United States Court of Appeals for the Fifth Circuit

No. 24-10268
Summary Calendar

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

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ISAAC JOHN OLIVAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:23-CR-64-1

Before JOLLY, GRAVES, and OLDHAM, *Circuit Judges*.

PER CURIAM:[*]

Isaac John Olivas appeals his guilty plea conviction for possessing a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). He argues that § 922(g)(1) exceeds Congress's authority under the Commerce Clause and that the statute is unconstitutional under the Second Amendment, both facially and as applied to him, in light of *New York State*

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

Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022). The Government has filed an opposed motion for summary affirmance or, alternatively, for an extension of time to file a merits brief.

The Government is correct that Olivas's arguments are foreclosed. *See United States v. Jones*, 88 F.4th 571, 573 (5th Cir. 2023) (Commerce Clause challenge), *cert. denied*, 144 S. Ct. 1081 (2024); *United States v. Diaz*, 116 F.4th 458, 467-72 (5th Cir. 2024) (Second Amendment challenges), *petition for cert. filed* (U.S. Feb. 18, 2025) (No. 24-6625). However, because Olivas opposes summary affirmance, it is not appropriate in this case. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Nevertheless, because *Jones* and *Diaz* are clearly dispositive, we affirm the district court's judgment without further briefing. *See United States v. Bailey*, 924 F.3d 1289, 1290 (5th Cir. 2019).

The motion for summary affirmance is DENIED, the alternative motion for an extension of time is DENIED, and the judgment of the district court is AFFIRMED.

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

UNITED STATES OF AMERICA, Plaintiff, v. ISAAC JOHN OLIVAS, Defendant.	2:23-CR-064-Z-BR-1

ORDER

Before the Court is Defendant Isaac John Olivas's Motion to Dismiss Indictment. ("Motion") (ECF No. 23). Olivas seeks dismissal of an Indictment charging him with being a Convicted Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). *Id.* at 1. He challenges Section 922(g)(1) as facially unconstitutional under both the Commerce Clause and the Second Amendment.[1] *Id.* His argument fails twice over. First, binding precedent expressly forecloses the arguments he asks this Court to adopt. Second, *Bruen*, far from casting doubt on felon in possession statutes, declined to disturb this area of law. In the absence of contrary Supreme Court precedent, this Court must follow Fifth Circuit caselaw. The Court **DENIES** his motion.

BACKGROUND

On July 27, 2023, a grand jury indicted Olivas on one count of being a Convicted Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(l) and 924(a)(8). ECF No. 1. Count One of the Indictment provides:

[1] Specifically, Olivas alleges that Congress had no power to pass 18 U.S.C. § 922(g)(1). ECF No. 23 at 1. Olivas makes no argument casting doubt on the constitutional application of Section 922(g)(1) to him.

> On or about May 10, 2023, in the Amarillo Division of the Northern District of Texas, and elsewhere, **Isaac John Olivas**, defendant, a person who had previously been convicted of a crime punishable by a term of imprisonment exceeding one year, did knowingly possess in and affecting interstate and foreign commerce, a firearm, that is a Smith & Wesson, .38 caliber revolver, bearing serial number J789947, defendant knowing he had been previously convicted of a crime punishable by a term of imprisonment exceeding one year.

ECF No. 1.

Olivas then moved to dismiss the Indictment. ECF No. 23. Fifth Circuit precedent forecloses his motion, as acknowledged by Olivas. *Id.* at 3–4, 7–8. Despite acknowledging that the Fifth Circuit has rejected his constitutional arguments, Olivas asks this Court to disregard that precedent and find in his favor. *Id.* Most notably, he insists that the Supreme Court's decision in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), calls for a different outcome here. *Id.* at 10.

