NO. _____

In the Supreme Court of the United States

JONATHAN R. HOWARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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July 25, 2025

QUESTIONS PRESENTED

Whether 18 U.S.C. §922(g)(1) comports with the Second Amendment as applied to a defendant whose most serious prior felony conviction is drug trafficking?

DIRECTLY RELATED PROCEEDINGS

United States v. Jonathan R. Howard, No. 4:23-CR-84 (N.D. Tex. August 28, 2023)

United States v. Jonathan R. Howard, No. 24-10920 (5th Cir. April 29, 2025)

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In the Supreme Court of the United States

No. _____

JONATHAN R. HOWARD,

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v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Jonathan R. Howard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion below was not selected for publication. It is reprinted on pages 1a–2a of the Appendix. The district court did not issue any written opinions.

JURISDICTION

The Fifth Circuit entered judgment on April 29, 2025. This petition is timely under S. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Section 922(g)(1) of Title 18 reads in relevant part:

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

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.

STATEMENT

A. Facts

Petitioner Jonathan R. Howard is a U.S. citizen, (Record in the Court of Appeals, at 230), appealing his conviction and sentence for possessing a firearm following a felony conviction, 18 U.S.C. §922(g)(1). Between the time he was 22 years-old and 29 years old, Mr. Howard committed a series of misdemeanors, including two misdemeanor assaults. (Record in the Court of Appeals, at 219-223). The next year he suffered two felony convictions for possessing drugs with

intent to distribute them, specifically between 4 and 200 grams of THC and methamphetamine. (Record in the Court of Appeals, at 223-224).

On February 23, 2023, Petitioner fired shots in his backyard, striking an elderly neighbor, who was injured but not killed. (Record in the Court of Appeals, at 214-216). After first denying hearing the gunshots, he eventually told police that he shot the gun to scare off an intruder. (Record in the Court of Appeals, at 215-217). The record contains no information contradicting this account or suggesting a more plausible motive. (Record in the Court of Appeals, at 215-217). Police searched Petitioner's home and found three guns, plus three grams of methamphetamine and four grams of cocaine. (Record in the Court of Appeals, at 215).

B. District Court Proceedings

The federal government indicted Petitioner for possessing firearms after a felony conviction. (Record in the Court of Appeals, at 13). Petitioner moved to dismiss the indictment, contending that the Second Amendment does not permit Congress to forbid gun possession by felons. Pet.App. 3a-4a, 8a-11a. The motion expressly invoked the government's burden to justify with historical evidence any regulation in facial conflict with the text of the Second Amendment. Pet.App. 8a-10a.

Answering the Second Amendment argument, the government cited two pieces of historical evidence in an effort to show that the original understanding of the Second Amendment would have permitted 18 U.S.C. §922(g)(1). First, it cited the English Bill of Rights, a pre-revolutionary anti-Catholic enactment

that expressly restricted the right to bear arms to Protestants. Pet.App. 16a-17a. Second, it cited a failed proposal to include language like the Second Amendment in the Pennsylvania ratifying convention. Pet.App. 17a. That proposal would have contained an exception for people convicted of crimes. Pet.App. 17a. The government cited no other historical evidence. Pet.App. 12a-23a. The district court denied the motion in an electronic order with no commentary. (Record in the Court of Appeals, at 5)(docket sheet, referencing ECF 22).

Petitioner pleaded guilty without a plea agreement. (Record in the Court of Appeals, at 79-80). The Presentence Report stated that at the time of the conduct in the instant case, he was on parole for the drug offenses discussed above. (Record in the Court of Appeals, at 224-225). The court imposed 120 months imprisonment, to be followed by three years of supervised release. Pet.App. 26a.

C. Appeal

On appeal, Petitioner renewed his Second Amendment challenge to his conviction, contending that the government could use only the two pieces of historical evidence submitted by the government to the District Court. *See* Initial Brief in *United States v. Howard*, No. 23-10920, 2023 WL 9030199 at **4, 5-16 (5th Cir. Filed December 26, 2023)("Initial Brief"). In the alternative, he contended that an expanded historical record could not justify the conviction. *See* Initial Brief, at **17-20. Specifically, he argued that the Nation has no tradition of disarming felons anytime near founding, and that any tradition of disarming those whose prior felonies established a

propensity for violence would not reach Petitioner. *See id*. Further, he asserted that 18 U.S.C. §922(g)(1) lies beyond Congress's power under the Commerce Clause. *See id*. at **5, 21-25.

The Fifth Circuit rejected the Second Amendment challenge. Pet.App. 1a-2a; *United States v. Howard*, No. 23-10920, 2025 WL 1233521 at *1 (5th Cir. Filed December 26, 2023). The entirety of the short opinion reads as follows:

> Jonathan R. Howard argues that his statute of conviction, 18 U.S.C. § 922(g)(1), violates the Second Amendment on its face and as applied to him in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). He also contends that § 922(g)(1) violates the Commerce Clause, but he correctly concedes his argument is foreclosed. *See United States v. Diaz*, 116 F.4th 458, 462 (5th Cir. 2024).
>
> His facial Second Amendment challenge is also foreclosed. *See United States v. Contreras*, 125 F.4th 725, 729 (5th Cir. 2025). His unpreserved as-applied challenge fails on plain error review because he has not shown that applying § 922(g)(1) based on his prior drug-trafficking felonies amounts to clear or obvious error. *See United States v. Jones*, 88 F.4th 571, 573-74 (5th Cir. 2023), cert. denied, 144 S. Ct. 1081 (2024); *United States v. Cisneros*, 130 F.4th 472, 476-77 (5th Cir. 2025).

