United States Court of Appeals for the Fifth Circuit

No. 24-10664
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
May 12, 2025
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANTONIO ROBLEDO TOVAR,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CR-633-1

Before SMITH, STEWART, and DUNCAN, *Circuit Judges*.

PER CURIAM:[*]

Antonio Robledo Tovar argues that his statute of conviction, 18 U.S.C. § 922(g)(1), violates the Second Amendment as applied to him. He also contends that § 922(g)(1) violates the Commerce Clause, but he correctly concedes that this argument is foreclosed. *See United States v. Diaz*, 116 F.4th 458, 462 (5th Cir. 2024).

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

We review Tovar's as-applied challenge for plain error because he did not adequately present this argument before the district court. *See United States v. Jones*, 88 F.4th 571, 572 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1081 (2024). An error is not clear or obvious where an issue is disputed or unresolved, or where there is an absence of controlling authority. *United States v. Rodriguez-Parra*, 581 F.3d 227, 230-31 (5th Cir. 2009). Because there is no binding precedent addressing whether applying § 922(g)(1) based on Texas convictions for possession of controlled substances is consistent with this nation's historical traditions and because it is not clear that *Bruen* or *Diaz* dictates such a result, Tovar is unable to demonstrate an error that is clear or obvious. *See id.*

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Crim. Action No. 3:20-CR-00633-N
	§	
ANTONIO ROBLEDO TOVAR (1)	§	

ORDER

Before the Court is the Defendant's Motion to Dismiss Counts One and Three of the Indictment filed March 30, 2023. The Government filed its response on April 7, 2023. Defendant Tovar moves to dismiss counts 1 and 3 of the indictment [32] arguing that 18 U.S.C. § 922(g)(1) is unconstitutional because Congress did not have the authority to enact it and it violates the Second Amendment. Both arguments are foreclosed by precedent binding on this Court. *See, e.g., United States v. Rawls*, 85 F.3d 240 (5th Cir. 1996); *United States v. Scroggins*, 599 F.3d 433 (5th Cir. 2010). The Court therefore denies the motion to dismiss.

Signed April 10, 2023.

David C. Godbey
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

ANTONIO ROBLEDO TOVAR

NO. 3:20-CR-633-N

(Supersedes Indictment returned on December 29, 2020)

SUPERSEDING INDICTMENT

The Grand Jury charges:

Count One
Possession of a Firearm by a Convicted Felon
(Violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2))

On or about March 29, 2020, in the Dallas Division of the Northern District of Texas, the defendant, **Antonio Robledo Tovar**, knowing that he had been convicted of a crime punishable by imprisonment for a term exceeding one year, that is, a felony offense, did knowingly possess, in and affecting interstate and foreign commerce, a firearm, to wit: a Glock, Model 27, .40 caliber pistol, bearing serial number MZS657.

In violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Count Two
Possession with Intent to Distribute a Controlled Substance
(Violation of 21 U.S.C. § 841(a)(1))

On or about March 29, 2020, in the Dallas Division of the Northern District of Texas, the defendant, **Antonio Robledo Tovar**, did knowingly and intentionally possess with intent to distribute a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance.

In violation of 21 U.S.C. § 841(a)(1), the penalty for which is found at 21 U.S.C. § 841(b)(1)(C).

Count Three
Possession of a Firearm by a Convicted Felon
(Violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2))

On or about May 3, 2021, in the Dallas Division of the Northern District of Texas, the defendant, **Antonio Robledo Tovar**, knowing that he had been convicted of a crime punishable by imprisonment for a term exceeding one year, that is, a felony offense, did knowingly possess, in and affecting interstate and foreign commerce, a firearm, to wit: a Glock, Model 22 Gen 4, .40 caliber pistol, bearing serial number PEL535.

In violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Count Four
Possession with Intent to Distribute a Controlled Substance
(Violation of 21 U.S.C. § 841(a)(1))

On or about May 3, 2021, in the Dallas Division of the Northern District of Texas, the defendant, **Antonio Robledo Tovar**, did knowingly and intentionally possess with intent to distribute a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of 21 U.S.C. § 841(a)(1), the penalty for which is found at 21 U.S.C. § 841(b)(1)(C).