LEGAL STANDARDS

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." This rule encompasses motions to dismiss an indictment for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). "As a motion to dismiss an indictment for failure to state an offense is a challenge to the sufficiency of the indictment," the Court must "take the allegations of the indictment as true" and must "determine whether an offense has been stated." *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004) (internal marks omitted) (quoting *United States v. Hogue*, 132 F.3d 1087, 1089 (5th Cir. 1998)). "The propriety of granting a motion to dismiss an indictment . . . by pretrial

motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact." *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005). "If a question of law is involved, then consideration of the motion is generally proper." *Id.*

I. Binding precedent forecloses Olivas's Commerce Clause argument.

Olivas first argues that the "possession" prong of Section 922(g) exceeds both statutory and constitutional authority. ECF No. 23 at 2–4. Specifically, he argues that "possess in or affecting commerce" must mean more than gun possession where any constituent part traveled across state lines. *Id.* at 3. Olivas "concedes that courts have thus far rejected" his arguments, but he contends that those courts erred. *Id.* at 3–6.

The Fifth Circuit squarely addressed that assertion in *United States v. Rawls*, 85 F.3d 240, 242–43 (5th Cir. 1996), and found it lacking. Interpreting the text of Section 922(g)(1), the Court held that "[t]he 'in or affecting commerce' element can be satisfied if the firearm possessed by a convicted felon had previously traveled in interstate commerce." *Id.* at 243 (citing *United States v. Fitzhugh*, 984 F.2d 143, 146 (5th Cir. 1993)). That conclusion relied on the Supreme Court's holding in *Scarborough v. United States*, where the Court interpreted a nearly identical statute to require only the "minimal nexus" that, at some point, the firearm traveled in interstate or foreign commerce. 431 U.S. 563, 575–77 (1977); *see also United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005) ("The interstate commerce element of a [Section] 922(g)(1) charge is satisfied where the government demonstrates that the firearm was manufactured out of state."). This binding precedent forecloses the statutory question here; Olivas's argument fails.

Olivas also claims that the *United States v. Lopez*, 514 U.S. 549 (1995) — which predated *Rawls* — shows that Section 922(g) exceeds congressional Commerce Clause authority. ECF No. 23 at 2–6. Not so. The *Rawls* court addressed this issue as well, noting that "[c]entral to the Court's

holding in *Lopez* was the fact that [the statute at issue] contained 'no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.'" *Rawls*, 85 F.3d at 242 (quoting *Lopez*, 514 U.S. at 561). But Section 922(g)(1) requires a defendant's possession be "in or affecting commerce." Due to this distinction, the *Rawls* court held that *Lopez* does not constitutionally invalidate Section 922(g)(1). *Id.* at 242–43. Since then, the Fifth Circuit continued upholding the constitutionality of Section 922(g)(1) under the Commerce Clause. *See, e.g.*, *United States v. Alcantar*, 733 F.3d 143, 145–46 (5th Cir. 2013); *United States v. Schmidt*, 487 F.3d 253, 255 (5th Cir. 2007). This Court must follow this binding precedent.

II. Binding precedent upholds Section 922(g)(1)'s constitutionality under the Second Amendment.

Olivas next challenges the constitutionality of Section 922(g)(1) under the Second Amendment. *Id.* at 6–10. Again, he concedes that the Fifth Circuit previously rejected this argument; still, he argues that the Supreme Court's recent holding in *Bruen* now demands a different outcome. *Id.* at 6–9.

The Second Amendment provides, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court recently clarified the framework governing the interpretation of the Second Amendment in *Bruen*. 142 S. Ct. 2111. Important here, that opinion requires a preliminary inquiry: whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2129–30. If it does, "the Constitution presumptively protects that conduct," and the court must determine whether the government has "justif[ied] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. Even when the Second Amendment presumptively applies, if the government meets its burden, a court

may find 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, 49 n.10 (1961)). *Bruen* marked a change in Second Amendment precedent by swapping the application of means-end scrutiny for an analysis of text, history, and tradition. *Id.* at 2127–28. But that test only applies where the Second Amendment's text presumptively applies. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111, 2134 (2022) (clarifying that petitioners "are part of 'the people' whom the Second Amendment protects" before turning to historical traditions of firearm regulation).

