., concurring, joined by Roberts, C.J.) (quoting *Heller*'s language); *id.* at 129 (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.) ("Like Justice Kavanaugh, I understand the Court's opinion today to cast no doubt on that aspect of *Heller*'s holding.").

Finally, the *Bruen* majority clarified that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue'

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[4] *See also*, *Bruen*, 597 U.S. at 15, 29-31, 33 n.8. 38 & n.9, 70-71.

licensing regimes."[5] *Id.* at 38 n.9 (majority opinion). Justifying this reservation, the Supreme Court explained that "shall issue" laws require background checks for the very purpose of ensuring that licenses are not issued to felons:

> Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent "law-abiding, responsible citizens" from exercising their Second Amendment right to public carry .... Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens."

Id. (citations omitted). This preservation of "'shall-issue' regimes and related background checks ... arguably implie[s] that it [is] constitutional to deny firearm licenses to individuals with felony convictions." *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023), *cert. granted*, *judgment vacated*, 144 S. Ct. 2708 (2024); *Vincent*, 127 F.4th at 1264 (readopting prior analysis on remand); *see also Range*, 124 F.4th at 283 (Krause, J., concurring) ("Prior felony convictions are by far the most common reason individuals fail NICS background checks.[] And the

[5] A "shall-issue" regime is "where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability." *Bruen*, 597 U.S. at 13 (majority opinion).

Supreme Court in *Bruen* endorsed the use of background checks, for violent and non-violent offenses alike, to ensure individuals bearing firearms are 'law-abiding' citizens." (footnote omitted)).

And most recently, in *Rahimi* the Supreme Court reaffirmed *Heller*'s "assurances," *McDonald*, 561 U.S. at 786, noting that "many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" 602 U.S. at 699 (citation omitted); *see also id.* at 735 (Kavanaugh, J., concurring) (observing that *Heller* "recognized a few categories of traditional exceptions to the [Second Amendment] right," including the "longstanding prohibitions on the possession of firearms by felons" (quotation marks omitted)). Indeed, the Supreme Court was careful to note that "we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id.* at 698 (majority opinion) (citing *Heller*, 554 U.S. at 626.).

Together, these repeated and consistent "assurances" make clear that felon-in-possession laws, like § 922(g)(1), are presumptively constitutional, demonstrating that our holding in *Vongxay* remains consistent with the Supreme Court's articulation of Second Amendment rights. Further, these "assurances" recognize a historical tradition of firearm regulation that supports the categorical application of § 922(g)(1) to felons like Duarte. *See Jackson*, 110 F.4th at 1125 ("Given these assurances by the Supreme Court, and the history that supports them, we conclude that there is no need for felony-by-felony

litigation regarding the constitutionality of § 922(g)(1).”). Our application of *Bruen*’s constitutional test to Duarte’s conduct confirms this reading.

B. *Bruen* Step One: Duarte’s Conduct Is Covered by the Second Amendment.

Turning to the application of *Bruen*, “[w]e first consider whether the Second Amendment’s plain text covers an individual’s proposed course of conduct.” *United States v. Perez-Garcia*, 96 F.4th 1166, 1178 (9th Cir. 2024), *petition for cert. filed*, --- U.S. ---- (U.S. Dec. 26, 2024) (Nos. 22-50314, 22-50316). “If so, the Second Amendment presumptively protects that conduct[, and] [t]he Government then bears the burden of justifying the challenged regulation by showing that it is consistent with our nation’s ‘historical tradition of firearm regulation.’” *Id.* (quoting *Bruen*, 597 U.S. at 24).

We conclude that Duarte’s proposed course of conduct is covered under the plain text of the Second Amendment. “The text of the Second Amendment refers to the right of ‘the people’ to keep and bear arms.” *Id.* at 1178 (citing U.S. Const. amend. II). As the Court in *Heller* observed, “‘[t]he people’ seems to have been a term of art employed in select parts of the Constitution[,] ... refer[ring] to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* at 580. Therefore, the *Heller* Court instructed that we start “with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.” *Id.* at 581. Accordingly,

because Duarte is undoubtedly a member of the national community, he is part of "the people" and the "Constitution presumptively protects" his right to possess a firearm. *Bruen*, 591 U.S. at 17.

Nonetheless, the Government contends that Duarte does not fall within the scope of the Second Amendment because of his status as a felon. The Government first relies on a "massively popular," *Heller*, 554 U.S. at 616, treatise by Thomas Cooley, which states that "[c]ertain classes have been almost universally excluded" from "the people," including "the idiot, the lunatic, and the felon, on obvious grounds." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 28-29 (Little, Brown & Co., 1st ed. 1868). And in line with this view, the Government notes that historically felons could be excluded from certain rights, such as the right to hold office and serve on juries. Thus, the Government reasons that felons are constitutionally excludable from the scope of the Second Amendment.

However, this passage from Cooley does not address the scope of constitutionally protected individual rights, like the one contained in the Second Amendment. Rather, Cooley's description of certain groups excluded from "the people" is derived from his discussion of "[w]ho are the *people* in whom is vested the sovereignty of the State?" *Id.* at 28. There, Cooley recognizes that "although all persons are under the protection of the government, and obliged to conform their action to its laws, there *are some who are altogether excluded from participation in the government*." *Id.* (emphasis added). In other words,

Cooley's passage refers to "elective franchise" and those who "should be admitted to a voice in the government." *Id.* at 29; *see also Williams*, 113 F .4th at 64 7 ("Cooley is discussing the right to vote—the 'elective franchise' and 'a voice in [the government's] administration.'" (citation omitted)).

These collective rights are distinct from individual rights, such as the rights set forth in the First, Second, and Fourth Amendments. *See Kanter v. Barr*, 919 F.3d437, 462 (7th Cir. 2019) (Barrett, J., dissenting) ("[T]he right to vote is held by individuals, but they do not exercise it solely for their own sake; rather, they cast votes as part of the collective enterprise of self-governance."). Indeed, when discussing the right to assemble and petition, Cooley takes a broader view of "the people," explaining that:

> The first amendment to the Constitution further declares that Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances.... When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise.... *But in all the enumerations and guaranties of rights the whole people are intended .... In this case, therefore, the right to assemble is preserved to all the people, and not merely to the electors, or to any other class or classes of the people.*

Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 267-68 (Little, Brown & Co. 1880) (second emphasis added). And in describing the Second Amendment, Cooley observes that its meaning "undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms." *Id.* at 271.

This view comports with how other individual rights like those of the First and Fourth Amendments—which are rights held by "the people"—apply to felons. *See Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."); *United States v. Lara*, 815 F.3d 605, 612 (9th Cir. 2016) (applying the Fourth Amendment to a defendant on probation who was convicted under§ 922(g)(1)). Thus, "[a] felon might lose the right to vote. But that does not mean the government can strip them of their right to speak freely, practice the religion of their choice, or to a jury trial." *Williams*, 113 F.4th at 647; *See Range*, 124 F.4th at 226 ("We see no reason to adopt a reading of 'the people' that excludes Americans from the scope of the Second Amendment while they retain their constitutional rights in other contexts.").

Next, the Government relies on language in *Vongxay* where we observed:

> [M]ost scholars of the Second Amendment agree that the right to bear arms was "inextricably ... tied to" the concept of a "virtuous citizen[ry]" that would protect society through "defensive use of arms

> against criminals, oppressive officials, and foreign enemies alike," and that "the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals)."

594 F.3d at 1118 (alteration in original) (citation omitted). However, we are not convinced that this language places Duarte, and other felons, outside the ambit of the Second Amendment. As an initial matter, *Vongxay* recognized that this "historical question has not been definitively resolved." *Id.* And although some of our sister circuits have cited this aspect of *Vongxay* with approval,[6] other jurists have noted that the "historical evidence is inconclusive at best." *United States v. Skoien*, 614 F.3d 638, 650 (7th Cir. 2010) (en banc) (Sykes, J., dissenting); *see also Folajtar v. Att'y Gen.*, 980 F.3d 897, 915-20 (3d Cir. 2020) (Bibas, J., dissenting) (criticizing the historical foundation for the theory that the right to keep and bear arms was limited to those who are virtuous). Indeed, then-Judge Barrett noted that "virtue exclusions are associated with civic rights[,]" which, as discussed above, are distinct from individual rights. *Kanter*, 919 F.3d at

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[6] *See*, *e.g.*, *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.'" (citing *Vongxay*, 594 F.3d at 1118)); *United States v. Carpio-Leon*, 701 F.3d 974, 979-80 (4th Cir. 2012) ("[F]elons were excluded from the right to arms because they were deemed unvirtuous." (citation and quotation marks omitted)); *Binderup v. Att'y Gen.*, 836 F.3d 336, 348 (3d Cir. 2016) (en banc) (citing *Vongxay*, 594 F.3d at 1118, for the proposition that felons are excluded from the right to bear arms because they are unvirtuous citizens").

462 (Barrett, J., dissenting). Thus, in the face of these conflicting interpretations of history, we adhere to the Supreme Court's definition of "the people," which does not exclude felons. *Heller*, 554 U.S. at 580.[7] Accordingly, we hold that Duarte'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.

C. *Bruen* Step Two: Section 922(g)(1) Is Consistent with Our Historical Tradition of Firearm Regulation.

Turning to the second step of the *Bruen* analysis, we hold that the Government has met its burden of showing that § 922(g)(1) "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

Under *Bruen*, courts must engage in analogical reasoning to determine "whether the modem regulation is 'relevantly similar' to historical laws and traditions, ... so as to 'evince[] a comparable tradition of regulation.'" *Perez-Garcia*, 96 F .4th at 1181 (citations omitted). Two metrics guide our analysis: (1) "whether modem and historical regulations impose

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[7] The Government also contends that the "people" need not have the same meaning in the Second Amendment as it does in the First and Fourth Amendments because of *Heller* and *Bruen*'s use of the language "law-abiding" citizens. Although we recognize that this language limits *Heller* and *Bruen*'s holdings, it does not follow that it also limits the scope of the Second Amendment. *See Rahimi*, 602 U.S. at 702 ("[T]hose decisions did not define the term and said nothing about the status of citizens who were not 'responsible.' The question was simply not presented."). Instead, we interpret the use of the phrase "law-abiding" as recognizing a historical tradition of disarming felons.

a comparable burden on the right of armed self-defense" (the "how"); and (2) "whether that burden is comparably justified" (the "why"). *Bruen*, 597 U.S. at 29 (citation omitted). "[A]nalogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 30. Thus, "even if a modem-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* Ultimately, "the appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 692 (emphasis added).

Furthermore, not all historical evidence is entitled to equal weight. *See Bruen*, 597 U.S. at 34. Because our inquiry focuses on interpreting the Second Amendment as the founding generation would have understood it, we primarily look to historical regulations extant when the Second and Fourteenth Amendments were adopted in 1791 and 1868, respectively.[8] *See id.* However, we may consider pre- and post-ratification history to the extent that it does not contravene founding-era evidence. *See id.* at 35-39. In sum, *Bruen*'s historical test requires that we attempt to place ourselves in the shoes of the founding generation, and to evaluate from this point of view

[8] We recognize that there is "ongoing scholarly debate" regarding the appropriate time frame of our analysis-whether we must only look to 1791 and the surrounding period or whether we may also consider 1868 and the surrounding period. *See Rahimi*, 602 U.S. at 692 n.1 (quoting *Bruen*, 597 U.S. at 37). The Supreme Court has not resolved this issue, and we need not decide it here, as the historical evidence from both periods is consistent. *See id.*

whether the present regulation would be consistent with its understanding of the Second Amendment.

To support the application of§ 922(g)(1) to Duarte, the Government proffers a variety of historical sources that evince two 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. We address each in turn, and agree that either supplies a basis for the categorical application of § 922(g)(1) to felons.[9]

1. Historical Felony Punishments.

First, "death was 'the standard penalty for all serious crimes' at the time of the founding." *Bucklew v. Precythe*, 587 U.S. 119, 129 (2019) (citation omitted); *see also Tennessee v. Garner*, 471 U.S. 1, 13 (1985) (explaining that, at common law, "virtually all felonies were punishable by death"). Likewise, "[c]olonies and states also routinely made use of estate forfeiture as punishment." *Diaz*, 116 F .4th at 468 (citing Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 332 nn.275 & 276 (2014) (collecting statutes)); *see also Range*, 124 F.4th at 267-71 (Krause, J., concurring) (collecting statutes). In 1769, Blackstone defined a felony as "an offence which

[9] We do not disagree with Judge Collins's conclusion that "taken together" both historical principles-that legislatures may disarm those who have committed the most serious crimes, and that categorical disarmament was also within the legislative power-serves to bolster our conclusion that § 922(g)(1) is categorically constitutional. *See* Concurring Op., Collins, J., at 58-60; *see also Rahimi*, 602 U.S. at 698.

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." 4 William Blackstone, Commentaries on the Laws of England 95 (1st ed. 1769). And these punishments were not limited to violent felonies, as "nonviolent crimes such as forgery and horse theft were capital offenses." *Medina*, 913 F.3d at 158; *see* Stuart Banner, *The Death Penalty: An American History* 23 (2002) (describing the escape attempts of men condemned to die for forgery and horse theft in Georgia between 1 790 and 1805); *Jackson*, 110 F.4th at 1127 (collecting laws that punished non-violent offenses with death and estate forfeiture). Indeed, in 1790, the First Congress made counterfeiting and forgery capital offenses. *See* Act of Apr. 30, 1790, ch. 9, § 14, 1 Stat. 112, 115.[10]

Thus, "it is difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms." *Medina*, 913 F.3d at 158. Certainly, if the greater punishment of death and

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[10] Colonies and states also authorized seizure of firearms from those who engaged in misdemeanor hunting offenses, such as hunting partridge or deer. *See*, *e.g.*, Act of Oct. 9, 1652, Laws and Ordinances of New Netherlands 138 (1868) (forbidding partridge and game hunting "on pain of forfeiting the gun"); Act of Apr. 20, ch. III (1745), 23 Acts of the North Carolina General Assembly 218, 219 (1805) (prohibiting nonresidents from hunting deer in "the King's Wast" and stating that any violator "shall forfeit his Gun" to the authorities). Although we recognize that these laws effected a temporary disarmament, we agree with our sister circuits that these laws support a historical tradition of disarming those who violated the law. *See Jackson*, 110 F.4th at 1127; *Hunt*, 123 F.4th at 706.

estate forfeiture was permissible to punish felons, then the lesser restriction of permanent[11] disarmament is also permissible. *See Rahimi*, 602 U.S. at 699 ("[I]f 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."); *see also Diaz*, 116 F.4th at 469 ("[I]f capital punishment was permissible to respond to theft, then the lesser restriction of permanent disarmament that § 922(g)(1) imposes is also permissible."); *Jackson*, 110 F.4th at 1127; *Hunt*, 123 F.4th at 705-06.

Indeed, pre- and post-ratification history support the view that legislatures could disarm those who committed the most serious crimes. The 1689 English Bill of Rights—"the 'predecessor to our Second Amendment'"—guaranteed that "Protestants ... may have Arms for their Defence suitable to their Conditions, and *as allowed by Law*[.]" *Bruen*, 597 U.S. at 44 (emphasis added) (citations and quotation marks

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[11] We note that § 922(g)(1) does not necessarily affect permanent disarmament of all felons. Under § 921(a)(20), certain offenses are excluded from § 922(g)(1)'s ambit including "offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20). Furthermore, "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter." *Id.* And under § 925(c), a felon may seek administrative relief and regain his right to bear arms. 18 U.S.C. § 925(c). However, this "relief provision has been rendered inoperative ... for Congress has repeatedly barred the Attorney General from using appropriated funds 'to investigate or act upon [relief] applications.'" *See Logan v. United States*, 552 U.S. 23, 28 n.1 (2007) (citation omitted).

omitted). "The purpose of this clause, according to historians, was to leave no doubt that it was Parliament that had regulatory power over firearms, not the Crown." *Atkinson v. Garland*, 70 F.4th 1018, 1031 (7th Cir. 2023) (Wood, J., dissenting) (citing Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309, 379-84 (1998)). And "[i]n Pennsylvania, Anti-Federalist delegates—who were adamant supporters of a declaration of fundamental rights—proposed that the people should have a right to bear arms 'unless for crimes committed, or real danger of public injury from individuals.'" *Perez-Garcia*, 96 F.4th at 1188 (emphasis and citation omitted).

Furthermore, in 1820, one of the nation's "best known proponents of abolishing capital punishment, Edward Livingston," prepared a systematic code of criminal law for Louisiana, which replaced the death penalty for crimes such as forgery, perjury, and fraud with permanent forfeiture of certain rights, including the "right of bearing arms." *Range*, 124 F.4th at 271-72 (Krause, J., concurring); *See* Edward Livingston, *A System of Penal Law for the State of Louisiana* 377, 378 (Phila., J. Kay, Jun. & Bro., Pittsburgh, J.L. Kay & Co. 1833) (including the right to bear arms as a civil right that may be forfeited); *id.* at 393 (between three and seven years' imprisonment and permanent forfeiture of civil rights for perjury); *id.* at 409 (between seven and fifteen years' imprisonment and permanent forfeiture of civil rights for forgery). Livingston's work won acclaim from founders such as Thomas Jefferson, James Madison, Justice Joseph Story, and Chief Justice John Marshall. *See Range*,

124 F.4th at 272 (Krause, J., concurring).[12] Though these codes were ultimately not adopted, the creation and reception of them serves as evidence of an unbroken understanding that the legislature could permanently disarm those who committed the most serious crimes consistent with the Second Amendment. *See id.*

The motivations for these historical punishments are relevantly similar to the justification for § 922(g)(1). "The purpose of capital punishment in colonial America was threefold: deterrence, retribution, and penitence." *Diaz*, 116 F.4th at 469. Likewise, "[t]he precursor to § 922(g)(1) ... was enacted to 'bar possession of a firearm from persons whose prior behaviors have established their violent tendencies.'" *Id.* (quoting 114 Cong. Rec. 14 773 (daily ed. May 23, 1968) (statement of Sen. Russell Long of Louisiana)). Thus, historical felony punishments are relevantly similar—sharing the "how" and "why"—to § 922(g)(1) and support its application to Duarte and all other felons.

In response, Duarte first challenges the frequency with which the punishments of death and estate forfeiture were imposed at the time of the founding. Specifically, he contends that the notion that all

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[12] *See also* Letter from John Marshall, Chief Justice, Supreme Court of the United States, to Edward Livingston (Oct. 24, 1825), https://findingaids.princeton.edu/catalog/C0280_c3493 (last visited Feb. 7, 2025) (noting that he had "no marginal notes to make nor any alterations to suggest" and stating that "no former legislator has relied sufficiently on [provisions that deprived criminals of civil political rights]; and [that he had] strong hope of its efficacy").

felonies at the founding were actually punished by death or forfeiture is "shaky." *See Kanter*, 919 F.3d at 458 (Barrett, J., dissenting) ("The premise of this argument—that the states permanently extinguished the rights of felons, either by death or operation of law, in the eighteenth and nineteenth centuries—is shaky.").

However, this argument misperceives our standard. To find Duarte's punishment consistent with the founding generation's understanding of the Second Amendment, history need not show that *every* felony was punished with death and estate forfeiture. It may be the case that by the time of the founding, legislatures made the policy choice to retreat from harsher punishments. But this does not mean that, as a matter of constitutional authority, legislatures lacked the ability to impose such punishments. Holding otherwise would "force[] 21st-century regulations to follow late-18th-century policy choices, giving us 'a law trapped in amber' ... [a]nd it assumes that founding-era legislatures maximally exercised their power to regulate." *Rahimi*, 602 U.S. at 739-40 (Barrett, J., concurring). Instead, the exposure to capital punishment and estate forfeiture is sufficient to demonstrate that the founding generation would view § 922(g)(1)'s permanent disarmament as consistent with the Second Amendment.

Duarte next contends that, even assuming that death and estate forfeiture were the standard punishments at the time of the founding, today's felonies do not correspond with felonies at the founding that were eligible for death and estate forfeiture. *See Lange v. California*, 594 U.S. 295, 311

(2021) ("The felony category then was a good deal narrower than now."). And he asserts that relying only on the modem felony label would provide legislatures too much discretion to define away Second Amendment rights.

However, this discretion is consistent with our nation's history. Since the founding, legislatures have been permitted to identify conduct that they deem the most serious and to punish perpetrators with severe deprivations of liberty. *See Jackson*, 110 F.4th at 1127 ("This historical record suggests that legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms, not merely to address a person's demonstrated propensity for violence."); *Hunt*, 123 F.4th at 707 ("Just as early legislatures retained the discretion to disarm categories of people because they refused to adhere to legal norms in the pre-colonial and colonial era, today's legislatures may disarm people who have been convicted of conduct the legislature considers serious enough to render it a felony.").

To the extent that Duarte contends that we should limit the application of § 922(g)(1) to felonies that at the time of the founding were punished with death, a life sentence, or estate forfeiture, we reject such a narrow view of history. Indeed, under Duarte's and the now-vacated panel opinion's approach, modem felonies that have been considered closely related to gun violence and presenting a danger to the community such as drug trafficking offenses could not form the basis for a § 922(g)(1) conviction. *See Duarte*,

101 F.4th at 691 n.16 (noting that criminalizing drug possession did not gain momentum until the early 20th century, and modem "illicit drugs" were legal "for a long stretch of this country's history"); Dissenting Op. at 99-100 ("[T]here are no comparable analogues that allowed for disarmament based upon drug offenses."); *see also Williams*, 113 F.4th at 659 (noting that drug trafficking is a serious offense that poses a danger to the community and often leads to violence). To adopt such a test would create "a law trapped in amber." *Rahimi*, 602 U.S. at 691.

2. Laws Categorically Disarming Dangerous Individuals.

Second, the Government points to a historical tradition of disarming "categories of persons thought by a legislature to present a special danger of misuse." *Rahimi*, 602 U.S. at 698. The historical record reveals a host of regulations that disarmed those whom the legislature deemed dangerous on a categorical basis. *See Jackson*, 110 F.4th at 1126; *Atkinson*, 10 F.4th at 1035 n.2 (Wood, J., dissenting); *Range*, 124 F.4th at 255-72 (Krause, J., concurring).

"[I]n the late 1600s, ... the government disarmed non-Anglican Protestants who refused to participate in the Church of England, ... and those who were 'dangerous to the Peace of the Kingdom.'" *Jackson*, 110 F.4th at 1126 (citations omitted). The same Parliament that enacted the English Bill of Rights also disarmed Catholics who refused to take an oath renouncing their faith, except as necessary for self-defense. *See Range*, 124 F.4th at 256-57 (Krause, J., concurring). Likewise, the colonies enacted similar restrictions on Catholics, prohibited the transfer of

weapons to Native Americans,[13] and banned slaves and free Black people from possessing firearms. *See id.* at 259, 264. And during the revolutionary period states disarmed those who refused to swear oaths of loyalty to the emerging nation. *See id.* at 259-63; *Jackson*, 110 F.4th at 1126-27; *Atkinson*, 10 F.4th at 1035 (Wood, J., dissenting).

Consistent with this tradition, through the late 1800s states continued to promulgate categorical restrictions on the possession of firearms by certain groups of people. These laws included restrictions on: (1) the sale of firearms to, or the possession of firearms by, individuals below specified ages;[14] (2) the sale of firearms to those of unsound mind;[15] (3) the possession

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[13] Although they did not directly prohibit Native Americans from possessing firearms, "these laws still inform how early settlers of the colonies that became the United States thought about regulating firearms." *Williams*, 113 F.4th at 652 n.8. "Their key idea was to keep weapons out of the hands of the Native Americans, whom colonists believed were hostile and dangerous." *Id.*

[14] At least ten state statutes restricted the possession or sale of firearms to those below certain ages: Act of July 13, 1892, ch. 159, § 5, 27 Stat. 116, 117 (D.C.); Act of Feb. 2, 1856, No. 26, § 1, 1855 Ala. Acts 17; Act of Apr. 8, 1881, ch. 548, § 1, 16 Del. Laws 716, 716; Act of Feb. 17, 1876, No. 128, § 1, 1876 Ga. Laws 112, 112; Act of Feb. 10, 1882, ch. 4, §§ 1-2, 1882 N.J. Acts 13, 13-14; Act of May 10, 1883, § 1, ch. 375, 1883 N.Y. Laws 556, 556; Act of Mar. 6, 1893, ch. 514, § 1, 1893 N.C. Pub. Laws 468,468; Act of June 10, 1881, No. 124, § 1, 1881 Pa. Laws 111, 111-112; Act of Apr. 13, 1883, ch. 374, § 1, 1883 R.I. Acts & Resolves 157, 157; Act of Nov. 16, 1896, No. 111, § 1, 1896 Vt. Acts & Resolves 83, 83.

[15] Three state statutes restricted the sale of firearms to those of unsound mind: Act of Feb. 4, 1881, ch. 3285, No. 67, § 1, 1881 Fla. Laws 87, 87; Crimes and Punishments-Relating to Minors and Deadly Weapons or Toy Pistols, ch. 105, § 1, 1883 Kan. Sess.

of firearms by those who are intoxicated;[16] and (4) the possession of weapons by certain vagrants—known as "tramps."[17]

Indeed, laws disarming "tramps" illustrate the broad and imprecise nature of categorical disarmament. "Tramps" were typically defined as those who went "about from place to place begging and asking or subsisting upon charity." *See*, *e.g.*, Act of Aug. 1, 1878, ch. 38, § 1, 1878 N.H. Laws 170. Tramps were an "object of fear" and described by one legal scholar as "the chrysalis of every species of criminal." Lawrence Friedman, *Crime and Punishment in American History* 102 (1993) (quotation marks

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Laws 159; Act of Feb. 17, 1899, ch. 1, § 52, 1899 N.C. Pub. Laws 3.

[16] Four other state statutes restricted the possession of firearms by those who were intoxicated: Act of Feb. 23, 1867, ch. 12, § 1, 1867 Kan. Sess. Laws 25; Act of Feb. 28, 1878, ch. 46, § 2, 1878 Miss. Laws 175; 1 Mo. Rev. Stat. ch. 24, Art. II, § 1274, at 224 (1879); Act of Apr. 3, 1883, ch. 329, § 3, 1883 Wis. Sess. Laws, Vol. 1, at 290.

[17] And thirteen more state statutes restricted the possession of firearms by those who were deemed "tramps": Act of Mar. 27, 1879, ch. 59, § 4, 1879 Conn. Pub. Acts 393,394; Act of Mar. 27, 1879, ch. 155, § 8, 1879 Del. Laws 223,225; Arrest Trial and Punishment of Tramps, ch. 43, § 4, 1890 Iowa Acts 68, 68-69; Act of Apr. 24, 1880, ch. 257, § 4, 1880 Mass. Acts 231,232; Miss. Rev. Code§ 2964 (1880); Act of Aug. 1, 1878, ch. 38, § 2, 1878 N.H. Laws 170,170; Act of May 5, 1880, ch. 176, § 4, 1 N.Y. Laws 296,297; Act of Mar. 12, 1879, ch. 198, § 2, 1879 N.C. Sess. Laws 355, 355; Act of June 12, 1879, § 2, 76 Ohio Laws 191, 192; Act of Apr. 30, 1879, No. 31, § 2, 1879 Pa. Laws 33, 34; Act of Apr. 9, 1880, ch. 806, § 3, 1880 R.I. Acts & Resolves 110, 110; Act of Nov. 26, 1878, No. 14, § 3, 1878 Vt. Acts & Resolves 29, 30; Act of Mar. 4, 1879, ch. 188, § 4, 1879 Wis. Sess. Laws 273, 274.

omitted). Indeed, the Ohio Supreme Court described tramps as follows:

> [T]he genus tramp, in this country, is a public enemy. He is numerous, and he is dangerous. He is a nomad, a wanderer on the face of the earth, with his hand against every honest man, woman, and child, in so far as they do not promptly and fully supply his demands. He is a thief, a robber, often a murderer, and always a nuisance. He does not belong to the working classes, but is an idler.

State v. Hogan, 63 Ohio St. 202, 215 (1900). In line with this view, the Ohio Supreme Court held that a statute that disarmed tramps was consistent with its state constitutional right to bear arms,[18] writing that the state right to bear arms "was never intended as a warrant for vicious persons to carry weapons with which to terrorize others." *Id.* at 219. Certainly not all "tramps" were "vicious" or "dangerous." Yet, thirteen states passed laws categorically disarming them on the belief that tramps, as a class, presented a danger to the community if armed.

To be clear, these laws reflect overgeneralized and abhorrent prejudices that would not survive legal

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[18] *See Range*, 124 F.4th at 267 (Krause, J., concurring) (noting that "state constitutional rights to bear arms ... were understood to be coextensive with the Second Amendment"); *see also* William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 Notre Dame L. Rev. 1467, 1472 (2024) (explaining that early American courts described the right to arms codified in "the English Bill of Rights, the Second Amendment to the U.S. Constitution, and various state constitutions as codifying the *same* preexisting right").

challenges today. And many of these laws would likely be unconstitutional today under *other* parts of the Constitution. But these laws are reflective of American history and tradition. And our historical tradition reveals that legislatures were permitted to categorically disarm those they deemed dangerous without having to perform "an individualized determination of dangerousness as to each person in a class of prohibited persons." *Jackson*, 110 F .4th at 1128; *see Atkinson*, 70 F.4th at 1035 (Wood, J., dissenting) ("[S]ince the founding, governments have been understood to have the power to single out categories of persons who will face total disarmament based on the danger they pose to the political community if armed."). "[F]our centuries of unbroken Anglo-American history shows that legislatures consistently disarmed entire categories of people who were presumed to pose a special risk of misusing firearms." *Range*, 124 F.4th at 273 (Krause, J., concurring). "Not all persons disarmed under historical precedents ... were violent or dangerous persons." *Jackson*, 110 F.4th at 1128. Indeed, "every categorical disarmament law was overbroad-sweeping in law-abiding people who were not dangerous, violent, untrustworthy, or unstable-yet they comported with the Second Amendment." *Range*, 124 F.4th at 267 (Krause, J., concurring).

Section 922(g)(1) fits within this tradition. "Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983). And this legislative judgment comports with our historical tradition of regulating

firearm possession by those who commit the most serious crimes to protect the public. *Supra* at 26-33; *see Hunt*, 123 F .4th at 708.[19] Accordingly, our historical tradition of categorically disarming those whom the legislature determines to represent a "special danger of misuse" also supports the application of § 922(g)(1) to felons, like Duarte, who assert that their felonies were nonviolent. *Rahimi*, 602 U.S. at 698.

. . .

In sum, these laws demonstrate that § 922(g)(1)'s permanent and categorical disarmament of felons is consistent with this Nation's historical tradition of firearm regulations. Legislatures have historically retained the discretion to punish those who commit the most severe crimes with permanent deprivations of liberty, and legislatures could disarm on a categorical basis those who present a "special danger of misuse" of firearms. *Rahimi*, 602 U.S. at 698. We agree with the Fourth and Eighth Circuits that either historical tradition is sufficient to uphold the application of § 922(g)(1) to all felons. *See Jackson*, 110 F.4th at 1127-28; *Hunt*, 123 F.4th at 706.

Section 922(g)(1) "is by no means identical to these [historical laws], but it does not need to be."

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[19] We do not hold, as Judge Collins would, that every legislative judgment that a group of individuals presents a "special danger of misuse" must be rooted in history. *See* Concurring Op., Collins, J., at 50. However, we recognize that, in this case, Congress's well-founded determination that felons, as a class, present a special danger of firearm misuse is fully supported by our tradition of regulating those who have committed the most serious crimes.

Rahimi, 602 U.S. at 698. History does not require "felony-by-felony litigation" to support the application of § 922(g)(1). *Jackson*, 110 F.4th at 1125; *Hunt*, 123 F.4th at 700. Instead, consistent with our historical tradition, the government is "empowered to regulate guns through categorical restrictions." *Atkinson*, 70 F.4th at 1038 (Wood, J., dissenting).[20]

Finally, we recognize that these historical principles "may allow greater regulation than would an approach that employs means-end scrutiny with respect to each individual person who is regulated." *Jackson*, 110 F.4th at 1129. However, these are the fruits of *Bruen*'s constitutional test. *See id.*; *see also Heller v. District of Columbia*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[G]overnments appear to have more flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny." (emphasis omitted)).

IV. Conclusion

Accordingly, § 922(g)(1) is constitutional as applied to Duarte and other non-violent felons. We **AFFIRM** Duarte's conviction.

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[20] Echoing Justice Thomas's lone dissent in *Rahimi*, Judge VanDyke's granular historical analysis contends that historical analogues for § 922(g)(1) are not sufficiently similar to uphold the application of § 922(g)(1) to non-violent felons. *Compare Rahimi*, 602 U.S. at 752-775 (Thomas, J., dissenting), *with* Dissenting Op. at 85-113. Our response is simple: "[a]s the [Supreme Court] said in *Bruen*, a 'historical *twin*' is not required." *Rahimi*, 602 U.S. at701 (quoting *Bruen*, 597 U.S. at 30).

R. NELSON, Circuit Judge, joined by IKUTA, Circuit Judge, concurring in judgment.

Because Duarte failed to raise his Second Amendment argument before the district court, we must apply plain error review. Applying that standard, there was no plain error by the district court, and I would uphold Duarte's conviction. Because I reach this conclusion, I would not reach the merits of Duarte's Second Amendment challenge under de novo review.

COLLINS, Circuit Judge, concurring in the judgment:

I agree with the majority's ultimate conclusion that Steven Duarte's as-applied Second Amendment challenge to his conviction under 18 U.S.C. § 922(g)(1) fails on the merits even under *de novo* review.[1] But I disagree with the majority's conclusion that, *standing alone*, *either* of the two historical traditions proffered by the Government—viz., (1) the recognized traditional power of legislatures with respect to felons, *i.e.*, those who have committed serious crimes; and (2) the limited historical power of legislatures, at the time of the founding, to disarm specified categories of persons—is sufficient to "suppl[y] a basis for the categorical application of § 922(g)(1) to felons." *See* Opin. at 26. In my view, § 922(g)(1) survives Second Amendment scrutiny only when these two historical traditions are "[t]aken together." *United States v. Rahimi*, 602 U.S. 680, 698 (2024). I therefore concur only in the judgment.

I

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. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment "codified a pre-existing" "individual right to keep and bear arms" "for defensive purposes," even if "unconnected to militia service." *Id.* at 592, 595, 602, 612 (emphasis omitted). The Court cautioned,

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[1] Like the majority, I assume *arguendo* that Duarte's challenge should be reviewed *de nova. See* Opin. at 13-14.

however, that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. Rather, the Second Amendment right was "enshrined with the scope [it] w[as] understood to have when the people adopted [it]." *Id.* at 634-35.

In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the Supreme Court set forth a basic framework based in "constitutional text and history" for "defining the character" and "outer limits" of the Second Amendment right and for "assessing the constitutionality of a particular regulation." *Id.* at 22. The Court instructed:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 24 (citation omitted). In *Rahimi*, the Court clarified that the "appropriate" historically based analysis requires "considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." 602 U.S. at 692 (emphasis added). Thus, in evaluating a challenged regulation's consistency with our Nation's history of firearm regulation, "[a] court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to

modem circumstances." *Id.* (simplified). Accordingly, the Court explained, "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791," and even "when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'" *Id.* at 691-92 (quoting *Bruen*, 597 U.S. at 30).

In determining whether a challenged law is "relevantly similar" to particular historical examples of permissible firearm regulations and fits within the "principles that underpin [the] regulatory tradition" reflected in such examples, a court must consider "[w]hy and how the [challenged] regulation burdens the right." *Rahimi*, 602 U.S. at 692 (citation omitted). Specifically, the court must consider "[1] whether modem and historical regulations impose a comparable burden on the right of armed self-defense" *(i.e.*, the "how"); and "[2] whether that burden is comparably justified" *(i.e.*, the "why"). *Bruen*, 597 U.S. at 29 (citations omitted). The *Rahimi* Court further clarified that, under the requisite historically based approach, courts should not evaluate particular historical examples in isolation, but should consider whether, "[t]aken together," they reflect a general principle that helps to define the contours of the Second Amendment right. *Rahimi*, 602 U.S. at 698 (citing two particular historical examples and holding that, "[t]aken together," these examples confirm the general principle that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed" consistent with the Second Amendment).

II

Applying this framework, I agree that § 922(g)(1)'s criminal prohibition of possession of firearms by convicted felons is consistent with the Second Amendment. In reaching this conclusion, I think it is unnecessary to address, or to rely on, the Government's argument that felons are not included within the "people" whose rights are protected by the "plain text" of the Second Amendment. *Bruen*, 597 U.S. at 24. Even assuming *arguendo* that felons are presumptively covered by the literal text of the Second Amendment, I agree that the Government has established that § 922(g)(1) "is consistent with the Nation's historical tradition of firearm regulation." *Id.*

A

I turn first to the Government's argument that the historical tradition at the time of the Second Amendment's adoption confirms that the right guaranteed by that Amendment does not "prohibit[] the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Rahimi*, 602 U.S. at 698 (stating that the Court did "not suggest that the Second Amendment prohibits" such laws and citing the page of *Heller* where the Court stated that the Court did not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill"). As I shall explain, a review of that often unsavory history reveals a tradition of categorical legislative disarmament that survives only in a highly constrained form.

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As *Rahimi* noted, English law over the centuries allowed for the disarmament of certain categories of persons, including "not only brigands and highwaymen but also political opponents and disfavored religious groups." *Rahimi*, 602 U.S. at 694. In response to the perceived abusive disarmament practices of "the Stuart Kings Charles II and James II," *Heller*, 554 U.S. at 592, Parliament in 1689 "adopted the English Bill of Rights, which guaranteed 'that the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law.'" *Rahimi*, 602 U.S. at 694 (quoting An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown, 1 Wm. & Mary, ch. 2, § 7, *in* 3 Eng. Stat. at Large 441 (1689)). Because the English Bill of Rights granted an individual right to "have Arms" only to "Protestants" and only "as allowed by Law," this right by its terms "was restricted to Protestants and held only against the Crown, but not Parliament." *Bruen*, 597 U.S. at 44. Indeed, the same year that it enacted the Bill of Rights, Parliament expressly disarmed Catholics (derisively referred to as "Papists"), although it also permitted any Catholic men "to retain those weapons that local justices ... thought necessary 'for the Defence of his House or Person.'" *See* Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. 285, 308-09 (1983) (citation omitted).