AFFIRMED.

Id.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO RESOLVE THE PROFOUND UNCERTAINTY, INCLUDING AN ACKNOWLEDGED CIRCUIT SPLIT, REGARDING THE CONSTITUTIONALITY OF 18 U.S.C. §922(G)(1) UNDER THE SECOND AMENDMENT.

A. The courts of appeals are divided.

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court held that when a firearm restriction contravenes the text of the Second Amendment, it is valid only to the extent that it is consistent with the nation's history and tradition of valid firearm regulation. *Bruen*, 597 U.S. at 19. It rejected the notion that firearm regulations may be affirmed based on a sufficiently compelling governmental interest. *Id.*

Section 922(g)(1) of Title 18 forbids the possession of firearms by most persons convicted of an offense punishable by more than a year's imprisonment. Since *Bruen*, "Section 922(g)(1)'s constitutionality has divided courts of appeals and district courts." Supplemental Brief for the Federal Parties in Nos. 23-374, *Garland v. Range* 23-683, at 2 (June 24, 2024)("Supplemental Brief in Range"), *available at https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf , last visited July 23, 2025.*

As the Ninth Circuit observed en banc, "[f]our circuits have upheld the categorical application of § 922(g)(1) to all felons." *United States v. Duarte*, 137 F.4th 743, 747 (9th Cir. May 9, 2025)(en banc)(citing *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024); *Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th Cir. 2025), and *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, 145 S.Ct. 1041 (2025)). The en banc Ninth Circuit joined this group in a decision that produced four separate opinions, including a partial dissent. *Duarte*, 137 F.4th at 762. In so doing, it overruled a panel opinion that had found the statute unconstitutional as applied to a person with prior convictions for vandalism, drug possession, and evading arrest. *See United States v. Duarte*, 101 F.4th 657, 661 (9th Cir. 2024), *reh'g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. 2024), *different results on rehearing* 137 F.4th at 747 (9th Cir. May 9, 2025)(en banc). This brings the total number of courts rejecting all constitutional challenges to the statute to five.

But as the en banc Ninth Circuit court also recognized, two more Circuits, including the court below, "have left open the possibility that § 922(g)(1) might be unconstitutional as applied to at least some felons," *Id.* (citing *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024), and *United States v. Williams*, 113 F.4th 637, 661–62 (6th Cir. 2024))(emphasis in original), while the en banc Third Circuit has actually held the statute unconstitutional as applied to a man with a prior felony conviction for making a false statement to obtain food stamps, *Range v. Att'y Gen.*, 124 F.4th 218, 222–23 (3d Cir. 2024)(en banc). Many

District Courts, though not the majority, have also found the statute unconstitutional in individual cases. *See* Supplemental Brief in *Range*, at *4-5, nn.1-3 (collecting cases); *see also United States v. Gomez*, 773 F.Supp.3d 257 (N.D. TX March 25, 2025)(marijuana possession), *appeal pending*. As the government observed last year, moreover, "[s]ome of those decisions have involved felons with convictions for violent crimes, such as murder, manslaughter, armed robbery, and carjacking." *Id.* at **4-5, & n.1.

Further, the Courts of Appeals have acknowledged extensive disagreement and uncertainty regarding certain methodological issues relevant to the resolution of *Bruen* challenges. These include the relevance of laws at founding that did not directly regulate firearms, such as capital punishment and estate forfeiture, *compare Range*, 124 F.4th at 231 (capital punishment and estate forfeiture for non-violent crime not relevant), *with Diaz*, 116 F.4th at 469-470 (giving dispositive weight to the availability of capital punishment for crimes analogous to the defendant's prior conviction); the status of pre-*Bruen* circuit precedent, *compare Vincent*, 127 F.4th at 1265–66 (circuit precedent unaffected, and collecting cases), *with Williams*, 113 F.4th at 648 (*Bruen* displaces earlier circuit precedent); the significance of *dicta* in *Heller*, *Bruen*, and *Rahimi* regarding "presumptively valid" restrictions on firearm ownership, *compare Duarte*, 137 F.4th at 750 (relying heavily on such passages to affirm §922(g)(1)) *with Diaz*, 116 F.4th at 465-466 (declining to give them controlling weight); and the propriety of inquiring into the defendant's conduct not been substantiated by a criminal conviction; *compare United States v. Kimble*, No. 23-

50874, 2025 WL 1793832, at *8 (5th Cir. June 30, 2025)(improper) *with Pitsilides v. Barr*, 128 F.4th 203, 211–12 (3d Cir. 2025)(proper). And Circuit opinions resolving challenges to §922(g)(1) frequently generate dissenting and concurring opinions, attesting to the pervasive uncertainty and disagreement in the area. *See Range*, 124 F.4th at 221 (six opinions, one dissent); *Duarte*, 137 F.4th at 745 (four opinions, one partial dissent)(reversing panel); *Williams*, 113 F.4th at 642 (concurring opinion from Judge concurring only in judgment in panel decision); *Atkinson v. Garland*, 70 F.4th 1018, 1019 (7th Cir. 2023)(dissent from panel decision).