And Fifth Circuit precedent upholding Section 922(g)(1) did not expressly invoke the means-end scrutiny that *Bruen* rejected. Its analysis more clearly invoked the considerations endorsed by both *Bruen* and Supreme Court precedent before it: "a test rooted in the Second Amendment's text, as informed by history." *Id.* at 2127 (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)). In particular, the Fifth Circuit has repeatedly cited *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), for the proposition that, when considering the Second Amendment as historically understood, Section 922(g)(1) is constitutional.

In *Emerson*, the Fifth Circuit first determined — based on a lengthy analysis of the Second Amendment's text and history — that the Second Amendment "protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms." 270 F.3d at 260. The court clarified, however, that those rights may "be made subject to . . . limited, narrowly tailored specific exceptions or restrictions . . . that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." *Id.* at 261. In particular, the court stated that "it is clear that felons . . . may be prohibited

from possessing firearms." *Id.* In support of this conclusion, the court pointed to constitutional scholarship 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." *Id.* at 226 n.21 (citations omitted).

Although the Fifth Circuit later determined that Emerson applied means-end scrutiny "sub silentio" as an additional analytical step, *United States v. McGinnis*, 956 F.3d 747, 755 (5th Cir. 2020), *Emerson* did not apply means-end scrutiny when performing this historical analysis. And, in later cases, the Fifth Circuit cited Emerson's historical analysis — along with its conclusion that "legislative prohibitions on the ownership of firearms by felons are not considered infringements on the historically understood right to bear arms protected by the Second Amendment" — in upholding the constitutionality of Section 922(g)(1). *United States v. Darrington*, 351 F.3d 632, 634 (5th Cir. 2003); *see also United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) (citing *Emerson* for the conclusion that it "is not inconsistent with the Second Amendment" as historically understood "to limit the ability of convicted felons to keep and possess firearms"). Therefore, even though the Fifth Circuit overruled *Emerson*'s embodiment of means-end scrutiny, *United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir. 2023), *cert. granted*, No. 22-915, 2023 WL 4278450 (U.S. June 30, 2023), its historical analysis was not called into doubt.

Moreover, following these decisions, the Supreme Court — performing its own thorough textual and historical analysis — confirmed *Emerson*'s understanding of the Second Amendment as protecting the individual right to keep and bear arms unconnected with military service. *Heller*, 554 U.S. at 577–628. Despite noting that its historical analysis was not "exhaustive," the Court underscored that "nothing in [its] opinion should be taken to cast doubt on longstanding

prohibitions on the possession of firearms by felons." *Id.* at 626; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons . . . .'") (internal citation omitted). Since then, the Fifth Circuit has consistently cited *Heller* in upholding the constitutionality of Section 922(g)(1) and reaffirming its pre-*Heller* decisions. *See, e.g.*, *United States v. Anderson*, 559 F.3d 348, 352 & n.6 (5th Cir. 2009) (stating that *Heller* "provides no basis for reconsidering" precedent upholding Section 922(g)(1) and, in fact, reinforces the lawfulness of "longstanding prohibitions on the possession of firearms by felons"); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) ("Dicta in *Heller* states that the opinion should not be taken to cast doubt on long-standing prohibitions on possession of firearms by felons, and we have reaffirmed our prior jurisprudence on this point since *Heller* was decided.") (internal citation and quotation marks omitted).

It was only "[p]ost-*Heller*" that the Fifth Circuit — following its sister circuits — "adopted a two-step inquiry" for analyzing restrictions of Second Amendment rights. *McGinnis*, 956 F.3d at 753 (quoting *Hollis v. Lynch*, 827 F.3d 436, 446 (5th Cir. 2016)). Analyzing a different subsection of 18 U.S.C. Section 922, the Fifth Circuit preserved at step one the determination of whether a challenged law "harmonizes with the historical traditions associated with the Second Amendment guarantee"; however, it introduced a second step: application of "means-ends scrutiny." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194–95 (5th Cir. 2012) (citing *Heller*, 554 U.S. at 577–628). The court did not challenge *Heller*'s recognition of "presumptively lawful regulatory measure[s]" — such as the prohibition of firearm possession by felons — but instead noted that such regulations "would likely be upheld at step one of [the] framework." *Id.* at 196. Following *National Rifle Association*, the

Fifth Circuit never applied this new framework in the context of Section 922(g)(1) but instead held — reiterating Heller's preservation of "the longstanding prohibitions on the possession of firearms by felons" — that the "rule of orderliness d[id] not permit [it] to revisit [its previous] holdings" upholding the statute. *United States v. Massey*, 849 F.3d 262, 265 (5th Cir. 2017).