Laws generally disarming Catholics also were enacted in some of the American colonies during the French and Indian War (1756-1763), which "was

perceived by many in [England] as a war between Protestantism and Catholicism." Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons From Possessing Arms*, 20 Wyo. L. Rev. 249, 263 (2020). In particular, the colonial legislatures in Pennsylvania, Maryland, and Virginia enacted laws generally barring Catholics from possessing firearms and ammunition.[2]

Colonial American legislatures also adopted other laws that categorically prohibited, or severely limited, the sale of firearms and ammunition to specific classes of persons. These included Native Americans,[3] as well

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[2] *See* 5 The Statutes at Large of Pennsylvania from 1682 to 1801, at 627 (James T. Mitchell & Henry Flanders eds., Wm. Stanley Ray 1898) (1759 statute providing "[t]hat all arms, military accoutrements, gunpowder and ammunition of what kind soever, any papist or reputed papist within this province hath or shall have in his house or houses ..., shall be taken from such papist or reputed papist by warrant"); 52 Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland 1755-1756, at 454 (Baltimore, J. Hall Pleasants ed., Md. Hist. Soc'y 1935) (1756 statute providing "that all Arms Gunpowder and Ammunition of what kind soever any Papist or reputed Papist within this Province hath or shall have in his House or Houses or elsewhere shall be taken from Such Papist or reputed Papist by Warrant"); 7 The Statutes at Large; Being a Collection of All the Laws of Virginia From the First Session of the Legislature in the Year 1619, at 35-39 (Richmond, William Waller Hening ed., Franklin Press 1820) (1756 statute providing "[t]hat no Papist, or reputed Papist," who refuses to take an oath of allegiance, "shall, or may have, or keep in his house or elsewhere, or in the possession of any other person to his use, or at his disposition, any arms, weapons, gunpowder or ammunition").

[3] *See*, *e.g.*, Acts of Assembly of the Province of Maryland, ch. 4, § 3 (Annapolis, Jonas Green 1763) (1763 statute providing that "it shall not be lawful for any Person or Persons within this

as, in southern States, slaves.[4] Moreover, during the Revolutionary War, the Continental Congress in

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Province, to sell or give to any Indian Woman or Child, any Gunpowder, Shot, or Lead, whatsoever, nor to any Indian Man within this Province, more than the Quantity of one Pound of Gunpowder, and Six Pounds of Shot or Lead, at any one Time"); 6 The Statutes at Large of Pennsylvania from 1682 to 1801, at 319-20 (James T. Mitchell & Henry Flanders eds., Wm. Stanley Ray 1899) (1763 statute providing for a fine, 39 lashes, and 12 months in the "common gaol of the county" "if any person or persons whatsoever shall directly or indirectly give to, sell, barter or exchange with any Indian or Indians whatsoever any guns, gunpowder, shot, bullets, lead or other warlike stores without license from" designated officials); Acts and Laws of His Majesty's Province of New-Hampshire in New-England 164 (Portsmouth, Daniel Fowle & Robert Fowle 1771) (1721 statute prohibiting anyone from supplying Indians "with any provision, cloathing, guns, powder shott, bullets, or any other goods"); *see generally* 1 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 18-19 (Lincoln, Univ. of Neb. Press 1984).

[4] *See, e.g.*, 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, at 131 (Richmond, William Waller Hening ed., Franklin Press 1820) (1723 statute providing that "every gun, and all powder and shot, and every such club or weapon ... found or taken in the hands, custody, or possession of any such negro, mulatto, or Indian, shall be taken away"); A Codification of the Statute Law of Georgia 813 (Savannah, William A. Hotchkiss ed., John M. Cooper 1845) (1770 statute providing that, with certain exceptions, "[i]t shall not be lawful for any slave to carry and make use of firearms, or any offensive weapon whatsoever"); 7 The Statutes at Large of South Carolina 410 (Columbia, David J. McCord ed., A.S. Johnston 1840) (1740 statute providing that "it shall be lawful for all masters, overseers and other persons whomsoever, to apprehend and take up any ... negro or other slave or slaves, met or found out of the plantation of his or their master or mistress, ... if he or they be armed with such offensive weapons," and "him or them to disarm").

March 1776 "recommended to the several assemblies, conventions, and councils or committees of safety of the United Colonies, immediately to cause all persons to be disarmed within their respective colonies, who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies." *See* 4 Journals of the Continental Congress 1774-1789, at 205 (Washington, D.C., Worthington Chauncey Ford ed., Library of Congress 1906). Heeding the Continental Congress's call, several States enacted laws disarming loyalists or those who refused to take loyalty oaths.[5] In fact, even before the Continental

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[5] *See* 5 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 479-84 (Boston, Wright & Potter Printing Co. 1886) (1776 statute providing that "every male person above sixteen years of age ... who shall neglect or refuse to subscribe a printed or written declaration ... upon being required thereto ... shall be disarmed, and have taken from him, in manner hereafter directed, all such arms, ammunition and warlike implements, as, by the strictest search, can be found in his possession or belonging to him"); 9 The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature in the Year 1619, at 281-83 (Richmond, William Waller Hening ed., J. & G. Cochran 1821) (1777 statute providing that any male above the age of 16 who refuses to take a loyalty oath will be "disarmed"); 9 The Statutes at Large of Pennsylvania From 1682 to 1801, at 110-14 (James T. Mitchell & Henry Flanders eds., Wm. Stanley Ray 1903) (1777 statute providing "[t]hat every person above the age [of 18] refusing or neglecting to take and subscribe the said oath or affirmation shall during the time of such neglect or refusal ... be disarmed"); 7 Records of the Colony of Rhode Island and Providence Plantations in New England 567-68 (Providence, John Russell Bartlett ed., A. Crawford Greene 1862) (1776 statute providing "that in case any such suspected [loyalist] shall refuse to subscribe [to an oath]," he will be "search[ed] for all arms,

Congress issued its recommendation, at least one State had already prohibited loyalists from bearing arms. *See* The Public Records of the Colony of Connecticut from May, 1995 to June, 1776, at 192-95 (Hartford, Charles J. Hoadly ed., Lockwood & Brainard Co. 1890) (1775 statute pre-dating the Continental Congress's recommendation and requiring that any accused loyalist who failed to show he was "not inimical" to the colonies be "disarmed").

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The tradition that emerges from these historical precedents is not particularly impressive. Today, *other* constitutional provisions would independently prohibit racially or religiously based discriminatory bans on gun ownership by Catholics, Blacks, or Native Americans (who, since at least 1924, have been recognized as full citizens). *See* U.S. Const., amends. I, V, XIV. And, of course, slavery was abolished by the Thirteenth Amendment. Moreover, the Supreme Court has recognized that, in light of the "polemical

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ammunition and warlike stores," which will be taken); The Acts of Assembly of the State of North Carolina 42-44 (Newbern, James Davis 1778) (1777 statute providing "[t]hat all Persons failing or refusing to take the Oath of Allegiance, and permitted by the County Courts ... to remain in the State, ... shall not keep Guns or other Arms within his or their House"); Journal of the Provincial Congress of South Carolina, 1776, at 77-79 (Charlestown 1776) (1776 resolution providing "[t]hat all persons who shall hereafter bear arms against, or shall be active in opposing the measures of the Continental or Colony Congress, and upon due conviction thereof before a majority of the Committee of the district or parish where such persons reside, be disarmed, and at the discretion of the said Committee taken into custody").

reactions by Americans" to the British government's efforts to "disarm the inhabitants of the most rebellious areas" of the colonies, *Heller*, 554 U.S. at 594, the Second Amendment was *itself* understood, at "the time of the founding," as having "largely eliminated governmental authority to disarm political opponents on this side of the Atlantic," *Rahimi*, 602 U.S. at 694. Much of the actual historical instances of legislative categorical exclusions from firearms possession have thus either been vitiated by other constitutional provisions or are inconsistent with what the Second Amendment itself was understood to accomplish. Given this shaky foundation, I cannot endorse the majority's view that we should extract from this historical tradition the sweeping principle that the Second Amendment allows a legislature to "categorically disarm[] those whom the legislature determines to represent a 'special danger of misuse'" or to "categorically disarm those [it] deem[s] dangerous." *See* Opin. at 36-38. The majority's deference to Congress's judgments as to whom it "deem[s]" to be unworthy of Second Amendment rights sounds like rational basis review, *see Armour v. City of Indianapolis*, 566 U.S. 673,680 (2012) (holding that "rational basis review requires deference to reasonable underlying legislative judgments"), but the *Heller* Court squarely rejected that standard as being inapplicable in the Second Amendment context, *see* 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment ... would have no effect.").

The difficult question nonetheless remains as to what "principles" should be understood to "underpin"

this particular "regulatory tradition," keeping in mind that a modem law need only be "*relevantly* similar to laws that our tradition is understood to permit." *Rahimi*, 602 U.S. at 692 (emphasis added) (simplified). In answering that question, I think we must keep two contrasting considerations in mind. On the one hand, as I have just noted, defining the principles that emerge from the tradition of legislative categorical disarmament at a very high level of generality—as the majority does—could allow legislatures to creatively fashion *new* categorical exclusions, thereby effectively gutting the Amendment's protections in a way that is at war with its original understanding. *See Rahimi*, 602 U.S. at 694 (emphasizing that the Second Amendment was understood to *limit* the sorts of broad disarmament measures the British had applied); *Heller*, 554 U.S. at 594-95 (similar); *see also Bruen*, 597 U.S. at 30 (stating that "courts should not uphold every modem law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted" (simplified)). On the other hand, the Supreme Court has made clear that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." *Rahimi*, 602 U.S. at 691-92.

The key to steering between these two extremes, in my view, is to remember that "history" must always remain the "guide" when it comes to recognizing and defining the scope of any asserted exclusions from the Second Amendment's reach. *Bruen*, 597 U.S. at 28. Therefore, to the extent that the historical tradition described above recognizes some measure of legislative discretion to impose disarmament on

particular categories of persons who are thought to present a "special danger of misuse," *see Rahimi*, 602 U.S. at 698, the eligible categories of such persons must *themselves* be historically based. To hold otherwise would be to say that Second Amendment rights effectively exist only at the sufferance of the legislature, which is directly contrary to the Amendment's central purpose. Accordingly, in order for a legislature to validly disarm a given category of persons, that category must itself be rooted in an identifiable historical antecedent.

The Court, however, has also made clear that the historical antecedent only needs to be "relevantly" similar, and the *Rahimi* Court held, in particular, that a historical tradition allowing the imposition of other, *more severe* penalties than disarmament on a given class of persons may provide a sufficient analogue to support allowing such persons to be disarmed. *See Rahimi*, 602 U.S. at 698-99 (citation omitted). Thus, in rejecting a Second Amendment challenge to 18 U.S.C. § 922(g)(8)(C)(i), which forbids gun possession by any person who is subject to a restraining order that "includes a finding that he poses 'a credible threat to the physical safety' of a protected person," *Rahimi*, 602 U.S. at 693 (quoting 18 U.S.C. § 922(g)(8)(C)(i)), *Rahimi* held that the so-called "going armed laws" provided, together with other laws, a relevant historical analogue, *id.* at 699. The "going armed laws prohibited 'riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land,'" and the penalty for violation of such laws was "'forfeiture of the arms ... and imprisonment.'" *Id.* at 697 (alterations in original) (quoting 4 William Blackstone, Commentaries on the Laws of England

149 (10th ed. 1787)). The Court held that § 922(g)(8)(C)(i) shared the same objective *(i.e.*, the same "why") as the "going armed laws," because they both "restrict[ed] gun use to mitigate demonstrated threats of physical violence." *Id.* at 698. The manner in which the going armed laws burdened gun possession was also sufficiently analogous, because § 922(g)(8)(C)(i) effectively imposes "temporary disarmament" when a restraining order is in effect, which entails *a* "*lesser restriction*" *than* "*imprisonment*" (which was the penalty imposed by the "going armed laws"). *Id.* at 699 (emphasis added).[6]

As applicable here, *Rahimi* thus teaches that a historical precedent establishing that, at the time of the founding, a discrete group of persons could *categorically* be subjected to legal disabilities and penalties that were equivalent to, or more onerous than, disarmament would provide a "relevantly similar" "historical analogue" that would suffice to support a legislative determination to categorically disarm such persons. *Rahimi*, 602 U.S. at 698-99 (citation omitted). By confining any legislative categorical disarmament power to only those historically based classes of persons who could be subjected to equivalent or greater disabilities, this approach avoids endorsing the sort of freewheeling

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[6] The dissent obviously does not like that, in determining when a given historical analogue is "sufficiently similar," *Rahimi* applied a greater-includes-the-lesser standard, *Rahimi*, 602 U.S. at 700, which the dissent views as too indeterminate, *see* Dissent at 122-23 & n.26. We are, of course, bound to follow and apply the Supreme Court's decision in *Rahimi*. *See* U.S. Const., art. III, § 1 (confirming that federal courts created by Congress are "inferior Courts" to the "one supreme Court").

legislative power to categorically disarm that the Second Amendment sought to eliminate. *See id.* at 694. And by counting, as relevantly similar, historical precedents that allowed categorical burdens greater than disarmament, this approach avoids limiting the range of permissible categorical disarmaments to only those particular categories of persons who were *specifically* subject to categorical *disarmament* in 1791. *See id.* at 691-92 (rejecting an approach to the Second Amendment that would entail "a law trapped in amber," such that the only permissible regulations would be those "*identical* to ones that could be found in 1791" (emphasis added)).[7] And, of course, notwithstanding the historical precedents, a legislature may not impose categorical disarmament on a given class of persons in a manner that would violate *other* provisions of the Constitution.

B

Against this backdrop, the question is whether there is a relevant historically based category of persons who, at the time of the founding, could be subjected to legal disabilities that were equivalent to, or more severe than, § 922(g)(1)'s lifetime prohibition on firearm possession. The answer to that question is yes. *See Heller*, 554 U.S. at 626-27 & n.26 (describing "longstanding prohibitions on the possession of firearms by felons and the mentally ill" as "presumptively lawful regulatory measures"); *Bruen*, 597 U.S. at 38-39 n.9 (affirming the presumptive constitutionality of shall-issue licensing regimes that

[7] The dissent, therefore, is wrong in insisting on an *identical* tradition, *viz.*, a showing that felons, "as a group, [were] categorically disarmed at the founding." *See* Dissent at 119.

"are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens'" (quoting *Heller*, 554 U.S. at 635)); *id.* at 80-81 (Kavanaugh, J., joined by Roberts, C.J., concurring) (reiterating *Heller*'s statement regarding "prohibitions on the possession of firearms by felons and the mentally ill" (quoting *Heller*, 554 U.S. at 626-27)); *Rahimi*, 602 U.S. at 699 (same).

1

The category of serious criminal offenses known as "felonies" was well-recognized at the founding. As explained in several influential contemporary legal treatises, felonies were those crimes deemed to be sufficiently serious, either at common law or by legislative enactment, so as to warrant capital punishment and forfeiture of the convicted individual's estate. *See* 4 William Blackstone. Commentaries on the Laws of England 94-95 (Oxford, Clarendon Press 1st ed. 1769) (hereinafter "Blackstone") ("Felony, in the general acceptance of our English law, compri[s]es every species of crime, which occasioned at common law the forfeiture of lands or goods" and "for which a capital punishment either is or was liable to be inflicted"); 1 Matthew Hale, The History of the Pleas of the Crown 703 (E & R. Nutt & R. Gosling 1st ed. 1736) (hereinafter "Hale") ("Generally if an act of parliament be, that if a man commit such an act, he shall have judgment of life and member, this makes the offense [a] felony, and this was ordinarily the clause used in ancient statutes."); 1 William Hawkins, A Treatise of the Pleas of the Crown 107 (London, E. Richardson & C. Lintot 4th ed. 1762) (hereinafter "Hawkins") (stating that "Felonies"

included those offenses expressly denominated as such, as well as "also those which are decreed to have or undergo Judgment of Life and Member by any Statute").

The gravity of felonies was also understood as being in contrast to the category of less serious crimes known as misdemeanors. "In the English law[,] misdemeanour [was] generally used in contradistinction to *felony*," 5 St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia 5 n. 1 (Philadelphia, William Young Birch & Abraham Small 1803) (hereinafter "St. George Tucker"), and referred to a crime that "may be punished, according to the degree of the ... offense, by fine, or imprisonment, or both," Richard Burn & John Burn, A New Law Dictionary 472 (Dublin, Brett Smith 1792) (hereinafter "Burn & Burn"); *see*, *e.g.*, 4 Blackstone, *supra*, at 99-100, 162-63 (distinguishing between misdemeanors and felonies).

Influential dictionaries at the time of the Second Amendment's ratification reflected a similar understanding that the term "felony" referred to the category of crime that was most serious and that was typically punishable by death. *See*, *e.g.*, Samuel Johnson, A Dictionary of the English Language (London, 10th ed. 1792) (defining a "felony" as "[a] crime denounced capital by the law"); Thomas Sheridan, A Complete Dictionary of the English Language (London, 2d ed. 1789) (same); 1 John Ash, The New and Complete Dictionary of the English

Language (London, 2d ed. 1795) (defining a "felony" as a "capital crime, a very heinous offence"); William Perry, The Royal Standard English Dictionary 239 (London, 5th ed. 1788) (defining a "felony" as a "capital or enormous crime"); Burn & Burn, *supra*, at 302 (explaining that "felony, as it is now become a technical term, signifies in a more restrained sense an offence of an high nature, yet it is not limited to *capital* offenses only, but still retains somewhat of this larger acceptance"); *see also* 1 Noah Webster, A Compendious Dictionary of the English Language 115 (New-Haven, Sidney's Press 1806) (following the definition in Ash's dictionary).

Accordingly, it was commonly understood that "death was 'the standard penalty for all serious crimes' at the time of the founding." *Bucklew v. Precythe*, 587 U.S. 119, 129 (2019) (quoting Stuart Banner, The Death Penalty: An American History 23 (Cambridge, Harvard Univ. Press 2002) (hereinafter "Banner")). Justice James Wilson thus observed in a law lecture he delivered in Philadelphia in the period of 1790-91 that "the idea of felony is now very generally and very strongly connected with capital punishment; so generally and so strongly, that if an act of parliament denominates any new offence a felony, the legal inference drawn from it is, that the offender shall be punished for it capitally." 3 James Wilson, The Works of the Honourable James Wilson, L.L.D., 16 (Philadelphia, Bird Wilson ed., Lorenzo Press 1804) (hereinafter "Wilson").[8]

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[8] The vacated panel opinion in this case ascribed to Justice Wilson the view that the widespread, common understanding of "felony" was incorrect as a technical and historical matter. *See*

The same treatises noted above also recognized the important point that the legislature had the authority to expand the category of "felony" to include additional serious crimes and that the legislature could, if it wished, subject such newly defined offenses to the punishment of death that was typically allowed for felonies. *See* 4 Blackstone, *supra*, at 98 ("And therefore if a statute makes any *new* offence felony, the law implies that it shall be punished with death ..., as well as with forfeiture" (emphasis added)); 1 Hale, *supra*, at 703-04 (recognizing the legislature's authority to enact "new felonies"); 1 Hawkins, *supra*, at 107 (similar). And that power to expand the category of felonies was not limited to only those offenses involving violent acts. Thus, for example, "[s]hortly after proposing the Bill of Rights, the First Congress ... punished forgery of United States securities, 'running away with a ship or vessel, or any goods or merchandise to the value of fifty dollars,' treason, and murder on the high seas with the same penalty: death by hanging." *Harmelin v. Michigan*, 501 U.S. 957, 980-81 (1991) (opinion of Scalia, J.) (original brackets omitted) (quoting Crimes Act of

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United States v. Duarte, 101 F.4th 657, 689, *vacated and reh'g en banc granted*, 108 F.4th 786 (9th Cir. 2024); *see also* Dissent at 91-92 (similar). But Justice Wilson's challenge to the traditional conception of felony reflected his personal belief that "[p]unishments ought unquestionably to be moderate and mild," 3 Wilson, *supra*, at 32, and as the quote above shows, "he recognized that the prevailing view was to the contrary," *Heller*, 554 U.S. at 610. Given that the purpose of originalism is "to determine *the public understanding* of a legal text," *id.* at 605, Justice Wilson's personal disagreement with the prevailing view is less relevant to the historical inquiry under *Bruen* and *Rahimi*.

1790, 1 Stat. 112, 114-15 (1790)); *see also United States v. Tully*, 28 F. Cas. 226, 228 (C.C.D. Mass. 1812) (No. 16,545) (Story, Circuit Justice) (explaining that "run[ning] away with [a] ship or vessel, or any goods or merchandi[s]e to the value of fifty dollars" did not require "personal force or violence"). Blackstone similarly observed that acts such as, *inter alia*, robbery, certain thefts, fraudulent bankruptcy, forgery of coin, and forgery of a marriage license were felonies that could warrant death and forfeiture. 4 Blackstone, *supra*, at 6, 156, 162-65, 238-39, 246-47. Colonial laws in the decades directly preceding, or during, the Revolutionary War prescribed the death penalty for a variety of felonies, including certain instances of counterfeiting, fraud, theft, and perjury. *See* Banner, *supra*, at 7-8 (describing pre-Revolution laws in New Hampshire, Connecticut, Pennsylvania, New York, Virginia, Delaware, and South Carolina that imposed capital punishment for non-violent crimes such as counterfeiting, perjury, theft,

embezzlement, and burning timber).[9] And the same is true of state laws at the time of the founding.[10]

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[9] *See also*, *e.g.*, Acts of the General Assembly of the Province of New-Jersey 121 (Burlington, Samuel Allinson ed., Isaac Collins 1776) (1741 statute imposing "the Pains of Death" for "Felons" convicted of impersonating another during bail proceedings); The History of the Province of New-York from the First Discovery to the Year 1732, at 216 (London, William Smith ed. 1757) (stating that "[t]o counterfeit ... is Felony without Benefit of Clergy"); A Digest of the Laws of Maryland 255-56 (Baltimore, Thomas Herty ed. 1799) (1776-78 statutes imposing "death as a felon" for forgery and counterfeiting); A Digest of the Laws of the State of Georgia 181 (Philadelphia, Robert Watkins & George Watkins eds. 1800) (hereinafter "Ga. Digest") (1773 statute providing that a counterfeiter of "paper money ... shall be adjudged a felon, and shall suffer death without benefit of clergy").

[10] *See*, *e.g.*, 1 A Manual of the Laws of North-Carolina 199 (Raleigh, John Haywood ed., 2d ed. 1808) (1790 law imposing felon status and death for horse theft); Ga. Digest, *supra*, at 467-68 (1792 law imposing felon status and death for forgery); *id.* at 341-43 (1786 law imposing felon status and death for counterfeiting); A Collection of All Such Acts of the General Assembly of Virginia, of a Public or Permanent Nature, as Are Now in Force 260-61 (Richmond, Augustine Davis 1794) (1792 law imposing death and felon status for certain instances of theft, forgery, and counterfeiting); 2 Laws of the State of New-York 41-42 (New-York, Thomas Greenleaf 1792) (1788 law imposing "death as a felon" for certain instances of forgery and counterfeiting); *id.* at 73-75 (1788 law imposing capital punishment for certain thefts); 1 The Public Acts of the General Assembly of North-Carolina 242 (Newbern, James Iredell & Francois-Xavier Martin eds., Martin & Ogden 1804) (1784 law stating that those convicted of committing forgery, counterfeiting, or fraud with respect to tobacco shipments "shall be adjudged a felon, and suffer as in cases of felony"); *Commonwealth v. Hope*, 39 Mass. 1, 9-10 (1839) (Shaw, C.J.) (discussing a 1784 law that "made burglary in the night time punishable with death"); Acts and Laws of the State of Connecticut, in America 66 (New-London, Timothy Green 1784)

Thus, at the time of the adoption of the Second Amendment, it was well understood that a legislature had the authority to define and expand a category of serious crimes and, if it chose, to subject those convicted of such crimes to the death penalty. Inflicting death, of course, is the most severe exercise of state power against an individual, and disarmament—even permanent disarmament—is a "lesser restriction" than execution. *See Rahimi*, 602 U.S. at 699. Because, at the time of the founding, legislatures had a recognized power to define serious crimes as felonies, and to attach the penalty of death and forfeiture of estate to them, the category of convicted "felons" is one that then could categorically be subjected to legal disabilities that equaled or exceeded lifetime disarmament. These two historical traditions (of legislative categorical disarmament and legislative power to define felonies eligible for severe punishment), *taken together*, therefore provide a sufficient historical analogue to satisfy the "how" requirement of *Bruen*.[11] And because the death

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(statute providing that "if any Person rise up by false Witness, wil[l]fully, and of Purpose to take away any Man's Life, such Offender shall be put to Death").

[11] I therefore disagree with the majority's suggestion that the two traditions, considered separately, provide *alternative* grounds for rejecting Duarte's Second Amendment challenge here. Considered separately, neither is sufficient. As I have explained, positing a free-floating legislative power to categorically disarm *any* group deemed to be unreliable, *see* Opin. at 36-38 & n.19, seems at war with the original understanding of the Second Amendment. *See supra* at 48-49. And the greater-includes-the-lesser argument that disarmament is a lesser burden than execution is also inadequate, standing alone, to uphold felon disarmament. Stripping convicted felons of their

penalty, like disarmament, is in part aimed at addressing the problem of potential future lawlessness by demonstrated lawbreakers, *see* 4 Blackstone, *supra*, at 11-12 (explaining that among the aims of criminal punishment were to "depriv[e] the party injuring of the power to do future mischief" and to "deter[] others"); *Joseph Story on Capital Punishment*, 43 Cal. L. Rev. 76, 80 (John C. Hogan ed. 1955) (1830 essay by Justice Story explaining that capital punishment is premised on "cutting [a convict] off from the power of doing further mischief" and "the deterring of others from committing like crimes"), the "why" requirement is satisfied as well.

For the foregoing reasons, the historical traditions concerning legislative treatment of felons and concerning legislative categorical disarmament, taken together, provide a "relevantly similar" historical analogue that justifies, as consistent with the Second Amendment, legislation permanently disarming the category of persons who are convicted felons. *Rahimi*, 602 U.S. at 698 (citation omitted). And because no other provision of the federal Constitution precludes discriminating, on a categorical basis, against convicted felons, Duarte's constitutional challenge to § 922(g)(1) must be rejected.

First Amendment rights is also less severe a consequence than death, but no one could seriously contend that such a statute would be consistent with the First Amendment. The crucial difference is that, in the context of the Second Amendment (in contrast to the First Amendment), there was, at the time of the founding, a well-recognized (if limited) legislative power to strip specified *categories of persons* of their right to bear arms.

2

In my view, none of the contrary arguments presented by Duarte and others on this point is persuasive. In particular, the fact that capital punishment was in practice only "sparingly" applied in the colonies and that many felonies were not eligible for the death penalty, *see Kanter v. Barr*, 919 F.3d 437, 459 (7th Cir. 2019) (Barrett, J., dissenting) (citation omitted), does not require a different conclusion. As I have explained, the relevant question in assessing the scope of a historically based legislative power to disarm particular categories of persons is whether it was understood, at the time of the founding, that the legislature had the *discretion* to impose on a particular group, categorically, legal burdens that were equivalent to or more onerous than permanent disarmament.[12] That was clearly the case with respect

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[12] Thus, while Congress and the States shifted away from capital punishment in the decades after the founding, *see* Banner, *supra*, at 112-43, this evolution in thought did "not alter the nature of felony" as a serious crime worthy of harsh punishment, as St. George Tucker recognized specifically with respect to Virginia's decision to abolish forfeiture and narrow the applicability of capital punishment. *See* 5 St. George Tucker, *supra*, at 95 n.1. And writing in 1868, the year of the Fourteenth Amendment's ratification, Francis Wharton explained that at common law, "it was held, that whenever judgment of life or member was affixed by statute, the offence to which it was attached became felonious by implication, though the word felony was not used in the statute," and that "[i]n this country, with a few exceptions, the common law classification has obtained; the principal felonies being received as they originally existed, and their number being increased as the exigencies of society prompted." 1 Francis Wharton, A Treatise on the Criminal Law of the United States § 2, at 2 (Philadelphia, Kay & Brother 6th ed. 1868).

to the category of persons who committed serious crimes that the legislature chose to define as felonies, and the Second Amendment is therefore not violated if a legislature decides to impose permanent disarmament on persons who have previously been convicted of what it deems to be a sufficiently serious crime.

Likewise, it does not matter that, under current Eighth Amendment doctrine, the vast majority of felonies are not constitutionally eligible for the death penalty. In assessing whether a legislature at the time of the founding had the discretion to impose burdens that exceeded disarmament in severity on a particular category of persons, what matters is the scope of such power as then understood, and not 21st century notions of what is consistent with "evolving standards of decency." *Kennedy v. Louisiana*, 554 U.S. 407, 419-21 (2008) (citation omitted). With respect to the question presented by this case, what matters is that (1) "to ordinary citizens in the founding generation" it was widely understood that legislatures could define an offense to be a felony and impose the death penalty for it, *see Heller*, 554 U.S. at 577; and (2) § 922(g)(1)'s categorical disarmament of felons does not violate any other provision of the Constitution.

III

For the foregoing reasons, I conclude that § 922(g)(1)'s lifetime ban on possession of a firearm or ammunition by a convicted felon does not violate the Second Amendment and that Duarte's as-applied challenge fails. I therefore respectfully concur in the judgment.

VANDYKE, Circuit Judge, with whom IKUTA and R. NELSON, Circuit Judges, join as to Part I, concurring in the judgment in part and dissenting in part:

Steven Duarte was indicted for possessing a firearm while knowing he had been previously convicted of "a crime punishable by imprisonment for a term exceeding one year," in violation of 18 U.S.C. § 922(g)(1). Duarte was previously convicted of five non-violent criminal offenses in California, each of which carried a sentence of one year or more in prison: vandalism, Cal. Penal Code § 594(a); felon in possession of a firearm, *id.* § 29800(a)(1); possession of a controlled substance, Cal. Health & Safety Code § 11351.5; and two convictions for evading a peace officer, Cal. Veh. Code § 2800.2. The government conceded in pre-trial proceedings below that "none of [Duarte' s] prior convictions are violent or involve fraud." Duarte did not challenge his indictment on Second Amendment grounds, as such an argument was foreclosed by our court's precedent in *United States v. Vongxay*, 594 F.3d 1111, 1114-18 (9th Cir. 2010).

After a jury trial, Duarte was convicted of violating § 922(g)(1). The Supreme Court then issued *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), which represented a dramatic shift from our court's approach to the Second Amendment and upended our court's precedent, *see id.* at 15 (abrogating *Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc)). *Bruen* thus called into question our court's precedents holding that § 922(g)(1)'s felon-in-possession ban is constitutional in all applications. *See Vongxay*, 594 F.3d at 1118; *United States v.*

Phillips, 827 F.3d 1171, 1174-76 (9th Cir. 2016). So on appeal Duarte brought an as-applied challenge to his conviction under the Second Amendment, arguing that the indictment failed to state an offense, and should thus be dismissed pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v).

A three judge-panel of our court reversed the district court, concluding that our precedent in *Vongxay* was "clearly irreconcilable" with *Bruen*, that Duarte was a part of "the people" protected by the Second Amendment, and that the government had not proved that § 922(g)(1)'s categorical prohibition, as applied to a nonviolent felon like Duarte, "'is part of the historical tradition that delimits the outer bounds of the' Second Amendment right." *United States v. Duarte*, 101 F.4th 657, 661-62 (9th Cir. 2024), *reh'g en banc granted*, *opinion vacated*, 108 F.4th 786 (9th Cir. 2024) (quoting *Bruen*, 597 U.S. at 19). Then a majority of our court voted to take this case en banc, vacating the panel op1n1on. *See Duarte*, 108 F.4th at 786; *see also id.* (VanDyke, J., disgrantle).

The majority of our en banc court now holds that under a de novo standard of review, applying § 922(g)(1) to Duarte does not violate the Second Amendment. In so holding, the majority makes a cavalcade of errors. First, the majority assumes that de novo review applies to Duarte's claims. The court should have instead disposed of this case under plain error review. Second, the majority concludes that our court's *pre-Bruen* precedent upholding § 922(g)(1) against Second Amendment challenges is not inconsistent with intervening Supreme Court authority. But given the paradigm change in Second

Amendment jurisprudence that *Bruen* effected, the majority's conclusion is incorrect. Third, the majority concludes that legislatures have unilateral discretion to disarm anyone by assigning the label "felon" to whatever conduct they desire. And fourth, the majority reaches the broad conclusion that legislatures can disarm entire classes of individuals, even absent a specific showing of individual dangerousness or propensity to violence.

I. Standard of Review

The majority needed to go no further than the standard of review to decide this case. Rather than "assum[ing] without deciding that de novo review applies," the majority should have applied plain error review and affirmed Duarte's conviction on that ground. De novo review does not apply here under Federal Rule of Criminal Procedure 12, as Duarte contends. Rather, Rule 52(b)'s plain error standard of review applies, and we should have used this opportunity while sitting as an en banc court to correct our erroneous exceptions to that standard.

Duarte's argument that de novo review should apply is wrong. Rule 12(b) provides that certain defenses—including certain defects in the indictment—must be raised by motion before trial. Fed. R. Crim. P. 12(b)(3)(B). If a defendant fails to timely make such a motion, then the defense can later be considered only "for good cause." *Id.* 12(c)(3). And Rule 52(b) provides that on appeal a court may only consider an issue that "was not brought to the court's attention" below if that issue represents "[a] plain error that affects substantial rights." We apply the familiar four-part *Olano* test to determine whether an

issue was "plain error." *United States v. Olano*, 507 U.S. 725, 732-35 (1993).

Against this backdrop, Duarte contends "that de novo review applies once a defendant-appellant shows Rule 12 good cause." The text of Rule 12 and Supreme Court precedent foreclose this argument. Rule 12 doesn't address appellate standards of review or "explicitly announce an exception to plain-error review." *Jones v. United States*, 527 U.S. 373, 388-89 (1999). So any argument that Rule 12 sets aside plain error upon a showing of good cause relies on an inference from silence. And on at least four occasions, the Supreme Court has refused to find exceptions to plain error based on inferences from silence. *See Johnson v. United States*, 520 U.S. 461,466 (1997); *Jones*, 527 U.S. at 388-89; *United States v. Vonn*, 535 U.S. 55, 64 (2002); *Greer v. United States*, 593 U.S. 503, 511-12 (2021). The fact that Rule 12 is silent about appellate standards of review isn't a good reason to buck that trend. Especially because Rule 12 is focused entirely on trial-court proceedings.

Arguing otherwise, Duarte cites *United States v. Guerrero*, 921 F.3d 895, 897 (9th Cir. 2019) (per curiam), which described "Rule 12's good-cause standard as displacing the plain-error standard under [Rule] 52(b)." There, our court correctly observed that plain error review is "the default standard" for reviewing claims on appeal that were not raised below. *Id.* But the court nevertheless concluded that if a defendant can't show good cause for an untimely defense, his defense is "waived" entirely and can't be reviewed at all—not even for plain error. *Id.* Indeed, that was the case in *Guerrero*—the panel concluded

that the defendant had not shown good cause, and therefore the court did not review the merits of defendant's arguments *at all*. *Id.* at 898.

Guerrero did not directly address the question posed to us here. In *Guerrero*, the court decided whether a defendant who fails to show good cause when required by Rule 12 can get any review at all. In answering that question, *Guerrero* said "no": if a defendant has not shown good cause he can get no review at all. In that sense, Rule 12 "displaces" Rule 52(b)'s "plain error" standard. When a defendant fails to satisfy Rule 12's requirement to raise a pre-trial defense—or fails to show "good cause"—then the court's inquiry stops at the Rule 12 analysis, and the court never even turns to the Rule 52(b) analysis.

The question Duarte poses is different: whether a defendant who *has* shown good cause for not raising a required Rule 12 defense should obtain de novo or plain error review when raising the required Rule 12 defense for the first time on appeal. *Guerrero* did not directly address that. In that instance, plain error review remains "the default standard" for reviewing new claims on appeal that were not raised at any time below, *id.* at 897, and thus the appellate court must apply the plain error standard.

To put it another way, Rule 12's good cause standard is not an alternative to Rule 52(b)'s plain error standard. Instead, the good cause standard is an additional "antecedent" requirement to be applied in tandem with Rule 52(b)'s plain error standard. *United States v. McMillian*, 786 F.3d 630, 636 (7th Cir. 2015). So when a defendant wants to raise a Rule 12(b)(3) defense for the first time *on appeal*, as Duarte seeks to

do here, he must show both good cause and plain error. Fed. R. Crim. P. 12(c)(3), 52(b). This is how other circuits have interpreted the interaction between the two rules. *See, e.g.*, *McMillian*, 786 F.3d at 636; *United States v. Mung*, 989 F.3d 639, 642 (8th Cir. 2021) ("[E]ven if he could show good cause, we would review his argument under the same plain error standard."); *United States v. Vance*, 893 F.3d 763, 770 (10th Cir. 2018) (applying good cause and plain error).

The upshot is that applying Rule 12 doesn't make it easier for Duarte to raise his Second Amendment arguments for the first time on appeal. It makes it harder. Rule 12 limits Duarte's ability to get even plain error review—if he can't show good cause, he's not entitled to any review at all. *Guerrero*, 921 F.3d at 898; *United States v. Wright*, 215 F.3d 1020, 1026-27 (9th Cir. 2000). That is why our court has made clear that "[p]lain error review applies on direct appeal even where an intervening change in the law is the source of the error." *United States v. Christensen*, 828 F.3d 763, 779 (9th Cir. 2015) (citing *Johnson*, 520 U.S. at 467-68).