B. This Court should resolve the uncertainty regarding the constitutional status of 18 U.S.C. §922(g)(1).

The issue merits intervention by this Court. There is a clear and acknowledged circuit split on the constitutionality of a federal statute. At least seven Circuits have weighed in, and there is relative balance as between those maintaining that the statute is always constitutional, on the one hand, and those acknowledging its constitutional vulnerabilities, on the other. The split will therefore not resolve spontaneously. And as can be seen above, a substantial volume of lower court opinions provide an ample resource to assist this Court in the resolution of the matter.

The matter is profoundly weighty. Two Circuits (the Third and Ninth) have dealt with the issue en banc, demonstrating that it meets the standards for discretionary review. And these two en banc treatments of the issue drew nine amici, further

attesting to its importance. *See Range*, 124 F.4th at 221; *Duarte*, 137 F.4th at 745. More than 6,000 people suffered conviction for violating this statute in Fiscal Year 2024 alone, almost all of whom went to prison. United States Sentencing Commission, *Quick Facts, 18 U.S.C. §922(g) Firearms Offenses*, at 1, *last visited May 22, 2025, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY24.pdf* . And of course most states have comparable statutes, which means that the true number of persons incarcerated each year for possessing a firearm after a felony conviction may be many times this number. *See e.g*. Alaska Stat. § 11.61.200(a)(1), (b)(1)-(3); Ariz. Rev. Stat. Ann. §§ 13-904(A), (B); 13-905; 13-906; Cal. Penal §§ 12021, 4852.17; Col. Rev. Stat. § 18-12-108.

The lack of clear answers about the constitutionality of this statute (and its state analogues) is intolerable for many reasons. First, there is a strong possibility that substantial numbers of Americans are in prison, and that more will go to prison, for the exercise of a fundamental constitutional right. That should be anathema in a free constitutional republic. Second, and conversely, the lack of clarity as to the scope of the Second Amendment right to own a firearm after a felony conviction may deter lawful prosecutions of criminal activity, jeopardizing public safety. Third, this lack of clarity may deter constitutionally protected conduct, or encourage reliance on mistaken beliefs about the scope of a constitutional right, resulting in illegal conduct and imprisonment. *See United States v. Schnur*, 132 F.4th 863, 871 (5th Cir. 2025)(Higginson,

J., concurring)(expressing concern about the notice problems that flow from uncertainty regarding the constitutional status of §922(g)(1)).

C. This case well presents the issue.

The present case is an apt vehicle to resolve the uncertainty. The issue is fully preserved, as Petitioner filed a detailed motion to dismiss the indictment based on the Second Amendment. Pet. App. 3a-4a, 8a-12a. He pressed the issue at the Fifth Circuit, Initial Brief at **4, 6-20. The Fifth Circuit said that Petitioner's as-applied challenge was not preserved, Pet.App. 2a; *United States v. Howard*, No. 23-10920, 2025 WL 1233521, at *1 (5th Cir. Apr. 29, 2025)(unpublished) but this conclusion is not supportable.

In District Court, Petitioner expressly invoked the government's burden, clearly imposed by *Bruen*, *see Bruen*, 597 U.S. at 24-25, 33-34, 38-39, to provide an historical analogue for Petitioner's disarmament, Pet.App. 8a-10a. If the discussion in the District Court never reached beyond the question of disarming felons generally, this is only a consequence of the government's choice to cite historical analogues that did not distinguish between Petitioner and other felons. Pet.App. 16a-17a. Petitioner did not label his district court challenge as either facial or as-applied. Pet. App. 3a-4a, 8a-12a. But even accepting, doubtfully, the Fifth Circuit's characterization of it as facial, this would not defeat preservation. A facial challenge implies the invalidity of the statute as applied to every person, *see United States v. Rahimi*, 602 U.S. 680, 693 (2024), and therefore necessarily asserts its invalidity as applied to the defendant. Accordingly, this Court need not and should not accept

the Fifth Circuit's summary conclusion that Petitioner failed to preserve an as-applied challenge.

Petitioner's challenge could well be resolved in his favor. Petitioner's most serious prior felony was possession of methamphetamine with intent to distribute. *See* (Record in the Court of Appeals, at 225). (He has also been convicted of possession of marijuana with intent to distribute, a forged check offense, and several misdemeanors). *See* (Record in the Court of Appeals, at 219-225). Although the founders knew of the problem of drug abuse, it was not a crime to possess or sell them. David T. Courtright, *A Century of American Narcotics Policy*, *in* Treating Drug Problems at 1 (1992)(observing that until roughly 100 years ago, "there was virtually no effective regulation of narcotics in the United States."). As such, it cannot be said that the Founders would have thought it appropriate to effect a permanent lifelong disarmament for that conduct. Further, the act of dealing drugs, whatever effects it may have on the community, is not by itself an act of violence. It thus cannot be easily equated to the assaultive conduct targeted by affray or "going armed" laws, which conduct resulted in temporary disarmament at founding. *See Rahimi*, 602 U.S. at 690, 697 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 149 (1769)).