Then came *Bruen*. As acknowledged by the Fifth Circuit, *Bruen* "fundamentally change[d]" the Second Amendment analysis by rejecting the addition of means-end scrutiny as a second step. *Rahimi*, 61 F.4th at 450. The *Bruen* Court reasoned that, contrary to the circuit courts' interpretation of its precedent, "*Heller* d[id] not support" this additional step in the analysis. *Id.* Importantly, though, "consistent with Heller," the *Bruen* Court expressly preserved the first step — "a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 142 S. Ct. at 2127. Notably, at this step, the line of precedent extending from *Emerson* to *Massey* upheld Section 922(g)(1) as consistent with the Second Amendment as historically understood.

In any event, and regardless of the remaining viability of Fifth Circuit case law pre-*Bruen*, its post-*Bruen* precedent reaches the same conclusion. In *Rahimi*, the Fifth Circuit reaffirmed the constitutionality of "longstanding prohibition[s] on the possession of firearms" by felons, as originally recognized in *Heller*. *Rahimi*, 61 F.4th at 452 (quoting *Heller*, 554 U.S. at 626–27). In considering whether the statute prohibiting possession of firearms by someone subject to a domestic violence restraining order violated the Second Amendment, the court rejected the government's argument that the amendment applied only to "ordinary, law-abiding citizens," as stated in *Bruen*. *Id.* at 451–52. The court construed *Bruen*'s reference to "ordinary, law-abiding citizens" — and *Heller*'s similar reference in discussing the amendment's scope — as "shorthand in explaining that its holding . . . should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.'" *Id.* at 452 (quoting *Heller*, 554 U.S. at 626–27, and

explaining that "*Bruen*'s reference . . . is no different"). These references were "meant to exclude from the [c]ourt's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* Because Rahimi did not fall into any such group, he enjoyed the "strong presumption" that he remained within "the people" protected by the Second Amendment: "[W]hile he was suspected of other criminal conduct at the time, Rahimi was not a convicted felon or otherwise subject to another 'longstanding prohibition[] on the possession of firearms' that would have excluded him." *Id.* (quoting *Heller*, 554 U.S. at 626–27).

Likewise, in *United States v. Daniels*, the Fifth Circuit again distinguished "felons" as "people who were historically stripped of their Second Amendment rights" and determined that the defendant in that case presumptively held Second Amendment rights because he was "not a felon or mentally ill." 2023 U.S. App. LEXIS 20870, at *10 (5th Cir. Aug. 9, 2023) (quotation omitted). Thus, even post-*Bruen*, the Fifth Circuit continues to interpret Supreme Court precedent as permitting the prohibition on firearm possession by felons. *See Rahimi*, 61 F.4th at 452; *see also id.* at 464 ("The Supreme Court has also made clear that our Nation's history and tradition include 'longstanding prohibitions on the possession of firearms by felons' — and that such measures are 'presumptively lawful.'") (Ho, J., concurring) (quoting *Heller*, 554 U.S. at 626 n.26).

Because the changes advanced in *Bruen* did not implicate the basis on which the Fifth Circuit held Section 922(g)(1) to be constitutional, and in light of Rahimi's express, post-*Bruen* affirmation of the constitutionality of "longstanding" felon-in-possession laws, district courts in this circuit have properly declined to reconsider the constitutionality of Section 922(g)(1). *See, e.g.*, *United States v. Thompson*, No. CR 22-173, 2023 WL 3159617, at *4 (E.D. La. Apr. 27, 2023) ("*Rahimi* recognizes, as did the Supreme Court in *Heller* and *McDonald*, that the history