The government does not meaningfully dispute that Duarte has good cause under Rule 12. Under our court's precedents, an intervening change in law satisfies Rule 12's good cause standard. *See United States v. Aguilera-Rios*, 769 F.3d 626, 629 (9th Cir. 2014). In *Aguilera-Rios*, our court held that there was "good cause" to consider a defendant's argument that had not been raised prior to trial pursuant to Rule 12(b)(3)(B) because the defendant "would have had no reason to challenge" the indictment at the district court as "this Court's caselaw ... foreclosed the

argument he now makes." *Id.* at 630-31. Similarly here, Duarte did not challenge his indictment because our precedent in *Vongxay* foreclosed his argument that § 922(g)(1) was unconstitutional. 594 F.3d at 1114-18; *see also Phillips*, 827 F.3d at 1175 ("[A]ssuming the propriety of felon firearm bans—as we must under Supreme Court precedent and our own—there is little question that Phillips's predicate conviction ... can constitutionally serve as the basis for a felon ban."). So Duarte has satisfied Rule 12's good cause requirement, and he is not barred entirely from raising his Second Amendment challenge in this appeal.

But because Duarte did not raise his Second Amendment argument at any point below—either in a Rule 12(b) motion or through another motion—under a plain reading of Rule 52(b) we must apply plain error review. *See*, *e.g.*, *United States v. Mak*, 683 F.3d 1126, 1133 (9th Cir. 2012) ("[C]onstitutional issues not originally raised at trial are reviewed for plain error.").

But that is not the end of the matter, because the Ninth Circuit has already muddied this otherwise clear rule by crafting atextual exceptions to the plain error standard. For example, our court has created an exception to Rule 52(b)'s plain error standard when a "new issue arises while the appeal is pending because of a change in the law." *United States v. Valdivias-Soto*, 112 F.4th 713, 721 n.5 (9th Cir. 2024) (quoting *United States v. Grovo*, 826 F.3d 1207, 1221 n.8 (9th Cir. 2016)); *see also United States v. Flores-Payan*, 942 F.2d 556, 558 (9th Cir. 1991); *United States v. Carlson*, 900 F .2d 1346, 1349 (9th Cir. 1990). If this exception

is satisfied, we apply de novo review. *Valdivias-Soto*, 112 F.4th at 721 n.5.

This change-in-law exception would apply to Duarte's claim. Just as *Bruen* was a change in law satisfying Rule 12's "good cause" requirement, *Bruen* was a sufficient change to warrant application of our "change in the law" exception to Rule 52(b), thus leading us to apply de novo review. *See*, *e.g.*, *Grovo*, 826 F.3d at 1221 n.8; *Aguilera-Rios*, *169* F.3d at 629.

But this exception should never have been created, and the government has asked us to take advantage of the en banc posture of this case to jettison it. *Cf United States v. Begay*, 33 F.4th 1081, 1090 n.3 (9th Cir. 2022) (en banc) ("The government did not ask us to revisit our precedent allowing the application of de novo review" under Rule 52(b).). I would accept that invitation. The exception is divorced from the text of Rule 52(b) and contradicts the Supreme Court's repeated rejection of exceptions to Rule 52(b).[1]

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[1] Our court has also crafted another exception to Rule 52(b)'s plain error review in cases where the court is "presented with [1] a question that is purely one of law and [2] where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *United States v. McAdory*, 935 F.3d 838, 841-42 (9th Cir. 2019) (alterations in original) (quoting *United States v. Garcia-Lopez*, 903 F.3d 887, 892 (9th Cir. 2018)). Both prongs of this exception would also appear to be met in this case, again leading to de novo review. Under the majority's chosen approach—upholding categorical bans on all felons—Duarte's claim raises a purely legal determination. *See United States v. Eckford*, 77 F.4th 1228, 1231 (9th Cir. 2023) (noting that application of the categorical approach is a "purely legal question"); *McAdory*, 935 F.3d at 842 ("[W]hether McAdory's prior convictions qualify as predicate felonies under § 922(g)(1) is

Rule 52(b) is mercifully short. It states: "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). "Except in unusual circumstances, that is all there is to it: we must review new, unpreserved arguments for plain error." *United States v. Yijun Zhou*, 838 F.3d 1007, 1015 (9th Cir. 2016) (Graber, J., concurring). Our exception has no grounding in Rule's 52(b)'s plain text, the sine qua non for interpreting the Federal Rules of Criminal Procedure. *See In re Pangang Grp. Co., LTD.*, 901 F.3d 1046, 1055 (9th Cir. 2018) (The Federal Rules of Criminal Procedure are "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions." (alteration in original) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988))).

A quick look at how this exception came about shows that it is not grounded in the text of Rule 52(b). The Ninth Circuit's exception materialized through an errant line in *United States v. Whitten*, where our court stated that "where a new theory or issue arises while an appeal is pending because of a change in the

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a purely legal question."). And "[t]he Government suffers no prejudice because of [Duarte's] failure to raise the issue to the district court—at the time, under then-current law, the answer would have been obvious and in the Government's favor. On appeal, the effect of intervening law was the subject of supplemental briefing and the main focus of oral argument so the Government has had a full opportunity to present its views." *McAdory*, 935 F.3d at 842. This exception is also unwarranted, and we should overrule it.

law," our court will review that issue in the first instance. 706 F.2d 1000, 1012 (9th Cir. 1983) (first citing *Hormel v. Helvering*, 312 U.S. 552, 557-58 (1941), then citing *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976)). The court's statement was entirely unnecessary to its opinion, as the appellant's argument was not based on new law, and so the exception did not apply. *Id.* And the two cases that *Whitten* relied upon when announcing this rule were not relevant to the proper interpretation of Rule 52. Neither was a criminal case, and thus neither had occasion to apply the Federal Rules of Criminal Procedure. *Hormel* was a civil taxation case, in which the Supreme Court held that a circuit court was correct to consider intervening Supreme Court precedent in rendering its decision on an appeal from the Board of Tax Appeals. 312 U.S. at 557-58. *Hormel* did not discuss, and arguably has no bearing on, the proper interpretation of Rule 52 of the Federal Rules of Criminal Procedure. (Nor could it have discussed Rule 52, as the Federal Rules of Criminal Procedure were not adopted until several years later. *See* Order Adopting Federal Rules of Criminal Procedure, 327 U.S. 821 (1945).). And *Singleton* was a civil challenge to a state statute, again without opportunity to discuss the rules of criminal procedure. 428 U.S. at 120. It did not discuss a new law exception—it simply stated that "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where 'injustice might otherwise result.'" *Id.* at 120-21 (citations omitted). In short, in *Whitten* our court conjured out of thin air an exception to Rule

52(b)'s plain error standard that was irrelevant to that case in any event.

In sharp contrast to what our court did in *Whitten*, the Supreme Court has repeatedly rebuffed litigants' and lower courts' efforts to create such exceptions. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 15 (1985). In *Johnson*, the Court explained that courts have "no authority to make" exceptions to Rule 52(b) "out of whole cloth." 520 U.S. at 466; *see also Puckett v. United States*, 556 U.S. 129, 135-36 (2009) (criticizing judicially crafted exceptions to Rule 52(b)); *Davis v. United States*, 589 U.S. 345, 347 (2020) (per curiam) (noting that courts should not "shield any category of errors from plain-error review"). And the Supreme Court frequently considers claims based upon changes in law under a plain error standard. *See, e.g.*, *Greer*, 593 U.S. at 511-12; *Henderson v. United States*, 568 U.S. 266, 270-71 (2013); *Johnson*, 520 U.S. at 464. For example, in *Henderson*, the Court explained that the "plainness" of an error should be measured at "the time of review." 568 U.S. at 271. That is, a change in law must be considered when determining whether the district court plainly erred. But if a change in the law means that plain error does not apply (as our court says), then how could a change in law ever be considered when deciding the plainness of an error (as the Supreme Court commands)? It can't. The Court's statements flatly contradict our exception.

Our change-in-law exception also makes us an outlier among the circuits. Other circuits have made clear they "review for plain error even if the objection would have lacked merit at the time of trial, before an intervening change in the law." *United States v. Maez*,

960 F.3d 949, 956 (7th Cir. 2020); *see also United States v. Jobe*, 101 F .3d 1046, 1062 (5th Cir. 1996) ("permit[ting] defendants to assert plain error based on intervening changes in the law"); *United States v. David*, 83 F.3d 638, 644-45 (4th Cir. 1996) (applying plain error review to claim based upon change in law); *United States v. Kramer*, 73 F.3d 1067, 1074 & n.16 (11th Cir. 1996) (same); *United States v. Retos*, 25 F.3d 1220, 1230 (3d Cir. 1994) (same); *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994) (same); *United States v. Jones*, 21 F.3d 165, 172-73 (7th Cir. 1994) (same); *United States v. Pervez*, 871 F.2d 310, 314 (3d Cir. 1989) (same).[2]

Because our exception has no grounding in the text of Rule 52(b), contradicts Supreme Court holdings, and conflicts with our sister circuits, I would overrule it here. Then freed from following our erroneous precedent, we should apply plain error review to Duarte's Second Amendment challenge.

Applying plain error review, this is an easy case. "Plain error" requires an error that is "clear" or "obvious," *Olano*, 507 U.S. at 731. The error must be so "clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection."

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[2] Other members of our court have raised the questionable provenance of the "pure questions of law" exception and stated that the exception should be reconsidered. *See, e.g.*, *Zhou*, 838 F.3d at 1017 (Graber, J., concurring) ("[O]ur line of the cases permitting an exception for 'pure questions of law' is contrary to Rule 52(b), Supreme Court precedent, and the practice of our sister circuits .... We ought to reconsider our errant line of cases en banc, either now or in a future appropriate case."); *United States v. Castillo*, 69 F.4th 648, 658 (9th Cir. 2023) (opinion of Wardlaw, J.).

United States v. Bain, 925 F.3d 1172, 1178 (9th Cir. 2019) (citation omitted). "An error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results." *United States v. Wijegoonaratna*, 922 F.3d 983, 991 (9th Cir. 2019) (citation omitted).

There was no plain error by the district court. Given the split among the circuit courts over the constitutionality of § 922(g)(1) as applied to felons convicted of non-violent offenses, and our *pre-Bruen* precedent upholding the constitutionality of the statute, I cannot say that the district court's error was "clear" and "obvious." *Olano*, 507 U.S. at 731; *Bain*, 925 F .3d at 1178. Our sister circuits have reached the same conclusion, finding no plain error when presented with similar challenges to§ 922(g)(1) after *Bruen*. *See, e.g.*, *United States v. Langston*, 110 F.4th 408, 420 (1st Cir. 2024); *United States v. Caves*, No. 23-6176-CR, 2024 WL 5220649, at *1 (2d Cir. Dec. 26, 2024); *United States v. Dorsey*, 105 F.4th 526, 532 (3d Cir. 2024); *United States v. Johnson*, 95 F .4th 404, 416-17 (6th Cir. 2024); *United States v. Jones*, 88 F.4th 571, 574 (5th Cir. 2023) (per curiam); *United States v. Miles*, 86 F.4th 734, 740-41 (7th Cir. 2023). As a member of the en banc court—and after overruling our atextual exceptions to plain error review—I would have taken the same approach here and upheld Duarte's conviction for his failure to show any plain error.

II. Merits of the Second Amendment Challenge

Although the majority could resolve this case under plain error review, it declines to do so. Instead, the majority addresses the merits of Duarte's Second

Amendment challenge under de novo review, resolving conclusively for our circuit that § 922(g)(1) is constitutional in all of its applications. In doing so, the majority deepens a circuit split, intentionally taking the broadest possible path to uphold § 922(g)(1).[3] Because the majority refuses to overrule our court's exceptions to the plain error standard, I would begrudgingly apply them here and reach the merits of Duarte's Second Amendment challenge under a de novo review. And under de novo review the majority is

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[3] *Compare United States v. Hunt*, 123 F.4th 697, 705, 707-08 (4th Cir. 2024) (concluding that "the possession of firearms by felons ... fall[s] outside the scope of the [Second Amendment] right as originally understood" and that legislatures can categorically disarm classes of people (cleaned up) (citations omitted)), *United States v. Jaclcson*, 110 F.4th 1120, 1129 (8th Cir. 2024) (concluding "that legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms" and "Congress acted within the historical tradition when it enacted § 922(g)(1)"), *Vincent v. Bondi*, 127 F.4th 1263, 1266 (10th Cir. 2025) (upholding the constitutionality of § 922(g)(1) "for all individuals convicted of felonies" including the "application of§ 922(g)(1) to nonviolent offenders"), and *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted*, *judgment vacated*, No. 24-5744, 2025 WL 76413 (U.S. Jan. 13, 2025) (concluding that *Bruen* did not abrogate the court's prior precedent upholding § 922(g)(1) against a Second Amendment challenge), *with Range v. Att'y Gen. United States*, 124 F.4th 218,222 (3d Cir. 2024) (en banc) (holding that § 922(g)(1) was unconstitutional as applied to a non-violent felon), *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024) (rejecting an as-applied challenge because the defendant's underlying felony was sufficiently similar to a death-eligible felony at the founding), *and United States v. Williams*, 113 F.4th 637, 662 (6th Cir. 2024) (rejecting an as-applied challenge because the defendant's criminal record showed that he was sufficiently dangerous to warrant disarmament).

wrong on the merits of Duarte's Second Amendment claim, so I dissent from that portion of the majority's opinion.

A. The Second Amendment Historical Analysis

Before turning to the merits of Duarte's Second Amendment challenge, I provide a brief description of the historical analysis the Supreme Court has directed us to follow when evaluating the scope of the individual right to "keep and bear" firearms. U.S. Const. amend. II. *Bruen* clarified "that the Second Amendment's text, history, and tradition are the '[o]nly' avenues to justify a firearm regulation." *United States v. Perez-Garcia*, 96 F.4th 1166, 1175 (9th Cir. 2024) (alteration in original) (quoting *Bruen*, 597 U.S. at 17). This involves a two-step inquiry in the face of Second Amendment challenges. *Bruen*, 597 U.S. at 17. First, we look at whether "the Second Amendment's plain text covers an individual's conduct." *Id.* If so, "the Constitution presumptively protects that conduct." *Id.* But because, "'[l]ike most rights, ... 'the right secured by the Second Amendment is not unlimited,'" we must look to our nation's "'historical tradition of firearm regulation' to help delineate the contours of the right." *United States v. Rahimi*, 602 U.S. 680, 691 (2024) (first quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), then quoting *Bruen*, 597 U.S. at 17).

It is the government's burden to show that a challenged regulation is consistent with our historical traditions, and it must do so by showing that the "challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* at 692 (citing *Bruen*, 591 U.S. at 26-31). In doing so,

we consider whether the government has shown that "the new law is 'relevantly similar' to laws that our tradition is understood to permit.'" *Id.* (quoting *Bruen*, 597 U.S. at 29). The government does so by identifying "historical precursors" supporting the challenged law's constitutionality. *Id.* "Why and how the regulation burdens the right are central to this inquiry." *Id.* (citing *Bruen*, 597 U.S. at 29). The challenged and historical laws are "relevantly similar" only if they share a common "why" *and* "how": they must both (1) address a comparable problem (the "why") and (2) place a comparable burden on the right holder (the "how"). *Id.*; *Bruen*, 597 U.S. at 27-30. While the government "need not [present] a 'dead ringer' or a 'historical twin'" to be successful, it must present at least an analogous historical regulation with a sufficiently similar "why" and "how." *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 30).

With that background in place, I turn to responding to the majority's analysis of Duarte's Second Amendment claims.[4]

B. The Status of our *Pre-Bruen* Precedent

At the outset, the majority incorrectly concludes that *Bruen* did not affect the holding or analysis of our court's precedent rejecting Second Amendment challenges to § 922(g)(1). *See Vongxay*, 594 F.3d at 1114-18. *Bruen* abrogated that precedent. *See* 597 U.S. at 15. While sitting as an en banc court, we are not

[4] I do not address the majority's conclusions at *Bruen*'s first step, *see* 597 U.S. at 17, because I agree that Duarte's challenged conduct is covered by the text of the Second Amendment, and that Duarte is a part of "the People" protected by the Second Amendment's guarantees.

bound by our prior circuit precedent, nor are three-judge panels bound by our circuit precedent when the holding or reasoning of an intervening Supreme Court or en banc case is "clearly irreconcilable" with our prior decision. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). When the "Supreme Court decisions have taken an approach that is fundamentally inconsistent with the reasoning of our earlier circuit authority," *id.* at 892, that alone "[i]s enough to render them 'clearly irreconcilable'" with one another, *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115, 1121 (9th Cir. 2020) (citation omitted).

The Second Amendment regime courts are now supposed to operate under is very different than the law we applied when our court upheld § 922(g)(1) in *Vongxay*. *Bruen* explicitly rejected the analytical framework that our court, and many others, had applied when addressing Second Amendment challenges, *see* 597 U.S. at 19 (rejecting our court's former "two-step approach" as "one step too many," and rejecting "applying means-end scrutiny in the Second Amendment context").

Our old test bears no relationship to *Bruen*'s test, which looks for "consisten[cy] with the principles that underpin our regulatory tradition," *Rahimi*, 602 U.S. at 692, and compares the "how and why" of the founding generation's regulations to the "how and why" of the modem regulation, *Bruen*, 597 U.S. at 29.

Vongxay, and the cases it relied upon, did not follow anything resembling *Bruen*'s text-history-and-tradition "mode of analysis." *Miller*, 335 F.3d at 900 ("[L]ower courts a[re] bound not only by the holdings of higher courts' decisions but also by their 'mode of

analysis.'" (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989))). Rather, *Vongxay* relied on a handful of prior circuit court decisions, then turned to *Heller*'s passing footnote referring to "longstanding" felon firearm bans as "presumptively lawful." *See Phillips*, 827 F.3d at 1174 ("[W]e held in *United States v. Vongxay*, that 'felons are categorically different from the individuals who have a fundamental right to bear arms,'" "based on th[e] language" in *Heller* that "'longstanding prohibitions on the possession of firearms by felons' ... were 'presumptively lawful'" (citations omitted)). In short, *Vongxay* wholly omitted *Bruen*'s two-step methodology, and thus its reasoning is "clearly irreconcilable" with *Bruen*'s "mode of analysis" for analyzing Second Amendment challenges. *Miller*, 335 F.3d at 893, 900.

To be sure, our sister circuits are split on the question of whether *Bruen* abrogated their *pre-Bruen* precedent regarding § 922(g)(1). *Compare Dubois*, 94 F.4th at 1293 (concluding *Bruen* did not abrogate circuit prior precedent upholding § 922(g)(1)), and *Vincent v. Garland*, 80 F.4th 1197, 1200-02 (10th Cir. 2023) (same), *with Range*, 124 F .4th at 225 (concluding that *Bruen* abrogated circuit precedent), *Diaz*, 116 F.4th at 471 (same), *Williams*, 113 F.4th at 645-46 (same), and *Atkinson v. Garland*, 70 F.4th 1018, 1022 (7th Cir. 2023) ("We must undertake the text-and-history inquiry the Court so plainly announced and expounded upon at great length."). But our court applies a more "flexible approach" than other circuits when determining whether circuit precedent has been abrogated by intervening authority. *Miller*, 335 F.3d at 899. In contrast with the more restrictive

standards our sister circuits require, to abrogate a prior decision of ours the intervening authority need only be "closely related" to the prior circuit precedent and need not "expressly overrule" its holding. *Id.*[5]

Our en banc court here should have made clear that our *pre-Bruen* decisions applying a mode of analysis other than *Bruen*'s text-history-and-tradition approach are no longer binding upon future panels of our court. Instead, the majority further bakes in our outdated and erroneous precedent.

C. Reliance on *Heller*'s "Presumptively Lawful" Footnote

The majority's continued reliance on *Vongxay*'s analytical approach is emblematic of another problem with Second Amendment jurisprudence in this Circuit: using "cherrypicked language" that is "mis- and over-applied from the Court's prior precedents" to uphold any firearms regulation that comes before it. *Duarte*, 108 F.4th at 788 (VanDyke, J., disgrantle). "[J]udges who are more interested in sidestepping than following the Court's Second Amendment precedent will latch onto phrases like 'presumptively lawful' ... while conveniently overlooking such

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[5] *Compare, e.g.*, *Dubois*, 94 F.4th at 1293 ("An intervening Supreme Court decision abrogates our precedent only if the intervening decision is both 'clearly on point' and 'clearly contrary to' our earlier decision .... To abrogate a prior-panel precedent, 'the later Supreme Court decision must "demolish" and "eviscerate" each of its "fundamental props."'" (citations omitted)); *Vincent*, 80 F.4th at 1201 ("[W]e can't jettison [our precedent] just because it might have been undermined in *Bruen*. We must instead determine whether *Bruen* indisputably and pellucidly abrogated [our precedent]." (citations omitted)).

bothersome details like the government's burden of supplying relevantly similar historical analogues." *Id.* That is exactly what *Vongxay* did, and what the majority here continues to do.

The majority extracts from *Heller*'s footnoted statement that felon-in-possession laws are "presumptively lawful" the apparent per se rule that *all* felon-in-possession laws are constitutional, warranting "the categorical application of § 922(g)(1) to felons." "[A]pplying *Heller*'s dicta uncritically," as our court continues to do, is "at odds with *Heller* itself, which stated courts would need to 'expound upon the historical justifications' for firearm-possession restrictions when the need arose." *Williams*, 113 F.4th at 648 (quoting *Heller*, 554 U.S. at 635). Nevertheless, the majority doubles-down on our *pre-Bruen* precedent "to foreclose Second Amendment challenges to § 922(g)(1), regardless of whether an underlying felony is violent or not." But "[m]aking the leap from *presumptively* constitutional to *always* constitutional ... is too much for that overused line to bear, no matter how you read it." *United States v. Jackson*, 121 F.4th 656, 658 (8th Cir. 2024) (Stras, J., dissental).

Heller speaks only in terms of a presumption. A presumption must be defeasible. *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) ("'[P]resumptively lawful' ... by implication[] means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge."). So the Court's statement that felon-in-possession laws are only *presumptively* lawful implies that felon-in-possession laws must be unlawful in at least *some* instances. *See Jackson*, 121 F.4th at 658

(Stras, J., dissental). And it is especially unusual to put such weight on *Heller*'s dicta that felon-in-possession laws are presumptively constitutional, because it is black-letter law that *all* legislation is entitled to a presumption of constitutionality. *See, e.g.*, *Davis v. Dep't of Lab. & Indus. of Washington*, 317 U.S. 249, 257 (1942); *O'Gorman & Young*, *Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931). But no one thinks that *that* longstanding presumption gives statutes passed by Congress blanket immunity from searching constitutional scrutiny.

Stretching the language of *Heller*'s "presumption" beyond what it can bear is par for the course on our court. The majority's holding continues a trend in our court's cases relying on *Heller*'s "presumptively lawful" footnote to sidestep the otherwise governing standard. 554 U.S. at 627 & n.26. You might call it our court's Second Amendment fiat-by-footnote. In *Heller*, the court identified at least four types of regulations that are presumptively lawful:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on [1] the possession of firearms by felons and [2] the mentally ill, or [3] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or [4] laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27. Our court has taken each of these "presumptively lawful" regulations outside of the

"heavy burden" that *Bruen* imposes on the government to justify its regulations. *United States v. Connelly*, 117 F.4th 269, 274 (5th Cir. 2024).

Consider "sensitive places" prohibitions. *Heller*, 554 U.S. at 626; *see generally* David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L. Rev. 203 (2018). Our court recently upheld certain "sensitive places" prohibitions that Hawaii and California enacted. *See Wolford v. Lopez*, 116 F.4th 959, 1002-04 (9th Cir. 2024); *see also Wolford v. Lopez*, 125 F.4th 1230, 1232 (9th Cir. 2025) (VanDyke, J., dissental) (detailing errors in the panel opinion). Relying in part on *Heller*'s "presumptively lawful" footnote, the *Wolford* panel concluded that it could apply a "more lenient standard ... when analyzing the regulation of firearms at 'sensitive places.'" *Wolford*, 116 F.4th at 978-79. In other words, our court held the government to a lower standard—let's call it *Bruen-lite*—when identifying "relevantly similar" historical analogues for sensitive places laws.

Or look at the way that our court has treated laws that impose "conditions and qualifications on the commercial sale of arms," another of *Heller*'s "presumptively lawful" categories. 554 U.S. at 626-27 & n.26. In *B & L Productions, Inc. v. Newsom*, our court held that commercial restrictions presumptively fall outside the plain text of the Second Amendment altogether. 104 F.4th 108, 119 (9th Cir. 2024). Notwithstanding the paradigm shift in Second Amendment law that *Bruen* announced, the *B & L Productions* panel adopted the exact same approach our court had taken years before, which concluded

that "*Heller*'s assurance that laws imposing conditions and qualifications on the commercial sale of firearms are presumptively lawful makes us skeptical ... that retail establishments can assert an independent, freestanding right to sell firearms under the Second Amendment." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc); *B & L Prods.*, 104 F.4th at 119 ("the approach we took in *Teixeira* ... remains appropriate").

And our court upheld § 922(g)(4)'s prohibition on the possession of firearms by those who are mentally ill in *Mai v. United States*, 952 F.3d 1106, 1121 (9th Cir. 2020). There, the court all but held that § 922(g)(4) did not burden Second Amendment rights based upon *Heller*'s presumptively lawful language. *See id.* at 1114 (reiterating the government's argument that "§ 922(g)(4) does not burden Second Amendment rights" because "[t]he Supreme Court identified as presumptively lawful" the prohibitions on the possession of firearms by the mentally ill) (citation omitted); *Mai v. United States*, 974 F.3d 1082, 1098 (9th Cir. 2020) (VanDyke, J., dissental) (disagreeing with the panel's conclusion that "Mr. Mai's long-ago mental illness forever excludes him from the community of 'law-abiding, responsible citizens' under the Second Amendment (i.e., once mentally ill, always so)"); *id.* at 1090 (Bumatay, J., dissental) *("Heller*'s observations about 'presumptively lawful regulatory measures' does not change this analysis. *Heller*'s reference to firearm prohibitions for the 'mentally ill' as being 'presumptively lawful,' appl[ies] to those who are *presently* mentally ill." (citations omitted)).

Finally, the majority here relies on *Heller*'s "presumptively lawful" language once more to adopt a per se rule upholding felon-in-possession bans. That is just as wrong as each of our court's earlier decisions relying on *Heller*'s "presumption" footnote to sidestep *Bruen*'s text-history-and-tradition test.

The Supreme Court has provided one test for assessing the constitutionality of regulations on the right to bear arms. "[T]he Second Amendment's text, history, and tradition are the '[o]nly' avenues to justify a firearm regulation." *Perez-Garcia*, 96 F.4th at 1175 (alteration in original) (quoting *Bruen*, 597 U.S. at 17)). Our court makes a "category error in its analysis" when it concludes that such regulations are not "subject to [the full scope of] *Bruen*'s test." *Reese v. A.T.F.*, 127 F.4th 583, 590 n.2 (5th Cir. 2025). By watering down this test, or sidestepping it completely, our court "place[s] more weight on these passing references than the Court itself did." *Kanter v. Barr*, 919 F.3d 437, 445 (7th Cir. 2019) (citation omitted). "Nothing allows us to sidestep *Bruen* in the way" the majority proposes. *Atkinson*, 70 F.4th at 1022; *see also id.* ("We must undertake the text-and-history inquiry the Court so plainly announced and expounded upon at great length.").

The majority's approach here confirms once more that Second Amendment jurisprudence in our circuit is not principally one of reason or logic. It does not actually rely on general historical "principles," distilled from history and tradition, or the holdings and reasoning of Supreme Court precedent. Rather, ours is a jurisprudence built on throwaway lines and footnotes. *See United States v. Perez-Garcia*, 115 F.4th

1002, 1008 (9th Cir. 2024) (VanDyke, J., dissental); *Duarte*, 108 F.4th at 788 (VanDyke, J., disgrantle). We disregard holdings to embrace dictum. And we set aside a coherent methodological approach for ad hoc exceptions justifying our court majority's policy preferences. The Supreme Court has demanded better of us—as does the Constitution—for "the right to keep and bear arms is among the 'fundamental rights necessary to our system of ordered liberty.'" *Rahimi*, 602 U.S. at 690 (quoting *McDonald*, 561 U.S. at 778); *see also id.* ("As a leading and early proponent of emancipation observed, 'Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty.'" (quoting Cong. Globe, 40th Cong., 2d Sess., 1967 (1868) (statement of Rep. Stevens))).

D. The Greater Includes the Lesser Rationale

The majority purports to derive from the historical record the "regulatory principle" that "legislatures may disarm those who have committed the most serious crimes." In doing so, the majority endorses the government's argument that because, in 1791, "the greater punishment of death and estate forfeiture was permissible to punish felons, [the] lesser restriction of permanent disarmament is also permissible." The majority's argument breaks down in at least three respects. First, the three historical sources the majority cites are insufficient to show an "unbroken understanding that the legislature could permanently disarm those who committed the most serious crimes consistent with the Second Amendment." Second, capital punishment and estate

forfeiture were imposed as punishment for only a few felonies. The death penalty was not, as the majority contends, "'the standard penalty for all serious crimes' at the time of the founding." And third, the majority's argument presupposes that the felonies at the founding were equivalent to felonies today. But that's obviously false; many felonies today bear little resemblance to felonies at the founding.

1. Historical Disarmaments

The majority's evidence of the "unbroken understanding that the legislature could permanently disarm those who committed the most serious crimes" is just one Colonial-era English enactment and two *draft* proposals from the Founding-era and succeeding decades. The paucity of that historical record speaks for itself. *Bruen* doubted that three Colonial-era laws were enough to show a historical tradition. 597 U.S. at 46 ("For starters, we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation."). The historical evidence the majority musters is even sparser than that which *Bruen* found inadequate. But even beyond that, each of the historical analogues the majority points to also fails as a historical analogue on its own terms.

First, the majority points to the 1689 English Bill of Rights, characterized as the "predecessor to our Second Amendment." This Bill of Rights provided "[t]hat the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by law." Bill of Rights 1688, 1 W. & M. Sess. 2 c. 2, sch. 1. (Eng.); *see also* 6 William Searle Holdsworth, *A History of English Law* 241 (1924) (explaining that Parliament added this provision to

the Bill of Rights in response to James II's refusal to allow Protestants the right to carry arms). But notwithstanding the ostensible limitation of this right "as allowed by law," "[t]here is no evidence that any Protestants were excluded from the 1689 arms right for being insufficiently loyal or law-abiding." *See* Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. 1, 23 (2024) [hereinafter Greenlee, *Disarming the Dangerous*]; *see also* 5 William Blackstone, *Commentaries* 57 (St. George Tucker ed. 1803) [hereinafter Blackstone, *Commentaries*] ("[T]hese laws are seldom exerted to their utmost rigour" and "if they were, it would be very difficult to excuse them."). And there were multiple "statements made during debates in Parliament that suggest all Protestants were protected by the right, regardless of their condition." Greenlee, *Disarming the Dangerous* at 23; *see also* 5 *Cobbett*'s *Parliamentary History of England* 183 (London, T.C. Hansard 1809) ("If you find not a way to convict them [for being Catholic], you cannot disarm them." (statement of W. Wogan)); 9 *Debates of the House of Commons*, *From the Year 1667 To the Year 1694*, at 170 (London, D. Henry, R. Cave & J. Emonson 1763) ("[B]eing not convicted [for being Catholic] they will say they are not concerned ... and not one man will ... deliver their arms." (statement of Speaker H. Powle)).

The founders also rejected the limitations on the right to bear arms set out in the 1689 English Bill of Rights. Greenlee, *Disarming the Dangerous* at 25; *see also Bridges v. California*, 314 U.S. 252, 264 (1941) ("[T]o assume that English common law in this field became ours is to deny the generally accepted

historical belief that 'one of the objects of the Revolution was to get rid of the English common law ....'" (citations omitted)). The right codified in the 1689 English Bill of Rights had "matured" and expanded by the founding, *Bruen*, 597 U.S. at 45, with Americans "swe[eping] aside" England's "as allowed by law" limitation. Joyce Lee Malcolm, *To Keep and Bear Arms* 136-37, 162 (1994). When James Madison introduced the Second Amendment in Congress, he criticized the limitations on the right to bear arms in the English Bill of Rights, including that it only protected the right of Protestants. *See* James Madison, *Notes for speech in Congress supporting Amendments* (June 8, 1789) (reprinted in 12 *The Papers of James Madison* 193-94 (Charles F. Hobson et al. eds., 1979)). Thomas Cooley explained how the Second Amendment "was adopted with some modification and enlargement from the English Bill of Rights of 1688." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 270 (Boston, Little, Brown & Co. 1880). And William Rawle's "influential treatise" on the Constitution, *Heller*, 554 U.S. at 607, contrasted the "cautiously described" English Bill of Rights—as it was "secured to protestant subjects only" and only protected "bearing arms for their defence, 'suitable to their conditions, and as allowed by law'"—with the more expansive American right, William Rawle, *A View of The Constitution of The United States of America* 126 (Philadelphia, Philip H. Nicklin ed. 1829). In sum, the 1689 English Bill of Rights does not support the majority's purported principle because it was not actually used to disarm those who had committed crimes and the founders explicitly departed from its limitations on the right to bear arms found in

our Bill of Rights. *See also Bruen*, 597 U.S. at 35 ("[C]ourts must be careful when assessing evidence concerning English common-law rights.... English common-law practices ... cannot be indiscriminately attributed to the Framers of our own Constitution.").

Second, the majority emphasizes that "[i]n Pennsylvania, Anti-Federalist delegates—who were adamant supporters of a declaration of fundamental rights—proposed that the people should have a right to bear arms 'unless for crimes committed, or real danger of public injury from individuals.'" But that proposal was just that: a proposal. It went nowhere. "[N]one of the relevant limiting language made its way into the Second Amendment" from this convention, nor from any of the other state ratifying conventions that the government points to. *Kanter*, 919 F.3d at 455 (Barrett, J., dissenting); *see also* 1 Jonathan Elliot, *The Debates in The Several State Conventions on The Adoption of The Federal Constitution* 326 (Washington, Jonathan Elliot 1836) (New Hampshire proposal); 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 675, 681 (1971) (Massachusetts proposal). The Pennsylvania minority proposal failed to even obtain a majority of its own convention. *Kanter*, 919 F.3d at 455 (Barrett, J., dissenting). This failed proposal is not enough to support the permanent disarmament of all felons. And this proposal was not "about felons in particular or even criminals in general," but rather those whose conduct "threatened violence and the risk of public injury." *Id.* at 456. "If 'crimes committed' refers only to a subset of crimes, that subset must be defined; using 'real danger of public injury' to draw the line is both internally

coherent and consistent with founding-era practice." *Id.*

Third and finally, the majority cites a draft criminal code that Edward Livingston proposed for the state of Louisiana. As the majority describes it, this code would have abolished the death penalty for certain crimes, replacing it instead with "permanent forfeiture of certain rights, including the 'right of bearing arms.'" It bears repeating that this too was a *draft* criminal code—as with Pennsylvania's convention proposal, the code was never adopted. Given the minimal probative value of such a draft code, it is no surprise that the government never raised it in its briefing to this court. Instead, the majority errs by bringing in historical evidence of its own volition. *See Baird v. Bonta*, 81 F.4th 1036, 1041 (9th Cir. 2023) ("A district court should not try to help the government carry its burden by sifting historical materials to find an analogue." (internal alterations and citation omitted)). As the Supreme Court has made clear, it is the government's burden to identify historical analogues supporting the government's regulations, not the court's. *See Rahimi*, 602 U.S. at 691 ("[W]hen the Government regulates arms-bearing conduct, ... it bears the burden to 'justify its regulation.'" (citation omitted)); *Bruen*, 597 U.S. at 24 ("The government must ... justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

In sum, the majority fails to point to any historical evidence that actually supports its supposed "unbroken understanding" of permanently disarming felons. The government and the majority thus fail to

situate§ 922(g)(1) in a "historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. It is perhaps unsurprising, then, that the majority attempts to compensate by pointing to a different analog—the purported practice of consistently executing felons at the founding.

2. The Majority's Cold, Dead Fingers Rationale

The majority's death-equals-disarmament argument is no more persuasive than its historical evidence for disarming felons. The majority contends that dead people can't keep or bear arms, and "death was 'the standard penalty for all serious crimes' at the time of the founding.'" But the historical support for that statement is "shaky." *Kanter*, 919 F.3d at 459 (Barrett, J., dissenting). During the colonial era, through the founding, and in the succeeding years, the death penalty was steadily divorced from serious crimes.

"[E]ven before the Founding, the link between felonies and capital punishment was frayed." *Folajtar v. Attorney General*, 980 F.3d 897, 920 (3d Cir. 2020) (Bibas, J., dissenting). In Blackstone's telling, at common law not all felonies faced capital punishment; it was only certain felonies "according to the degree of guilt," "to which capital or other punishment may be superadded." 5 Blackstone, *Commentaries*, 95; *see also id.* at 97 ("Felony may be without inflicting capital punishment ... and it is possible that capital punishments may be inflicted, and yet the offence be no felony ...."). The American colonies further limited the scope of crimes eligible for the death penalty

relative to the English Common Law. *Folajtar*, 980 F.3d at 920 (Bibas, J., dissenting).