Count Five
Possession of a Firearm in Furtherance of a Drug Trafficking Crime
(Violation of 18 U.S.C. § 924(c)(1)(A)(i))

On or about May 3, 2021, in the Dallas Division of the Northern District of Texas, the defendant, **Antonio Robledo Tovar**, did knowingly possess a firearm, to wit: a Glock, Model 22 Gen 4, .40 caliber pistol, bearing serial number PEL535, in furtherance of the commission of a drug trafficking crime, for which the defendant may be prosecuted in a court of the United States, that is, possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1), as charged in Count Four of this indictment.

In violation of 18 U.S.C. § 924(c)(1)(A)(i).

Forfeiture Notice
(18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c); 21 U.S.C. § 853(a))

Upon conviction for the offense alleged in Counts One, Three, and/or Five of this Indictment, and pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), the defendant, **Antonio Robledo Tovar**, shall forfeit to the United States of America any firearm and ammunition involved or used in the commission of the respective offense.

Upon conviction for the offense alleged in Counts Two and/or Four of this Indictment and pursuant to 21 U.S.C. § 853(a), the defendant, **Antonio Robledo Tovar**, shall forfeit to the United States of America all property, real or personal, constituting, or derived from, the proceeds obtained, directly or indirectly, as the result of the offense; and any property, real or personal, used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the respective offense.

This property includes, but is not limited to, the following:

(1) a Glock, Model 27, .40 caliber pistol, bearing serial number MZS657;

(2) a Glock, Model 22 Gen 4, .40 caliber pistol, bearing serial number PEL535; and

(3) any ammunition recovered with the firearms.

A TRUE BILL:

Natalie Wilson
FOREPERSON

PRERAK SHAH
ACTING UNITED STATES ATTORNEY

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

United States of America, Plaintiff,	§ §	
v.	§	Case No. 3:20-cr-633-N
ANTONIO ROBLEDO TOVAR, Defendant.	§ §	

Defendant's Motion to Dismiss Counts One and Three of the Indictment

Defendant Antonio Robledo Tovar moves to dismiss Counts One and Three of 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 March 29, 2020, and May 3, 2021, 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 Counts One and Three of the indictment.

Argument

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

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

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

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

> [1] Congress may regulate the use of the channels of interstate commerce. . . .
>
> [2] Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . [and]
>
> [3] Congress' 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

[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.

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.'

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 individu-al'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 who have completed their sentences 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 and after serving their sentences, 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 Counts One and Three of the Indictment.

Respectfully submitted,

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/s/ *Marti R. Morgan*
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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2023, I electronically filed the foregoing document using the Court's CM/ECF system, thereby providing service on attorneys of record.

/s/ *Marti R. Morgan*
MARTI R. MORGAN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA

v.

ANTONIO ROBLEDO TOVAR

NO. 3:20-CR-633-N

GOVERNMENT'S OPPOSITION TO MOTION TO DISMISS INDICTMENT

Antonio Robledo Tovar moves to dismiss the indictment, claiming that 18 U.S.C. § 922(g)(1) is unconstitutional—on its face—because it: (1) exceeds Congress's Commerce Clause authority; and (2) violates the Second Amendment. Both arguments fail. The first is foreclosed—as Tovar correctly concedes. So, too, is the second argument. Settled "existing precedent" holds that "criminal prohibitions on felons (violent or nonviolent) possessing firearms [do] not violate" the Second Amendment. *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010). The Supreme Court's decision in *Bruen*[1]—which excluded from its discussion groups, like felons, historically disarmed under the Second Amendment—did not disturb that settled precedent.

Further, even if the issue is now open to debate, the Court should reject Tovar's argument because: (1) felons are not among the "law abiding" citizens protected by the Second Amendment; and (2) *Bruen*'s focus on history and text only confirms that Section 922(g)(1) does not run afoul of the Second Amendment. Tovar's motion should be denied.