As noted above, the Presentence Report in this case stated that Petitioner was on parole at the time of the offense. Three Circuits have held that the Second Amendment permits the government to criminalize gun possession by people on supervision. *See United*

States v. Moore, 111 F.4th 266 (3d Cir. 2024); *United States v. Giglio*, 126 F.4th 1039, 1043–44 (5th Cir. 2025); *United States v. Goins*, 118 F.4th 794 (6th Cir. 2024). However, the government never relied on this fact in District Court. Pet.App. 12a-24a. Nor did it submit any historical evidence of analogous practice at founding in that court. Pet.App. 12a-24a. Again, the government bears the burden of demonstrating that its laws comport with the Nation's tradition of valid firearm regulation, *see Bruen*, 597 U.S. at 24-25, 33-34, 38-39, a task it sought to accomplish in District Court only with the English Bill of Rights and a failed proposal in the Pennsylvania ratifying convention, Pet.App. 16a-17a. This Court therefore need not reach the question of what Second Amendment rights are possessed by parolees to resolve this case.

Petitioner's case is a sound vehicle to address the constitutionality of §922(g)(1), so this Court should grant certiorari.

CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

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July 25, 2025

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 29, 2025
Lyle W. Cayce
Clerk

No. 23-10920
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JONATHAN R. HOWARD,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CR-84-1

Before HIGGINBOTHAM, JONES, and OLDHAM, *Circuit Judges*.

PER CURIAM:[*]

Jonathan R. Howard argues that his statute of conviction, 18 U.S.C. § 922(g)(1), violates the Second Amendment on its face and as applied to him in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). He also contends that § 922(g)(1) violates the Commerce Clause, but he

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

correctly concedes his argument is foreclosed. *See United States v. Diaz*, 116 F.4th 458, 462 (5th Cir. 2024).

His facial Second Amendment challenge is also foreclosed. *See United States v. Contreras*, 125 F.4th 725, 729 (5th Cir. 2025). His unpreserved as-applied challenge fails on plain error review because he has not shown that applying § 922(g)(1) based on his prior drug-trafficking felonies amounts to clear or obvious error. *See United States v. Jones*, 88 F.4th 571, 573-74 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1081 (2024); *United States v. Cisneros*, 130 F.4th 472, 476-77 (5th Cir. 2025).

AFFIRMED.

In the United States District Court
for the Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA, **PLAINTIFF,**	§	
v.	§	**CASE NO. 4:23-CR-84-O**
JONATHAN R. HOWARD, **DEFENDANT.**	§	

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

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

Introduction and Background

The grand jury alleged that, on or about February 23, 2023, Defendant violated the possession prong of 18 U.S.C. § 922(g)(1) and § 924(a)(2). Section 922(g)(1) provides, in pertinent part:

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

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

Laws completely banning felons from possessing firearms did not exist at the time of the founding or at the ratification of the Second Amendment. *See*, e.g., *Kanter v. Barr*, 919 F.3d 437, 462 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated on other grounds by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (recognizing that "scholars have not identified eighteenth or nineteenth century laws depriving felons of the right to bear arms"). The current federal ban first appeared in 1968. Even so, courts have thus far upheld § 922(g)(1) against constitutional attack.

Legal Standard

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

Argument

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

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

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

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

> [1] Congress may regulate the use of the channels of interstate commerce. . . .
>
> [2] Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . [and]

> [3] Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.

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

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

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

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

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

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

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

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

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

> As we noted on direct appeal, an ATF weapons expert testified at Rawls' trial that the revolver he possessed was manufactured in Massachusetts, so that the revolver's presence in Texas had to result from transport in interstate commerce. This evidence is sufficient to establish a past connection between the firearm and interstate commerce.

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

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

5. *Lopez* seemed to, but did not expressly, overrule the more permissive test for federal regulation of gun possession articulated in *Scarborough*. A fair reading of *Scarborough* suggests that the

case was concerned solely with statutory interpretation and did not purport to resolve any constitutional issues. *See United States v. Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc).

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

7. If *Scarborough* is a constitutional decision, then it grants the federal government unlimited power to regulate the affairs of Americans. *See Alderman*, 131 S. Ct. at 702–03 (Thomas, J., dissenting from denial of certiorari) ("The lower courts' reading of *Scarborough*, by trumping the *Lopez* framework, could very well remove any limit on the commerce power."). Any physical object has almost certainly crossed a state line at some point in the past. To hold that this past travel grants Congress a perpetual right to regulate what someone does or does not do with that object is to eliminate any restrictions on Congress's power. Five Justices again rejected the view that the Commerce Clause grants the federal government power "to regulate an individual from cradle to

grave." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557–58 (2012) (Roberts, J.); *see also id.* at 649 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

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

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

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

"When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2129–30. The text of the Amendment— "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," U.S. Const., amend. II—"'guarantee[s] the individual right to possess and carry weapons in case of confrontation' that does not depend on service in the militia." *Bruen*, 142 S. Ct. at 2127.

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

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

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

Bruen, 142 S. Ct. at 2126.