And even for those crimes that were capital, "[t]he colonies carried out the death penalty 'pretty sparingly,' and '[p]roperty crimes were, on the whole, not capital.'" *Id.* (quoting Lawrence M. Friedman, *Crime and Punishment in American History* 42 (1993)). "Colonial Pennsylvania, for instance, on average sentenced fewer than two people per year to die and executed only one of those two per year." *Id.* (citation omitted). And in 1682, Pennsylvania "limited imposition of the death penalty to 'willful murder.'" June Carbone, *Seeing Through the Emperor*'s *New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 531 (1983) [hereinafter Carbone, *Principles in Bail*] (quoting 2 Charles P. Keith, *Chronicles of Pennsylvania 1688-1748*, at 586 (1917)). In short, "[a]t the common law, few felonies, indeed, were punished with death." James Wilson, *Lectures on Law*, *in* 2 *Collected Works of James Wilson* 242 (Kermit L. Hall & Mark David Hall eds., 2007) [hereinafter, Wilson, *Lectures*]; *see also* 1 Wilson, *Lectures on Law* 343 ("How few are the crimes-how few are the capital crimes, known to the laws of the United States, compared with those known to the laws of England!").

The relationship between the death penalty and felonies continued to diverge at the founding. "[M]any states were moving away from making felonies ... punishable by death in America." *Range*, 124 F.4th at 227. Founder James Wilson explained that while, in theory, "the idea of [a] felony [wa]s very generally ... connected with capital punishment," in practice, this

"inference[] ... [wa]s by no means entitled the merit of critical accuracy." 2 Wilson, *Lectures* 242. And James Madison explained in The Federalist that the term "felony is a term of loose signification, even in the common law of England." *The Federalist No. 42*, at 234 (Clinton Rossiter ed., 1961) (James Madison). What defined a felony "is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws." *Id.* As a result, there were "many felonies, not one punished with forfeiture of estate, and but a very few with death."[6] 6 Nathan Dane, *A*

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[6] *See*, *e.g.*, Act for the Punishment of Diverse Capital and Other Felonies, *in Acts and Laws of the State of Connecticut in America* 182-83 (Hartford, Hudson & Goodwin 1796) (listing various "felonies" but punishing only some capitally (*e.g.*, bestiality, arson, bearing false witness); Act for the Punishment of Certain Atrocious Crimes and Felonies, *in Acts and Laws of the State of Connecticut in America*, *supra*, at 183-86 (listing various "felonies" that were punished with a term of imprisonment (*e.g.*, forgery, counterfeiting, attempted rape, horse theft, robbery)); *General Laws of Pennsylvania, from the Year 1700 to April 22, 1846*, at 155 (Philadelphia, T. & J.W. Johnson 1847) (abolishing capital punishment for *all* crimes except first-degree murder); An Act to Prevent the Stealing and Taking away of Boats and Canoes, *in* 1 *The Laws of the Province of South Carolina* 49 (Nicholas Trott, ed. 1736) (punishing boat theft with "corporal punishment" and a fine "if the Matter of Fact be a Felony"); 1793 Act Respecting the Punishment of Criminals, *in* 2 *The Laws of Maryland* chap. L VII, § 10 (William Kilty ed. 1800) (empowering justices of the court to, "in their discretion," sentence males convicted of"[a]ny felony" "to serve and labour for any time[] ... not exceeding seven years"); 1801 Act Declaring the Crimes Punishable with Death or with Imprisonment in the State Prison, *in* 1 *The Laws of the State of New York* 254 (Albany, Charles R. & George Webster 1802) (committing any person "duly convicted ... of any felony," with certain enumerated exceptions, to a "term [of imprisonment] not more than fourteen years"); *see*

General Abridgment and Digest of American Law 715 (Boston, Cummings, Hilliard & Co. 1824).

In the years immediately after the Founding, the relationship became even more attenuated. *See Perez-Garcia*, 1115 F.4th at 1018-19 (VanDyke, J., dissental) (detailing this relationship). For example, of more than twenty crimes the first Congress defined in The Crimes Act of 1790, only seven were punishable by death. *See* Act for the Punishment of Certain Crimes Against the United States, ch. 9, §§ 1-28, 1 Stat. 112, 112-18 (1790). Manslaughter, perjury, mayhem (the intentional maiming of another person), and larceny were all non-capital offenses, punished with imprisonment for a term of years. *Id.* §§ 7, 13, 16, 18. And even for the "nonviolent crimes such as forgery and horse theft" that the majority points to, "by the early Republic, many states assigned lesser punishments." *Range*, 124 F.4th at 231.

After the founding, a movement also began to narrow the list of capital crimes to "murder alone, or murder and rape in some states." Carbone, *Principles in Bail* at 535. "By 1798, five states had abolished it for all crimes besides murder." Mugambi Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, 71 Am. J. Comp. L. 46, 69 (2023). "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." Will Tress, *Unintended Collateral*

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also 2 Timothy Cunningham, *A New and Complete Law Dictionary*, Felony (2d ed. 1771) (describing punishments for various felonies as ranging from death and estate forfeiture to imprisonment and hard labor).

Consequences: Defining Felony in the Early American Republic, 57 Clev. St. L. Rev. 461, 468 (2009). Michigan abolished the death penalty for all crimes but treason in 1846, and Rhode Island and Wisconsin each abolished the death penalty entirely between 1852 and 1853. *See* John D. Bessler, *The Death Penalty in Decline: From Colonial America to the Present*, 50 Crim. L. Bull. 245, 258 (2014); Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the American Agenda* 28 (1986). Indeed, Edward Livingston's proposed criminal code for Louisiana, on which the majority stakes much of its historical argument, was part of this movement to eliminate the death penalty as part of the criminal law. So the historical evidence belies the majority's claim that "death was 'the standard penalty for all serious crimes' at the time of the founding."

Absent the relationship at the founding between the historical punishments for felonies and § 922(g)(1), the majority's rationale crumbles. To get around the absence of historical support, the majority contends that "history need not show that *every* felony was punished with death and estate forfeiture.... Instead, the exposure to capital punishment and estate forfeiture is sufficient to demonstrate that the founding generation would view § 922(g)(1)'s permanent disarmament as consistent with the Second Amendment." But "[t]he Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here—de facto lifetime disarmament for all felonies and felony—equivalent misdemeanors—is rooted in our Nation's history and tradition." *Range*, 124 F.4th at 231. So "the historical

evidence belies the [majority's] necessary link in its analysis." *Perez-Garcia*, 1115 F.4th at 1018 (VanDyke, J., dissental). The "history confirms that the basis for the permanent and pervasive loss of all rights cannot be tied generally to one's status as a convicted felon or to the uniform severity of punishment that befell the class." *Kanter*, 919 F.3d at 461 (Barrett, J., dissenting).

Moreover, even putting aside the ahistorical foundation for the majority's attempted analogy, its death-equals-disarmament equivalence still fails. "The obvious point that the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society." *Id.* at 462 (Barrett, J., dissenting). "No one suggests that [someone with a felony conviction] has no right to a jury trial or [to] be free from unreasonable searches and seizures." *Williams*, 113 F.4th at 658. "Dead men do not speak, assemble, or require protection from unreasonable searches and seizures...." *United States v. Jackson*, 85 F.4th 468, 474 (8th Cir. 2023) (Stras, J., dissental). But "we wouldn't 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." *Kanter*, 919 F.3d at 461-62 (Barrett, J., dissenting).

How can the "greater include the lesser" rationale work when the claimed "greater" (capital punishment of all, or even most, felonies) was in fact a historical fiction? It can't. And what can the founders' greater willingness to apply capital punishment tell us about whether they would disarm those *not* sentenced to

death? Nothing. But those aren't the only flaws with the majority's historical analysis. The majority is also wrong to uncritically equate modern-day felonies with those at the founding, the point I tum to next.

3. The Difference Between Modern and Founding-era Felonies

The majority cannot dispute that "today's felonies do not correspond with felonies at the founding that were eligible for death and estate forfeiture." And the majority rightly concedes that "[t]he felony category then was a good deal narrower than now." "Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies." *Tennessee v. Garner*, 471 U.S. 1, 14 (1985). For example, the crime of vandalism—one of Duarte's prior convictions—would have been a misdemeanor at the founding. *United States v. Collins*, 854 F.3d 1324, 1333 (11th Cir. 2017) (describing "malicious mischief" as "the closest common-law offense for damaging another's property"); *see, e.g.*, Act of 1772, in *An Abridgment of the Laws of Pennsylvania* 357 (Philadelphia, Farrand, Hopkins, Santzinger & Co. 1811) (setting forth the penalty for "malicious mischief" as a payment of "the sum of twenty-five pounds"). And "possessing a firearm as a felon"—another of Duarte's prior convictions—"was not considered a crime until 1938 at the earliest." *Diaz*, 116 F.4th at 468 (citing Federal Firearms Act, ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 1250-51 (1938)). As a result of this expansion of what constitutes a felony, § 922(g)(1) now covers an "immense and diverse category" of criminal offenses—"everything from ... mail fraud, to selling pigs without a license in Massachusetts, redeeming large

quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses." *Kanter*, 919 F.3d at 466 (Barrett, J., dissenting).[7]

The majority acknowledges this glaring problem but then bulldozes right over it. It concludes that legislatures have "discretion[] consistent with our nation's history .... to identify conduct that they deem the most serious and to punish perpetrators with severe deprivations of liberty." The majority doesn't point to any limits on that discretion. It is true that 'judges [normally] have little authority to question a legislature's decision to criminalize or punish certain conduct; a felony sentence is 'purely a matter of legislative prerogative.'" *Williams*, 113 F.4th at 660-61 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)). "But when that decision implicates a fundamental, individual right, judicial deference is simply not an option." *Id.* at 661.

Under the majority's approach, the Second Amendment is a paper tiger with no fixed boundaries. "Congress may decide to change [the definition of what a felony is] in the future." *Diaz*, 116 F.4th at 469. "Such a shifting benchmark should not define the

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[7] *See also* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 269 (2020) [hereinafter Greenlee, *Historical Justification*] ("[I]n West Virginia, someone who shoplifts three times in seven years, 'regardless of the value of the merchandise,' is forever prohibited from possessing a firearm. In Utah, someone who twice operates a recording device in a movie theater is forever prohibited from possessing a firearm. And in Florida, a man committed a felony when he released a dozen heart-shaped balloons in a romantic gesture ...." (footnotes and citations omitted)).

limits of the Second Amendment, without further consideration of how that right was understood when it was first recognized." *Id.*; *see also Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting) ("The majority's extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label.").

"Simply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny." *Diaz*, 116 F.4th at 469. "Put simply, there is no historical basis," for Congress "to effectively declare" that committing a crime punishable by imprisonment for a term exceeding one year, will result in permanent loss of one's Second Amendment right "simply because" that is how Congress defined a felony in § 922(g)(1). *Bruen*, 597 U.S. at 31.

Rather, applying *Bruen* requires the government to proffer Founding-era felony analogues that are "distinctly similar" to Duarte's underlying offenses and would have been punishable either with execution, with life in prison, or permanent disarmament. *See id.* at 26. This is the approach taken by several of our sister circuits, including in cases where courts have found "distinctly similar" Founding-era felonies. *See Range*, 124 F .4th at 232 (concluding that the government had not shown a "longstanding history and tradition of depriving people like Range," who was convicted of mail fraud, "of their firearms"); *Diaz*, 116 F.4th at 472 (concluding that disarmament was appropriate because "[a]t the time of the Second Amendment's ratification, those—

like Diaz—guilty of certain crimes—like theft—were punished permanently and severely").

The proper approach in a case like this would be for the government, instead of simply relying on the "felony" label, to instead present analogies between "distinctly modem" felonies and any Founding-era analogues, just as it must do with other firearm regulations. *Bruen*, 597 U.S. at 28-29. But in evaluating such analogies to Founding-era crimes, courts must consider what the modem crime at issue is most similar to: a relevant capital offense that could subject an individual to life imprisonment or permanent disarmament? Or a crime subject to lesser penalties—like a term of years or temporary disarmament—or perhaps activity that was left entirely unregulated?[8] *Compare Connelly*, 117 F .4th at 279 ("[W]e must ask: Which are marijuana users more like: British Loyalists during the Revolution? Or repeat alcohol users?").[9]

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[8] As the above discussion should make clear enough, contrary to Judge Collins's caricature of my position I would not require an "*identical* tradition." I would simply require a historical analogue that has a closer fit to the modem law and thus has a "comparable burden" and is "comparably justified" in its restriction on the right of armed self defense. *Bruen*, 597 U.S. at 29.

[9] To justify avoiding this approach required by *Bruen*, the majority turns to a new favorite talismanic Supreme Court line—stating that this would lead to looking for "a law trapped in amber." The majority's fear is unwarranted. Just as it must do when considering other Second Amendment challenges, the court here too is perfectly capable of looking to analogies and other "relevantly similar" Founding-era regulations. This is not the first cherrypicked line from a Supreme Court Second Amendment opinion that our court has weaponized to dodge the

Analogizing properly, the government has not shown that § 922(g)(1)'s permanent firearm ban can be constitutionally applied to Duarte. As already noted, Duarte's prior vandalism and felon-in-possession convictions were not felonies at the founding. And there are no comparable analogues that allowed for disarmament based upon drug offenses. *Connelly*, 117 F.4th at 278 ("The government identifies no class of persons at the Founding who were 'dangerous' for reasons comparable to marijuana users."); *see also Duarte*, 101 F .4th at 691 & n.16. The government has not adduced any evidence showing whether Duarte's remaining conviction for evading a peace officer fits within any "longstanding" tradition of "prohibit[ing] ... the possession of firearms by felons." *Heller*, 554 U.S. at 626. So the government has altogether failed to show that applying § 922(g)(1) to Duarte "is 'relevantly similar' to laws that" provided for similar punishments at the founding. *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 29).

E. Designating Categories of Dangerous Persons

As if the blanket discretion the majority bestows upon legislatures to disarm anyone they label as a felon was not concerning enough, the majority also

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standard the Supreme Court has directed us to apply. *See*, *e.g.*, *McDougall v. Cnty. of Ventura*, 23 F.4th 1095, 1124 n.1 (9th Cir.), *reh'g en banc granted*, *opinion vacated*, 26 F.4th 1016 (9th Cir. 2022), and *on reh'g en banc*, 38 F.4th 1162 (9th Cir. 2022) (VanDyke, J., concurring); *Perez-Garcia*, 1115 F.4th at 1008 (VanDyke, J., dissental). Perhaps the Supreme Court should consider trimming some of that low-hanging fruit out of its dicta. *See Duarte*, 108 F.4th at 788 (VanDyke, J., disgrantle).

identifies a second—and even broader—"regulatory principle" supporting § 922(g)(1)'s constitutionality: "legislatures may categorically disarm those they deem dangerous, without an individualized determination of dangerousness."

There is no such principle grounded in our nation's historical tradition. The historical analogues on which the majority and the government rely satisfy neither the "how" nor the "why" of *Bruen*'s test. The majority relies first on certain Founding-era laws that disarmed British Loyalists, Catholics, Native Americans, and Blacks. The majority then relies upon a series of laws that effectuated temporary disarmaments—of minors, those of unsound mind, the actively intoxicated, and "tramps." But the former set of laws were all united by one historical principle: they "permitted disarmament if one was a member of a group that was expected to take up arms against the government." *Perez-Garcia*, 115 F.4th at 1031 (VanDyke, J., dissental). And the second set of laws effectuated mere temporary dispossessions of firearms—not permanent bans like § 922(g)(1). Because the historical analogues fail to match either the "how" or the "why" of *Bruen*'s test, they are not "relevantly similar" to § 922(g)(1). *Rahimi*, 602 U.S. at 692.

1. Categorical Disarmament Laws

The first set of laws the majority relies upon are those it characterizes as "regulations that disarmed those whom the legislature deemed dangerous on a categorical basis." These colonial- and Founding-era laws disarmed or otherwise limited the ability to own firearms by British Loyalists, Catholics, Native

Americans, Blacks, and slaves. But the majority is wrong in its historical analysis. The laws did disarm groups that were deemed to be "dangerous" in the sense that they were 'judged to be a threat to the public safety." *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting). But this "history and tradition of disarming 'dangerous' persons does not include non-violent [felons like Duarte]. Indeed, not one piece of historical evidence suggests that, at the time they ratified the Second Amendment, the Founders authorized Congress to disarm *anyone* it deemed dangerous." *Connelly*, 117 F.4th at 277.

In *Bruen*'s parlance, these sets of categorical disarmament laws are not analogues because they were motivated by a different "why." Their motivation was "one particular type of perceived danger: that the group would take up arms against the government during war or in revolt." *Perez-Garcia*, 115 F.4th at 1012 (VanDyke, J., dissental); *see also Range*, 124 F.4th at 245 (Matey, J., concurring) ("Laws imposing class wide disarmament were enacted during times of war or civil strife where separate sovereigns competed for loyalty."); *Jackson*, 85 F.4th at 472 (Stras, J., dissental) ("[T]he decades surrounding the ratification of the Second Amendment showed a steady and consistent practice. People considered dangerous lost their arms. But being a criminal had little to do with it.").

By contrast, § 922(g)(1)'s broader prohibition serves to—in the majority's telling, and in Congress's judgment—prevent the general danger of gun violence and misuse of firearms. *See Kanter*, 919 F.3d at 448 (describing the government's interest in § 922(g)(1)

"as preventing gun violence"); *id.* at 451 (Barrett, J., dissenting) (same). "Section 922(g)(1) ... takes aim at 'gun violence' generally, which is a 'problem that has persisted in this country since the 18th century.' And § 922(g)(1) 'confront[s] that problem' with 'a flat ban on the possession of guns.'" *Duarte*, 101 F.4th at 677 (alterations omitted) (quoting *Bruen*, 597 U.S. at 26, 27). Because these laws did not address a comparable problem, they are not "relevantly similar." *Bruen*, 597 U.S. at 27-30.

Given the extent to which the government has relied upon these alleged categorical disarmament laws, a further explanation of each of the four categories is in order. During the Revolutionary War, former colonies enacted laws to disarm the Loyalists and others who did not take an oath to the union. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 711 (2009) [hereinafter Marshall, *Martha Stewart*]. The Continental Congress recommended that legislatures "disarm persons 'who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies.'" Greenlee, *Historical Justification* at 264 (quoting 4 *Journals of the Continental Congress*, *1774-1789*, at 205 (Worthington Chauncey Ford ed. 1906)). At least six states enacted such laws, disarming those who refused to "renounc[e] all allegiance to the now-foreign sovereign George III in addition to swearing allegiance to one's State."[10] Marshall, *Martha Stewart* at 724-25.

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[10] *E.g.*, Act of Oct. 10, 1779, *in* 9 *Statutes at Large of Pennsylvania* 347-48 (James T. Mitchell & Henry Flanders eds.

These Loyalist laws were temporary measures-both in the timing for their enactments and in the extent to which they disarm individuals.[11] They were

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1903) [hereinafter, Pa. Statutes at Large]; Act of May 1, 1776, *in* 5 *The Acts and Resolves*, *Public and Private*, *of the Province of the Massachusetts Bay* 479-482 (Boston, Wright & Potter Printing Co. 1886); Act of May 1777, in 9 *Statutes at Large* 281-82 (Hening ed. 1821) [hereinafter, *Va. Statutes at Large*]; Act of 1776, *in* 7 *Records of the Colony of Rhode Island and Providence Plantations in New England* 567 (Bartlett ed. 1862); Act of 1777, *in* 24 *The State Records of North Carolina* 86-89 (Clark ed. 1905); Act of 1778, *in* 203 *Hanson*'s *Laws of Maryland 1763-1784*, at 193, 278 (Annapolis, Frederick Green 1801); Act of 1775, *in* 15 *The Public Records of the Colony of Connecticut*, *From May*, *1775*, *to June 1776*, at 193 (Hartford, Case, Lockwood & Brainard Co. 1890) (disarming those who "libel[ed] or defame[d] any of the resolves of the Honorable Congress of the United Colonies" or, upon "complaint being made to the civil authority," were found to be "inimical to the liberties of this Colony and the other United Colonies in America"); Order of May 21, 1776, *in* 15 *Documents Relating to the Colonial History of the State of New York* 103 (Albany, Weed, Parsons & Co. 1887) (ordering the supplying of its militias with "such good Arms fit for soldiers use as they may have collected by disarming disaffected persons"); Act of April 14, 1778, *in Acts of the General Assembly of the State of New Jersey* 90 (Burlington, Isaac Collins 1777) (granting authority to Council of Safety "to deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements, and Ammunition which they own or possess").

[11] *See*, *e.g.*, Act of 1778, in 10 Va. *Statutes at Large* 309-10 (calling for the confinement of disaffected persons "in this time of public[] danger, when a powerful and vindictive enemy are ravaging our southern sister states ... it has become highly expedient ... to vest the executive with extraordinary powers for a limited time"); Act of 1779, *in* 9 *Pa. Statutes at Large* 441 (calling for the "temporary suspension of law" in the "time[] of public danger" and confining suspected Loyalists).

"merely temporary," 2 Blackstone, *Commentaries* 368 n.2, as they were enacted in the midst of the war, and did not "survive[] through the Founding in anything like their original form," Marshall, *Martha Stewart* at 726.[12] They were also temporary in the sense that individuals could regain their right to bear arms upon swearing an oath of allegiance to the Union or disavowing the Crown. *See*, *e.g.*, Act of Dec. 1775, *in* 15 *The Public Records of the Colony of Connecticut*, *supra*, at 193 (stating that individuals who were "inimical" to the States would be disarmed only "until they shall satisfy" the authorities that they "are friendly to this and the other United Colonies"); *see also* June 13, 1777, Journal of the Council of Safety, *in* 1 *The Public Records of the State of Connecticut* 327-29 (Hartford, Cask, Lockwood & Brainard 1894) (releasing "John Wilcocks and James Ward," and "George Folliot," from custody after each took an oath of loyalty).

Given the temporary nature of these laws disarming Loyalists, they fail both the "why" and "how" of *Bruen*'s second step. The motivation for these regulations (wartime measures) was also different than the motivation behind § 922(g)(1) (limiting gun crimes). And the manner in which these laws effectuated that purpose-a temporary disarmament-does not match § 922(g)(1)'s lifetime ban. So these

[12] After the Revolutionary War, some states did continue to disarm Loyalists. Greenlee, *Disarming the Dangerous* at 53. But these laws too were temporary—both in the time for which they were enacted, and the timeframe within which individuals could get their right to bear arms back upon taking an oath.

laws are not "relevantly similar" to § 922(g)(1). *Bruen*, 597 U.S. at 29.

The colonial laws disarming Catholics fare no better under *Bruen*'s test. The government points to only three such colonial laws.[13] But again, it is "doubt[ful] that *three* colonial regulations" prove that disarming Catholics as a class ever became a "well-established" national tradition. *See Bruen*, 597 U.S. at 46. These laws too were temporary measures; passed at the height of the French and Indian War, during which "American Protestants worried that their Catholic neighbors were plotting with Catholic France to impose Catholic rule throughout America." Greenlee, *Disarming the Dangerous* at 35-36. And just as with disarming Loyalists amidst the Revolutionary War, these laws were limited in time and bore virtually "the same rationale." Marshall, *Martha Stewart* at 723. So again, the "why" and "how" break down under *Bruen*'s test.

The colonial laws barring the sale of arms to Native Americans are even less relevant. At least eight colonies enacted such laws that barred the sale

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[13] *See* Act of 1757 for Forming and Regulating the Militia, *in* 3 *Pennsylvania Archives* 131-32 (Harrisburg, Joseph Severns & Co. 1853) (seizing arms belonging to any "Papist or reputed Papist"); Act of 1756, for Regulating the Militia of the Province of Maryland, *in* 52 *Proceedings and Acts of the General Assembly, 1755-1756*, at 454 (Raphael Semmes ed. 1946) (same); Act of 1756 for Disarming Papists, and Reputed Papists, Refusing To Take the Oaths To the Government, *in* 7 *Va. Statutes at Large* 35-36 ("[N]o Papist, or reputed Papist [refusing to take an oath], shall, or may have, or keep in his house or elsewhere, or in the possession of any other person to his use, or at his disposition, any arms, weapons, gunpowder or ammunition ....").

of firearms to Native Americans.[14] The colonies justified these laws as measures in an ongoing military conflict. Greenlee, *Disarming the Dangerous* at 29-30; *Perez-Garcia*, 115 F.4th at 1026 (VanDyke, J., dissental). Their aim was to limit the danger of armed encounters with hostile Native Americans. *See* Greenlee, *Disarming the Dangerous* at 29.[15] So these

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[14] *See* 1 *Journals of the House of Burgesses of Virginia*, *1619-1658/59*, at 13 (H.R. Mcilwaine ed. 1915) (making it a crime to "sell or give any Indians any piece shott, or poulder, or any other armes offensive or defensive"); Act of 1633 Respecting the Indians, *in The Charters and General Laws of the Colony and Province of Massachusetts Bay* 133 (T.B. Wait & Co., 1814) (banning the selling or bartering of "any gun or guns, powder, bullets, shot, [or] lead, to any Indian whatsoever"); Ordinance of March 31, 1639, *in Laws and Ordinances of New Netherland*, *1638-1674*, at 19 (Albany, Weed, Parsons & Co. 1868) ("every Inhabitant of *New Netherland* ... is most expressly forbidden to sell any Guns, Powder or Lead to the Indians, on pain of being punished by Death"); *The Public Records of the Colony of Connecticut*, *Prior to the Union With New Haven Colony*, *May 1665*, at 529-30 (Hartford, Brown & Parsons 1850) (barring repairing an Indian's gun or selling one to an Indian); Act of 1763 to Prohibit the Selling of Guns, Gunpowder, or other Warlike Stores to the Indians, *in* 6 *Pa. Statutes at Large* 319-20 (banning giving, selling, bartering, or exchanging with any Indian "any guns, gunpowder, shot, bullets, lead or other warlike stores without license"); Act of 1763 for Prohibiting All Trade With the Indians, *in Acts of Assembly of the Province of Maryland*, ch. IV, § 3 (Jonas Green, 1764) (prohibiting selling or giving "Gun-powder, Shot, or Lead" to Indians over a certain quantity).

[15] *See also*, *e.g.*, 1675 Act for the Safeguard and Defence of the Country Against the Indians, *in* 2 Va. *Statutes at Large*, *supra*, at 326-27, 336 (condemning "the sundry mur[d]ers, rapines and many depredations lately committed and done by Indians on the inhabitants of this country," directing that "a war[] be declared ... against all such Indians," and ordering that "any person ... within this colony ... presum[ing] to trade ... with any Indian any

laws too fail to serve as a distinctly similar historical analogue, as they had a distinct purpose (the "why")—not arming the enemy. The laws also imposed a different type of burden (the "how"). They did not ban Native Americans from *possessing* firearms but simply prohibited colonists from *selling* them arms. Greenlee, *Disarming the Dangerous* at 29.

Finally, colonial laws disarming slaves and Blacks reflected similar concerns. Just as the colonists feared the "danger of Indian attack[s]," they felt the "equivalent fear" of "indentured servants and slaves as a class." Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 L. & Hist. Rev. 567, 581 (1998). The colonies justified disarming Blacks based on the threat of violence they posed as a collective group.[16]

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powder, shot[] or arm[s] ... shall suffer death without benefit[] of clergy").

[16] *See, e.g.*, Act of 1752, *in 2 Va. Statutes at Large* 481-82 ("Whereas the frequent meeting of considerable numbers of negroe slaves ... is judged of dangerous consequence ... it shall not be lawful[] for any negroe or other slave to carry or arm[] himself[] with any club, staff[], gun[] ... or any other weapon."); Act of 1770, *in A Codification of the Statute Law of Georgia* 813 (Augusta, Charles E. Greville 1848) ("[A]s it is absolutely necessary to the safety of this province[] ... to restrain the wandering and meeting of ... slaves ... it shall be lawful for any person ... to apprehend any ... slave ... found out of the plantation ... [and] if he ... be armed ... to disarm [him]."); Act of 1740, *in* 7 *Statutes at Large of South Carolina* 410 (Columbia, A.S. Johnston 1840) (same); *see also* 1790 Act of N.C., in *A Manual of the Laws of North-Carolina* 172 (Raleigh, J. Gales 1814) ("When any number of negroes, or other slaves, or free people of color, shall collect together in arms, and be going about the country, committing thefts and alarming the inhabitants of any county, it shall be the duty of the commanding officer of such county to

See Heller, 554 U.S. at 611-12 (citing *Waters v. State*, 1 Gill 302, 309 (Md. 1843) for the proposition that "free blacks were treated as a 'dangerous population,'" prompting "'laws ... to make it unlawful for them to bear arms'"). Many colonies prohibited slaves and free Blacks from possessing arms for this reason.[17] *See* Jamie G. McWilliam, *Refining the Dangerousness*

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suppress[] such depredations or insurrections."); 12 The *Colonial Records of the State of Georgia* 451-52 (Candler ed. 1907) (petitioning the Governor for relief from "a Number of Slaves appear[ing] in Arms ... [and] commit[ting] great Outrages and plunder in and about the Town" so that "all Slaves ... be immediately disarmed").

[17] *See* Act of 1664, *in* 2 *The Colonial Laws of New York From the Year 1664 to the Revolution* 687 (Albany, James B. Lyon 1894) (making it unlawful "for any Slave or Slaves to have or use any gun Piston sword Club or any other Kind of Weapon whatsoever" unless in the presence of their master); Act for the Trial of Negroes, *in* 1 *Laws of the State of Delaware* 104 (Newcastle, Samuel & John Adams 1797) (regulating the possession of weapons by "any Negro or Mulatto slave"); Act of 1704 Relating to Servants and Slaves, *in Proceedings and Acts of the General Assembly of Maryland*, *September*, *1704-April*, *1706*, at 261 (Browne ed. 1906) ("[N]o Negro or other Slave within this Province shall be permitted to carry any Gunn or any other Offensive Weapon ...."); *Acts of Assembly*, *Passed in the Province of New York*, *From 1691*, *to 1718*, at 144 (London, John Baskett 1719) ("[I]t shall not be Lawful for any Negro, Indian, or Mulatto Slave, to have or use any Gun or Pistol, but in his Master's ... Presence .... "); Act of 1770, *in A Codification of the Statute Law of Georgia*, *supra*, at 812 ("It shall not be lawful for any slave, unless in the presence of some white person, to carry and make use of firearms, or any offensive weapon whatsoever ...."); Act of 1740, *in* 7 *Statutes at Large of South Carolina*, *supra*, at 404 (same); Act of 1755, *in* 18 *The Colonial Records of the State of Georgia* 117-18 (Candler ed. 1910) ("[I]t shall not be Lawfull for any Slave ... to Carry and make use of Fire Arms" except with a ticket that must be renewed each month).

Standard in Felon Disarmament, 108 Minn. L. Rev. Headnotes 315, 319-20 (2024) [hereinafter, McWilliam, *Refining the Dangerous Standard*].

In sum, this history reveals that even while there was a tradition of disarming groups deemed to be "dangerous," *Kanter*, 919 F.3d at 464 (Barrett, J., dissenting), the danger motivating their disarmament was always a very particular one: "a violent attack against the community by a group opposed to the current regime." *Perez-Garcia*, 115 F.4th at 1028 (VanDyke, J., dissental); *id.* ("In each historical scenario, danger meant one thing: a violent attack." (quoting Mc William, *Refining the Dangerousness Standard* at 324-25)); *see also Range*, 124 F.4th at 244-45 (Matey, J., concurring) (describing the "hallmark [principle] of our Nation's firearm regulations" that "an individual cannot exercise [the right to bear arms] to rebel against a just government").

It should be clear enough that § 922(g)(1) does not fit within that tradition. The burdens and justifications *(Bruen*'s "how" and "why") for laws disarming disfavored groups at the founding are not "relevantly similar" to § 922(g)(1)'s blanket ban on non-violent felons possessing firearms. *Bruen*, 597 U.S. at 29. While § 922(g)(1) was "originally intended to keep firearms out of the hands of violent persons," Greenlee, *Historical Justification* at 274, the law now "encompasses those who have committed *any* nonviolent felony or qualifying state-law misdemeanor—" an "immense and diverse category." *Kanter*, 919 F.3d at 466 (Barrett, J., dissenting); *see also United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (noting that "the earliest incarnation" of

§ 922(g)(1) codified "as the Federal Firearms Act of 1938 ... initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary").

The majority thus fails to show support for its proposed "regulatory principle" from the 17th- and 18th-century categorical disarmament laws it addresses. As we'll see, its second set of 19th-century laws fare no better.

2. Temporary Disarmaments

The majority points to four sets of laws that it describes as "categorical restrictions on the possession of firearms by certain groups of people." These laws restricted the ability to possess firearms by minors, the unsound of mind, the intoxicated, and "tramps." At the outset, given the absence of such regulations in the Founding-era, the majority only cites law from the Reconstruction-era (or later). This approach "inverts historical analysis by relying principally on mid-to-late-19th century statutes (most enacted after Reconstruction)" then "work[ing] backward to assert that these laws are consistent with founding-era analogues." *Reese*, 127 F.4th at 596. But none of these laws is a "relevantly similar" analogue in any event, as they were merely temporary disarmaments, in contrast to § 922(g)(1)'s permanent disarmament.

The first set involves laws that prohibited minors from purchasing or possessing firearms. Of course, a limitation on a minor's right is necessarily a temporary limitation, given that the limitation falls away once the minor passes the age of majority. Moreover, the idea that historical limitations on the scope of a *minor*'s constitutional rights can justify

even greater restrictions on an *adult*'s rights contradicts the Supreme Court's repeated conclusions that other fundamental constitutional rights apply differently to minors. *See*, *e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 337-38 (1985) (Fourth Amendment); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 550-51 (1971) (Sixth Amendment); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (free speech); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (free exercise); U.S. Const. amend. XXVI (voting); *see also Reese*, 127 F.4th at 591 (noting that constitutional rights are applied to minors "with modifications"). In short, these late-19th century laws authorizing the temporary disarmament of minors are not relevantly similar to § 922(g)(1)'s lifetime disarmament.

The same is true of the laws that prohibited the sale of firearms to those of unsound mind. These historical laws only provide support for disarming those who are *presently* ill. *See Tyler v. Hillsdale Cnty. Sheriff*'s *Dep 't*, 837 F.3d 678, 705-06 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment). "Our common law heritage has long recognized that mental illness is not a permanent condition." *Tyler*, 837 F.3d at 710 (Sutton, J., concurring in most of the judgment); *see also* Anthony Highmore, *A Treatise on The Law of Idiocy and Lunacy* 73 (Exeter, George Lamson 1822) ("A lunatic is never to be looked upon as irrecoverable."). "At the time of the Founding" "mental illness was considered a *temporary* ailment that only justified a *temporary* deprivation of rights." *Mai v. United States*, 974 F.3d 1082, 1090 (9th Cir. 2020) (Bumatay, J., dissental); *see also id.* at 1089 ("[T]he evidence is clear: temporary

mental illness didn't lead to a permanent deprivation of rights."). The laws the majority relies on did not effectuate the *permanent* disarmament of those who were deemed to be of unsound mind. So they too are not "relevantly similar."

The majority next proffers four state laws that restricted the possession of firearms by those who were intoxicated, or the sale of firearms to them. But offering just four Reconstruction-era laws "passed scores of years post-Ratification ... misses the mark by a wide margin." *Connelly*, 117 F.4th at 281. At best, these "statutes provide support for banning the *carry* of firearms *while actively intoxicated*." *Id.* (discussing the same laws the majority relies upon). They did not ban the wholesale possession of firearms by those who used intoxicating substances, nor did they ban carry by those who were not actively under the influence. *Id.*; *see also* Act of Feb. 28, 1878, *in Laws of the State of Mississippi* 175 (Jackson, Power & Barksdale) (simply prohibiting the "s[ale] to any minor or person intoxicated," and not prohibiting the carrying of firearms generally). These laws are not relevantly similar to § 922(g)(1)'s permanent disarmament.

The laws disarming "tramps" are no different. They too did not effectuate permanent disarmaments. Rather, they applied only to individuals who were actively engaging in certain activities. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1475 (2009) (distinguishing between restrictions that limit "how" or "when" one may carry, and restrictions that limit "who" may carry). For example, Ohio's law

applied to men who were not "in the county in which he usually lives or has his home" and were "found going about begging and asking subsistence by charity." *State v. Hogan*, 63 Ohio St. 202, 208 (1900). "The point of prohibiting armed tramps from threatening harm to another's person or property was plainly to prevent violence." Greenlee, *Historical Justification* at 270 (citing *Hogan*, 63 Ohio St. at 215, 219). As the Ohio Supreme Court explained in upholding this law against constitutional challenge, the law did not prohibit carrying firearms generally but only carrying firearms for the unlawful purpose of "terrorizing" the community. *See Hogan*, 63 Ohio St. at 216; *id.* at 219 ("A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people.").

Altogether, the majority's proffered laws simply effectuated temporary disarmaments. And a temporary disarmament is not a relevant analogue to the lifetime bar on possession that § 922(g)(1) imposes. *See Rahimi*, 602 U.S. at 699 (emphasizing "[s]ection 922(g)(8)'s restriction was temporary as applied to Rahimi"); *id.* at 713 (Gorsuch, J., concurring) (stressing the same point); *Kanter*, 919 F.3d at 468 n.18 (Barrett, J., concurring) (distinguishing between permanent and temporary disarmaments). Because the "how" of the historical temporary disarmaments do not match § 922(g)(1)'s much-broader permanent disarmament, these laws are not "relevantly similar" analogues. *Rahimi*, 602 U.S. at 692.

3. Absolute Discretion

The consequences of the principle the majority announces are profound. The majority puts it entirely within the hands of "the legislature [to] determine[] [who] represent[s] a 'special danger of misuse.'" In doing so, our court neuters any judicial oversight of the legislative determinations as to who can be permanently disarmed—effectively stripping them of their Second Amendment rights altogether.

By granting legislatures unreviewable discretion to disarm entire categories of individuals, the majority necessarily returns right back to a regime of deference to legislative interest-balancing rejected by the Supreme Court in *Bruen*. *See Range*, 124 F.4th at 228 (rejecting the approach the majority takes here "because such 'extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label'" (quoting *Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting))); *Williams*, 113 F.4th at 660 (rejecting the majority's approach here because "complete deference to legislative line-drawing would allow legislatures to define away a fundamental right"). The Supreme Court has clearly instructed us to *stop* deferring to legislative interest-balancing in Second Amendment cases. *See Bruen*, 597 U.S. at 19, 22, 26. The Court has given us one standard for determining when an individual can be disarmed, consistent with the Second Amendment: "whether there is a tradition of disarming analogous groups in a similar manner and for similar reasons. Deference to legislative labels is not part of that test." *Perez-Garcia*, 115 F.4th at 1022 (VanDyke, J., dissental) (citations omitted).