[1] *New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

1. Tovar's Commerce Clause argument is foreclosed.

Tovar expressly concedes that his arguments under the Commerce Clause are foreclosed. (Dkt. No. 32 at 3 ("Defendant concedes that courts have thus far rejected both the *statutory* argument . . . and the *constitutional* argument") (emphasis in original).) And though he urges that the Fifth Circuit erred in those holdings, (*id.* at 3, n.1), this Court must reject his invitation to contravene binding precedent. *See Team Contractors, L.L.C. v. Waypoint Nola, L.L.C.*, 976 F.3d 509, 518 (5th Cir. 2020) ("Under this circuit's rule of orderliness, each panel deciding an appeal is bound by Fifth Circuit precedents (*as district courts surely are for other reasons*).") (emphasis added). Because the Fifth Circuit has rejected this exact argument, this Court must deny Tovar relief on this basis.

2. Section 922(g)(1) does not violate the Second Amendment.

Tovar's alternative argument—that Section 922(g)(1) violates the Second Amendment—is likewise meritless. That argument fails because: (1) it is foreclosed; (2) felons are not among the People protected by the Second Amendment; and (3) this Nation's history confirms that felons can be, consistent with constitutional protections, disarmed.

A. Tovar's argument is foreclosed.

Tovar argues that Section 922(g)(1) violates the Second Amendment. The Fifth Circuit has expressly rejected that argument. *Scroggins*, 599 F.3d at 451; *United States v. Darrington*, 351 F.3d 632, 634 (5th Cir. 2003) ("Section 922(g)(1) does not violate the Second Amendment."). In *Scroggins*, for example, the Fifth Circuit explaiTovar that, "[p]rior to *Heller*, this circuit had already recognized an individual right to bear arms, and

had determiTovar that criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate that right." *Id.* (discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008).) The Court further explaiTovar that "[d]icta in *Heller* states that the opinion should not 'be taken to cast doubt on long-standing prohibitions on possession of firearms by felons.'" *Id.* For those reasons, the Court rejected the argument that Section 922(g)(1) violates the Second Amendment. *Id.*

Tovar misaims his argument that *Bruen* "upset" Fifth Circuit precedent. (Dkt. No. 32 at 7.) As the Fifth Circuit recently recognized, the Supreme Court in *Bruen* (and *Heller*) "exclude[d] from the Court's discussion groups"—like felons—"that have historically been stripped of their Second Amendment rights." *United States v. Rahimi*, 61 F.4th 443, 452 (5th Cir. 2023). "*Bruen*'s reference to 'ordinary, law-abiding citizens' is no different" than *Heller*'s reference to "law-abiding, responsible" citizens. *Id.* Because *Bruen* excluded from its discussion felons' purported rights under the Second Amendment, *see id.*, that opinion cannot be read to upend decades of settled circuit precedent upholding Section 922(g)(1). *See United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013) (applying the rule of orderliness and explaining that "an intervening change in the law must be unequivocal, not a mere 'hint' of how the Court might rule in the future").

In fact, to the extent that *Bruen* overcame Fifth Circuit precedent in this area, it was in its application of a means-end scrutiny at the second step of the applicable analysis. *See Bruen*, 142 S. Ct. at 2125-29. Before *Bruen*, some Fifth Circuit cases applied a two-step approach for determining whether a firearm regulation violated the

Second Amendment: "the first step [was] to determine whether the challenged law impinges upon a right protected by the Second Amendment—that is, whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee; the second step [was] to determine whether to apply intermediate or strict scrutiny [i.e., means-end scrutiny] to the law, and then determine whether the law survives the proper level of scrutiny." *See, e.g.*, *NRA of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012), *abrogated on other grounds by Bruen*, 142 S. Ct. at 2127-31. Although *Bruen* rejected the second step of that framework, *Bruen*, 142 S. Ct. at 2126-27, it did not significantly alter the first step—assessing whether the relevant regulation "impinges upon a right protected by the Second Amendment." *NRA of Am.*, 700 F.3d at 194; *see Bruen*, 142 S. Ct. at 2129-30 (assessing first whether "the Second Amendment's plain text covers an individual's conduct"). As the *Bruen* Court observed, step one is "broadly consistent" with the text-and-history analysis that the Supreme Court requires. *See Bruen*, 142 S. Ct. at 2127 (observing that "[s]tep one of the [two-step] framework is broadly consistent with Heller, which demands a test rooted in the Second Amendment's text, as informed by history").