Before *Bruen*, the Fifth Circuit had reasoned that § 922(g)(1) is a "longstanding" prohibition even though "it cannot boast a precise founding-era analogue." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012), abrogated by *Bruen*, 142 S. Ct. at 2126. But *Bruen*'s focus on tradition and history—and its prohibition on considering the *wisdom* of a prohibition—casts doubt on *Heller*'s dicta about felon disarmament. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–635) (emphasis in *Bruen*). Ex-felons are among "the people" protected by the First, Second, and Fourth Amendments to the Constitution. Section 922(g)(1)'s possession prong entirely deprives them of the right to possess firearms for self defense, in the home or elsewhere. And the Government cannot bear the heavy burden of establishing that this law is consistent with the nation's tradition of firearm regulation.

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

"[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126. There can be no doubt that § 922(g)(1)'s possession prong prohibits the very conduct protected by the Second Amendment's

"operative clause"—that is, "to possess and carry weapons in case of confrontation." *See Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592). The complete prohibition applies everywhere—at home, in public, in transit, or at rest. And it applies throughout the duration of an ex-felon's life.

And the statute plainly disarms members of "the people" protected by the Second Amendment. That term "refers 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." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). After conviction, ex-felons are restored to the rights of citizenship and retain their place among "the people" who are entitled to the protections of the First, Second, Fourth, Ninth, and Tenth Amendments to the Constitution. "[T]he Second Amendment's plain text covers" the "conduct" prohibited by § 922(g)(1)'s possession prong, and "the Constitution presumptively protects that conduct." *See Bruen*, 142 S. Ct. at 2129–30. At the very least, ex-felons have rejoined the political community and become part of "the people" in states like Texas, where they enjoy the right to vote. Tex. Election Code §11.002(a)(4).

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

Under *Bruen*, the government bears the burden of proving § 922(g)(1)'s constitutionality. 142 S. Ct. at 2130. After *Bruen*, the government must "justify" § 922(g)(1)'s possession prong "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2130. It cannot carry that burden here.

"Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J. L. & Pub. Pol'y 695, 708 (2009); *see also* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) ("The Founding generation had no laws . . . denying the right to people convicted of crimes."). Professor Carlton

Larson performed a historical study and found no analogs for § 922(g) in the 17th, 18th, or 19th centuries:

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

Carlton F.W. Larson, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L. J. 1371, 1376 (2009).

Conclusion

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joshua Rhodes, hereby certify that on April 28, 2023, I served a true and correct copy of this document upon Assistant United States Attorney Shawn Smith via ECF.

/s/ Joshua Rhodes
JOSHUA RHODES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA v. JONATHON HOWARD (01)	No. 4:23-CR-084-O

RESPONSE TO DEFENDANT'S MOTION TO DISMISS

TO THE HONORABLE REED O'CONNOR, U.S. DISTRICT JUDGE:

The United States of America files its Response to the Defendant's Motion to Dismiss, and would respectfully show this Court as follows:

Howard moves to dismiss the indictment charging him with being a felon in possession of a firearm in violation of Title 18 U.S.C. § 922(g)(1), claiming that the statute is an unconstitutional restriction of his Second Amendment rights.[1] Howard relies on the Supreme Court's recent opinion in *New York State Rifle & Pistol Ass'n Inc. v. Bruen*, 142 S.Ct. 2111 (2022). But *Bruen* did not modify well-established case law holding that convicted felons are not covered by the Second Amendment. To the contrary, six justices in *Bruen* reiterated the constitutionality of felon-dispossession statutes. Accordingly, existing Fifth Circuit precedent upholding Section 922(g)(1) remains binding and forecloses Howard's argument.

1 Howard also makes a commerce-clause challenge, but as he concedes this is well foreclosed. (See Defendant's Motion, p. 8.)

I. Background

On March 29, 2023, a grand jury returned an indictment against Jonathon Howard alleging a violation of 18 U.S.C. § 922(g)(1). The indictment alleged Howard possessed firearms on or about February 23, 2023, after having been convicted of a crime punishable by imprisonment for a term exceeding one year, and having knowledge of the same. A writ of habeas corpus ad prosequendum was issued on March 30, 2023, and Howard had his initial appearance and arraignment on April 3, 2023. Trial is set for May 15, 2023.

II. Legal Analysis

Howard argues that the indictment should be dismissed because the Supreme Court's opinion in *Bruen* rendered Section 922(g)(1) unconstitutional. Howard misreads the opinion. Existing Fifth Circuit precedent upholding Section 922(g)(1) remains good law and forecloses Howard's argument.

A. *Bruen* did not extend Second Amendment rights to convicted felons.

Prior to *Bruen*, courts analyzed Second Amendment challenges using a two-step test. First, the court determined whether the challenged law impinged upon a right protected by the Second Amendment. If it did not, the law was upheld. If, however, the law impaired a right protected by the Second Amendment, the court would proceed to the second step and "determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny." *Hollis v. Lynch*, 827 F.3d 436, 446-47 (5th Cir. 2016) (internal citations omitted.)