It is problem enough that the majority steps back into a regime of interest-balancing. But the majority goes even further. Instead of just returning to the old interest-balancing regime—in which our court applied either strict or intermediate scrutiny, *see*, *e.g.*, *Young*, 992 F.3d at 783-84—the majority's decision here effectively now applies *rational basis* review to categorical firearm disarmaments. One step forward in *Bruen*, three steps back in the Ninth Circuit.

As *Heller* explained, "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." 554 U.S. at 628 n.27. That is why, for each of our constitutional rights—including those found in the First through Fourteenth Amendments—courts do not simply defer to legislative fiat. *See id.* at 636 ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

The majority's rational basis test doesn't stop at disarming just felons either. Under the majority's extreme deference, the legislature can disarm anyone it deems to present a "special danger." States could, for example, disarm "aliens, or military veterans with PTSD." *Nat'l Rifle Ass'n*, *Inc. v. A.T.F.*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J., dissental). And why stop at felons? Those with misdemeanor convictions could be disarmed too.[18] Perhaps even just those who have

[18] *See Kanter*, 919 F.3d at 449 (discussing findings that "even handgun purchasers with only 1 prior misdemeanor conviction and no convictions for offenses involving firearms or violence were nearly 5 times as likely as those with no prior criminal

only ever been indicted. Those with a below-average IQ score could lose their right to bear arms.[19] Those who are unemployed, are less educated, or have a low income could be banned, since a legislature could rationally conclude that they were more likely as a group to commit violent crimes.[20] How about everyone under the age of 25? Of course, they could be disarmed too under the majority's rationale.[21] There are countless classes of people for whom a legislature could muster up enough statistics to show that they are more likely to commit certain crimes using a firearm than the general public: men;[22] people who

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history to be charged with new offenses involving firearms or violence" (quoting Garen J. Wintemute, et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 J. Am. Med. Ass'n 2083, 2083 (1998) (emphasis omitted))).

[19] *See*, *e.g.*, Richard J. Herrnstein et al., *Does IQ Significantly Contribute to Crime?*, *in Taking Sides: Clashing Views on Controversial Issues in Crime and Criminology* 34-42 (6th ed. 2001) (arguing that IQ is a significant cause of crime and indicating that criminal populations generally have an average IQ below the mean).

[20] *See*, *e.g.*, Richard B. Freeman, *The Economics of Crime*, *in* 3 *Handbook of Labor Economics* 3532 (Ashenfelter & Card eds. 1999).

[21] *See*, *e.g.*, Richard B. Freeman, *Why Do So Many Young American Men Commit Crimes and What Might We Do About It?*, J. Econ. Perspectives, Winter 1996, at 29-30.

[22] *See United States v. Daniels*, 77 F.4th 337,353 & n.39, (5th Cir. 2023) (noting that in 2012, approximately 80% of offenders arrested for violent crimes were men (citing Crime in the United States 2012, Fed. Bureau Invest. (2012), https://ucr.tbi.gov/crime-in-the-u.s./2012/crime-in-the-u.s.-2012/tables/42tabledatadecoverviewpdf/table_42_arrests_by_sex_2012.xls)).

play violent videogames;[23] transgender persons;[24] registered Democrats.[25]

The merits of the social science behind each of these suspect classifications may not be rock-solid. But under the majority's rational basis test, I see no reason why they would not pass constitutional muster. After all, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). "[T]he rational basis standard 'asks whether there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Montana Med. Ass'n v. Knudsen*, 119 F .4th 618, 630 (9th Cir. 2024) (quoting *Olson v. California*, 104 F.4th 66, 77 (9th Cir. 2024) (en banc)) (cleaned up). With no more than a rational basis

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[23] *See, e.g.*, Craig Anderson et al., *Violent Video Game Effects on Aggression, Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review*, 136 Psych. Bull. 151, 151-73 (2010) ("[W]e believe that debates can and should finally move beyond the simple question of whether violent video game play is a causal risk factor for aggressive behavior; the scientific literature has effectively and clearly shown the answer to be 'yes.'").

[24] *See, e.g.*, Diana Miconi et al., *Meaning in Life, Future Orientation and Support for Violent Radicalization Among Canadian College Students During the COVID-19 Pandemic*, Frontiers Psychiatry, Feb. 2022, at 7, 9 ("Transgender and gender-diverse youth emerge as the group at the highest risk of support for [violent radicalization].").

[25] *See* Marc Meredith & Michael Morse, *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*, 651 Annals Am. Acad. Pol. & Soc. Sci. 220,229 (2014).

requirement, legislatures have carte blanche authority to disarm any disfavored groups.

We would never treat any other fundamental constitutional right this way. This "approach once again makes the Second Amendment a constitutional outlier." *Perez-Garcia*, 115 F.4th at 1020 (VanDyke, J., dissental). I have already explained how we treat the First and Fourth Amendments different from the Second. *Id.* at 1020-21. Under the First Amendment, legislatures cannot willy-nilly preclude speech "on a categorical basis based on a reasonable determination that [the speech] present[s] a 'special danger.'" Rather, to "exempt[] a category of speech from the normal prohibition on content-based restrictions" the government must show "'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.'" *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (quoting *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 792 (2011)). In the Sixth Amendment context, the Supreme Court has also rejected deference to state policymakers when identifying exceptions to the confrontation right, emphasizing that "federal constitutional rights are not typically defined-expanded or contracted-by reference to [such] non-constitutional bodies of law." *Smith v. Arizona*, 602 U.S. 779, 794 (2024).

Try to imagine any other constitutional right that the members of this majority would treat the way it treats the Second Amendment—explicitly providing our court's imprimatur to "overbroad" laws and granting governments authority to strip the rights even of "law-abiding people who [are] not dangerous,

violent, untrustworthy, or unstable." I can't think of one. The Second Amendment is inarguably the red-headed stepchild of the Constitution.

III. Response to Separate Concurrence

Judge Collins's concurrence offers a different route to get to the majority's conclusion. The concurrence first accepts the majority's view that there is a historical tradition that rests on the back of the racially and religiously discriminatory laws that categorically disarmed certain groups at the founding. But unlike the majority, Judge Collins is unwilling to leverage that tradition to authorize a freewheeling power today to disarm *any* group a legislature desires, since that historical principle would be too broad to satisfy *Bruen*'s commands and would effectively eliminate an express constitutional guarantee. So to cabin the principle, the concurrence concludes that a legislature's categorical disarmament power must at least be tethered to some group that was actually disfavored at the founding. Thus the Second Amendment does not prevent legislatures from categorically disarming those who were disarmed in the past, such as Loyalists, Catholics, Native Americans, Blacks, and slaves (although the concurrence quickly adds that all of these groups—except modern anglophiles, I suppose—would presumably be protected from singling out today by other constitutional provisions).

It's an admirable attempt by Judge Collins to cabin the majority's breathtakingly broad historical principle and to gerrymander something to save § 922(g)(1) as applied to nonviolent felons without inventing a sweeping exception to the Second

Amendment that so obviously swallows the rule. The threshold problem with that approach, though, is the stubborn fact that felons were never, as a group, categorically disarmed at the founding. The concurrence needs some mechanism to extend the disarmament power to all felons notwithstanding this historical obstacle, so it concludes that the modem power to disarm extends not only to those who were disarmed at the founding, but also to any group that could have been treated as bad as or worse than being disarmed. This works, the concurrence concludes, because legislatures at the founding could treat felons worse than just disarming them—they could impose the death penalty upon them. Therefore, "taken together," the two historical traditions of the state power to severely punish felons and the state power to categorically disarm historically disfavored groups are enough to sustain § 922(g)(1)'s constitutionality.

I offer a few points in response to Judge Collins's gloss on the majority's approach.

First, the different route taken by the concurrence still runs into many of the same flaws that I and other judges have already identified with the majority's approach. For starters, both the majority and concurrence depend on a false history. As I already explained, the colonies departed from the older common law tradition of generally imposing the death penalty for felonies, and that trend continued through the founding and into succeeding generations. So to get around this absence of historical support, the concurrence makes the same analytical move the majority does, contending that what matters is not that *real* history supports its position, but rather that

history theoretically *could have* supported its position, since presumably Founding-era legislatures had the discretion to make basically any felony (not to mention many non-felonies) death eligible.

But that doesn't do the trick. *Bruen* requires a "well-established" historical tradition, not speculation about what historically could have happened in a Marvel-style multiverse. 597 U.S. at 46. Because history shows the lack of any "uniform severity of punishment that befell" felons at the founding, "the permanent and pervasive loss of all rights cannot be tied generally to one's status as a convicted felon." *Kanter*, 919 F.3d at 461 (Barrett, J., dissenting).

The concurrence's historical analysis tracks the majority's flaws in another way too. The concurrence presupposes that felonies at the founding were the equivalent of felonies today. But as described in response to the majority, many felonies today bear little resemblance to the felonies at the founding that were eligible for the death penalty. *See*, *e.g.*, *Garner*, 471 U.S. at 14. This is particularly problematic for the concurrence. If the whole point of the concurrence's novel approach is to arrive at the same conclusion as the majority but in a way that does not give carte blanche to legislatures to simply disarm whomever they want, then you would think that the types of "felons" disarmed today would need to be the same types of "felons" usually executed at the founding. Where the only similarity is the label "felon," then the constraining rationale for the concurrence's alternative approach falls apart.

From the laws that disarmed Catholics, Loyalists, slaves, Blacks, and Native Americans the concurrence

also seems to draw the same principle as the majority: That these groups of persons were all deemed to present a "special danger of misuse." But like the majority the concurrence fails to acknowledge that each of these "[l]aws imposing class wide disarmament were enacted during times of war or civil strife where separate sovereigns competed for loyalty." *Range*, 124 F.4th at 245 (Matey, J., concurring). Thus the historical principle that flows from these laws is that groupwide disarmament is appropriate "if one was a member of a group that was expected to take up arms against the government." *Perez-Garcia*, 115 F.4th at 1031 (VanDyke, J., dissental). Neither the majority nor the concurrence make sense of that.

The concurrence also suffers from the flaw that it does not explain what historical punishments are severe enough to be equal to or "greater" than disarmament. The concurrence notes that "a historical tradition allowing the imposition of other, *more severe* penalties than disarmament on a given class of persons may provide a sufficient analogue to support allowing such persons to be disarmed," but never explains what penalties are, in fact, "more severe." Most would agree that death is worse than disarmament. As the concurrence acknowledges, "[i]nflicting death ... is the most severe exercise of state power against an individual," thus making *any* other punishment a lesser restriction. But at what point does imprisonment—even if not for life—become "more severe" than permanent disarmament? Many would no doubt surrender their right to bear arms for life rather than spend even a short time in prison. And how large must a fine become before it is more severe than permanent disarmament? The majority treats

disarmament as a "lesser restriction" than estate forfeiture. But why would forfeiture be a more severe punishment than disarmament when, in fact, an individual could recover all that was forfeited, but could not recover the constitutional right stripped by a permanent disarmament? *See Range*, 124 F.4th at 231 (describing estate forfeiture as a temporary punishment). Just like the majority, the concurrence offers no principled way for courts to ascertain what "legal burdens [are] equivalent to or more onerous than permanent disarmament." Nor could it. This is surely at least part of the reason courts don't use this "greater includes the lesser" reasoning for other rights.[26]

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[26] The concurrence is correct to note that I am not a fan of the "greater-includes-the-lesser" standard. Unless such standards are rigorously applied, they fail to constrain judges. And it is clear that in the Second Amendment context judges need constraining, as judges—like my colleagues in the majority here—can always find a reason to rule against the Second Amendment when given some flexibility. Indeed, one of the reasons that *Bruen* rejected the interest balancing two-step approach was that it gave too much leeway to judges to balance away constitutional rights. 597 U.S. at 22-24. The Justices have also repeatedly emphasized that courts must be careful to avoid using historical analogizing to eliminate constraints. *See id.* at 29 n.7 (noting that analogizing "is not an invitation to revise th[e] balance [struck by the founding generation] through means-end scrutiny"); *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring) (noting that "a court must be careful not to read a principle at such a high level of generality that it waters down the right"); *id.* at 734 (Kavanaugh, J., concurring) (noting that a "history-based methodology supplies direction and imposes a neutral and democratically infused constraint on judicial decisionmaking"); *id.* at 712 (Gorsuch, J., concurring) (noting the problem of permitting judges "to extrapolate their own broad new principles

It is also important to notice that while the concurrence makes an admirable effort to reach a narrower holding than the majority's, it is far from clear that it successfully achieves that goal. The concurrence would cabin the discretion afforded to legislatures in just one dimension while leaving a wide-open path to generally disarm in just slightly different ways. The concurrence contends that its approach "confin[es] any legislative categorical disarmament power" and "avoids endorsing the sort of freewheeling legislative power to categorically disarm that the Second Amendment sought to eliminate." But the concurrence's approach leaves legislatures essentially unfettered discretion to categorically disarm for life anyone who has committed some crime (and who hasn't?) by using the eminently manipulable "felony" label. As the concurrence acknowledges, there are few limits on what conduct a legislature could designate a felony. So at the end of the day, the concurrence would still "give[] legislatures unreviewable power to manipulate the Second Amendment [just] by choosing a label." *Id.* at 228 (quoting *Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting)).

And while at first blush the concurrence's serpentine approach may seem to be a handy way to justify disarming all felons—but only felons—on closer

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from" text and history such that "no one can have any idea how they might rule"). The concurrence fails to head those warnings when applying the greater-includes-the-lesser standard here; not only applying that standard, but extending it beyond the context of temporary disarmament in which the *Rahimi* court applied it to the new context of permanent disarmaments. 602 U.S. at 699.

inspection it unfortunately isn't as constrained as it first appears. If, as the concurrence posits, the "legislative categorical disarmament power" can apply to any "historically based classes of persons who could be subjected to equivalent or greater disabilities," then it is not just felons who would be affected. While the concurrence would rely on "*other* provisions of the Constitution" to cabin its approach, other large groups besides felons still fall in the gap. Legislatures at the founding punished-including with death or lengthy imprisonment-those who engaged in conduct that the founding generation deemed to be sexually immoral or deviant, a tradition of disarmament that could presumably extend to the massive part of society today who engage or have engaged in similar conduct.[27] Legislatures at the founding also allowed for the indefinite imprisonment of delinquent debtors in debtor's prisons, a tradition that one could expect to allow for disarming the bankrupt or insolvent today.[28] The sexually immoral and debtors at the founding certainly were "subjected to legal disabilities that were equivalent to, or more severe than,"

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[27] *See*, *e.g.*, An Act Against, and For The Punishment of, Adultery, *in Acts and Laws of the State of Connecticut in America*, *supra*, at 30-31; Martin J. Siegel, *For Better or for Worse: Adultery*, *Crime* & *the Constitution*, 30 J. Fam. L. 45, 48 (1992) (discussing the prevalence of colonial laws prohibiting adultery and sex outside of wedlock); *Lawrence v. Texas*, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting) (noting that there are "records of 20 sodomy prosecutions and 4 executions during the colonial period" (citing Jonathan Katz, *Gay/Lesbian Almanac* 29, 58, 663 (1983))).

[28] *See* Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* 81 (2002); *see also generally* Charles Dickens, *Little Dorrit* (London, G.L. Wright 1857).

disarmament. If legislatures today can disarm those who fall in even just these two "historically based" categories, a large number of Americans beyond just "felons" could be disarmed under the concurrence's approach.[29] And I'm sure if we tried we could think of more groups.

Now you might think that judges and state legislatures out here on the left coast would never, ever rely on historical laws punishing sexual conduct and impoverishment to justify modem disarmament. If so, you would be wrong. Our court has repeatedly made sufficiently clear that when it comes to justifying disarmament, *any* stick will do to beat a dog—even the ugliest stick. One need look no further than this very case, where the majority and the government (and the concurrence) justify disarming non-violent felons by relying on racially and religiously discriminatory laws. Notwithstanding the majority's professed displeasure with such discriminatory laws, this displeasure apparently

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[29] *See*, *e.g.*, Bankruptcy Filing Statistics, United States Courts, https://www.uscourts.gov/data-news/reports/statisticalreports/bankruptcy-filings-statistics (last visited April 21, 2025); Lindsay T. Labrecque & Mark A. Whisman, *Attitudes Toward and Prevalence of Extramarital Sex and Descriptions of Extramarital Partners in The 21st Century*, 31 J. Family Psych. 952, 952-57 (2017); Lawrence B. Fine, *Trends in Premarital Sex in The United States*, *1954-2003*, Pub. Health Rep., Jan.-Feb. 2007, at 76 (noting that "[a]lmost all individuals of both sexes have intercourse before marrying"); Jeffrey M. Jones, *LGBTQ+ Identification in US. Now at 7.6%*, GALLUP (Mar. 13, 2024), https://news.gallup.com/poll/611864/lgbtq-identification.aspx (noting that "7.6% of U.S. adults now identify[] as lesbian, gay, bisexual, transgender, queer or some other sexual orientation besides heterosexual").

takes a back seat to their "demonstrated dislike of things that go bang." *See Mai*, 974 F.3d at 1097 (VanDyke, J., dissental). Similarly, while the State of Washington and a majority of this court professed tears of sympathy for the plight of the mentally ill and insisted that they didn't really believe that once mentally ill, always so, *see Mai*, 952 F.3d at 1121, that didn't stop them from justifying permanent disarmament based on exactly that notion, *see Mai*, 974 F.3d at 1098 (VanDyke, J., dissental). Just as our court does with race and religion here, and did with mental illness in *Mai*, when presented with a choice between modem sexual mores and views about the poor, or effectuating a broader disarmament, the safe bet is that our court would pursue the latter. The concurrence's approach, while an admirable attempt to limit our court's discretion to broadly disarm groups other than all felons, would still leave ample avenues to get to much of the same result as the "legislatures-can-ban-whomever-they-want" principle adopted by the majority today. I give the concurrence an "A" for effort, but ultimately the same failing grade as the majority for its slightly different but equally flawed approach.

IV. Conclusion

It's worth reiterating at this point how unnecessary it was for the majority to reach the merits of Duarte's Second Amendment claim in this case. If forced to decide whether to apply the plain error or de novo standard of review, I would easily predict that a majority of this en banc panel would apply plain error. But in its zeal to reach and broadly deny Duarte's Second Amendment claim on the merits, the majority

is happy to simply assume de novo review. That allows it to announce the broadest of holdings, giving legislatures effectively unconstrained authority to disarm entire swaths of our citizenry. Once again we demonstrate our court's deep-seated prejudice against a fundamental constitutional right, and I must respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-50048

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
STEVEN DUARTE, AKA Shorty,
Defendant-Appellant.

Filed: July 17, 2024

ORDER

MURGUIA, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion is vacated.

VANDYKE, Circuit Judge, dissenting from the grant of rehearing en banc:[1]

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[1] While dissentals are more common, judges on both this and other courts have, on occasion, penned dissents from the *grant* of en banc review. *See*, *e.g.*, *Feldman v. Ariz. Sec'y of State*'s *Off*, 841 F.3d 791, 794 (9th Cir. 2016) (O'Scannlain, J., dissenting from the grant of rehearing en banc); *United States v. Bowen*, 485 F.2d

"What would you do if you were stuck in one place and every day was exactly the same, and nothing that you did mattered?" In the Ninth Circuit, if a panel upholds a party's Second Amendment rights, it follows automatically that the case will be taken en banc. This case bends to that law. I continue to dissent from this court's Groundhog Day approach to the Second Amendment. Following the Supreme Court's recent decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024), the federal government acquiesced in certiorari in a handful of cases pending before the Court and presenting the same question addressed in this case.[2] The Supreme Court should have granted one or more of those cases, and this

case illustrates why. After *New York State Rifle & Pistol Ass'n*, *Inc. v. Bruen*, 597 U.S. 1 (2022), perhaps no single Second Amendment issue has divided the

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1388, 1388 (9th Cir. 1973) (Chambers, J., same); *United States v. Seale*, 550 F.3d 377, 377 (5th Cir. 2008) (Smith, J., same). These disgrantles are understandably rare because in every circuit other than ours en banc rehearing involves the full court, where any active judge disagreeing with the court's decision to rehear the case may ultimately express that disagreement in the en banc decision itself. But because the Ninth Circuit's peculiar en banc procedures do not guarantee participation in the en banc panel to all active judges, a disgrantle is the only guaranteed way a judge on this court can publicly explain why it was inappropriate for our court to take a particular case en banc.

[2] Supplemental Brief for the Federal Parties, *Garland v. Range*, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024); *Vincent v. Garland*, No. 23-683, 2024 WL 3259668 (U.S. July 2, 2024); *Jackson v. United States*, No. 23-6170, 2024 WL 3259675 (U.S. July 2, 2024); *Cunningham v. United States*, No. 23-6602, 2024 WL 3259687 (U.S. July 2, 2024); *Doss v. United States*, No. 23-6842, 2024 WL 3259684 (U.S. July 2, 2024).

lower courts more than the constitutionality of the 18 U.S.C. § 922(g)(1) felon-disarmament rule's application to certain nonviolent felons. The Third Circuit-and for a time, this circuit-concluded that there was no analogous tradition of disarmament for at least *some* defendants. *Range v. Atty Gen.*, 69 F .4th 96, 106 (3d Cir. 2023) (en banc), *cert. granted*, *judgment vacated*, --- S. Ct. ----, 2024 WL 3259661 (July 2, 2024); *United States v. Duarte*, 101 F.4th 657,691 (9th Cir. 2024). The Eighth Circuit concluded otherwise, *United States v. Jackson*, 69 F.4th 495, 501-05 (8th Cir. 2023), *cert. granted*, *judgment vacated*, --- S. Ct. ----, 2024 WL 3259675 (July 2, 2024), while the Tenth and Eleventh Circuits upheld the continued constitutionality of Section 922(g)(1) under *pre-Bruen* precedent without reaching the historical question, *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023), *cert. granted*, *judgment vacated*, --- S. Ct. ----, 2024 WL 3259668 (July 2, 2024); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024).

Nothing in the Supreme Court's recent *Rahimi* decision controls or even provides much new guidance for these cases, which is undoubtedly why the federal government took the unusual step of asking the Court to review one or more of these

pending cases immediately after *Rahimi* instead of following the Court's usual practice of GVRing (granting, vacating, and remanding) related cases. It's also why the original panel in this case, after careful consideration, saw no reason to modify our opinion after *Rahimi* came down. But the Supreme Court rejected the government's request and kicked the can down the road, GVRing all the pending Section

922(g)(1) decisions and instructing the lower courts to take another look at them in light of *Rahimi*.

The Supreme Court's docket this next term is no doubt full of important issues to decide, and this delay-the-inevitable approach to pressing Second Amendment questions would be just fine if the circuit courts were populated with judges committed to faithfully applying the considerable instruction already provided to us by the Court. But that is clearly not the case. In this circuit, you could say that roughly two-fifths of our judges are interested in faithfully applying the totality of the Supreme Court's Second Amendment precedent when analyzing new issues that have not yet been directly addressed by the Court. The other 17/29ths of our bench is doing its best to avoid the Court's guidance and subvert its approach to the Second Amendment. That is patently obvious to anyone paying attention. To say it out loud is shocking only because judges rarely say such things out loud.

For most of the judges in our circuit, any loss in a Second Amendment challenge at the Supreme Court is celebrated as a tool to further our artificial cabining of *Bruen*. Such losses are bound to arise—as with any constitutional challenge, not all Second Amendment ones have merit. But when those losses occur, our court will grasp onto the *loss* itself as if that were the overarching guiding principle offered by the Court, using it to supplement and invigorate the cherrypicked language already mis- and over-applied from the Court's prior precedents. Like someone who eisegetes Scripture just to validate their pre-existing worldview, judges who are more interested in sidestepping than following the Court's Second

Amendment precedent will latch onto phrases like "presumptively lawful" and "law-abiding citizen" while conveniently overlooking such bothersome details like the government's burden of supplying relevantly similar historical analogues.

None of our current justices spent time in this circuit, so perhaps it is understandable that they would reasonably expect all lower courts to faithfully apply *the entirety* of their Second Amendment case law. Let's be clear: out here on the Left Coast, that is a fantasy. The kind of subversive approach I have described will continue as long as the Supreme Court leaves an opening. Granting certiorari, vacating, and remanding *Range* et al. after deciding *Rahimi* only served to open the field a little more for our court to contort the Supreme Court's Second Amendment guidance. The Ninth Circuit is going to joyride *Rahimi* and the GVRs that followed it like a stolen Trans Am until the Supreme Court eventually corrects us (again).

* * *

Emboldened by Rahimi's loss and the Court's subsequent GVRs, the en banc panel in this case will surely rely on *Rahimi* as support for an inevitable and entirely predictable conclusion that Duarte has no Second Amendment rights. But *Rahimi* actually validates the original panel's application of the Court's prior precedents. The Supreme Court emphasized that Rahimi had been judicially determined to pose a credible threat to the safety of others. The government never tried to show that Duarte poses such a threat. The Court also relied on Section 922(g)(8)'s temporary nature. Section 922(g)(1)'s disarmament is

permanent. *Rahimi* supports the panel's conclusion that Duarte could be disarmed if the government could provide historical crimes, analogous to his, that were punished by "death, estate forfeiture, or a life sentence." *Duarte*, 101 F.4th at 689. The government failed to do so. While *Rahimi* involved a distinct legal question and so its outcome is not directly controlling here, everything it clarified about the Second Amendment supports the original panel's analysis and conclusion in this case.

First, the legal question addressed in *Rahimi* is significantly different than the one presented here. Unlike Duarte, who the government concedes had no prior violent convictions, *see Duarte*, 101 F .4th at 663 n.1, *Rahimi* involved a domestic abuser with a long and well-documented history of violence with a firearm. 144 S. Ct. at 1894-95. During one incident, Rahimi dragged his girlfriend to his car, shoved her head against the dashboard, and fired a gun when she tried to flee. *Id.* Rahimi later "threatened a different woman with a gun, resulting in a charge for aggravated assault with a deadly weapon," and became "the suspect in a spate of at least five additional shootings." *Id.* at 1895. A judge issued Rahimi's girlfriend a restraining order on the basis that he posed "a credible threat to the physical safety of [her] or her family." *Id.* at 1896 (cleaned up). This rendered him ineligible to possess firearms under Section 922(g)(8), which, unlike Section 922(g)(1)'s permanent bar on possession, "only prohibits firearm possession so long as the defendant 'is' subject to a restraining order." *Id.* at 1902. And unlike Duarte's as-applied challenge, Rahimi brought a facial challenge to Section 922(g)(8)—the "most difficult

challenge to mount successfully." *Id.* at 1898. To recap, Rahimi, who had a proven track record of violence, brought a broad facial challenge to Section 922(g)(8)'s relatively narrow and temporary bar on firearm possession. Duarte, with no history of violence, brought a narrower as-applied challenge to Section 922(g)(1)'s permanent and complete dispossession.

The Supreme Court emphasized that its holding in *Rahimi* was a narrow one. *See id.* at 1903 ("[W]e conclude only this: ...."). It relied heavily on the distinction between those "who have been found to pose a credible threat to the physical safety of others [and] those who have not," *id.* at 1902, to "conclude only [that] [a]n individual *found by a court* to pose a credible threat to the physical safety of another may be *temporarily* disarmed consistent with the Second Amendment," *id.* at 1903 (emphasis added). As Justice Gorsuch explained, the Court did not "decide ... whether the government may disarm a person without a judicial finding that he poses a 'credible threat' to another's physical safety," "resolve whether the government may disarm an individual permanently," or "approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem ... 'not responsible.'" *Id.* at 1909-10 (Gorsuch, J., concurring). These issues left unaddressed by *Rahimi* are directly implicated in this case, and the factors that the Court relied on to assure itself of Section 922(g)(8)'s constitutionality are simply not present here. Section 922(g)(1) does not require a judicial determination that a felon like Duarte would "pose[] a clear threat of physical violence to another." *Id.* at1901. Nor is its disarmament temporary.

The historical examination in *Rahimi* directly supports the original panel's conclusion in this case. In analyzing Rahimi's facial challenge to Section 922(g)(8), the Supreme Court primarily examined two sets of historical laws: "surety" and "affray" laws. *Id.* at 1899-1901. Surety laws consisted "in obliging those persons whom there is a probable ground to suspect of future misbehavior, to stipulate with and to give full assurance ... that such offense ... shall not happen, by finding pledges or securities for ... their good behavior." 4 William Blackstone, Commentaries *251. As applied to firearms, surety laws generally required a bond to be posted by anyone who posed a clear threat of violence to another. *See*, *e.g.*, Act of May 18, 1846, in The Revised Statutes of the State of Michigan, Passed and Approved May 18, 1846 692 (1846) (requiring surety for "any person [who] shall go armed with a ... pistol ... on complaint of any person having reasonable cause to fear an injury or breach of the peace"). Affray laws similarly targeted individuals who misused arms, but instead of aiming to prevent future violence, they "provided a mechanism for punishing those who had menaced others with firearms." *Rahimi*, 144 S. Ct. at 1900. For example, Massachusetts punished those "as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth." Act of January 29, 1795, in 1 The General Laws of Massachusetts, From the Adoption of the Constitution, to February, 1822 454 (Theron Metcalf ed. 1823).

The Supreme Court analyzed these laws and extracted the principle that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Rahimi*,

144 S. Ct. at 1901. Because "Section 922(g)(8) restricts gun use to mitigate *demonstrated* threats of physical violence, just as the surety and going armed laws do," the Court found it to fit within that regulatory tradition. *Id.* (emphasis added). But unlike Section 922(g)(8), the burden on Duarte's Second Amendment right imposed by Section 922(g)(1) is not relevantly similar to the historical surety or affray laws, as 922(g)(1) applies universally to anyone with the status of "felon" instead of those who have more specifically posed a "*demonstrated* threat[] of physical violence." *Id.* (emphasis added).

Section 922(g)(1) applies to anyone "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). This applies to the many felons whose crime or conduct show they pose a "clear threat of physical violence to another." *Rahimi*, 144 S. Ct. at 1901. But it equally applies to felons who have no history of or expected propensity towards violence, like Martha Stewart. When assessing the burden on the Second Amendment right imposed by the surety and affray laws, the Court in *Rahimi* found it key that the laws "involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at 1902. This tracks the view of scholars who have linked these historical laws to a principle of disarming those who pose a threat of physical violence to another.[3] Here the

[3] *See*, *e.g.*, Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 285 (2020) (highlighting these historical laws' focus on "persons guilty of committing violent crimes," "persons

government not only failed to show the Duarte "likely would threaten or had threatened another with a weapon." *Id.* It conceded he has no history of violence. *Duarte*, 101 F.4th at 663 n.1.

The Court in *Rahimi* also found it relevant that, "like surety bonds of limited duration," Section 922(g)(8)'s burden on Rahimi's rights was "temporary." *Rahimi*, 144 S. Ct. at 1902. "In Rahimi's case that [burden ends] one to two years after his release from prison ...." *Id.* Section 922(g)(1) contains no such time limitation. Once brought within the statute's scope, Duarte is permanently disarmed. *See* 18 U.S.C. § 922(g)(1).

Finally, the Court examined the penalty imposed by the historical surety and affray laws. The affray laws "provided for imprisonment," *Rahimi*, 144 S. Ct. at 1902 (citation omitted), and under the surety laws, "[i]f an individual failed to post a bond, he would be jailed," *id.* at 1900 (citation omitted). The Court then reasoned 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." *Id.* at 1902. In other words, the Court in *Rahimi* compared both the

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with violent tendencies," and other groups thought prone to commit violence); Jamie G. McWilliam, *Refining the Dangerousness Standard in Felon Disarmament*, 108 Minn. L. Rev. Headnotes 315, 324 (2024) ("[T]he danger feared by those drafting the historical disarmament laws was always physical violence."); F. Lee Francis, *Defining Dangerousness: When Disarmament is Appropriate*, 56 Tex. Tech L. Rev. 593, 597 (2024) (concluding that "violent conduct" is necessary for disarmament).

conduct committed by Rahimi to that proscribed by the historical laws and the punishment imposed by Section 922(g)(8) to that of those laws. Since both generally aligned, the Court upheld Section 922(g)(8)'s ban.

This is fundamentally the same reasoning already adopted by the original panel in *Duarte*. The panel reasoned that for those crimes that were historically punished by "death, estate forfeiture, or a life sentence," the defendants were necessarily disarmed and therefore these crimes could be used as analogies "to largely modem crimes that may not closely resemble their historical counterparts but still share with them enough relevant similarities to justify permanent disarmament." *Duarte*, 101 F .4th at 689-90 (cleaned up). Applying this reasoning in *Rahimi* led the Court to conclude that Rahimi could be disarmed under Section 922(g)(8). But applying it here leads to the opposite conclusion about Section 922(g)(1) as applied to Duarte. The government failed to show that the underlying crimes Duarte committed were analogous to any category of crime for which "death, estate forfeiture, or a life sentence" was the historical penalty. *Id.* at 691. Under the reasoning of *Rahimi*, therefore, the core logic of *Duarte* was validated notwithstanding the different outcome in the two cases.

* * *

In a circuit with a majority of judges committed to faithfully applying the Supreme Court's Second Amendment jurisprudence, I wouldn't need to write this. In that world, this court's forthcoming en banc decision denying Duarte's Second Amendment rights

could be characterized as additional, desirable lower court "percolation" that might possibly assist the Supreme Court when it eventually addresses this question. But precisely because a supermajority of our court is so predictably biased against firearms, our en banc decision will once again speak volumes only about Second Amendment inevitability in the Ninth Circuit, while telling us nothing about how the Supreme Court's precedents, properly construed, apply to Section 922(g)(1)'s ban. Maybe someday we will break out of this predetermined script.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-50048

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
STEVEN DUARTE, AKA Shorty,
Defendant-Appellant.

Argued and Submitted: Dec. 4, 2023
Filed: May 9, 2024

Before: Carlos T. Bea, Milan D. Smith, Jr., and Lawrence VanDyke, Circuit Judges.

OPINION

BEA, Circuit Judge:

18 U.S.C. § 922(g)(1) makes it a crime for any person to possess a firearm if he has been convicted of an offense "punishable by imprisonment for a term exceeding one year." Steven Duarte, who has five prior non-violent state criminal convictions—all punishable for more than a year—was charged and convicted under § 922(g)(1) after police saw him toss a handgun out of the window of a moving car. Duarte now

challenges the constitutionality of his conviction. He argues that, under the Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), § 922(g)(1) violates the Second Amendment as applied to him, a non-violent offender who has served his time in prison and reentered society. We agree.

We reject the Government's position that our *pre-Bruen* decision in *United States v. Vongxay*, 594 F .3d 1111 (9th Cir. 2010), forecloses Duarte's Second Amendment challenge. *Vongxay* is clearly irreconcilable with *Bruen* and therefore no longer controls because *Vongxay* held that § 922(g)(1) comported with the Second Amendment without applying the mode of analysis that *Bruen* later established and now requires courts to perform. *Bruen* instructs us to assess all Second Amendment challenges through the dual lenses of text and history. If the Second Amendment's plain text protects the person, his arm, and his proposed course of conduct, it then becomes the Government's burden to prove that the challenged law is consistent with this Nation's historical tradition of firearm regulation. *Vongxay* did not apply these two analytical steps because *Bruen* had not yet established them. We must therefore reconsider § 922(g)(1)'s constitutionality, this time applying *Bruen*'s two-step, text-and-history framework.

At step one of *Bruen*, we easily conclude that Duarte's weapon, a handgun, is an "arm" within the meaning of the Second Amendment's text and that Duarte's "proposed course of conduct—carrying [a] handgun[] publicly for self-defense"—falls within the

Second Amendment's plain language, two points the Government never disputes. *Bruen*, 597 U.S. at 32. The Government argues only that "the people" in the Second Amendment excludes felons like Duarte because they are not members of the "virtuous" citizenry. We do not share that view. *Bruen* and *Heller* foreclose that argument because both recognized the "strong presumption" that the text of the Second Amendment confers an individual right to keep and bear arms that belongs to "all Americans," not an "unspecified subset." *Bruen*, 597 U.S. at 70 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008)). Our own analysis of the Second Amendment's publicly understood meaning also confirms that the right to keep and bear arms was every citizen's fundamental right. Because Duarte is an American citizen, he is "part of 'the people' whom the Second Amendment protects." *Bruen*, 597 U.S. at 32.

At *Bruen*'s second step, we conclude that the Government has failed to prove that § 922(g)(1)'s categorical prohibition, as applied to Duarte, "is part of the historical tradition that delimits the outer bounds of the" Second Amendment right. *Bruen*, 597 U.S. at 19. The Government put forward no "well-established and representative historical analogue" that "impose[d] a comparable burden on the right of armed self-defense" that was "comparably justified" as compared to § 922(g)(1)'s sweeping, no-exception, lifelong ban. *Id.* at 29, 30. We therefore vacate Duarte's conviction and reverse the district court's judgment entering the same.

I.

On the night of March 20, 2020, two Inglewood police officers noticed a red Infiniti auto drive past them with tinted front windows. The officers turned around and trailed the car for a time before seeing it run a stop sign. When they activated their patrol lights, one of the officers saw the rear passenger (later identified as Duarte) roll the window down and toss out a handgun. The Infiniti drove about a block farther before stopping.

The officers approached the vehicle, removed Duarte and the driver from the car, and handcuffed them. A search of the car's interior recovered a loaded magazine wedged between the center console and front passenger seat. A third officer arrived at the scene and searched the immediate area, where he found the discarded handgun—a .380 caliber Smith & Wesson—with its magazine missing. One of the officers loaded the magazine into the recovered pistol, and it fit "perfectly."