The Fifth Circuit's substantial jurisprudence upholding Section 922(g)(1) is not predicated on the kind of means-end scrutiny that *Bruen* rejected. Rather, the analysis was premised on an examination of "the Second Amendment's text, as informed by history"—that is, the "right to bear arms protected by the Second Amendment" as "historically understood." *See Darrington*, 351 F.3d at 634; *see also United States v. Emerson*, 270 F.3d 203, 226 n.21 (5th Cir. 2001) (citing authorities indicating that

"Colonial and English societies of the eighteenth century" excluded felons from possessing firearms and that "the Founders" would not have "considered felons within the common law right to arms or intended to confer any such right upon them"). The Fifth Circuit also based its jurisprudence on the Supreme Court's statements in *Heller*, 554 U.S. 570 (2008), indicating that "the central right that the Second Amendment was intended to protect" was "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *NRA of Am.*, 700 F.3d at 193 (discussing *Heller* (emphasis added)), and that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful," *Heller*, 554 U.S. 570, 626-27 & n. 26; *see United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009) ("*Heller* provides no basis for reconsidering *Darrington*['s holding that Section 922(g)(1) does not violate the Second Amendment]"). And "*Bruen*'s reference to 'ordinary, law-abiding citizens' is no different." *Rahimi*, 61 F.4th at 452.

For these reasons, *Bruen* did not overturn settled Fifth Circuit precedents holding that Section 922(g)(1) does not violate the Second Amendment. Tovar's argument thus is foreclosed.[2]

B. Felons, like Tovar, are not among the People protected by the Second Amendment.

[2] Indeed, in other cases in this District, counsel from the office of the Federal Public Defender has conceded that this argument remains foreclosed after *Bruen*. And district courts have rejected the argument accordingly. *See, e.g.*, *United States v. Hollins*, Order, No. 3:20-CR-110-K (01), Dkt. No. 29 (N.D. Tex. Feb. 21, 2023) ("The Defendant concedes that the claim is foreclosed by Fifth Circuit precedent and therefore the Motion is DENIED.").

Even if this Court considers the issue anew, it should reject Tovar's argument because felons do not fall within "the people" protected by the Second Amendment, a term that *Heller* said refers to "members of the political community." *Heller*, 554 U.S. at 580; *see also Rahimi*, 61 F.4th at 452 (explaining that "*Bruen*'s reference to 'ordinary, law-abiding citizens is no different"). As the Fifth Circuit explaiTovar in *Rahimi*, felons are a group who "have historically been stripped of their Second Amendment rights," and "whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Rahimi*, 61 F.4th at 452. Thus, felons fall outside "the overarching class of 'law-abiding, responsible citizens' covered by the Second Amendment." *Id.* at 452 n.6. Therefore, this Court must reject the argument that Section 922(g)(1) violates felons' Second Amendment rights.

Tovar's rejoinder is unpersuasive. He claims in conclusory fashion that "[a]fter conviction and after serving their sentences, ex-felons are restored to the rights of citizenship and retain their plaice among 'the people' who entitled to the protections" of the Second Amendment. (Dkt. No. 32 at 8.) But *Heller* and *Bruen* do not so hold, and *Rahimi* states the very opposite. Tovar's motion does not even cite *Rahimi*, let alone explain why the Fifth Circuit was wrong to conclude there that felons fall outside of "the people" protected by the Second Amendment. *See Rahimi*, 61 F.4th at 452 n.6. This Court—consistent with *Rahimi*—should conclude that felons fall outside "the overarching class of 'law-abiding, responsible citizens' covered by the Second Amendment," *id.*, meaning that Tovar's argument fails.

C. This Nation's historical tradition confirms that felons can be dispossessed of firearms.

Even if *Bruen* upended settled circuit precedent vis-à-vis Section 922(g)(1) (it did not), and even if felons were among those protected by the Second Amendment (they are not), this Nation's historical tradition confirms that felons can be dispossessed of firearms. Specifically, two types of historical laws support Section 922(g)(1)'s constitutionality: (1) laws authorizing capital punishment and estate forfeiture for felons; and (2) laws disarming those deemed untrustworthy based on lack of adherence to the rule of law.

a. Laws authorizing capital punishment and estate forfeiture.