The *Bruen* Court concluded that this two-step approach contained "one step too many." 142 S. Ct. at 2127. Although the Supreme Court opined that step one of the test was adequately "rooted in the Second Amendment's text, as informed by history," the Court determined that neither text, history, nor precedent authorized courts to apply "means-end scrutiny" at the test's second step. *Id.* The Court explained that "the very enumeration of [a] right" in the Constitution "takes out of the hands of government—even the [Judiciary]—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," as the strict scrutiny and intermediate scrutiny tests purportedly empowered judges to do. *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

Instead, the *Bruen* Court held that, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2129–30. To successfully defend a firearms law that restricts such conduct, the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. "Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

Therefore, under *Bruen*, courts must look to "the Second Amendment's plain text," as informed by "this Nation's historical tradition of firearm regulation" when considering the constitutionality of gun laws. *Bruen*, 142 S. Ct. at 2126. Two independent aspects of the Amendment's text demonstrate that it does not prevent legislatures from disarming felons.

First, the government's position is that felons do not fall within "the people" protected by the Second Amendment, a term that the Supreme Court said refers to "members of the political community." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). Legislatures have historically had wide latitude to exclude felons from the political community. As Thomas Cooley explained in his "massively popular 1868 Treatise on Constitutional Limitations," *id.* at 616, "the people in whom is vested the sovereignty of the State . . . cannot include the whole population," and "[c]ertain classes have been almost universally excluded"—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 (1st ed. 1868). Felons could therefore historically be excluded from "exercis[ing] the elective franchise," *id.* at 29, as well as from other, closely related "political rights"—including the rights to "hold public office," to "serve on juries," and, most relevant here, "the right to bear arms," Akhil Reed Amar, *The Bill of Rights* 48 (1998). Indeed, today it remains the case that "[t]he commission of a felony often results in the lifelong forfeiture of a number of rights" tied to membership in the political community, including "the right to serve on a jury and the fundamental right to vote." *Medina v. Whitaker,* 913 F.3d 152, 155, 160 (D.C. Cir. 2019).

The government acknowledges that a recent panel of this Court held 18 U.S.C. § 922(g)(8)—which prohibits the possession of firearms by someone subject to a domestic-violence restraining order—unconstitutional post-*Bruen*. *See United States v. Rahimi*, __ F.4th __, 2023 WL 1459240 (5th Cir. Feb. 2, 2023). The Department is

seeking further review of that decision. But even if the decision stands, it does not foreclose the government's argument that the Second Amendment does not extend to felons. *Rahimi* interpreted the words "the people" in the Second Amendment to mean "all members of the political community," including a non-felon subject to a restraining order. *Id.* at *3. This leaves room for the conclusion that convicted felons—who are not members of the political community for the reasons discussed above—do not fall within "the people" protected by the Second Amendment.

Second, and more importantly, regardless of whether felons fall within "the people," the right "to keep and bear arms" has never been understood to prevent the disarming of felons. *Heller* explained that "the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'" *Heller*, 554 U.S. at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)). The 1689 English Bill of Rights, which "has long been understood to be the predecessor to our Second Amendment," *id.* at 593, provided that "the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law," *id.* (quoting 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441). The wording of that provision indicates that "the legislature—Parliament—had the power and discretion to determine who was sufficiently loyal and law-abiding to exercise the right to bear arms." *Range v. Attorney General*, 53 F.4th 262, 275 (3d Cir. 2022) (per curiam), *vacated upon granting of rehearing en banc*, 2023 WL 118469 (Jan. 6, 2023). Thus,

when the "Second Amendment . . . codified [the] *pre-existing* right" to bear arms, *Heller*, 554 U.S. at 592, it codified a right that was "not unlimited," *id.* at 626, and was not understood to extend to lawbreakers.

The Constitution's ratification debates support this understanding of the Amendment's text. In what *Heller* called a "highly influential" proposal, 554 U.S. at 604, a group of Pennsylvania antifederalists advocated for an amendment guaranteeing the right to bear arms "unless for crimes committed, or real danger of public injury." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 662, 665 (1971)). This "Second Amendment precursor[ ]," indicates that the Amendment allowed the legislature to disarm those who had committed serious "crimes" such as felonies. *Heller*, 554 U.S. at 604. Thus, the Amendment's text, understood in its historical context, does not prevent Congress from disarming felons.

The Supreme Court's authoritative interpretation of the Second Amendment's text confirms this view. *Heller* explained that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. *Heller* indicated that "prohibitions on carrying concealed weapons" were lawful. *Id*. It said the Amendment applies only to "the sorts of weapons" that were "in common use at the time." *Id.* at 627 (quotations omitted). And the Court wrote that "nothing in [its] 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. Thus, in conducting its "textual analysis" of the Second Amendment, *id.* at 578, the Court saw no inconsistency between the Amendment's text and laws prohibiting "possession of firearms by felons," *id.* at 626.