A federal grand jury indicted Duarte for possessing a firearm while knowing he had been previously convicted of "a crime punishable by imprisonment for a term exceeding one year," in violation of 18 U.S.C. § 922(g)(1). The indictment referenced Duarte's five prior, non-violent criminal convictions in California: vandalism, Cal. Penal Code § 594(a); felon in possession of a firearm, *id.* § 29800(a)(1); possession of a controlled substance, Cal. Health & Safety Code § 11351.5; and two convictions for evading a peace officer, Cal. Veh. Code

§ 2800.2.[1] Each of these convictions carried a possible sentence of one year or more in prison.

Duarte pleaded not guilty to the charge in the indictment. His case proceeded to trial, a jury found him guilty, and he received a below-guidelines sentence of 51 months in prison. He timely appealed and now challenges his conviction under the Second Amendment. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

II.

We normally review claims of constitutional violations *de novo*. *United States v. Oliver*, 41 F.4th 1093, 1097 (9th Cir. 2022). But because Duarte did not challenge § 922(g)(1) on Second Amendment grounds in the district court below, the Government argues that Federal Rule of Criminal Procedure 52(b)'s more demanding plain error standard of review controls. *Id.* ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). We disagree.

It is true that Rule 52(b)'s plain error standard "is the default standard governing ... consideration of issues not properly raised in the district court" and thus "ordinarily applies when a party presents an issue for the first time on appeal." *United States v. Guerrero*, 921 F.3d 895, 897 (9th Cir. 2019). But when the untimely issue is a Rule 12(b)(3) "defense[]" or

[1] In the proceedings below, the Government conceded in pre-trial briefing that "none of [Duarte's] prior convictions [we]re violent." And neither Duarte's indictment, nor the pre-sentencing report prepared after his conviction, alleged that Duarte's predicate offenses involved violence.

"objection[]" to a criminal indictment, "Rule 12's good-cause standard ... displac[es] the plain-error standard" under Rule 52(b). *Id.*; *see* Fed. R. Crim. P. 12(b)(4)(B)(c)(1) ("[A] court may consider the [untimely] defense, objection, or request if the party shows good cause."). If the defendant demonstrates good cause for failing to raise the Rule 12(b)(3) issue below, we may consider it for the first time and will apply whatever default standard of review would normally govern the merits, which in this case is de novo review. *See United States v. Aguilera-Rios*, 769 F.3d 626, 629 (9th Cir. 2014).

No one disputes here that Duarte's Second Amendment challenge is untimely because he could have raised it as a Rule 12(b)(3) defense or objection to his indictment. Duarte, however, demonstrated good cause for asserting his constitutional claim now instead of then. When Duarte was indicted, he "had no reason to challenge" whether § 922(g)(1) violated the Second Amendment as applied to him. *Aguilera-Rios*, 769 F.3d at 630. We had already held in *Vongxay* "that § 922(g)(1) does not violate the Second Amendment as it applies to ... convicted felon[s]." 594 F.3d at 1118. Only later did the Supreme Court decide *Bruen*, which (for reasons we explain just below) is irreconcilable with *Vongxay*'s reasoning and renders it no longer controlling in this Circuit. Because *Vongxay* "foreclosed the argument [Duarte] now makes," Duarte had good cause for not raising it in a Rule 12(b)(3) pretrial motion. *Aguilera-Rios*, 769 F.3d at 630. We may consider his challenge for the first time and will review it de novo.

III.

A.

We must first decide whether *Bruen* abrogated our decision in *United States v. Vongxay*. We follow our decision in *Miller v. Gammie* to answer that question. 335 F.3d 889 (9th Cir. 2003). Under *Miller*, "where the *reasoning or theory* of [a] prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority," we are "bound by the later and controlling authority" and "reject the prior circuit opinion as ... effectively overruled." *Id.* at 893 (emphasis added). This is a more "flexible approach" than what other circuits use. *Id.* at 899. To abrogate a prior decision of ours under *Miller*, the intervening authority need only be "closely related" to the prior circuit precedent and need not "expressly overrule" its holding. *Compare id.*, *with United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024) (intervening authority must be "clearly on point" and must "demolish and eviscerate each of [the prior decision's] fundamental props") (citations omitted). So long as the "the Supreme Court ha[s] taken an 'approach [in an area of law] that [is] fundamentally inconsistent with the reasoning of our earlier circuit authority,[']" *Rodriguez v. AT&T Mobility Services LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (quoting *Miller*, 335 F.3d at 889, 990), that "[i]s enough to render them" irreconcilable with one another, *Langere v. Verizon Wireless Services, LLC*, 983 F.3d 1115, 1121 (9th Cir. 2020) (citations omitted).

As a result, "[e]ver since ... *Miller v. Gammie*[,] ... we have not hesitated to overrule our own precedents when their underlying reasoning could not be squared

with the Supreme Court's more recent pronouncements." *In re Nichols*, 10 F.4th 956, 962 (9th Cir. 2021). We have found the standard met in the obvious cases, such as when a later Supreme Court decision implicitly (but not expressly) overrules an earlier precedent of ours because the supervening authority fundamentally reshapes an area of law by announcing a new or clarified analytical framework that the earlier decision never applied. *See United States v. Slade*, 873 F.3d 712, 715 (9th Cir. 2017); *see also*, *e.g.*, *United States v. Baldon*, 956 F.3d 1115, 1121 (9th Cir. 2020) ("[The Supreme Court's] clarification [in *Stokeling*] of 'violent force' ... is 'clearly irreconcilable' with ... [*Solorio-Ruiz*'s] ... analytical distinction between substantial and minimal force. This distinction no longer exists."); *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) (holding previous *per se* rule for rejecting Rule 60(b)(6) motions based on intervening change in law was irreconcilable with Supreme Court's "case-by-case approach"); *Swift v. California*, 384 F.3d 1184, 1190 (9th Cir. 2004). So too have we invoked *Miller* when the *affirmative* reasons for a previous panel decision "necessarily rested on *at least one* assumption that is clearly irreconcilable with intervening higher authority." *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1020 (9th. Cir. 2006) (emphasis added); *see Lair v. Bullock*, 798 F.3d 736, 746 (9th Cir. 2015) ("Because *Eddleman* relied *at least in part* on a state's interest in combating 'influence,' whereas *Citizens United* narrowed the analysis ... to exclude th[at] state[] interest ... *Citizens United* abrogated *Eddleman*'s ... analysis.") (citing *Miller*, 335 F.3d at 893) (emphasis added). Thus, while *Miller*'s "clearly irreconcilable"

test may be a "high" standard, by no means is it an "insurmountable" one. *Langere*, 983 F.3d at 1121.

With these principles in mind, we conclude that *Vongxay*'s reasoning is "clearly irreconcilable" with *Bruen* and its holding therefore no longer controls. *Miller*, 335 F.3d at 893. *Vongxay* did not follow the textually and historically focused "mode of analysis" that *Bruen* established and required courts now to apply to all Second Amendment challenges. *Id.* at 900 ("[L]ower courts a[re] bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'") (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)); *see*, *e.g.*, *Slade*, 873 F.3d at 715 ("Since *Jennen* failed to consider whether section 9A.36.021 is divisible ... the decision's reasoning is 'clearly irreconcilable' with the analytical process [later] prescribed by [the Supreme Court in] *Descamps* and *Mathis*.") (citing *Miller*, 335 F.3d at 893). Nor do *Vongxay*'s affirmative bases for upholding § 922(g)(1) salvage *Vongxay*'s holding. We must therefore conduct our Second Amendment analysis of § 922(g)(1) anew, this time following *Bruen*'s analytical framework.

1.

Before *Bruen*, virtually every circuit (ours included) "coalesced around a 'two-step' framework for analyzing Second Amendment challenges." *Bruen*, *591* U.S. at 17; *see*, *e.g.*, *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013). At the first step, we asked whether the challenged law affected conduct historically protected by the Second Amendment. *E.g.*, *Young v. Hawaii*, 992 F.3d 765, 783-84 (9th Cir. 2021) (en banc), *vacated*, --- U.S. ---, 142 S. Ct. 2895, 213 L.

Ed. 2d 1108 (2022). If it did, we moved to the second step, where we applied varying levels of scrutiny to the challenged law, depending on how close the regulated conduct lay to the "core" of the Second Amendment right to "keep and bear arms." *Id.*

"*Bruen* effected a sea change in Second Amendment law" by replacing this tiers-of-scrutiny framework with one grounded exclusively in text and history. *Maryland Shall Issue, Inc. v. Moore*, 86 F.4th 1038, 1041 (4th Cir. 2023), *rehearing en banc granted*, 86 F.4th 1038 (Jan. 11, 2024). Courts must now consider, as a "threshold inquiry," *United States v. Alaniz*, 69 F .4th 1124, 1128 (9th Cir. 2023), whether "the Second Amendment's plain text covers" the person challenging the law, the "arm" involved, and the person's "proposed course of conduct," *Bruen*, *591* U.S. at 17. If the Second Amendment's "bare text" covers the person, his arm, and his conduct, "the government must [then] demonstrate that the [challenged] regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 18, 44 n.11. To meet its burden, the Government must "identify a well-established and representative historical *analogue*" to the challenged law. *Id.* at 30 (emphasis in original). As to courts, "th[e] historical inquiry that [we] must [now] conduct" requires "reasoning by analogy," in which the two "central considerations" will be whether "how" the proffered historical analogue burdened the Second Amendment right, and "why" it did so, are both sufficiently comparable to the challenged regulation. *Id.* at 28, 29. "Only if" the Government proves that its "firearm regulation is consistent [in this sense] with th[e] Nation's historical tradition may a court conclude that

the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 17 (citations omitted).

Because *Bruen* "had not yet clarified the[se] particular analytical step[s]" until after *Vongxay* was decided, *Vongxay*, predictably, failed to apply them. *See Slade*, 873 F.3d at 715. Unlike *post-Bruen* circuit cases to consider § 922(g)(1)'s constitutionality, *Vongxay* did not grapple with the "threshold [textual] inquiry ... whether [Vongxay] [wa]s part of 'the people' whom the Second Amendment protects," whether "the weapon at issue" was an "arm" within the meaning of the Second Amendment, or "whether the 'proposed course of conduct' f[ell] within the Second Amendment['s]" plain language. *See Alaniz*, 69 F.4th at 1128 (quoting *Bruen*, 597 U.S. at 31-32); *see also*, *e.g.*, *Range v. Attorney General*, 69 F.4th 96, 101 (3d Cir. 2023) ("We begin with the threshold question: whether Range is one of 'the people' who have Second Amendment rights."). As a result, *Vongxay* never decided whether to proceed to *Bruen*'s second step, which would have required the Government to prove that § 922(g)(1)'s lifetime ban on felons possessing firearms imposed a "comparable burden" on the Second Amendment right that was "comparably justified" compared to historical examples of firearm regulations—the "how and why" of *Bruen*'s "analogical inquiry." 597 U.S. at 29; *compare United States v. Jackson*, 69 F.4th 495, 501-06 (8th Cir. 2023) (surveying historical examples and concluding § 922(g)(1) comported with this Nation's history of firearm regulation), *with Range*, 594 F.3d at 103-06 (surveying the same history but concluding the opposite).

The dissent does not dispute that *Vongxay* never performed the textual "person," "arms," and "conduct" analysis at *Bruen*'s first step, nor the historically focused "reasoning by analogy" approach required at *Bruen*'s step two. But none of these omissions should matter, the dissent argues, because *Heller* read the Second Amendment's "the people" as "exclu[ding] ... felons" and *Bruen* "implicitly endorsed" that reading when it made the (unremarkable) observation that the petitioners in that case-two "ordinary, law-abiding, adult citizens"-were indisputably "part of 'the people.'" 597 U.S. at 31; Dissent at 66, 71. So there is "harmon[y]" between *Bruen* and *Vongxay* after all. Dissent at 67-68.

The dissent's post-hoc reading of *Bruen* and *Heller* finds no support in either case. The Supreme Court "has *never* suggested that felons are *not* among 'the people' within the plain meaning of the Second Amendment." *United States v. Perez-Garcia*, 96 F.4th 1166, 1175 (9th Cir. 2024) (emphasis added). Quite the opposite, *Heller* defined "the people" in the broadest of terms: the phrase "unambiguously refer[red]" to "all Americans," not "an unspecified subset." 554 U.S. at 581. More importantly, *Bruen* ratified that broad definition, quoting *Heller*'s language directly to hold that "[t]he Second Amendment guarantee[s] to '*all Americans*' the right to bear commonly used arms in public." 597 U.S. at 70 (quoting *Heller*, 554 U.S. at 581) (emphasis added).

In sum, *Vongxay*'s wholesale omission of *Bruen*'s twostep methodology is "clearly irreconcilable" with *Bruen*'s "mode of analysis" for analyzing Second Amendment challenges. *Miller*, 335 F.3d at 900. We

would be remiss, however, to ignore *Vongxay*'s affirmative reasons for upholding § 922(g)(1). We do that below. Because *Vongxay*'s rationale "rested on ... at least one assumption" about the propriety of felon firearm bans, none of which continue to have any purchase in a *post-Bruen* world, this is a separate basis for parting ways with *Vongxay* under *Miller v. Gammie*. *See Ortega-Mendez*, 450 F.3d at 1020.

2.

Vongxay concluded that§ 922(g)(1) comported with the Second Amendment because that was what we held in *United States v. Younger*, 398 F.3d 1179, 1192 (9th Cir. 2005). *Vongxay*, 594 F.3d at 1116. But "[t]he reasoning upon which *Younger* was based-that the Second Amendment does not give individuals a right to bear arms-was *invalidated* by *Heller*," *id.* (emphasis added), and again by *Bruen*, which expressly reaffirmed *Heller*'s holding that "the Second Amendment[] ... 'guarantees the *individual* right to possess and carry weapons in case of confrontation,'" 597 U.S. at 33 (emphasis added) (quoting *Heller*, 554 U.S. at 592). *Vongxay*'s reliance on *Younger* is therefore "clearly irreconcilable" with Bruen-separate and apart from *Vongxay*'s failure to apply *Bruen*'s methodology. *See Murray v. Mayo Clinic*, 934 F.3d 1101, 1105-06 (9th Cir. 2019).

While concluding that "*Younger* control[led]" and the "legal inquiry end[ed]" with that case, *Vongxay* also turned to two Fifth Circuit, *pre-Heller* decisions—*United States v. Everist*, 368 F.3d 517 (5th Cir. 2004) and *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001)—which purportedly "len[t] credence to the ... viability of *Younger*'s holding" in a *post-Heller* (but

pre-Bruen) world. *Vongxay*, 594 F.3d at 1116, 1117. *Vongxay* endorsed, specifically, *Everist*'s holding that§ 922(g)(1) was constitutional "as a 'limited and narrowly tailored exception to the freedom to possess firearms, reasonable in its purposes and consistent with the right to bear arms.'" *Id.* at 1116-17 (quoting *Everist*, 594 F.3d at 519 (quoting *Emerson*, 270 F.3d at 261)). This was "particularly instructive for [a] *post-Heller* analys[is]" of § 922(g)(1), *Vongxay* reasoned, because the Fifth Circuit had recognized, "even before *Heller*," that the right to keep and bear arms was an individual right, and yet still determined that "felon [firearm] restrictions" were "permissible ... under heightened scrutiny." 594 F.3d at 1117 (citing *Everist*, 368 F.3d at 519).

Vongxay's dependence on *Emerson* and *Everist* is untenable *post-Bruen*. "*Emerson* applied heightened-Le., intermediate-scrutiny" to uphold a different law-18 U.S.C. § 922(g)(8)-against a Second Amendment challenge.[2] *United States v. McGinnis*, 956 F.3d 747, 759-60 (5th Cir. 2020). Relying exclusively on *Emerson*, *Everist* applied the same "means-end" scrutiny approach to § 922(g)(1) and similarly held that law was a "narrowly tailored" and "reasonable" regulation on the Second Amendment right. *Emerson*, 368 F.3d at 519 (quoting *Everist*, 270 F.3d at 261). *Bruen*, as we know, "expressly repudiated the ...

[2] 18 U.S.C. § 922(g)(8) ("It shall be unlawful for any person [to possess a firearm] ... who is subject to a court order that ... restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.").

means-end scrutiny ... embodied in *Emerson*" and *Everist*. *See United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir. 2023), *cert. granted*, --- U.S. ---, 143 S. Ct. 2688, --- L.E.2d --- (2023). Thus, as with *Younger*, *Everist*'s reasoning—and the reasoning of the precedent on which it stood *(Emerson*)—were abrogated by *Bruen*. *Vongxay*'s reliance on these cases is clearly irreconcilable with *Bruen*. *See Murray*, 934 F.3d at 1105-06.

The Government and the dissent remind us repeatedly that, while *Jiongxay* relied on *Everist* and *Emerson*, *Vongxay* never itself applied the now defunct means-end scrutiny approach to uphold § 922(g)(1). Dissent at 68-69. That counts for little under *Miller* and its progeny because when, as here, the prior circuit decision in question imports the reasoning of a previous case by citing it with approval, we ask simply whether *that* earlier case's reasoning is "clearly irreconcilable" with subsequent higher authority. *See id.* ("In *Head*, we relied on the reasoning of our sister circuits ... [but] *Gross* and *Nassar* undercut the reasoning set forth by our sister circuits [in those cases]."). What matters is that *Vongxay* still *endorsed* the Fifth Circuit's application of means-end scrutiny to § 922(g)(1) because it cited *Everist* for the proposition "that, although there is an individual right to bear arms, felon restrictions are permissible even under *heightened scrutiny*." *Vongxay*, 594 F.3d at 1117 (emphasis added) (citing *Everist*, 368 F.3d at 519).

Vongxay lastly took comfort in the *Heller* Court's remark that "nothing in [its] opinion should be taken to cast doubt" on certain "longstanding" laws restricting the Second Amendment right, such as laws

"prohibit[ing] ... the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 626. In a footnote, *Heller* labeled these and other examples as "presumptively lawful." *Id.* n.26. *Vongxay* took this to mean that felon firearm bans were "categorically different" from other restrictions on the Second Amendment right, which "buttressed" the conclusion that § 922(g)(1) was constitutional. 594 F.3d at 1115, 1116.

"Simply repeat[ing] *Heller*'s language" about the "presumptive[] lawful[ness]" of felon firearm bans will no longer do after *Bruen*. *See Pena v. Lindley*, 898 F.3d 969, 1007 n.18 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (citing *Vongxay*, 594 F.3d at 1115). *Bruen* expressly "require[s] courts to assess whether" § 922(g)(1), *id.* at 26, like "*any* regulation infringing on Second Amendment rights[,] is consistent with this nation's historical tradition of firearm regulation," *Perez-Garcia*, 96 F.4th at 1175 (citations omitted). It would pay lip service to this mandate if we continued to defer (as *Vongxay* did) to *Heller*'s footnote, not least because the historical pedigree of felon firearm bans was never an issue the *Heller* Court purported to resolve. While referring to such laws and others as "longstanding," the Court "fail[ed] to cite any colonial analogues," *Heller*, 554 U.S. at 721 (Breyer, J., dissenting), and clarified that it was "not providing [an] extensive historical justification" for felon firearm bans because *Heller* was its "first in-depth examination of the Second Amendment," not an attempt "to clarify the entire field," *id.* at 635. "[T]here w[ould] be time enough to expound upon the historical justifications for [these and other] exceptions," *Heller* promised, "if and when

th[ey] ... come before us." *Id.*; *see also Vongxay*, 594 F.3d at 1117 n.4 (acknowledging *Heller* "anticipated the need for such historical analy[is]"). The Court has yet to explore this country's history of banning felons from possessing firearms.[3] Until then, we can no longer "assum[e]," by way of *Heller*'s footnoted caveat, the "propriety of [every] felon firearm ban" that comes before us. *See United States v. Phillips*, 827 F.3d 1171, 1175 (9th Cir. 2016). "Nothing allows us to sidestep *Bruen* in th[is] way."[4] *Atkinson v. Garland*, 70 F.4th

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[3] When that day comes, perhaps the Court will also clarify how far back felon firearm prohibitions must stretch to qualify as "longstanding." We are confident, however, that anything postdating the 19th century is not what the Court has in mind. *See*, *e.g.*, *Bruen*, 597 U.S. at 30 (discussing *Heller*'s reference to "longstanding" laws "forbidding the carrying of firearms in sensitive places" and concluding that such laws consisted of a limited set of "18th- and 19th-century" regulations prohibiting firearms in "schools and government buildings"); Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. 1, 73 (2024) (determining that "Founding era history is paramount" because, as the Court recognized in *Bruen*, "not all history is created equal" and "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them").

[4] Even before *Bruen*, we were uncomfortable with *Vongxay*'s reliance on *Heller*'s "presumptively lawful" footnote. In *United States v. Phillips*, we upheld a defendant's § 922(g)(1) conviction against a Second Amendment challenge because *Vongxay*'s reading of *Heller*'s footnote "foreclose[d]" the defendant's constitutional claim. 827 F.3d at 1174. "Nevertheless, there [we]re good reasons to be skeptical of the constitutional correctness" of *Vongxay*'s deference to *Heller*'s footnote. *Id.* "*Heller*'s caveat endorsed only 'longstanding' regulations on firearms, naming felon bans in the process," and "[y]et courts and scholars are divided over how 'longstanding' tho[se] bans really are." *Id.*; *see also id.* at n.2 (collecting sources). Even *Vongxay*

1018, 1022 (7th Cir. 2023); *see also Baird v. Banta*, 81 F.4th 1036, 1043 (9th Cir. 2023) ("*Bruen* clarified the appropriate legal framework to apply when a ... statute [is challenged] under the Second Amendment.").

Had the Court in *Bruen* endorsed simply deferring to *Heller*'s "presumptively lawful" footnote, the outcome of that case would have been much different. "[L]aws forbidding the carrying of firearms in sensitive places" were another one of the categories of "'longstanding' ... and 'presumptively lawful' regulatory measures" that *Heller*'s footnote mentioned. *Jackson v. Cty. & County of San Francisco*, 746 F.3d 953, 959 (9th Cir. 2014) (quoting *Heller*, 554 U.S. at 626-27, 627 n.26); *see Bruen*, 597 U.S. at 30. But rather than go along with New York's "attempt[] to characterize [its] proper-cause requirement as a [longstanding] 'sensitive-place'" regulation under *Heller*, the *Bruen* Court rejected, as having "no historical basis," the argument that "New York [could] effectively declare the island of Manhattan a 'sensitive place'" where public carry could be categorically banned. *Id.* at 30-31. As with any other firearm regulation challenged under the Second Amendment, *Bruen* clarified, courts must now analyze "sensitive place" laws by analogizing them to a sufficiently comparable historical counterpart. *See id.* at 30.

It would be "fundamentally inconsistent" with *Bruen*'s analytical framework to treat felon firearm bans any differently, as nothing in the majority

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conceded that this "historical question ha[d] not been definitively resolved." 594 F.3d at 118 (citing some of the same sources).

opinion implies that we can jettison *Bruen*'s test for one "presumptively lawful" category of firearm regulations but not others (e.g., sensitive place regulations). *See Rodriguez*, 728 F.3d at 979. And far from what the dissent suggests, applying *Bruen* to laws like § 922(g)(1) will not "uproot" any "longstanding prohibitions" on felons possessing firearms. Dissent at 73. To the extent any such "longstanding" tradition exists, *Bruen* would require us to *uphold* § 922(g)(1). But to do that, we must first flesh out what the relevant tradition is and how it compares to the law before us. That is the whole point of the "analogical inquiry" at *Bruen*'s second step, which played no role in *Vongxay*'s reasoning.

3.

The Government understandably downplays *Vongxay*'s heavy reliance on prior cases that are clearly inconsistent with *Bruen*. *See also* Dissent at 68-69, 71. It also concedes by omission that *Vongxay* did not apply the two-step textual and historical methodology that *Bruen* requires. The Government argues instead that (if you squint hard enough) it is clear *Bruen* endorsed *Vongxay*'s "conclusion" that Congress may categorically disarm all felons for life because the Court referred to the petitioners in *Bruen* as "law abiding" and "responsible" citizens not once, not twice, but 14 times.

First, whether *Vongxay* reached the right "conclusion" is irrelevant under *Miller* if "th[at] conclusion [can] no longer [be]'supported for the reasons stated' in th[e] decision." *Rodriguez*, 728 F.3d at 979 (quoting *United States v. Lindsey*, 634 F.3d 541, 551 (9th Cir. 2011)); *see also Langere*, 983 F.3d at 1121

("[D]eference [to intervening Supreme Court decisions] *extends to the reasoning* of ... the decisions ... not just their holdings.") (emphasis added). Because *Vongxay*'s *rationale* for holding § 922(g)(1) constitutional is incompatible with *Bruen*, *Vongxay*'s holding cannot control.

Second, we do not think that the Supreme Court, without any textual or historical analysis of the Second Amendment, intended to decide the constitutional fate of so large a population in so few words and with such little guidance. *See Range*, 69 F.4th at 102 ("[T]he phrase 'law-abiding, responsible citizens' is as expansive as it is vague."); Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 Cardozo L. Rev. 1573, 1595 (2022) ("[R]ecent scholarly estimates of the number of former felons range from 19 million to 24 million.") (internal citations omitted). "[T]he criminal histories of the plaintiffs ... in *Bruen*," after all, "were not at issue in th[at] case," *Range*, 69 F.4th at 101, and "[i]t is inconceivable that [the Supreme Court] would rest [its] interpretation of the basic meaning of any guarantee of the Bill of Rights upon such ... dictum in a case where the point was not at issue and was not argued," *Heller*, 554 U.S. at 625 n.25. So we agree with the Third Circuit that *Bruen*'s scattered references to "law-abiding" and "responsible" citizens did not implicitly decide the issue in *this* case. *Range*, 69 F.4th at 101; *see United States v. Johnson*, 256 F.3d 895, 916 (9th Cir. 2001) (separate opinion of Kozinski, J., Trott, T.G. Nelson, Silverman, JJ.) (statements "uttered in passing" and "made ... without analysis" do not bind future panels).

* * *

Vongxay did not apply anything that resembles the analytical steps of *Bruen*'s "mode of analysis" to determine whether § 922(g)(1) was constitutional under the Second Amendment. *Miller*, 335 F.3d at 900 (internal citations omitted). *Vongxay* instead relied first on prior decisions from this circuit and others, the reasoning of which does not square with *Bruen*, and then turned to *Heller*'s passing footnote ref erring to "longstanding" felon firearm bans as "presumptively lawful," which the *Heller* Court made without "providing [any] extensive historical justification," *Heller*, 554 U.S. at 635. We must therefore apply *Bruen*'s two-step framework to reconsider § 922(g)(1)'s constitutionality.

B.

Step one of *Bruen* asks the "threshold question," *Range*, 69 F.4th at 101, whether "the Second Amendment's plain text covers" (1) the individual, (2) the type of arm, and (3) the "proposed course of conduct" that are at issue, *Bruen*, 597 U.S. at 19, 31-32. Here, as *in Bruen*, it is undisputed that the Second Amendment protects the arm in this case (a handgun) and the conduct involved (simple possession). *See id.* at 31-32. All that is left for us to decide is the first textual element: whether Duarte is among "the people" to whom the Second Amendment right belongs.

On that issue, Duarte argues that "the people" in the Second Amendment means all American citizens, which includes him. Look no further than the Court's textual analysis of "the people" in *Heller*, where the Court construed that phrase as "unambiguously

refer[ring]" not to any "unspecified subset" of people but to "all members of the national community," which includes "all Americans." *Id.* at 580-81; *see also Bruen*, 597 U.S. at 70 (ratifying *Heller*'s "all Americans" definition of "the people"). Regardless whether Duarte is an American citizen, the Government responds, the Second Amendment excludes felons from "the people" because the right to keep and bear arms was a qualified "political" right at the Founding reserved for members of the "virtuous citizenry." The right to bear arms, in other words, was no different from the right to vote, sit on a jury, or run for office, all of which state legislatures historically denied felons because their conduct had proved they were not upright or moral citizens.

Duarte is one of "the people" because he is an American citizen. *Heller* resolved this textual question when it held that "the people" includes "all Americans" because they fall squarely within our "national community." *Id.* at 580-81. *Bruen* expressly reaffirmed that reading. 597 U.S. at 70 ("The Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions.") (quoting *Heller*, 554 U.S. at 581). Our own analysis of the Second Amendment's text and history also confirms that the original public meaning of "the people" in the Second Amendment included, at a minimum, all American citizens. We therefore reject the Government's position that "the people," as used in the Second Amendment, refers to a narrower, "unspecified subset" of virtuous citizens. *See Heller*, 554 U.S. at 580.

1.

In *Heller*, "the people"—the "holder of the [Second Amendment] right"—was the starting point of the Court's textual analysis. *Id.* at 581. The Court began by tracking that phrase's use across various provisions in the Constitution. While the preamble, Article I, § 2, and the Tenth Amendment "refer[red] to 'the people' acting collectively," they "deal[t] with the exercise or reservation of powers, not rights." *Id.* at 579-80. Of those provisions that, like the Second Amendment, referred to the "the people" in the context of individual rights—the First, Fourth, and Ninth Amendments—the phrase was used as a "term of art" that "unambiguously refer[red] to all members" of the "political" or "national community," not "an unspecified subset." *Id.* at 580. The Court then closed this part of its textual analysis by concluding that there is "a strong presumption that the Second Amendment right is exercised individually and belongs to *all Americans*." *Id.* at 581 (emphasis added).

The Government argues that the Court in *Heller* never meant to define the scope of "the people" when it said those words. We are urged to think about it less as a statement of law and more as a "comment" the *Heller* Court made as a warmup to its ultimate conclusion "[t]hat the [Second] Amendment confers an individual right unrelated to militia service." If the court wants guidance from *Heller* as to who "the people" are, we should focus instead on *Heller*'s concluding remarks at the tail-end of the opinion, where the Court stated that "whatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-

abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

The Court's textual analysis of "the people" in *Heller* hardly reads as a "mere[] ... prelude to another[,] [more important] legal issue that command[ed] the [Court's] full attention." *Johnson*, 256 F.3d at 914-16; *see Range*, 69 F.4th at 101. The Second Amendment's use of "the people" to "descri[be] the holder of th[e] right" was "[t]he first salient feature of the [Amendment's] operative clause" that dominated the *Heller* Court's textual analysis-the second being the Amendment's phrase "to keep and bear arms," which described "the substance of the right." *Heller*, 554 U.S. at 580-81. Thus, defining who "the people" were and the "substance" of the right they held were both equally necessary to *Heller*'s holding. *See id.* at 581 ("We move now from the holder of the right—'the people'—to the substance of the right: 'to keep and bear Arms.'"). Only after "[p]utting ... these [two] textual elements together" did the Court conclude that the "[m]eaning" of the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592 (emphasis added).

So we agree with Duarte that *Heller* read "the people" in the Second Amendment as "unambiguously refer[ring] ... not to an unspecified subset" but to "all Americans," who are indisputably "part of the national community." *Id.* at 580-81; *see also Bruen*, 597 U.S. at 70 ("The Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions.") (quoting *Heller*, 554 U.S. at 581);

McDonald v. City of Chicago, Ill., 561 U.S. 742, 767-68 (2010) ("[W]e concluded[] [in *Heller* that] citizens must be 'permitted to 'use [handguns] for the core lawful purpose of self-defense.'") (citing *Heller*, 554 U.S. at 630). With that, we join the growing number of circuits to give authoritative weight to *Heller*'s "national community" definition for "the people."[5]

2.

Our own analysis of the Second Amendment's text, "as informed by [its] history," confirms that "the people" included, at a minimum, all American citizens-without qualification. *Bruen*, 597 U.S. at 19. Mindful that "the Constitution was written to be understood by the voters," we begin with the "'normal and ordinary' meaning of the Second Amendment's language." *Heller*, 554 U.S. at 557 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). We also

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[5] *See, e.g.*, *United States v. Daniels*, 77 F.4th 337, 342 (5th Cir. 2023) ("The right to bear arms is held by 'the people.' That phrase 'unambiguously refers to all members of the political community[] ... not a special group of upright citizens. ... Even as a marihuana user, Daniels is a member of our political community.") (citations omitted); *Range*, 69 F.4th at 101, 103 ("[T]he Second Amendment right, *Heller* said, presumptively 'belongs to all Americans.' ... We reject the Government's contention that only 'law-abiding, responsible citizens' are counted among 'the people[,]' ... [and] conclude that Bryan Range remains among 'the people' despite his [felony] conviction."); *United States v. Jimenez-Shi/on*, 34 F.4th 1042, 1046 (11th Cir. 2022) (observing "even ... dangerous felons and those suffering from mental illness" are "indisputably part of 'the people'"); *United States v. Jimenez*, 895 F.3d 228, 233 (2d Cir. 2018) ("[A]t least members of the 'national community' or those with a 'sufficient connection' with that community are part of the 'people' covered by the Second Amendment.").

consider the same pre- and post-ratification sources that *Heller* looked to because when it comes "to determin[ing] the *public understanding* of a legal text in the period after its enactment or ratification," the historical record serves as "a critical tool of constitutional interpretation." *Bruen*, 597 U.S. at 20 (emphasis in original) (quoting *Heller*, 554 U.S. at 605).

What we gather from history is that ordinary English speakers at the Founding understood the "people" to refer to "the whole Body of Persons who live in a Country[] or make up a Nation." N. Bailey, *An Universal Etymological English Dictionary* 601-02 (1770). The "most useful and authoritative [contemporaneous-usage] dictionaries" of the Founding-era uniformly defined the term this way.[6] Antonin Scalia & Bryan A. Gamer, *Reading Law: The Interpretation of Legal Texts* 419 (1st ed. 2012). This broad definition—with its focus on residency—largely overlapped with the commonly understood meaning of "citizens" at that time. *Compare People*, Webster, *supra*, at 600 ("The body of persons who compose a community, town, city, or nation"), *with e.g.*, *Citizen*, Dyche, *supra*, at 156 ("[A] freeman or inhabitant of a city or body corporate."). Other Founding-era sources likewise used the two terms synonymously. *See*, *e.g.*, The Federalist No. 2, at 10 (John Jay) (Jacob E. Cooke

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[6] *See*, *e.g.*, Noah Webster, *American Dictionary of the English Language* 600 (1st ed. 1828) ("The body of persons who compose a community, town, city, or nation."); Thomas Dyche, *A New General English Dictionary* 626 (14th ed. 1776) ("[E]very person, or the whole collection of inhabitants in a nation or kingdom."); Samuel Johnson, *A Dictionary of the English Language* 297 (6th ed. 1785) ("A nation; those who compose a community.").

ed. 1961) ("To all general purposes we have uniformly been one people each individual citizen everywhere enjoying the same national rights, privileges, and protection."); The Federalist No. 14 (James Madison) ("Hearken not to the unnatural voice which tells you that the people of America[] ... can no longer be fellow citizens of one great, respectable, and flourishing empire."); *Douglass v. Stephens*, 1 Del. Ch. 465, 467 (1821) ("[T]he people of the United States ... resist[ed] the ... British King and Parliament .... [T]hey knew that they were practically, as well as legally, fellow-citizens, ... enjoying every right and privilege indiscriminately with the inhabitants.").

This notion that one's status as a "citizen" signified his membership among "the people" traces its roots to English common law. In his Commentaries on the Laws of England, William Blackstone explained that every "[n]atural-born subject[]" of England "fall[s] under the denomination of the *people*" because his birth within the realm creates an "intrinsic" duty of allegiance, a "tie ... which binds [him] to the king." 2 William Blackstone, *Commentaries* *366 (St. George Tucker ed. 1803) (1767); *see also* William Blackstone, *An Analysis of the Laws of England* 24 (6th ed. 1771) ("Allegiance is the duty of all subjects; being the reciprocal tie of *the People* to the Prince.") (emphasis added). But this "tie" went both ways. "[B]y being born within the king's" realm, Blackstone continued, all "natural-born subjects ... acquire" a "great variety of rights," *id.* at *371, including "the fundamental right[] of Englishmen," to "hav[e] arms for their defence," *see Heller*, 554 U.S. at 594 (citing 1 Tucker's Blackstone, *supra*, at *136, *139-40); *Jimenez-Shlon*, 34 F.4th at 1047 (citations omitted). "[T]he colonists considered

themselves to be vested with th[ese] same fundamental rights" because, as British subjects, they counted themselves among "the People of Great Britain." *McDonald*, 561 U.S. at 816, 817 (Thomas, J., concurring in part and concurring in judgment) (quoting The Massachusetts Resolves (Oct. 29, 1765), reprinted in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1766, p.56 (E. Morgan ed. 1959)).

That "the people" referred (at a minimum) to all citizens, and that the "right of the people" to keep and bear arms was a fundamental right of *every* citizen, is also "confirmed by [the] analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment." *Heller*, 554 U.S. at 600. The "most relevant" of these examples are the ten "state constitutional provisions written in the [late] 18th century or the first two decades of the 19th." *Id.* at 582. While three of those states—Indiana, Missouri, and Ohio—described the Second Amendment right as belonging to "the people," Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 209 (2006), six states—Alabama, Connecticut, Kentucky, Maine, Mississippi, and Pennsylvania—expressly conferred it to "the citizens" or "*every* citizen."[7] Tennessee, in addition, described the right as belonging to all "freemen," another term for "citizens." Tenn. Const. art. I, § 26; *see, e.g.*, *Citizen*,

[7] Ala. Const. art. I, § 27; Conn. Const. art. I, § 15; Ky. Const. of 1792, art. XII, cl. 23; Me. Const. of 1819, art. I, § 16; Miss. Const. of 1817, art. I, § 23; Pa. Const. art. 1, § 21; *see* Volokh, *supra*, at 208-09.

Samuel Johnson, *A Dictionary of the English Language* 297 (6th ed. 1785) ("A freeman of a city; not a foreigner; not a slave."); *see also Simpson v. State*, 13 Tenn. 356, 360 (1833) ("By this clause of the constitution, an express power is ... secured to *all the free citizens* of the state to keep and bear arms for their defence.") (emphasis added).