For centuries, felonies have been "the most serious category of crime." *Medina v. Whitaker*, 913 F.3d 152, 155, 158 (D.C. Cir. 2019). In 1769, Blackstone defiTovar a felony as "an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt." 4 William Blackstone, *Commentaries on the Laws of England* 95 (1st ed. 1769). Blackstone observed that "[t]he idea of felony is so generally connected with that of capital punishment, that we find it hard to separate them." *Id.* at 98 (capitalization omitted). Capital punishment and forfeiture of estate were also commonly authorized punishments in the American colonies (and then the states) up to the time of the founding. *Folajtar v. Attorney General of the U.S.*, 980 F.3d 897, 904-05 (3d Cir. 2020). Indeed, the First Congress (which drafted and proposed the Second Amendment) made a variety of felonies punishable by death, including treason, murder

on federal land, forging or counterfeiting a public security, and piracy on the high seas. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112-15 (1790). And many American jurisdictions up through the end of the 1700s authorized forfeiture of a felon's estate. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 332 & nn.275-276 (2014) (citing statutes).

A few examples demonstrate the severe consequences of committing a felony at the time. In 1788, just three years before the Second Amendment's ratification, New York passed a law providing for the death penalty for crimes such as burglary, robbery, arson, malicious maiming and wounding, and counterfeiting. 2 Laws of the State of New York Passed at the Sessions of the Legislature (1785-1788) at 664-65 (1886). The act established that every person convicted of an offense making the person "liable to suffer death, shall forfeit to the people of this State, all his, or her goods and chattels, and also all such lands, tenements, or hereditaments" the person possessed "at the time of any such offence committed, or at any time after." *Id.* at 666. For all other felonies, the authorized punishment for "the first offence" was a "fine, imprisonment, or corporal punishment," and the punishment "for any second offense or felony committed after such first conviction" was "death." *Id.* at 665.

Two years earlier, New York had passed a law severely punishing counterfeiting of bills of credit. 2 Laws of the State of New York Passed at the Sessions of the Legislature (1785-1788) at 260-61 (1886). The law said a counterfeiter "shall be guilty of felony, and being thereof convicted, shall forfeit all his or her estate both real and personal to the people of this State, and shall be committed to the bridewell [correction

house] of the city of New York for life, and there confiTovar to hard labor." *Id.* at 261. In addition, "to prevent escape," the defendant was to be "branded on the left cheek with the letter C, with a red hot iron." *Id.*

Similarly, in 1777, Virginia adopted a law for the punishment of forgery, which the legislature believed had previously "ha[d] not a punishment sufficiently exemplary annexed thereto." 9 William Waller Hening, Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature 302 (1821). The act stated that anyone convicted of forging, counterfeiting, or presenting for payment a wide range of forged documents "shall be deemed and holden guilty of felony, shall forfeit his whole estate, real and personal, shall receive on his bare back, at the publick whipping post, thirty nine lashes, and shall serve on board some armed vessel in the service of this commonwealth, without wages, for a term not exceeding seven years." *Id.* at 302-03. Throughout the 1700s, other American colonies punished a variety of crimes with death, estate forfeiture, or both. For example, a 1700 Pennsylvania law provided that any person convicted of "wilfully firing any man's house, warehouse, outhouse, barn or stable, shall forfeit his or her whole estate to the party suffering, and be imprisoTovar all their lives in the House of Correction at hard labor." 2 Statutes at Large of Pennsylvania from 1682 to 1801 at 12 (1896). A 1705 Pennsylvania law provided that a person convicted of rape "shall forfeit all his estate" if unmarried, and "one-third part thereof" if married, in addition to receiving 31 lashes and imprisonment for "seven years at hard labor." *Id.* at 178. A 1715 Maryland law provided that anyone convicted of "corruptly embezzling, impairing, razing, or altering any will or record" that resulted in injury to