Moreover, *Heller* defined the right to bear arms as belonging to "law-abiding, responsible" citizens, *Heller*, 554 U.S. at 635, a category which clearly excludes felons. *See United States v. Massey*, 849 F.3d 262, 265 (5th Cir. 2017). *Bruen* echoed that definition, stating no fewer than fourteen times that the Second Amendment protects the rights of "law-abiding" citizens. *Bruen*, 142 S. Ct. at 2122, 2125, 2131, 2133, 2134, 2138, 2150, 2156. And six justices took pains to emphasize that *Bruen* did nothing to upset *Heller*'s and *McDonald*'s reassurances that certain firearms regulations, such as prohibitions on the possession of firearms by felons, are constitutional. *See id.* at 2157 (Alito, J., concurring) ("Nor have we disturbed anything that we said in *Heller* or *McDonald* . . . , about restrictions that may be imposed on the possession or carrying of guns."); *id.* at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring) ("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations," including the "'longstanding prohibitions on the possession of firearms by felons'" discussed in *Heller* and *McDonald* (quoting *Heller*, 554 U.S. at 626, 636)); *id.* at 2189 (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting) ("I understand the Court's opinion today to cast no doubt on that aspect of *Heller*'s holding" permitting felons to be prohibited from possessing firearms).

Unsurprisingly, courts confronting this issue post-*Bruen* have uniformly held that Section 922(g)(1) remains constitutional. As a panel of the Third Circuit persuasively explained, legislatures can, consistent with the Second Amendment's text and history, prohibit firearm possession by "those who have demonstrated disregard for the rule of law through the commission of felony." *Range v. Attorney General*, 53 F.4th 262, 266 (3d Cir. 2022) (per curiam), *vacated upon granting of rehearing en banc*, 2023 WL 118469 (Jan. 6, 2023). Although that panel decision has been vacated, its conclusion is consistent with the longstanding consensus among the courts of appeals: "no circuit" has ever "held [18 U.S.C. § 922(g)(1)] unconstitutional as applied" to an individual convicted of an offense labeled a felony. *Medina v. Whitaker*, 913 F.3d 152, 155, 158 (D.C. Cir. 2019) (upholding § 922(g)(1) based on "tradition and history"). Moreover, dozens of district courts nationwide have upheld Section 922(g)(1) as constitutional after *Bruen*. *See Range*, 53 F.4th at 262 n.6 (collecting cases).

Several district courts in Texas have upheld Section 922(g)(1) post-*Bruen*. For instance, in a recent 28 U.S.C. § 2255 petition in the Northern District of Texas, a defendant raised the constitutionality of Section 922(g)(1). *Davis v. United States*, No. 4:19-CR-080-A, 2023 WL 129599, at *4 (N.D. Tex. Jan. 9, 2023). The district court rejected the challenge, ruling that:

> "the constitutionality of § 922(g) is not open to question. *United States v. Darrington*, 351 F.3d 632, 634 (5th Cir. 2003). Recent opinions recognizing the right to keep and bear arms do not suggest that prohibitions on gun possession by convicted felons like Movant are invalid. *See McDonald v. City of Chicago*, 561

> U.S. 742, 786 (2010); *Dist. of Columbia v. Heller*, 554 U.S. 570, 626-27, 636 (2008). Contrary to Movant's argument, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), does not suggest that § 922(g) is unconstitutional."

Id. at *4.

Likewise, a court in the Southern District of Texas ruled that "18 U.S.C. § 922(g)(1) remains constitutional in the aftermath of *Bruen;* in applying [the *Bruen* Court's] test, this Court finds that felons are not covered under the plain text of the Second Amendment, because they are not within the categories of individuals which the plain text "presumably protects." *United States v. Hill*, No. CR H-22-249, 2022 WL 17069855, at *5 (S.D. Tex. Nov. 17, 2022).

Accordingly, the *Bruen* decision did not undermine the long-standing principle that felon-dispossession statutes are constitutional. Pre-*Bruen* precedent on the constitutionality of Section 922(g)(1) remains good law.

B. Fifth Circuit precent remains good law, thereby foreclosing Howard's argument.

Prior to *Bruen*, the Fifth Circuit repeatedly held in published opinions that Section 922(g)(1)'s prohibition on gun possession by felons does not violate the Second Amendment. *See United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. Anderson*, 559 F.3d 348 (5th Cir. 2009); *see also United States v. Massey*, 849 F.3d 262, 265 (5th Cir. 2017); *Nat'l Rifle Assn's of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 n.7 (5th Cir. 2012), *abrogated on*

other grounds by Bruen, 142 S. Ct. at 2127-31. *Bruen* did not impugn Fifth Circuit caselaw concluding that felons are categorically a group of people who fall outside the protections of the Second Amendment—*particularly* based on longstanding historical tradition. Indeed, as discussed above, six justices wrote separately to emphasize that *Bruen* did nothing to upset *Heller*'s and *McDonald*'s reassurances that certain firearms regulations, such as prohibitions on the possession of firearms by felons, are constitutional. For that reason, it is clear that *Bruen* does not overrule *Darrington*, *Anderson*, and *Scroggins*. These cases, therefore, remain binding.[2]

And, while the Fifth Circuit has not ruled on the constitutionality of Section 922(g)(1) post-*Bruen*, a recent opinion suggests that it has no intention of overturning its long-standing precedent. In *Rahimi*, the Fifth Circuit ruled that Section 922(g)(8), which prohibits the possession of firearms by people subject to a domestic-violence restraining order, is unconstitutional in light of the holding in *Bruen*. 2023 WL 1459240, at *4. The Fifth Circuit, however, distinguished Section 922(g)(8) from long-standing prohibitions on the possession of firearms by convicted felons. It emphasized that the Supreme Court wrote in *Heller* that its opinion "should not '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