"That of the[se] ... state constitutional protections ... enacted immediately after 1789, at least seven unequivocally protected [every] individual *citizen s* right to self-defense is strong evidence that this is how the founding generation conceived of the right." *Heller*, 554 U.S. at 603. "These provisions," after all, offer "the most analogous linguistic context" for discerning how the public understood the Second Amendment right. *Id.* at 585-86. And "[i]t is clear from th[eir] formulations that," when describing the holder of the right, the Founding generation used "the people" and "the citizens" interchangeably. *Id.* at 585.

The "three important founding-era legal scholars [to] interpret[] the Second Amendment"—William Rawle, Joseph Story, and St. George Tucker—likewise equated "the people" with "citizens" and described the right to keep and bear arms as an all-citizens' right. *Id.* at 605. In his "influential treatise," Rawle spoke of"[the] people [who are] permitted and accustomed to bear arms ... [as] properly consist[ing] of armed citizens." *Id.* at 607 (quoting W. Rawle, *A View of the Constitution of the United States of America* 140 (1825)) (emphasis added). Story similarly wrote that "[t]he right of *the citizens* to keep and bear arms has justly been considered as the palladium of the liberties ... [I]t offers a strong moral check against

the ... arbitrary power of rulers ... [and] enable[s] *the people* to resist and triumph over them." *Heller*, 554 U.S. at 607-08 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1897, pp. 620-21 (4th ed. 1873)) (emphasis added). And Tucker, in his notes to Blackstone's Commentaries, described the holder of the arms right mostly broadly of all: "[*A*]*ll men*, *without distinction*, ... are absolutely entitled ... [to] th[e] right of self-preservation." 2 Tucker's Blackstone, *supra*, at 145-46 n. 42 (1803) (emphasis added); *see Heller*, 554 U.S. at 594-95 (citing *id.*).

Mid-19th-century cases interpreting the Second Amendment carried on this unbroken tradition of referring to the right to keep and bear arms as every citizen's right. *See*, *e.g.*, *Heller*, 554 U.S. at 612 (quoting *United States v. Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940) ("The constitution of the United States also grants to the citizen the right to keep and bear arms.'")); *State v. Chandler*, 5 La. Ann. 489,490 (1850) (describing the Second Amendment as protecting every "man's right to carry arms ... 'in full open view'"). The Georgia Supreme Court's decision in *Nunn v. State*, 1 Ga. 243, 251 (1846), for instance-a case that "perfectly captur[ed]" the import of the Second Amendment's text-described the right as belonging to "the *whole people*, old and young, men, [and] women ...." *Heller*, 554 U.S. at 612 (quoting *id.*) (emphasis added).

We will stop there, although we could go on. *See McDonald*, 561 U.S. at 773-74 ("[T]he Civil Rights Act of 1866, ... which was considered at the same time as the Freedmen's Bureau Act, similarly sought to

protect the right of *all citizens* to keep and bear arms.") (emphasis added). We are confident that, "by founding-era consensus," the "right of the people" to keep and bear arms was publicly understood as the fundamental right of every citizen. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168 (10th Cir. 2012).

3.

Against this weight of evidence, the Government tells us that "the people" protected by the Second Amendment historically included not all citizens but rather a subset of them-namely, members of the "virtuous citizenry." As its one and only example from history, the Government quotes the most favorable language from 19th-century commentator Thomas Cooley's "massively popular" Treatise on Constitutional Limitations. *Heller*, 554 U.S. at 616. In that work, Cooley wrote that "the people, in the legal sense, must be understood to be those who ... are clothed with political rights," such as the right of "elective franchise." Thomas M. Cooley, *A Treatise on the Constitutional Limitation Which Rest upon the Legislative Power on the States of the American Union* ch. III, 39 (4th ed. 1878). When used "in this connection," he continued, "[c]ertain classes have been almost universally excluded" from "the people," such as the "slave, ... the woman, ... the infant, the idiot, the lunatic, *and the felon*." *Id.* at 36, 37 (emphasis added). "The theory" was that these groups "lack[ed] either the intelligence, ... the liberty of action," or, in the case of felons, "the virtue" that was "essential to the proper exercise of the elective franchise." *Id.* at 37. So they "are compelled to submit to be ruled by an authority

in the creation of which they ha[d] no choice." *Id.* at 36.

Cooley was referring to the "idiomatic" meaning of "the people" used in select parts of the Constitution that "deal with the exercise or reservation of [the] powers, not [the individual] rights" of "the people." *See Heller*, 554 U.S. at 579-80. Indeed, the notion that the right to vote was among the "natural right[s]" of "the people" was, in Cooley's view, "utterly without substance" because it "d[id] not exist for the benefit of the individual, but for the benefit of the state itself." Cooley, *General Principles of Constitutional Law in the United States of America* ch. XIV, § II at 248-49 (1880); *see also Kanter v. Barr*, 919 F.3d 437, 462 (7th Cir. 2019) (Barrett, J., dissenting) ("For example, the right to vote is held by individuals, but they do not exercise it solely for their own sake; rather, they cast votes as part of the collective enterprise of self-governance."). When used to describe the fundamental rights of individuals, as opposed to their powers, Cooley clarified that "the people" took on the much broader "all-citizens" definition that we have described all along. He explained this difference in meaning when discussing the First Amendment in his 1880 work, General Principles of Constitutional Law:

> The first amendment to the Constitution further declares that Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances .... When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who

> have a share in the government through being clothed with the elective franchise ... *But in all the enumerations and guaranties of rights the whole people are intended*[.] ... In this case, therefore, *the right to assemble is preserved to all the people*, *and not merely to the electors*, *or to any other class or classes of the people*.

Id. at 267 (emphasis added). So we add Cooley to the already long list of influential writers who understood "the people," in the rights' context, to mean the whole body of citizens, and the "right of the people to keep and bear arms" as every citizen's right.

* * *

"[W]ith respect to [whom] the right to keep and bear arms" belongs, "[n]othing in the Second Amendment's text draws a ... distinction" between those who are virtuous and those who are not. *See Bruen*, 597 U.S. at 32 (emphasis added) (finding no distinction between public versus private carry in the phrase "keep and bear arms"). Because Duarte's status as an American citizen places him among "the people" protected by the Second Amendment's "bare text," "[t]he Second Amendment ... presumptively guarantees" his right to possess a firearm for self-defense. *Bruen*, 597 U.S. at 33, 44 n.11. The Government now "shoulder[s] the burden of demonstrating" at step two of *Bruen* that § 922(g)(1) "is consistent with the Second Amendment's ... historical scope."[8] *Id.* at 44 n.11.

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[8] While *Bruen* offered no explicit guidance on who bears the burden at step one, "[w]e need not decide that issue here because

C.

At *Bruen*'s second step, the Government must prove that it "is consistent with this Nation's historical tradition of firearm regulation" for Congress to ban permanently, by making it a felony, a non-violent offender like Duarte from possessing a firearm even after he has already served his terms of incarceration. *See id.* at 34. Because "[b]ans on convicts possessing firearms were unknown [in the United States] before World War I," *Chovan*, 735 F.3d at 1137 (quoting C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698, 708 (2009)), the Government must identify for us "a well-established and representative historical *analogue*" to § 922(g)(1) that can justify the law's application to Duarte, *Bruen*, 597 U.S. at 30. In assessing whether the Government has met its burden, the two "central considerations" that guide our analysis are "how and why" the Government's proposed analogues burdened the Second Amendment right. *Id.* (citations omitted). Did these historical examples, we must ask, "impose a comparable burden on the right of armed self-defense" *(Bruen*'s "how") that was "comparably justified" *(Bruen*'s "why") as compared to § 922(g)(1)? *Id.* at 29.

One final point of order. While the Government does not have to find for us a historical "dead ringer" to § 922(g)(1), a law that "remotely resembles" a felon firearm ban is not enough. *Id.* at 30. We are looking for something in between these two endpoints. On that score, *Bruen* offers some additional guidance. If the

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our conclusion that the Second Amendment presumptively protects" Duarte "would stand regardless." *Perez-Garcia*, 96 F.4th at 1178 n.8.

law at issue is a "distinctly modem firearm regulation[]" because it addresses a societal problem "unimaginable at the founding," the Government's historical analogues need only be "relevantly similar" to the challenged law. *Id.* at 28-29; *see Perez-Garcia*, 96 F.4th at 1182; *Alaniz*, 69 F.4th at 1129-30.

Section 922(g)(1), however, takes aim at "[]gun violence" generally, which is a "problem that has persisted [in this country] since the 18th century." *Bruen*, 597 U.S. at 26, 27. And § 922(g)(1) "confront[s] that problem" with "a flat ban on the possession of []guns" by the formerly incarcerated, which no one here disputes is something "that the Founders themselves could have adopted." *Id.* at 27. Thus, the fact that the "[t]he Founding generation *had no laws* limiting gun possession by ... people convicted of crimes," Adam Winkler, *Heller s Catch-22*, 56 UCLA Law Rev. 1551, 1563 (2009) (emphasis added)—while not fatal to the Government's case—means that "the lack of a ... historical regulation" that is "distinctly similar" to § 922(g)(1) is strong if not conclusive "evidence" that the law "is inconsistent with the Second Amendment," *Bruen*, 597 U.S. at 27; *see also Baird*, 81 F.4th at 1047 ("Because states in 1791 and 1868 also grappled with general gun violence, California must provide analogues that are 'distinctly similar.'"); *Range*, 69 F.4th at 103 (similar). We tum now to the Government's evidence.

1.

The Government's first proposed category of historical analogues are not firearm regulations per se but a trio of draft proposals that certain members of New Hampshire's, Massachusetts's, and

Pennsylvania's state conventions recommended adding to the Constitution prior to its ratification. New Hampshire's convention offered language providing that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 326 (2d ed. 1891). "Samuel Adams and other delegates unsuccessfully urged the Massachusetts convention to recommend" adding a provision to the Constitution that it "be never construed to authorize Congress to ... prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Marshall, *supra*, at 713 (quoting 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 674-75 (1971) (emphasis added)). A minority of Pennsylvania's convention lastly proposed language that read: "[T]he people have a right to bear arms for the defense of themselves ... and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals." 2 Schwartz, *supra*, at 665 (emphasis added)).

"It is dubious" at best whether several, rejected "proposals [made] in the state conventions," *Heller*, 554 U.S. at 603, can—consistent with *Bruen*'s second step—amount to a "well-established and representative" national tradition of regulating firearms, *Bruen*, 597 U.S. at 30; *see also Heller*, 554 U.S. at 590 ("It is always perilous to derive the meaning of an adopted provision from []other provision[s] deleted in the drafting process."). None of the proposals, obviously, found its way into the Second Amendment. The two most restrictive ones

(Pennsylvania's and Massachusetts's) failed to carry a majority vote within their own states. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 222 (1983). And neither of those two states, we add, incorporated the language of its proposal into the Second Amendment provision of *its own* constitution.[9] *See*, *e.g.*, Pa. Const. art. 1, § 21 (1790); Mass. Const. pt. 1, art. 17 (1780); *see* Volokh, *supra*, at 208. All told, a handful of failed proposals "deleted in the drafting process," *Heller*, 554 U.S. at 590, without more, offers "too dim a candle," to illuminate "how and why" the Founding generation restricted the Second Amendment right, *see Folajtar v. Attorney General*, 980 F.3d 897, 915 (3d Cir. 2020) (Bibas, J., dissenting). "But even assuming that this legislative history is relevant," *Heller*, 554 U.S. at 603; *see Perez-Garcia*, 96 F.4th at 1188, we agree with now-Justice Barrett that "[t]he common concern [among] all three" of the proposals was "not about felons in particular or even criminals in general" but those whose conduct "threatened violence and the risk of public injury," *Kanter*, 919 F.3d at 456 (Barrett J., dissenting).

Start with New Hampshire's proposal. It empowered Congress to disarm only those who "are or have been in actual rebellion," which was a crime against the state that denoted violence. *Id.* at 456 (citing *Rebellion*, 2 New Universal Etymological English Dictionary (4th ed. 1756) ((defining "rebellion" as "traitorous taking up [of] arms, or a tumultuous

[9] Nor did New Hampshire, which did not ratify an arms right provision in the constitution until 1982. *See* Volokh, *supra*, at 199.

opposing [of] ... the nation")). Adams's proposal in the Massachusetts convention permitted disarming only citizens who were not "peaceable," a term that at the time meant "[f]ree from war; free from tumult"; "[q]uiet; undisturbed"; "[n]ot violent; not bloody"; "[n]ot quarrelsome; not turbulent." Samuel Johnson, *A Dictionary of the English Language* (5th ed. 1773), *quoted in Kanter*, 919 F.3d at 455 (Barrett, J., dissenting). "Far from banning the [possession] of ... firearms" by any class of criminal, Adams's proposal "merely [sought to] codif[y] the existing common-law" tradition of disarming those who "b[ore] arms to terrorize the people, as had [been done since] the Statute of Northampton" in 1328. *See Bruen*, 597 U.S. at 46-47; *compare id.* (citing Massachusetts's colonial law "authoriz[ing] justices of the peace to arrest 'all Affrayers, Rioters, Disturbers, or Breakers of the Peace'") (1692 Mass. Acts and Laws no. 6, pp 11-12)), *with Kanter*, 919 F.3d at 455 (Barrett J. dissenting) ("Those who 'breach[ed] the peace' caused '[a] violation of the public peace, as by a riot, affray, or any tumult which [wa]s contrary to law, and destructive to the public tranquility.'") (quoting Noah Webster, *An American Dictionary of the English Language* (1828))). Only the Pennsylvania minority's proposal—which would have allowed disarming those "for *crimes committed*, or [for] real danger of public injury"—comes close to "suggest[ing]" the categorical disarmament of all lawbreakers. *Perez-Garcia*, 96 F.4th at 1188. *But see Bruen*, 597 U.S. at 66 ("[W]e will not give disproportionate weight to a single state statute and a pair of state-court decisions."). But when read together with the remaining clause "or [for] real danger of public injury," the more plausible

interpretation is that "crimes committed" referred to a narrower "subset of crimes [that] suggest[ed] a proclivity for violence." *Kanter*, 919 F.3d at 456 (Barrett J., dissenting); Scalia, *supra*, at 112 (explaining that "or," when "set off by commas," "introduces a definitional equivalent").

On balance, then, the draft proposals allude to a possible tradition of disarming a narrow segment of the populace who posed a risk of harm because their conduct was either violent or threatened future violence. That does not offer a "distinctly similar" justification for an across-the-board disarming of non-violent offenders like Duarte. *Bruen*, 591 U.S. at 26. We move on to the Government's second category of historical analogues.

2.

The Government next refers us to 17th- to early 19th-century colonial and American laws that disarmed groups whom the Founding generation, according to the Government, "deemed untrustworthy based on [their] lack of adherence to the rule of law." At the height of the Revolutionary War, British Loyalists who refused to swear allegiance to the new republic were dispossessed of their firearms. *Infra* Part a. Catholics were disarmed in England once the Protestants seized power after the Glorious Revolution; several colonies passed similar Catholic-disarmament laws during the French and Indian War. *Infra* Part b. Bans on selling arms to Indians were a matter of course in the early American colonies. *Infra* Part c. And Blacks, free and enslaved alike, were routinely deprived of their arms. *Infra* Part d. Repugnant as these laws are by modem standards, the

Government maintains that they represent a longstanding tradition in this country of disarming groups whom legislatures thought were "unwilling" to comply with the law.

Laws that disarmed British Loyalists, Catholics, Indians, and Blacks fail both the "why" and "how" of *Bruen*'s analogical test. First, the "why." There is a solid basis in history to infer that states could lawfully disarm these groups because they "were written out of 'the people'" altogether. *Rahimi*, 61 F.4th at 457. But Duarte is an American citizen and counts among "the people" by both modem and Founding-era standards. And insofar as legislatures passed these laws to prevent armed insurrections by dangerous groups united along political, ideological, or social lines, the Government offers no historical evidence that the Founding generation perceived formerly incarcerated, non-violent criminals as posing a similar threat of collective, armed resistance.

As to the nature of the burden on the Second Amendment right (the "how" under *Bruen)* most of the historical examples we have seen were far less reaching than § 922(g)(1). During the American Revolution, states generally allowed British Loyalists to regain their arms once they swore loyalty to the new republic. *Infra* Part C.2.a. Catholics still retained "such necessary weapons" for their own self-defense. *Bruen*, 597 U.S. at 45 n.12 (quoting 1 Wm. & Mary c. 15, § 4, in 3 Eng. Stat. at Large 399 (1688)). Many colonial-era firearm regulations targeting Indians did not even disarm this group but instead banned the *sale* of arms *to them*. *Infra* Part C.2.c. Even laws prohibiting Blacks from possessing arms still allowed

for (albeit narrow) exceptions. *Infra* Part C.2.d. What this all tells us is that the burden on the Second Amendment right under these laws did not persist for life for these groups. It was subject to certain need-based or case-specific exemptions or could end altogether when evidence undermined the justification for the disability. That stands in stark contrast to § 922(g)(1)'s lifelong, no-exception, categorical ban. The Government's proffered analogues are thus not "distinctly similar" to § 922(g)(1) in both "how and why" these laws burdened the Second Amendment right.

a. Laws disarming British Loyalists or "disaffected" persons.

When the Revolutionary War was in full swing, early state legislatures routinely condemned "disaffected" persons as "enem[ies] to the American cause," who "spread [their] disaffection" from within to the detriment of the war effort. Act of 1779, 9 *The Statutes at Large of Pennsylvania from 1682 to 1801* 441 (1903). "[T]here [wa]s great reason to believe" that "dangerous and disaffected" persons "communicate[d] intelligence to the [British] enemy," and were inclined to either join or support an insurrection should one arise. Act of 1778, 1 *Laws of the State of New York Passed at the Sessions of the Legislature* 50 (1777-1784); Act of 1780, 10 *Statutes at Large*; *Being a Collection of All the Laws of Virginia*, *from the First Session of the Legislature in the Year 1619* 310-11 (Hening ed. 1822) ("[C]omit[ting] to close confinement[] any person ... suspect[ed] of disaffection" in the event of invasion or insurrection). So much so did this class of people concern the new

nation that the Continental Congress "recommended ... disarm[ing] persons 'who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies.'" Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 264 (2020) (quoting 1 *Journals of the Continental Congress*, *1774-1789*, at 285 (1906)). Six of the states heeded this advice by enacting oath-or-disarmament laws, which stripped individuals of their arms if they refused to "renounc[e] all allegiance to the now-foreign sovereign George III in addition to swearing allegiance to one's State."[10] Marshall, *supra*, at 724-25.

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[10] Act of 1779, 9 *Statutes at Large of Pennsylvania*, *supra*, at 347-48; Act of 1776, 5 *The Acts and Resolves*, *Public and Private*, *of the Province of Massachusetts Bay* 479 (1886); 1777 Act of Va., 9 *Statutes at Large*, *supra*, at 282; Act of 1776, 7 *Records of the Colony of Rhode Island and Providence Plantations in New England* 567 (Bartlett ed. 1862); Act of 1777, 24 *The State Records of North Carolina* 89 (Clark ed. 1905); Act of 1778, 203 *Hanson* s *Laws of Maryland 1763-1784* 193,278 (1801).

Several other states passed similar laws. Connecticut disarmed those who "libel[ed] or defame[d] any of the resolves of the ... Congress of the United Colonies" or, upon "complaint being made to the civil authority," were found to be "inimical to the liberties of th[e] Colon[ies]." Act of 1775, 15 *The Public Records of the Colony of Connecticut*, *From May*, *1775*, *to June 1776* 193 (Hoadly ed. 1890). New York ordered the supplying of its militias with "such good Arms ... as they may have collected by disarming disaffected persons," Order of 1776, 15 *Documents Relating to the Colonial History of the State of New York* 103 (Fernow ed. 1887). New Jersey, lastly, empowered its Council of Safety "to deprive ... [all] Arms, Accoutrements, and Ammunition" from "such Person

The Government would have us conclude that the reason the states disarmed "disaffected" persons was "because their actions evinced an unwillingness to comply with the legal norms of the nascent social compact." That is far too generalized an abstraction to draw and ignores the historical context in which these laws were passed. *See Bruen*, 597 U.S. at 42 (noting 16th century "royal efforts at suppress[ing] ... handguns" arose not because of "concerns about their safety but rather their inefficacy").

The states passed these laws during "the darkest days of an existential domestic war" between the newly formed republic and Great Britain. Marshall, *supra*, at 725. "[N]on-associat[ors]," the thinking went, not only "refuse[d] ... to defend, by arms, th[e] United Colonies," 1 *Journals of the Continental Congress*, *1774-1789*, at 285 (1906), but might also "take up arms *against* America" in "th[is] present unhappy dispute," *see* Resolution of the Council of Safety, Jan. 18, 1776, 1 *The Revolutionary Records of the State of Georgia* 101 (Candler ed. 1908) (emphasis added). Confiscating their weapons—for the time being—was thought both reasonable and necessary to preserve the new nation. *See* Greenlee, *supra*, at 265 ("Like the English, and out of similar concerns of violent insurrections, the colonists disarmed those who might rebel against them."); *Perez-Garcia*, 96 F.4th at 1187 ("The justification was always that those being disarmed were dangerous.") (quoting Greenlee, *supra*, at 265).

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as they shall judge disaffected." Act of 1777, *Acts of the General Assembly of the State of New Jersey* 90 (1777).

The laws targeting disaffected persons, for example, certainly read like emergency wartime measures. *See*, *e.g.*, 1778 Act of Va., 10 *Statutes at Large*, *supra*, at 310-11 (calling for the confinement of disaffected persons "in this time of public[] danger, when a powerful and vindictive enemy are ravaging our southern sister states"); 1779 Act of Pa., 9 *Statutes at Large*, *supra*, at 441 (calling for the "temporary suspension of law" in this "time[] of public danger" and confining suspected Loyalists). And there is good reason to think they were, in famed commentator St. George Tucker's words, "merely temporary." 2 Tucker's Blackstone, *supra*, at *368 n.2 (discussing Virginia's 1777 oath-or-disarmament law); *see also* Marshall, *supra*, at 726 ("[T]here is good reason to consider the[se] [laws] not to have survived through the Founding in anything like their original form."). It lastly bears emphasis that only male inhabitants who qualified for militia service—i.e., men of fighting age—had to swear an oath. Most states, in other words, disarmed those who were not just sympathetic to the prospect of a domestic, armed uprising, but physically capable of joining one. *E.g.*, 1776 Act of Mass., 5 *Acts and Resolves*, *supra*, at 479 (1886) (requiring "every male person above sixteen" to swear the oath and disarming those who "neglect[ed] or refuse[d]"); 1777 Act of Va., 9 *Statutes at Large*, *supra*, at 282 (same); Act of 1777, 24 *The State Records of North Carolina*, *supra*, at 88 (similar); Act of 1776, 7 *Records of the Colony of Rhode Island*, *supra*, at 566 (1862) (same); 1777 Act of Penn., 9 *Statutes at Large*, *supra*, at 111.

There is just as good reason to conclude that "disaffected" persons could be disarmed *in toto* because they fell outside "the people" and were

therefore deemed to have no fundamental rights. *See Jimenez-Shilon*, 34 F.4th at 1048. Since "an individual's undivided allegiance to the sovereign" was a "precondition" to his "membership in the political community," British Loyalists "renounced" their place among "the [American] people" by refusing to swear a loyalty oath. *Jimenez-Shilon*, 34 F.4th at 1048 (quoting *United States v. Perez*, 6 F.4th 448, 462 (2d Cir. 2021) (Menashi, J., concurring) (internal quotations omitted)).

At least several states explicitly justified disarming Loyalists along these lines. North Carolina, for example, explained that it is "the Duty of every Member of Society to give proper Assurance of fidelity to the Government from which he enjoys protection." Act of 1777, 24 *The State Records of North Carolina*, *supra*, at 88. Those who abstain from swearing allegiance, "by their refusal ... to do [so]," "proclaim that they should no longer enjoy the *Privileges* of *Freemen* [i.e., citizens] of the ... State." *Id.* (emphasis added). Pennsylvania, Virginia, and Maryland similarly invoked this idea of a "reciprocal" relationship of "allegiance and protection" between the citizen and state. 1777 Act of Va., 9 *Statutes at Large*, *supra*, at 281; 1778 Act of Pa., 9 *Statutes at Large*, *supra*, at 111; Act of 1777, 203 *Hanson s Laws of Maryland*, *supra*, at 187; Churchill, *supra*, at 160 ("Noting that 'in every free state, allegiance and protection are reciprocal,' Maryland['s] ... test oath barred those refusing from ... keeping arms."). By refusing to promise the former, the "disaffected" person swore off "the benefits of the latter." *E.g.*, 1777 Act of Va., 9 *Statutes at Large*, *supra*, at 281.

It is no small coincidence either that these "loyalty" oaths were precursors to the 1795 naturalization oath that the First Congress later required resident aliens to swear as a condition for American citizenship. *Compare* 2 Tucker's Blackstone, *supra*, at *368 n.2 (quoting Virginia's oath-or-disarmament law), *with id.* at *374 n.12 (quoting 1795 federal naturalization law). Thus, "[t]o refuse [that oath in 1777] was to declare oneself [not only] a resident alien of the new nation," but, "given the war," a "resident *enemy* alien" who sympathized with a foreign belligerent power. Marshall, *supra*, at 725 (emphasis added); *see also* Thomas Jefferson, Notes on the State of Virginia 163 (Lilly & Wait eds., 1832) ("By our separation from Great Britain, British subjects became aliens, and being at war, they were alien enemies."). Consistent with that status change, disarmament was just one "part of a wholesale stripping of rights and privileges" that followed from refusing to swear allegiance. Marshall, *supra*, at 725. Many states, for example, sent suspected Loyalists to the "gaol," where they were held without bail until they recited the oath. *See*, *e.g.*, 1779 Act of Pa., 9 *Statutes at Large*, *supra*, at 442; 1777 Act of Va., 9 *Statutes at Large*, *supra*, at 282-83. Virginia went one step further, barring oath-recusants from "suing for any debts ... [and] buying lands, tenements, or hereditaments." 1777 Act of Va., 9 *Statutes at Large*, *supra*, at 282; *see also* Notes on the State of Virginia, *supra*, at 162 ("By our laws, ... no alien can hold lands, nor alien enemy maintain an action for money, or other moveable thing."). North Carolina outright banished those who refused their oath and declared anyone so banished who returned to the state "guilty

of Treason." Act of 1777, 24 *The State Records of North Carolina*, *supra*, at 89. The few "permitted ... to remain in the State" were not allowed to *leave* without express "[p]ermission ... obtained from the Governor and Council." *Id.* Thus, "[b]y refusing to take an oath of allegiance," disaffected persons "forfeited [not just] the state's protection of their right to arms," *Jimenez-Shilon*, 34 F.4th at 1048, but other fundamental rights considered intrinsic to one's membership among "the people," *see Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (enumerating certain "fundamental" rights of citizens as including "[t]he right ... to pass through ... in any other state, ... to institute and maintain actions of any kind[,] ... [and] to take, hold and dispose of property").

When viewed through this lens, the Government's analogy to laws disarming Loyalists fails the "why" of *Bruen*'s second step. Insofar as these laws were meant as "merely temporary" measures, 2 Tucker's Blackstone, *supra*, at *368 n.2, that "disarm[ed] [a] narrow segment[] of the population" because they "threaten[ed] ... the public safety," that does not justify *permanently* disarming *all nonviolent* felons today, *see Perez-Garcia*, 96 F.4th at 1189 (citing *Kanter*, 919 F.3d at458 (Barrett, J., dissenting)). And if disarming the British Loyalist naturally followed because he swore himself out of "the people" by refusing his oath of allegiance, that reasoning does not carry over to the nonviolent offender who served his prison term. The Government offered no evidence demonstrating that a former non-violent convict forever forfeited his legal

status as one of "the people" merely because he sustained a criminal conviction.[11]

Nor did "how" these laws burden the Second Amendment right come close to approximating § 922(g)(1)'s lifetime, no-exception ban. *Bruen*, 597 U.S. at 29. The laws themselves were short-lived, as we mentioned earlier, but so was their burden on the Second Amendment right. Of the "disaffected" who were disarmed, they could normally regain their arms upon demonstrating they were not, in fact, "disaffected" to the American cause. Massachusetts, for instance, provided that disaffected persons could "receive their arms again ... by the order of' the "committees of correspondence, inspection or safety." Act of Mass. (1775-76), 5 *Acts and Resolves*, *supra*, at 484. Rhode Island similarly contemplated that those who refused their loyalty oath could still keep their weapons by providing "satisfactory reasons" for their recusal. 1776 Act, 7 *Records of the Colony of Rhode Island* 567 (Bartlett ed. 1862). Connecticut's law spoke

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[11] In any case, we doubt that the garden variety horse thief or counterfeiter, for example, stood on remotely similar legal footing as British Loyalists at the Founding. Depending on the jurisdiction, the former served several years of "hard Labor" for his nonviolent offense. *See*, *e.g.*, *An Act for the Punishment of certain atrocious Crimes and Felonies*, Acts and Laws of the State of Connecticut, in America, 183-84 (1796). While incarcerated, his fundamental rights as one of "the people" were "merely suspended." *Kanter*, 919 F.3d at 461 (Barrett, J., dissenting) (citing, e.g., *In re Estate of Nerac*, 35 Cal. 392, 396 (1868)). The latter was a "traitor in thought, ... [if] not in deed," Notes on the State of Virginia, *supra*, at 165, who had no rights to speak of, Marshall, *supra*, at 725 ("The harsh yet simple principle of the Revolution was that Tories 'had no civil liberties.'") (quoting Leonard W. Levy, *Emergence of a Free Press* 173 (1985)).

most directly to the principle that disaffected persons were not disarmed for life, qualifying that he who was found "inimical" to the States would be disarmed only "until such time as he could prove his friendliness to the liberal cause." G.A. Gilbert, *The Connecticut Loyalists*, 4 Am. Historical Rev. 273, 282 (1899); *see* Act of Dec. 1775, 15 *The Public Records of the Colony of Connecticut*, *supra*, at 193; *see also* Journal of the Council of Safety, 1 *The Public Records of the State of Connecticut* 329 (Hoadly ed. 1894) (releasing "George Folliot of Ridgfield" from custody after he swore to take an oath of loyalty).

b. Laws disarming Catholics or "Papists."

Laws disarming Catholics fare arguably worse as historical analogues to § 922(g)(1) because the Government "point[s] to only three [such] restrictions." *See Bruen*, 597 U.S. at 46. In 1756, Pennsylvania's and Maryland's colonies each enacted militia laws that seized arms belonging to any "Papist or reputed Papist" and barred them from enlisting in the local militia. 3 *Pennsylvania Archives* 131-32 (Samuel Hazard ed. 1853); 52 *Proceedings and Acts of the General Assembly*, *1755-1756* 454 (Raphael Semmes ed. 1946). The Virginia colony, that same year, required "any Person ... suspected to be[] a Papist" "to swear allegiance to Hanoverian dynasty and to the Protestant succession." 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 & Hist. Rev. 139, 157 (2007). No Catholic "so refusing ... [could] have any Arms, Weapons, Gunpowder, or

Ammunition." Act of 1756, 7 *Statutes at Large* 35-36 (Hening ed. 1820).

It is "doubt[ful] that *three* colonial regulations" prove that disarming Catholics as a class ever became a "well-established" tradition in this country. *See Bruen*, 597 U.S. at 46 (emphasis in original). The practice appears instead to have been more of an English novelty that began when "the deposed King James II ... disarm[ed] Protestants while arming ... Roman Catholics." Marshall, *supra*, at 722-21. Indeed, the inhabitants of Virginia, Pennsylvania, and Maryland were still British subjects when they passed their Catholic-disarmament laws, and they did so at the height of the French and Indian War, "which was perceived by many ... as a war between Protestantism and Catholicism." Greenlee, *supra*, at 263. Following independence, the custom did not seem to secure a strong enough foothold on this side of the Atlantic to mature into a longstanding tradition of firearm regulation. We are unaware of any post-ratification laws disarming Catholics as a class. *See id.* at 721 ("Like the game laws, the English exclusion of subjects based on religion ha[d] no place within the Second Amendment, as early commentators also celebrated."); *see also Bruen*, 597 U.S. at 35 ("[C]ourts must be careful when assessing evidence concerning English common-law ... English common-law practices cannot be indiscriminately attributed to the Framers of our own Constitution.").

We are not even sure that disarming Catholics was that prevalent in England. "[T]hese laws are seldom exerted to their utmost rigour," Blackstone wrote, and "if they were, it would be very difficult to

excuse them." *See* 5 Tucker's Blackstone, *supra*, at 57; *see id.* at 55-56 (summarizing arms restrictions and other anti-Catholic English laws); *see also Bruen*, 597 U.S. at 58 ("[R]espondents offer little evidence that authorities ever enforced surety laws."). Episodes like the foiled Gunpowder Plot of 1605, where Guy Fawkes led fervent Catholics in a conspiracy to kill King James I and blow up both Houses of Parliament, Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1210-11 (2016), "obliged parliament to counteract so dangerous a spirit by laws of a great, and then perhaps necessary, severity," 5 Tucker's Blackstone, *supra*, at 57. Thus, Blackstone explained, these laws "are rather ... accounted for ... from their history, and the urgency of the times which produced them, than to be approved ... as a standing system of law." *Id.*

In any event, the "why" behind these laws does not justify disarming non-violent felons as a class. In theory, Catholics "acknowledge[ed] a foreign power, superior to the sovereignty of the kingdom." *Id.* at 55. Catholics "c[ould not] complain if the laws of th[e] kingdom will not treat them upon the footing of good subjects," Blackstone wrote, when their "separation" from the Church of England was "founded [not] only upon [a] difference of [religious] opinion" but a "subversion of the civil government." *Id.* at 54-55. Taking away their guns thus followed "the same rationale" for stripping suspected loyalists of their arms during the American Revolution. Marshall, *supra*, at 724. The only difference was the "religious overlay." *Id.* While one's "disaffection" to American independence went together with supporting the British, "being Roman Catholic was equated with

supporting [the deposed Catholic king] James II," was "presumptive [with] treason," and made one "effectively a resident enemy alien liable to violence against the [protestant] king" George II. *Id.*

Nor can we say that the burdens these laws imposed on the Second Amendment right were as heavy as § 922(g)(1)'s no-exception, lifetime ban. In England, "[e]ven Catholics, who [technically] fell beyond protection of the right to have arms, ... were at least allowed to keep'such necessary Weapons as shall be allowed ... by Order of the Justices of the Peace ... for the Defence of his House or Person.'" *Bruen*, 597 U.S. at 45 n.12 (quoting 1 Wm. & Mary c. 15, § 4, in 3 Eng. Stat. at Large 399 (1688)). Maryland's and Virginia's laws included the same self-defense exception. 1756 Act of Va., 7 *Statutes at Large*, at 35 (Hening ed. 1820); 1756 Act of Md., 52 *Proceedings and Acts of the General Assembly*, *1755-1756* 448 (Raphael Semmes ed. 1946) (similar). That Virginia, for example, thought it was "dangerous at th[e] time to permit Papists to be armed," yet still allowed for a professed Catholic to possess arms for self-defense, suggests that even a suspected traitor to the English crown still retained his fundamental right to protect himself with a firearm. 1756 Act of Va., 7 *Statutes at Large*, *supra*, at 35.

c. Laws disarming Indians.

Like Catholics and Loyalists, Indians, while not traitors, "had always been considered [members of a] distinct, independent political communit[y]," with whom the colonies were frequently at war. *Worcester v. State of Ga.*, 31 U.S. 515, 519 (1832). Indians, simply put, "w[ere] [not] ... citizen[s] of the British colonies"

and were not "entitled to the [same] rights of English subjects," so they could be disarmed as a matter of course. *Jiminez-Shilon*, 34 F.4th at 1047 (quoting Joyce Lee Malcom, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 140 (1994)). And to the extent they were, it was generally during times of conflict.[12] In a similar vein, to *sell* Indians arms during wartime was to provide material aid to the enemy, a capital crime in many cases. *See*, *e.g.*, 1675 Act of Va., 2 *Statutes at Large* 326-27, 336 (Hening ed. 1823). Thus, colonial assemblies justified barring the sale of arms to Indians not because they were "deemed untrustworthy based on lack of adherence to the rule of law," but because they were foreign combatants with whom the colonists were engaged in an ongoing and violent military conflict.

For example, one 1675 Virginia law, after condemning "the sundry mur[d]ers, rapines and many depredations lately committed and done by Indians on the inhabitants of this country," resolved that "a war[] be declared ... against all such Indians," and warned that "any person ... within this colony ... presum[ing] to trade ... with any Indian any powder, shot[] or arm[s] ... shall suffer death without benefit[] of clergy."

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[12] *See*, *e.g.*, An Order for All Indians on Long Island to Bee Disarmed, in This Juncture of Ware, & That None Ramble from Place to Place, 14 *Documents Relating to the Colonial History of the State of New York* 712 (1883); Ordinance of the Director and Council of New Netherland, *Laws and Ordinances of New Netherland (1638-1674)* 234 (O'Callaghan ed. 1868) (ordering "a[ll] Indians" to forfeit their arms after "hav[ing] been inform[ed] that ... Indians of the *Tappaen* ... intended to kill one or more Christians" and "to prevent such dangers of isolated murders and assassinations").