another's estate or inheritance "shall forfeit all his goods and chattels, lands and tenements." 1 The Laws of Maryland[,] With the Charter, The Bill of Rights, the Constitution of the State, and its Alterations, The Declaration of Independence, and the Constitution of the United States, and its Amendments 79 (1811). A 1743 Rhode Island law provided that any person convicted of forging or counterfeiting bills of credit "be adjudged guilty of Felony" and "suffer the Pains of Death" and that any person knowingly passing a counterfeit bill be imprisoTovar, pay double damages, and "forfeit the remaining Part of his Estate (if any he hath) both real and personal, to and for the Use of the Colony." Acts and Laws of The English Colony of Rhode Island and Providence-Plantations in New-England in America 33-34 (1767). And a 1750 Massachusetts law provided that rioters who refused to disperse "shall forfeit all their lands and tenements, goods and chattles [sic]," in addition to receiving 39 lashes and one year's imprisonment. 3 Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 545 (1878).

As the D.C. Circuit has observed, "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. Thus, "tradition and history" show that "those convicted of felonies are not among those entitled to possess arms" under the Second Amendment. *Id.* at 158, 160.

b. Laws disarming untrustworthy individuals and those outside the political community.

A second category of historical laws also provides an analogy to felon disarmament—laws that "categorically disqualified people from possessing firearms based on a judgment that certain individuals were untrustworthy parties to the nation's social compact." *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). In 1689, the same Parliament that "wr[ote] the 'predecessor to our Second Amendment' into the 1689 English Bill of Rights," *Bruen*, 142 S. Ct. at 2141 (quoting *Heller*, 554 U.S. at 593), also passed an "Act for the better secureing the Government by disarming Papists and reputed Papists." 1 W. & M., Sess. 1, ch. 15, 6 Statutes of the Realm 71.[3] That Act provided that any Catholic who refused to make a declaration renouncing his faith could not possess any "Arms Weapons Gunpowder or Ammunition (other th[a]n such necessary Weapons as shall be allowed to him by Order of the Justices of the Peace . . . for the defence of his House or person)." *Id.* at 72. The required oath "was a gesture of allegiance to the English government and an assurance of conformity to its laws." *Range*, 53 F.4th at 275.

American colonies enacted similar laws. For example, "several colonies enacted complete bans on gun ownership by slaves and Native Americans," based on "alienage or lack of allegiance to the sovereign." *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1047 (11th Cir. 2022) (quotations omitted). And during the French and Indian War,

[3] Though the statutory compilation identifies this as a 1688 act, it was enacted in 1689. *See* 14 Journal of the House of Lords (1685-1691) 208-09 (reflecting enactment on May 11, 1689).

Virginia passed a law disarming Catholics that allowed them to keep their arms if they swore an oath of allegiance to the king. 7 Statutes at Large; Being A Collection of All the Laws of Virginia 35-36 (1820) (1756 law). These laws discriminating based on race or religion are repugnant and would be unconstitutional today for reasons having nothing to do with the Second Amendment, but they nevertheless demonstrate that colonial legislatures "had the power and discretion to use status as a basis for disarmament" even of non-violent groups. *Range*, 53 F.4th at 276 n.18.

During the Revolutionary War, Connecticut passed a law providing that any person who "shall libel or defame" any acts or resolves of the Continental Congress or the Connecticut General Assembly "made for the defence or security of the rights and privileges" of the colonies "shall be disarmed and not allowed to have or keep any arms." Public Records of the Colony of Connecticut 193 (1890) (1775 law). And, at the recommendation of the Continental Congress, *see* 4 Journals of the Continental Congress 205 (1906) (resolution of March 14, 1776), at least six states disarmed the "disaffected" who refused to take an oath of allegiance to those states*, see, e.g.*, 5 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 479 (1886) (1776 law); 7 Records of the Colony of Rhode Island and Providence Plantations, in New England 567 (1776 law); 1 The Public Acts of the General Assembly of North Carolina 231 (1804) (1777 law); 9 Statutes at Large; Being A Collection of All the Laws of Virginia 282 (1821) (1777 law); Rutgers, New Jersey Session Laws Online, Acts of the General Assembly of the State of New-Jersey 90 (1777 law); 9 Statutes at Large of Pennsylvania 348 (1779 law). Again, these laws demonstrate that, at the time of the

founding, legislatures had the authority to disarm even non-violent people whom they deemed not to be law-abiding and trustworthy. Indeed, as the Fourth Circuit has observed, there is "substantial evidence that the Founders severely limited the right to bear arms, excluding from its protection a broad range of often non-violent individuals and groups deemed 'dangerous.'" *United States v. Pruess*, 703 F.3d 242, 246 n.3 (4th Cir. 2012).