2 Indeed, even if one were to interpret *Bruen* as hinting that the Court was amenable to arguments about the constitutionality of felon-dispossession statutes, that would not be sufficient to overrule existing Circuit Court precedent on the subject. *See United States v. Alcantar, 733 F.3d 143, 146* (5th Cir. 2013) (applying rule of orderliness, explaining that "an intervening change in the law must be unequivocal, not a mere 'hint' of how the Court might rule in the future").

government buildings ...." *Id*. at *4 (quoting *Heller* at 626–27). It then tied that opinion to *Bruen*, writing that "*Heller's* reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights. *Bruen's* reference to 'ordinary, law-abiding' citizens is no different." *Id*. at *4. The opinion in *Rahimi*, therefore, affirms the conclusion that *Bruen* did not cast doubt on the constitutionality of Section 922(g)(1). *Darrington*, *Anderson*, and *Scroggins* remain good law.

Several district courts in Texas have concluded that pre-*Bruen* Fifth Circuit precent on Section 922(g)(1) remains binding and forecloses any challenge to the constitutionality of the statute. For instance, a court in this district recently denied a constitutional challenge to Section 922(g)(1), ruling that "the Fifth Circuit has repeatedly held that § 922(g)(1) does not violate the Second Amendment. This court is 'not free to overturn' that biding Fifth Circuit presentence, even if *Bruen* may call that precent into question." *United States v. Demonya Marquise Swarn*, 3:22-CR-437-M, Docket No. 20, Feb. 10, 2023, at 1) (quoting *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 789 (5th Cir. 2021)) (order attached).

Similarly, a district court in the Western District of Texas rejected a motion to dismiss a Section 922(g)(1) charge because it was "'not free to overturn' the Fifth Circuit's pre-*Bruen* decisions upholding Section 922(g)(1). This Court must instead 'f[ind] itself bound' by those precedents, reject Defendant's challenge, and leave it to the Fifth Circuit to decide for itself whether its decisions survive *Bruen.*" *United States v. Jordan*, No. EP-22-CR-01140-DCG-1, 2023 WL 157789, at *7 (W.D. Tex. Jan. 11,

2023) (internal citations omitted); s*ee also United States v. Grinage*, No. 21-CR-00399, 2022 WL 17420390, at *3 (W.D. Tex. Dec. 5, 2022) (concluding that *Emerson*, *Scroggins*, and *Anderson* all appropriately "relied on a textual and historical analysis to find § 922(g)(1) constitutional," and therefore that "[n]othing in the *Bruen* decision calls into question the precedential effect of Fifth Circuit decisions finding § 922(g)(1) constitutional based on the Second Amendment's text and history").

Accordingly, Fifth Circuit precedent remains binding and Howard's argument is foreclosed.

III. Conclusion

Felon-dispossession laws are permitted by "the Second Amendment's plain text," as informed by "this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. While the Supreme Court and the Fifth Circuit have recently struck down other firearms regulations, these courts have gone to great lengths to emphasize that their holdings do not call into doubt the constitutionality of prohibitions on the possession of firearms by felons. The long-standing tradition of felon dispossession statutes is rooted in American history and has not been undermined by any court. Existing Fifth Circuit case law affirming the constitutionality of Section 922(g)(1) remains good law and forecloses Howard's argument. His motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2023, I electronically filed the foregoing document with the clerk for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

s/ Shawn Smith
SHAWN SMITH
Assistant United States Attorney

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

v.

JONATHAN R. HOWARD

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:23-CR-00084-O(01)
U.S. Marshal's No.: 52134-510
Shawn Smith, Assistant U.S. Attorney
John Stickney, Attorney for the Defendant

On May 17, 2023 the defendant, JONATHAN R. HOWARD, entered a plea of guilty as to Count One of the Indictment filed on March 29, 2023. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	02/23/2023	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of $100.00 as to Count One of the Indictment filed on March 29, 2023.

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

Sentence imposed August 25, 2023.

REED O'CONNOR
U.S. DISTRICT JUDGE

Signed August 28, 2023.

IMPRISONMENT

The defendant, JONATHAN R. HOWARD, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **ONE HUNDRED TWENTY (120) MONTHS** as to Count One of the Indictment filed on March 29, 2023.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THREE (3) YEARS** as to Count One of the Indictment filed on March 29, 2023.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

(1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
(2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
(3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
(4) You must answer truthfully the questions asked by your probation officer.
(5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
(6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
(7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

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

(11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

(13) You must follow the instructions of the probation officer related to the conditions of supervision.

In addition the defendant shall:

not commit another federal, state, or local crime;

not illegally possess controlled substances;

cooperate in the collection of DNA as directed by the probation officer;

not possess a firearm, ammunition, destructive device, or any dangerous weapon;

refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court;

pay the assessment imposed in accordance with 18 U.S.C. § 3013;

take notice that if this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment;

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

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

FINE/RESTITUTION

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

Restitution is not ordered because there is no victim other than society at large.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

BY _____
Deputy Marshal