2 *Statutes at Large*, *supra*, at 326-27, 336. New York and Massachusetts similarly denounced "the dangerous practice of selling [g]uns ... [to] the Indians" as causing "the destruction of the Christians" and as "very poisonous and destructive to the English." Ordinance of 1645, *Laws and Ordinances of New Netherland*, *1638-1674* 47 (O'Callaghan ed. 1868); Act of 1676, 11 *Records Of The Colony Of New Plymouth In New England* 242-43 (Pulsifer ed. 1861). Anyone "daring to trade" any arms or "munitions of War" with them was to be executed. *Id.* "[T]he eastern Indians have broke[n] and violated all treaties and friendship made with them," one 1721 New Hampshire law remarked. 1721 Act, *Acts and Laws of His Majestys Province of New Hampshire* 164 (1771). "[T]herefore [be] it enacted ... [t]hat whoever shall ... supply them with any ... guns, powder shot[], [or] bullets ... [shall] pay the sum of five hundred pounds, and suffer twelve months imprisonment." *Id.* Thus, even those colonies punishing the sale of arms to Indians less harshly still justified these measures as designed to prevent the arming of a foreign enemy.

The nature of the burden imposed by these laws was also different in kind from how § 922(g)(1) operates. Most colonial enactments targeting Indians regulated a different type of conduct. *See Bruen*, 597 U.S. at 47. Rather than ban Indians from *possessing* firearms, the laws prohibited the *sale* of arms to them by colonial residents. *E.g.*, 1675 Act of Va., 2 *Statutes at Large*, *supra*, at 326-27, 336. They also referred to licensing requirements and implied that those with proper credentials could still trade arms with Indians. Pennsylvania's 1676 sale-of-arms ban, for instance, prohibited persons from "sell[ing] giv[ing] or

barter[ing] ... any gun ... to any Indian" "without *license first* ... [being] obtained under the Governor's hand and Seal." Act of 1676, *Charter to William Penn, and Laws of the Province of Pennsylvania* 32 (Staughton et al., 1879) (emphasis added); *see also* Act of 17 63, Pa. Laws 319, § 1 (prohibiting sale of "guns ... or other warlike stores *without license*") (emphasis added). Georgia similarly outlawed selling arms to Indians in 1784 but only at any "place ... [other] than at stores or houses *licensed for that purpose*." Act of Feb. 1784, *Digest of Laws of the State of Georgia* 288-89 (Watkins ed. 1800) (emphasis added); *see also* Act of 1645, *Laws and Ordinances of New Netherland, 1638-1674* 47 (O'Callaghan ed. 1868) (prohibiting the sale of "munitions of War" to Indians "without express permission").

d. Laws disarming Slaves and free Blacks.

The by-now-familiar reasons for disarming Loyalists, Catholics, and Indians also motivated laws disarming Slaves and free Blacks as a class. Slaves, by definition, fell outside "the people" entitled to Second Amendment protection. *E.g.*, *Citizen*, Samuel Johnson, *A Dictionary of the English Language* 297 (6th ed. 1785) ("A freeman of a city; not a foreigner; not a slave"). And "free blacks, like that of Tories and Roman Catholics, ... were considered ... non-citizens or, at best, second class citizens." Marshall, *supra*, at 726. At the time, they enjoyed any right to arms solely as a matter of legislative grace. *See e.g.*, *State v. Newsom*, 27 N.C. 250, 254 (1844) (concluding that "free people of color cannot be considered as citizens in the largest sense of the term" and the state therefore has "the power to say ... who, of this class of persons,

shall have a right to a licence [to keep arms], or whether they shall"). "[T]he external danger of Indian attack[s]," moreover, "was consistently matched" by the "equivalent fear" (especially in the South) of "indentured servants and slaves as a class," Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 Law & Hist. Rev. 567, 581 (1998)—hence why states like Virginia, Georgia, South Carolina, and North Carolina commonly justified disarming Blacks based on the threat of violence they posed as a collective group.[13] *See also Heller*, 554 U.S. at 611-12 (citing *Waters v. State*, 1 Gill 302, 309 (Md. 1843) for the proposition that "free blacks were treated as a 'dangerous population,'" prompting "laws ... to prevent their

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[13] *See*, *e.g.*, 1752 Act of Va., 2 *Statutes at Large*, *supra*, at 481-82 ("Whereas the frequent meeting of considerable numbers of ... slaves ... is judged of dangerous consequence ... it shall not be lawful[] for any ... slave to carry or arm[] himself[] with any club, staff[], gun[] ... or any other weapon."); 1770 Act of Ga., *A Codification of the Statute Law of Georgia* 813 (Hotchkiss ed. 1848) ("[A]s it is absolutely necessary to the safety of this province[] ... to restrain the wandering and meeting of ... slaves ... it shall be lawful for any person ... to apprehend any ... slave ... found out of the plantation ... [and] if he ... be armed ... to disarm [him]."); 1740 Act of S.C., *Statutes at Large of South Carolina* 410 (McCord ed. 1840) (same); *see also* 1790 Act of N.C., *A Manual of the Laws of North-Carolina* 172 (Haywood ed. 1814) ("When any number of ... slaves ... shall collect together in arms ... committing thefts and alarming the inhabitants of any county ... it shall be the duty of commanding [militia] officer ... to suppress[] such depredations or insurrections."); 12 *Colonial Records of the State of Georgia* 451-52 (Candler ed. 1907) (complaining of "a Number of Slaves appear[ing] in Arms ... [and] commit[ting] great Outrages and plunder in and about the Town" and petitioning that "all Slaves ... be immediately disarmed").

migration into th[e] State; to make it unlawful for them to bear arms; [and] to guard even their religious assemblages with peculiar watchfulness'").

And as with every other historical analogue the Government relies on, laws disarming Blacks still allowed for certain case-specific exceptions. Virtually every law that we found contained exemptions for slaves who were armed but had in their possession a "ticket or license ... from his or her master." 1768 Act of Ga., *A Compilation of the General and Public Statutes of the State of Georgia* 594 (Cobb ed. 1859). This was basically a certificate authorizing them to possess firearms for some limited purpose—usually to hunt and kill game.[14] To be clear, the notion that Blacks as a class were equally entitled to the right to possess arms for self-defense arguably did not enter the public conscience until Reconstruction. *See Bruen*, 597 U.S. at 60 (surveying the "outpouring of discussion ... [during Reconstruction regarding] whether and how to secure constitutional rights for newly free slaves"). But what these and other exemptions demonstrate is that categorical bans on certain groups possessing arms gave way when the justifications for disarming them no longer existed. The slave "carrying his master's arms to or from his ... plantation" did not pose the same threat under the law as the slave who carried a gun after sundown. *See*, *e.g.*, 1768 Act of Ga., *A Compilation of the General and*

[14] 1768 Act, *A Compilation of the General and Public Statutes of the State of Georgia* 594 (Cobb ed. 1859); 1741 Act, *A Manual of the Laws of North-Carolina* 157 (Haywood ed. 1814); 1748 Act of Va., 6 *Statutes at Large* 169 (Hening ed. 1819); 1722 Act, 7 *Statutes at Large of South Carolina* 373 (McCord ed. 1840).

Public Statutes of the State of Georgia 594 (Cobb ed. 1859). The Massachusetts merchant in 1668 presumably could not sell arms to *every* Indian but he could sell to "Indians *not in hostility* with ... any of the English." 1668 Act, *Colonial Laws of Massachusetts* 240-41 (1672) (emphasis added). The "Papist" in 1756 Virginia kept his arms if he swore allegiance to the protestant King George III, 1756 Act, 7 *Statutes at Large*, *supra*, at 35-36, because this proved his Catholic faith "was founded only upon [the] difference of [religious] opinion," not "the subversion of civil government," 5 Tucker's Blackstone, *supra*, at 54-55. And the British Loyalist in 1777 Connecticut was disarmed only "until such time as he could prove his friendliness to the liberal cause." Act of Dec. 1775, *The Public Records of the Colony of Connecticut* 193 (Hoadly ed. 1890).

§ 922(g)(1) has no analogous exceptions for the class it targets and thus "bears little resemblance" to the class-based firearm prohibitions "in effect at [or near] the time the Second Amendment was ratified." *Cf United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011). "[O]riginally intended to keep firearms out of the hands of *violent* offenders, Greenlee, *supra*, at 274 (emphasis added), § 922(g)(1) is now far broader and far less case-specific than "its earlie[r] incarnation [codified] as the Federal Firearms Act of 1938," *Booker*, 644 F.3d at 24. Its predecessor "initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary." *Id.* In its present form, the law now "encompasses those who have committed *any* nonviolent felony or qualifying state-law misdemeanor"—an "immense and diverse category."

Kanter, 919 F.3d at 466 (Barrett, J., dissenting); *id.* ("[Section 922(g)(1)] includes everything from ... mail fraud, to selling pigs without a license in Massachusetts, redeeming large quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses.")

In sum, the burdens and justifications *(Bruen*'s "how" and "why") for laws disarming disfavored groups at the Founding are not "distinctly similar" to § 922(g)(1) to justify its blanket ban on non-violent felons possessing firearms. *Bruen*, 597 U.S. at 30 ("[C]ourts should not uphold every modem law that remotely resembles a historical analogue because doing so risk[s] endorsing outliers that our ancestors would never have accepted."). We turn now to the Government's final body of historical evidence.

3.

According to the Government, the Founding generation "would have understood" that the 18th-century felon had no right to possess a firearm because, historically, he faced death and total estate forfeiture for his crimes. Citing colonial and Founding era laws declaring miscellaneous offenses as either capital crimes or ones that resulted in civil forfeiture, the Government argues that these were the default penalties for committing a felony at that time. Since felons at the Founding were punished this harshly, the Government contends, it is consistent with our nation's history to disarm *permanently* the *modern-day* felon because that is far less severe a penalty. We reject this line of reasoning.

First, the history of punishing felonies at the Founding is far more nuanced than the Government

lets on; the notion that *all* felons (violent and non-violent alike) were historically put to death or stripped of their estates is "shaky" to begin with. *Kanter*, 919 F.3d at 459 (Barrett J., dissenting). Founder James Wilson, for example, explained that while, in theory, "the idea of [a] felony [wa]s very generally ... connected with capital punishment," in practice, this "inference[] ... [wa]s by no means entitled the merit of critical accuracy." *James Wilson s Lectures on Law* Part 3, Chap. I (1791). In England, "few felonies, indeed, were punished with death." *Id.* And on this side of the Atlantic, a "felony" in late 18th-century America was likewise "a term of loose signification." The Federalist No. 42 (James Madison). What counted as one, and how it was punished, was "not precisely the same in any two of the States; and varie[d] in each with every revision of its criminal laws." *Id.* As a result, there were "many felonies" on the books in the late 18th- and early 19th-century, "not one punished with forfeiture of estate, and but a very few with death."[15] 6 Nathan Dane, *Digest of American Law* 715 (1823).

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[15] *See*, *e.g.*, Act *of Conn.*, *Acts and Laws of the State of Connecticut* 182-83 (1796) (listing various "felonies" but punishing only some capitally (e.g., bestiality, arson, bearing false witness) and others with a term of imprisonment (e.g., forgery, horse stealing, robbery)); *General Laws of Pennsylvania*, *from the Year 1700 to April 22*, *1846* 155 (1847) (abolishing capital punishment for *all* crimes except first-degree murder); An Act to Prevent the Stealing and Taking away of Boats and Canoes, 1 *The Laws of the Province of South Carolina* 49 (1776) (punishing boat theft with "corporal punishment" and a fine "if the Matter of Fact be a Felony"); 1793 Act Respecting the Punishment of Criminals, 2 *The Laws of Maryland* chap. LVII, § XIII (1800) (empowering justices of the court to, "in their

Second, today's felon, in many respects, resembles nothing of his Founding-era counterpart, despite bearing the same label. Even as the newly formed states filled the pages of their penal codes with new felonies each passing year, "[t]he felony category" at the Founding still remained "a good deal narrower [then] than now." *Lange v. California*, 141 S. Ct. 2011, 2023 (2021). The upshot is that "[m]any crimes classified as misdemeanors, or nonexistent, at common law are ... felonies" today. *Tennessee v. Garner*, 471 U.S. 1, 14 (1985). Indeed, at least one of Duarte's prior felonies—vandalism—almost certainly would have been a misdemeanor. *United States v. Collins*, 854 F.3d 1324, 1333 (11th Cir. 2017) (explaining "the closest common-law offense for damaging another's property" was "malicious mischief," which was punishable by a fine); *see*, *e.g.*, Act of 1772, *An Abridgment of the Laws of Pennsylvania* 357 (Purdon ed. 1811) ("[A]ny person or persons [who] shall maliciously and voluntarily break ... any brass or other knocker affixed to such door ... [shall] pay the sum of twenty-five pounds.").

So not all felonies now were felonies then, and many felonies then were punishable by a term of

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discretion," sentence males convicted of "[a]ny felony" "to serve and labour for any time[] ... not exceeding seven years"); 1801 Act Declaring the Crimes Punishable with Death or Imprisonment in the State Prison, 1 *The Laws of the State of New York* 254 (1802) (committing any person "duly convicted ... of any felony," with certain enumerated exceptions, to a "term [of imprisonment] not more than fourteen years."); *See also* 2 Timothy Cunningham, *A New and Complete Law Dictionary* (3d ed. 1783) (describing punishments for various felonies as ranging from death and estate forfeiture to imprisonment and hard labor).

years—not execution, civil forfeiture, or life in prison. Nevertheless, it may well be that "the 18th- and 19th-century" laws traditionally punishing *certain* felonies with death, estate forfeiture, or a life sentence are the closest things to "longstanding" felon firearm bans that *Heller* had in mind. *See Bruen*, 597 U.S. at 1; *see also Phillips*, 827 F.3d at 1174 n.1 (citing *Chovan*, 735 F.3d at 1144 (Bea, J., concurring)). We might then venture to "assume it settled that *these*" offenses were of a kind the Founding generation thought serious enough to warrant the permanent loss of the offender's Second Amendment right. *Bruen*, 597 U.S. at 30 (emphasis added); *see also id.* ("[A]ssum[ing] it settled" that the "relatively few 18th- and 19th-century 'sensitive places'" (schools, polling places, courthouses, etc.) were "the[] locations ... where arms carrying could be prohibited consistent with the Second Amendment."). And it would lastly stand to reason that we "c[ould] use ... th[ese] historical regulations" as "analogies," *id.* at 31, to "largely *modern* crimes" that may not "closely" resemble their historical counterparts but still share with them enough "relevant[] similar[ities]" to justify permanent disarmament for committing such new-age offenses, *see Alaniz*, 69 F .4th at 1129-30 (emphasis added) ("Like burglary or robbery, [modem-day] drug trafficking plainly poses substantial risks of confrontation that can lead to immediate violence.").

That would all seem to be in step with *Bruen.* Yet the Government would have us go much further. We are asked to hold that "Congress[] ... [can] define any ... crime as a felony and thereby use it as the basis for a § 922(g)(1) conviction." *Phillips*, 827 F.3d at 1176 n.5 (emphasis added).

This, in our view, "expand[s]" the historical felony category "far too broadly." *Bruen*, 597 U.S. at 31. "Put simply, there is no historical basis" for Congress "to effectively declare" that committing "a[ny] crime punishable by imprisonment for a term exceeding one year," § 922(g)(1), will result in permanent loss of one's Second Amendment right "simply because" that is how we define a felony today, *Bruen*, 597 U.S. at 31 ("New York [cannot] ... declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."); *see also Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting) ("The majority's extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label."). To accept the Government's position would "in effect exempt" from Second Amendment protection entire categories of people whose crimes were misdemeanors or did not exist at the Founding. *See Bruen*, 597 U.S. at 30. As one commentator put it, "someone who shoplifts three times in seven years [in West Virginia] ... twice operates a recording device in a movie theater [in Utah] ... [or] release[s] a dozen heart-shaped balloons [as] a romantic gesture [in Florida]" will earn a lifetime ban on possessing a firearm under § 922(g)(1) because it is apparently a felony to do any of those things in those respective states. Greenlee, *supra*, at 269 (citations omitted). That, in our view, is a bridge too far.

A more faithful application of *Bruen* requires the Government to proffer Founding-era felony analogues that are "distinctly similar" to Duarte's underlying offenses and would have been punishable either with execution, with life in prison, or permanent forfeiture

of the offender's estate. *See Bruen*, 597 U.S. at 27. Our *pre-Bruen* decision in *Phillips* largely endorsed this approach. After "assuming the propriety of felon firearm bans," as *Vongxay* required, we still canvassed the history to determine whether "Phillips's predicate conviction for misprision of felony c[ould] constitutionally serve as the basis for a felon ban" under § 922(g)(1). *Phillips*, 827 F.3d at 1175. "[T]here [w]as little question" that it could, we explained, because the Founding generation had labelled Phillips's crime a "felony" ever since the First Congress passed the Crime Act of 1790. *See id.* at 1175-76 (citing 1 Stat. 113, Sec. 6). True, we did not ask whether misprison of felony was a capital or life-sentence offense back then. But this was only because *Bruen* had not yet clarified that "how" a historical analogue burdens a Second Amendment right is a "central consideration[]" that courts must weigh when reviewing the history. *Bruen*, 597 U.S. at 29 (citations omitted). With that minor tweak, our approach today conforms with both *Phillips* and *Bruen*.

Here, Duarte's underlying vandalism conviction, we have explained, likely would have made him a misdemeanant at the Founding. *See infra* at 59. Duarte's second predicate offense—felon in possession of a firearm, Cal. Pen. Code § 29800(a)(1)—was a nonexistent crime in this country until the passage of the Federal Firearms Act of 1938. *See Range*, 69 F.4th at 104. As for Duarte's remaining convictions—drug possession and evading a peace officer—we do not know whether either crime traces back to an analogous, Founding-era predecessor because the

Government failed to proffer that evidence.[16] Based on this record, we cannot say that Duarte's predicate offenses were, by Founding era standards, of a nature serious enough to justify permanently depriving him of his fundamental Second Amendment rights. The Government therefore failed to demonstrate that applying § 922(g)(1)'s lifetime firearm ban to Duarte fits within any "longstanding" tradition of "prohibit[ing] ... the possession of firearms by felons." *Heller*, 554 U.S. at 626.

IV.

We do not base our decision on the notion that felons should not be prohibited from possessing firearms. As a matter of policy, § 922(g)(1) may make a great deal of sense. But "[t]he very enumeration of the [Second Amendment] right" in our Constitution "takes out of [our] hands ... the power to decide" for which Americans "th[at] right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (emphasis added).

Duarte is an American citizen, and thus one of "the people" whom the Second Amendment protects. The Second Amendment's plain text and historically understood meaning therefore presumptively

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[16] Criminalizing drug possession, in particular, did not appear to gain significant momentum until the early 20th century, with the passage of such laws as the Food and Drug Act of 1906 and the Harrison Narcotics Tax Act of 1914. *See* Margarita Mercado Echegaray, Note, *Drug Prohibition in America: Federal Drug Policy and its Consequences* 75 Rev. Jur. U.P.R. 1215, 1219 (2006); *cf Alaniz*, 69 F.4th at 1129-30 (citing *id.*). Before then, what we now think of as "illicit drugs," such as opium and cocaine, "were ... legal in the United States" for a long stretch of this country's history. Echegaray, *supra*, at 1218.

guarantee his individual right to possess a firearm for self-defense. The Government failed to rebut that presumption by demonstrating that permanently depriving Duarte of this fundamental right is otherwise consistent with our Nation's history. We therefore hold that § 922(g)(1) violates Duarte's Second Amendment rights and is unconstitutional as applied to him.

REVERSED; CONVICTION VACATED.

M. SMITH, Circuit Judge, dissenting:

Whether felons have a Second Amendment right to bear arms is settled in our circuit. They do not. *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). Until an intervening higher authority that is clearly irreconcilable with *Vongxay* is handed down, we, as a three-judge panel, are bound by that decision. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003).

The Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), did not overrule *Vongxay*. Instead, *Bruen* reiterates that the Second Amendment right belongs only to law-abiding citizens. Duarte's Second Amendment challenge to 18 U.S.C. § 922(g)(1), as applied to nonviolent offenders, is therefore foreclosed. Accordingly, I respectfully dissent.

* * *

In *Vongxay*, we held that § 922(g)(1) does not violate the Second Amendment as applied to persons with nonviolent felony convictions. *See* 594 F .3d at 1118. There, the defendant (Vongxay) had three previous, nonviolent felony convictions: two for car burglary and one for drug possession. *Id.* at 1114. He was charged and convicted under *§* 922(g)(1) after a police officer found a firearm on his person outside a nightclub. *Id.* at 1113-14. Vongxay challenged his conviction on Second Amendment grounds, arguing that § 922(g)(1) "unconstitutionally limits firearm possession by categories of people who have not been deemed dangerous." *Id.* at 1116 (internal quotation marks omitted). We affirmed his conviction, holding that nothing in *District of Columbia v. Heller*, 554 U.S.

570 (2008), "can be read legitimately to cast doubt on the constitutionality of § 922(g)(1)" and that felons are "categorically different from the individuals who have a fundamental right to bear arms." *Vongxay*, 594 F.3d at 1114-15. Duarte does not dispute that *Vongxay* is on point.

In our circuit, a decision of a prior three-judge panel is controlling until a superseding ruling comes from the Supreme Court or a panel of our court sitting en banc. *See Miller*, 335 F.3d at 893, 899-900. "[T]he issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.* at 900. When the two authorities are "clearly irreconcilable," we consider ourselves "bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." *Id.* The "clearly irreconcilable" requirement is "a high standard." *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975,979 (9th Cir. 2013) (internal quotation marks omitted). "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140-41 (9th Cir. 2012), and *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011) (per curiam)). "In order for us to ignore existing Ninth Circuit precedent ... the reasoning and principles of [the later authority] would need to be so fundamentally inconsistent with our

prior cases that our prior cases cannot stand." *In re Gilman*, 887 F.3d 956, 962 (9th Cir. 2018). But if we "can apply our prior circuit precedent without running afoul of the intervening authority, we must do so." *Lair*, 697 F.3d at 1207 (internal quotations marks omitted).

Nothing in the Supreme Court's decision in *Bruen* reflects a retreat from the Court's earlier statement in *Heller* that "longstanding prohibitions on the possession of firearms by felons and the mentally ill" are "presumptively lawful." *Heller*, 554 U.S. at 626, 627 n.26; *see also McDonald v. Chicago*, 561 U.S. 742, 786 (2010) (plurality) (noting that the Court "made it clear in *Heller* that [its] holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill'" and that the Court "repeat[s] those assurances here" (citation omitted)). To the contrary, *Bruen*'s analysis implicitly acknowledged *Heller*'s exclusion of felons from "the people" protected by the Second Amendment. *See* 597 U.S. at 31-32 ("It is undisputed that petitioners Koch and Nash—two ordinary, *law-abiding*, adult citizens—are part of 'the people' whom the Second Amendment protects." (emphasis added) (citing *Heller*, 554 U.S. at 580)); *see also*, *e.g.*, *Heller*, 554 U.S. at 635 ("law-abiding, responsible citizens"). *Indeed*, Bruen *repeatedly limited its definition of the scope of the right to "law-abiding" citizens, using that phrase no fewer than fourteen times throughout the opinion. See* 597 U.S. at 9, 15, 26, 29-31, 33 n.8, 38 & n.9, 60, 70- 71.[1]

[1] The majority does "not think that the Supreme Court, without any textual or historical analysis of the Second Amendment,

Two of the Justices whose concurrences were essential to the judgment cabined the scope of *Bruen* on this very point. Justice Kavanaugh, joined by Chief Justice Roberts, wrote separately to "underscore two important points about the limits of the Court's decision." *Id.* at 79 (Kavanaugh, J., joined by Roberts, C.J., concurring). His second point is germane here: "[A]s *Heller* and *McDonald* established and the Court today again explains, the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. Properly interpreted, the Second Amendment allows a variety of gun regulations." *Id.* (Kavanaugh, J., joined by Roberts, C.J., concurring) (cleaned up). Justice Kavanaugh then reiterated *Heller*'s and *McDonald*'s statements that a "prohibition[] on the possession of firearms by felons" is "presumptively lawful." *See id.* at 81 (Kavanaugh, J., joined by Roberts, C.J., concurring) (citations omitted).

Justice Alito added in a separate concurrence that *Bruen* did not "disturb[] anything that [the Court] said in *Heller* or *McDonald* about restrictions that may be imposed on the possession or carrying of guns." *Id.* at 72 (Alito, J., concurring) (cleaned up). He made clear: "All that we decide in this case is that the Second Amendment protects the right of *law-abiding* people to carry a gun outside the home for self-defense." *Id.* at 76 (Alito, J., concurring) (emphasis added).

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intended to decide the constitutional fate of so large a population in so few words and with such little guidance." But any doubt or ambiguity on this issue cuts in favor of following circuit precedent. It is Duarte's burden to show that *Vongxay* is "clearly irreconcilable" with *Bruen*.

Thus, *Bruen* did nothing to upend our decision in *Vongxay*. *Bruen* was a Second Amendment challenge to New York's gun licensing regime, not the felon-in-possession statute at issue in *Vongxay*; *Bruen* repeatedly emphasized that it only extended the Second Amendment right to "law-abiding citizens," a phrase it used, as noted, no fewer than fourteen times; and three Justices in the *Bruen* majority reiterated, unequivocally, that a prohibition on the possession of firearms by felons is presumptively lawful.[2] The two decisions are harmonious.

Moreover, *Vongxay*'s mode of analysis is not clearly inconsistent with that in *Heller*. *Vongxay* is a *post-Heller* decision that considered, *inter alia*, the historical scope of the Second Amendment.[3] *See*

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[2] The majority claims that the Supreme Court did not even *suggest* in *Heller* or *Bruen* that felons are not among "the people" within the meaning of the Second Amendment, quoting our recent decision in *United States v. Perez-Garcia*, 96 F.4th 1166, 1175 (9th Cir. 2024). But *Perez-Garcia* itself notes that "when the Supreme Court specifically analyzed limitations on the scope of the Second Amendment's protections, *Heller* described the Second Amendment right as belonging to 'law-abiding, responsible citizens,'" that "*Bruen*, in turn, used the term 'law-abiding, responsible citizens' and its variants more than a dozen times when describing the Second Amendment's scope," and that the *Bruen* "concurrences reiterated the same point." *Perez-Garcia*, 96 F.4th at 1179 (cleaned up).

[3] We noted the following:

> Finally, we observe that most scholars of the Second Amendment agree that the right to bear arms was "inextricably ... tied to" the concept of a "virtuous citizen[ry]" that would protect society through "defensive use of arms against criminals, oppressive officials, and foreign enemies alike," and that "the right to bear arms does not preclude laws disarming

Bruen, 597 U.S. at 22 ("*Heller* relied on text and history."); *Vongxay*, 594 F.3d at 1118. We did not reference, let alone employ, the "means-end" scrutiny that *Bruen* rejected. *See Bruen*, 597 U.S. at 19; *Vongxay*, 594 F.3d at 1114-18. That we cited *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004), and *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), does not suggest otherwise. *See Vongxay*, 594 F.3d at 1116-17. Rather, we cited these Fifth Circuit cases merely as examples from our "examination of cases from other circuits and of historical gun restrictions [that] lends credence to the *post-Heller* viability of" *United States v. Younger*, 398 F.3d 1179, 1192 (9th Cir. 2005), in which we held that § 922(g)(1) is constitutional. *Vongxay*, 594 F.3d at 1116. We did not adopt their mode of analysis.

For the reasons noted, Duarte fails to meet the "high standard" of *Miller*. *See Rodriguez*, 728 F.3d at 979. *Vongxay* is neither "clearly irreconcilable" nor "so fundamentally inconsistent" with *Bruen* that we must

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> the unvirtuous citizens (i.e. criminals) ...." Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 (1986); *see also* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461,480 (1995) (noting that felons "were excluded from the right to arms" because they were "deemed incapable of virtue"). We recognize, however, that the historical question has not been definitively resolved. *See* C. Kevin Marshall, *Why Cant Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 714-28 (2009) (maintaining that bans on felon gun possession are neither long-standing nor supported by common law in the founding era).

Vongxay, 594 F.3d at 1118.

reject our precedent. *See Miller*, 335 F.3d at 900; *In re Gilman*, 887 F .3d at 962. To conclude otherwise is to read *Bruen* more broadly than, at a minimum, Chief Justice Roberts, Justice Alito, and Justice Kavanaugh intended. The *Bruen* majority did not fashion an entirely new Second Amendment test, instead stressing that it was applying the same "test that [the Court] set forth in *Heller*." 597 U.S. at 26. *Bruen* rejected only "means-end scrutiny," which, again, is a mode of analysis *Vongxay* did not employ. *See id.* at 24, 26. We are thus bound by our holding in *Vongxay*: § 922(g)(1) does not violate the Second Amendment as it applies to nonviolent felons. *See* 594 F.3d at 1118. Duarte's challenge is foreclosed, and no further inquiry is necessary.

The majority errs by discarding *Vongxay* and conducting the Second Amendment analysis of § 922(g)(1) anew. First, the majority contends that *Vongxay* is "clearly irreconcilable" with *Bruen* because of "*Vongxay*'s wholesale omission of *Bruen*'s two-step methodology." That is, we are no longer bound by *Vongxay* because "*Vongxay* did not follow the textually and historically focused 'mode of analysis' that *Bruen* established and required courts now to apply to all Second Amendment challenges."

The majority appears to suggest that *Vongxay*'s failure to apply the two-step framework set forth in *Bruen* is alone sufficient to render the decision null. But that view is not supported by *Miller* or its progeny. The *Miller* analysis focuses on the "theory" and "reasoning" underlying the decisions; the analysis turns on function, not form. *See Miller*, 335 F.3d at 900. Yet, the majority states: "Because *Bruen* had not

yet clarified these particular analytical steps until after *Vongxay* was decided, *Vongxay*, predictably, failed to apply them" (cleaned up), citing our decision in *United States v. Slade*, 873 F.3d 712, 715 (9th Cir. 2017). *Slade* does not stand for such formalism. In *Slade*, we held that our decision in *United States v. Jennen*, 596 F.3d 594 (9th Cir. 2010), was clearly irreconcilable with later Supreme Court precedent because *Jennen* based its analysis on an implicit assumption that the Supreme Court thereafter expressly denounced. *See Slade*, 873 F.3d at 715. It was not the mere failure to consider "the analytical process [later] prescribed by [the Supreme Court]" that made the two decisions clearly irreconcilable but rather *Jennen*'s incorrect legal assumption. *See id.* The circumstances here are different. We did not merely assume in *Vongxay* that a felon was excluded from "the people" whom the Second Amendment protects, nor did the Supreme Court expressly reject that view in *Bruen* (in fact, again, it implicitly endorsed the view). *Slade* is therefore inapposite, as are the other authorities cited by the majority on this issue. *See*, *e.g.*, *United States v. Baldon*, 956 F.3d 1115, 1121 (9th Cir. 2020) (prior precedent rested on analytical distinction between "substantial" and "minimal" force rebuffed by intervening authority); *Swift v. California*, 384 F.3d 1184, 1190 (9th Cir. 2004) (prior precedent applied "relates to" test that Supreme Court later expressly overruled). Under *Miller*, the creation of a new test does not per se invalidate prior precedent.

Second, the majority contends that "*Vongxay*'s reliance on *Younger* is ... 'clearly irreconcilable' with *Bruen*—separate and apart from *Vongxay*'s failure to

apply *Bruen*'s methodology." But *Vongxay* did not improperly rely on cases holding that the Second Amendment protected a collective rather than individual right. *Vongxay* was decided after *Heller* and recognized that *Heller* "invalidated" this court's *pre-Heller* caselaw holding that the Second Amendment did not protect an individual right. 594 F .3d at 1116. We cited *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), only to explain its *pre-Heller* precedent and cited *Younger*, 398 F.3d at 1192, for its holding: "that § 922(g)(1) does not violate the Second Amendment rights of a convicted felon." *Vongxay*, 594 F.3d at 1116. That holding was correct-even if, as *Vongxay* acknowledged, the reasoning was wrong. We then explained why *Heller* did not disturb that holding. *Id.* at 1116-18.

Indeed, in a case decided six years after *Vongxay*, we expressly rejected the argument that *Vongxay* somehow invalidated itself by citing *pre-Heller* precedent:

> Phillips argues that *Vongxay* is not good law. He contends that it conflicted with circuit precedent when it relied, in part, on *United States v. Younger*, 398 F.3d 1179 (9th Cir. 2005), a *pre-Heller* case that held that there is no individual right to bear arms under the Second Amendment. *See Vongxay*, 594 F.3d at 1116. But *Vongxay* acknowledged *Heller*'s holding—that there is an individual right under the Second Amendment—notwithstanding the panel's assertion that it was "still bound by *Younger*." *Id.* ...

> If the panel had truly considered itself bound by *Younger* in all respects, it would not have analyzed the Second Amendment question at all, since there would have been no claim to an individual right. If Phillips believes that *Vongxay* is inconsistent with *Heller*, his remedy in this court is to seek rehearing en banc.

United States v. Phillips, 827 F.3d 1171, 1174 n.1 (9th Cir. 2016). Since the majority's theory here is identical to the argument rejected in *Phillips* (except referencing *Bruen*, rather than *Heller)*, it is foreclosed.

The "clearly irreconcilable" requirement of *Miller* is a "high standard." *Rodriguez*, 728 F.3d at 979. As long as we "can apply our prior circuit precedent without running afoul of the intervening authority, we must do so." *Lair*, 697 F.3d at 1207. For the reasons noted, we can easily do so here. Nevertheless, the majority engages in a de novo Second Amendment analysis of § 922(g)(1). Had *Bruen*, for example, redefined the meaning of "the people" under the Second Amendment, such a review may indeed be necessary. But *Bruen* did not do so. The scope of "the people" is the same now under *Bruen*, as it was under *Vongxay*, as it was under *Heller*. Felons are excluded from the right to keep and bear arms.

* * *

The majority reads *Bruen*, a Supreme Court decision reviewing New York's gun licensing regime, as an invitation to uproot a longstanding prohibition on the possession of firearms by felons. *Bruen* extends no such invitation. As Justice Alito cautioned, *Bruen*

decides "nothing about *who* may lawfully possess a firearm." *Bruen*, 597 U.S. at 72 (emphasis added).

One day—likely sooner, rather than later—the Supreme Court will address the constitutionality of § 922(g)(1) or otherwise provide clearer guidance on whether felons are protected by the Second Amendment. But it is not our role as circuit judges to anticipate how the Supreme Court will decide future cases. *See United States v. Osife*, 398 F.3d 1143, 1148 (9th Cir. 2005) ("As the Supreme Court has explained, when there is clearly controlling precedent, circuit courts are not to anticipate the direction in which the Court's jurisprudence is moving."), *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332 (2009); *Tekoh v. Cnty. of Los Angeles*, 997 F.3d 1260, 1263 (9th Cir. 2021) (Miller, J., concurring in the denial of rehearing en banc) ("[M]aking such predictions is the role of academics and journalists, not circuit judges. Our duty is to follow what the Supreme Court has done, not forecast what it might do."). Until we receive contrary definitive guidance from the Supreme Court, or from a panel of our court sitting en banc, we are bound by our decision in *Vongxay*.

I respectfully dissent and express the hope that our court will rehear this case en banc to correct the majority's misapplication of *Bruen*.

Appendix D

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 22-cr-387

UNITED STATES OF AMERICA,

v.

STEVEN DUARTE, AKA Shorty,

Defendant.

Filed: Feb. 28, 2022

JUDGMENT

In the presence of the attorney for the government, the defendant appeared in person on this date.

Month	Day	Year
02	23	2022

Counsel	Oliver P. Cleary, CJA Appointment (Name of Counsel)
Plea	☒ GUILTY, and the court being satisfied that there is a factual basis for the plea. ☐ NOLO CONTENDERE ☐ NOT GUILTY
Finding	There being a finding/verdict of **GUILTY,** defendant has been

	convicted as charged of the offense(s) of: Felon in Possession of a Firearm and/or Ammunition in violation of 18 U.S.C. § 922(g)(1), as charged in Count 1 of the Indictment.
Judgment and Prob/Comm Order	The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the cause was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: **Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Steven Duarte, is hereby committed on Count 1 of the Single-Count Indictment to the custody of the Bureau of Prisons for a term of fifty-one (51) months.**

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three (3) years under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04.
2. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at

least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.

3. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.

4. During the course of supervision, the Probation Officer, with the agreement of the defendant and defense counsel, may place the defendant in a residential drug treatment program approved by the U.S. Probation and Pretrial Services Office for treatment of narcotic addiction or drug dependency, which may include counseling and testing, to determine if the defendant has reverted to the use of drugs. The defendant shall reside in the treatment program until discharged by the Program Director and Probation Officer.

5. As directed by the Probation Officer, the defendant shall pay all or pa1t of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.

6. During the period of community supervision, the defendant shall pay the special

assessment in accordance with this judgment's orders pertaining to such payment.

7. When not employed or excused by the Probation Officer for schooling, training, or other acceptable reasons, the defendant shall perform 20 hours of community service per week as directed by the Probation & Pretrial Services Office.

8. The defendant shall not associate with anyone known to the defendant to be a member of the 18th Street Gang and others known to the defendant to be participants in the 18th Street Gang's criminal activities, with the exception of the defendant's family members. The defendant may not wear, display, use or possess any gang insignias, emblems, badges, buttons, caps, hats, jackets, shoes, or any other clothing that defendant knows evidence affiliation with the 18th Street Gang, and may not display any signs or gestures that defendant knows evidence affiliation with the 18th Street Gang.

9. As directed by the Probation Officer, the defendant shall not be present in any area known to the defendant to be a location where members of the 18th Street Gang meet or assemble.

10. The defendant shall submit the defendant's person, property, house, residence, vehicle, papers, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement

officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

11. The defendant shall cooperate in the collection of a DNA sample from the defendant.

It is ordered that the defendant shall pay to the United States a special assessment of $100, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

The Court recommends that the defendant be considered for participation in the Bureau of Prison's Residential Drug Abuse Program (RDAP).

The Court authorizes the Probation & Pretrial Services Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotic addiction or drug dependency. Further redisclosure of the Presentence Report by the treatment provider is

prohibited without the consent of the sentencing judge.

Defendant informed of his right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

February 28, 2022	[handwritten: signature]
Date	U.S. District Judge

…

Appendix E

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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)

(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;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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.