The right to bear arms is analogous to certain civic rights historically subject to forfeiture by individuals convicted of crimes. Felons were generally excluded from service on juries in eighteenth-century America. *See* Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 Am. Univ. L. Rev. 65, 179 (2003). They were also generally excluded from voting. "[E]leven state constitutions adopted between 1776 and 1821 prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons." *Green v. Bd. of Elections of City of N.Y.*, 380 F.2d 445, 450 (2d Cir. 1967). Just as historical laws required persons convicted of felonies to forfeit civic rights, Section 922(g)(1) permissibly imposes a firearms disability "as a legitimate consequence of a felony conviction." *Tyler v. Hillsdale County Sheriff's Dep't*, 837 F.3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring in most of the judgment).

c. Comparing these historical statutes to Section 922(g)(1) confirms that it is constitutional.

Both types of historical statutes discussed above demonstrate Section 922(g)(1)'s constitutionality. *Bruen* recognized that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791." *Bruen*,

142 S. Ct. at 2132. *Bruen* identified two relevant metrics for this analogical inquiry: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133. Put another way, the "central considerations" are "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* (emphasis and quotations omitted).

Under the first metric, Section 922(g)(1) imposes *no* "burden [on] a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S. Ct. at 2133. "[C]onviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment." *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017). Moreover, the burden imposed on the felon's rights is comparable to historical laws disarming the untrustworthy and *less* severe than many historical felony-punishment laws, which often included the death penalty and forfeiture of one's entire estate.

Furthermore, the modern and historical laws are "comparably justified." *Bruen*, 142 S. Ct. at 2133. The historical laws sought to adequately punish felons and deter re-offending, as well as to protect society from the untrustworthy. Section 922(g)(1) serves a more limited but equally justified purpose. It seeks to protect society from gun violence committed by felons, who have previously shown disregard for society's laws and are more likely to reoffend, potentially in dangerous ways.

Tovar contends that Section 922(g)(1) is inconsistent with the nation's history of firearm regulation because it purportedly has no analog prior to the 20th Century. (Dkt.

No. 32 at 9.) But his argument misunderstands *Bruen*'s historical inquiry. *Bruen* emphasized that the government need only identify a "historical *analogue*, not a historical *twin*." *Bruen*, 142 S. Ct. at 2133. As explaiTovar above, Section 922(g)(1) and the historical laws are "relevantly similar," *id.* at 2132, because they imposed severe consequences on the commission of a felony and authorized legislatures to disarm untrustworthy people.

Moreover, the lack of an identical historical statute does not suggest that the founding generation would have viewed Section 922(g)(1) as violating the Second Amendment. As one district court recently observed, a "list of the laws that *happeTovar to exist* in the founding era is . . . not the same thing as an exhaustive account of what laws would have been theoretically *believed to be permissible* by an individual sharing the original public understanding of the Constitution." *United States v. Kelly*, No. 3:22-CR-37, 2022 WL 17336578, at *2 (M.D. Tenn. Nov. 16, 2022). Founding-era legislatures cannot be presumed to have legislated to the full limits of their constitutional authority.

In sum, Section 922(g)(1) is consistent with the Nation's historical tradition of firearm regulation. Therefore, this Court should reject Tovar's argument that Section 922(g)(1) is unconstitutional on its face.

CONCLUSION

Tovar's motion relies on two arguments that are foreclosed. The motion to dismiss the indictment should be denied.

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CERTIFICATE OF SERVICE

I certify that on April 7, 2023, I electronically filed this document with the Clerk for the United States District Court, Northern District of Texas, using the electronic case filing ("ECF") system. The ECF system will send a "Notice of Electronic Filing" to all parties/counsel for record who have consented in writing to accept the Notice as service of this document by electronic means.

s/ **John J. Boyle**
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