and tradition of the Second Amendment make clear that prohibiting convicted felons from possessing firearms is constitutionally tolerable."); *United States v. Mosley*, No. 4:23-CR-0041-P, 2023 WL 2777473, at *2 (N.D. Tex. Apr. 4, 2023) ("[T]he Fifth Circuit has held that restrictions prohibiting convicted felons from possessing firearms do not violate the Second Amendment . . . . *Bruen* did not change that fundamental premise."); *United States v. Clay*, No. 6:22-CR-00086, 2023 WL 3059155, at *2 (S.D. Tex. Apr. 23, 2023) ("[T]he Court has reviewed cases that both pre- and post-date *Bruen* and finds that *Bruen* does not render Section 922(g)(1) unconstitutional."). In fact, since *Bruen*, almost "[a]ll district courts within the Fifth Circuit have . . . rejected" constitutional challenges to Section 922(g)(1) under the Second Amendment. *United States v. Isaac*, No. SA-22-CR-0037-XR, 2023 WL 2467886, at *1 (W.D. Tex. Mar. 9, 2023); *but see United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 U.S. Dist. LEXIS 112397, at *75 (S.D. Miss. June 28, 2023) (granting a motion to dismiss a Section 922(g)(1) indictment based on an as-applied challenge).

The Court agrees with the near-unanimous conclusion of courts in this circuit and concludes that it is bound by precedent upholding Section 922(g)(1). The issue is foreclosed by Fifth Circuit precedent "absent an intervening change in law" that "unequivocally overrule[s]" it. *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 234 (5th Cir. 2023); *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)."). Far from unequivocally overruling Fifth Circuit precedent, *Bruen* eliminated a step of the Second Amendment analysis — means-end scrutiny — that the Fifth Circuit only applied "sub silentio" when upholding Section 922(g)(1). *See McGinnis*, 956 F.3d at 755. In contrast, the Fifth Circuit expressly considered the Second Amendment as historically

understood, concluding that it does not — and was not intended to — protect convicted felons. *Emerson*, 270 F.3d at 261; *Darrington*, 351 F.3d at 634. The Supreme Court reaffirmed this conclusion when it preserved the "longstanding prohibitions" on firearm possession by felons. *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786. And the Fifth Circuit thereafter expressly adopted the Supreme Court's preservation of such prohibitions. *Anderson*, 559 F.3d at 352 n.6; *Scroggins*, 599 F.3d at 451; *Massey*, 849 F.3d at 265. Finally, *Bruen* kept intact *Heller* — which the Fifth Circuit repeatedly, expressly cited when upholding Section 922(g)(1), and which preceded its imposition of a two-step analysis. *Bruen*, 142 S. Ct. at 2127, 2134. And, if any uncertainty remained, the Fifth Circuit confirmed following *Bruen* that felon-in-possession restrictions are historically supported and presumptively lawful. *Rahimi*, 61 F.4th at 452; *Daniels*, 2023 U.S. App. LEXIS 20870, at *10.

Even if *Bruen* constituted an intervening change in the law, the Fifth Circuit has indicated that a district court "correctly f[inds] itself bound by" Fifth Circuit precedent — even in the face of a subsequent Supreme Court decision that appears to "implicitly overrule" that precedent — until the Fifth Circuit "determine[s] that a former panel's decision has fallen unequivocally out of step with some intervening change in the law." *See In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021); *see also Thompson*, 2023 WL 3159617, at *4 ("[T]he authority to determine whether the Fifth Circuit's pre-*Bruen* precedent regarding the constitutionality of [Section] 922(g)(1) has been overturned by an intervening change in the law lies with the Fifth Circuit alone."); *United States v. Jordan*, No. EP-22-CR-01140-DCG-1, 2023 WL 157789, at *7 (W.D. Tex. Jan. 11, 2023) ("[T]he Fifth Circuit's opinion in *Bonvillian* indicates that [d]istrict [c]ourts have no power to declare that an intervening Supreme Court case inters an otherwise-binding Fifth Circuit case."). Therefore, in accordance with controlling Fifth Circuit precedent, the

Court concludes that Section 922(g)(1) is constitutional under the Second Amendment.

CONCLUSION

Because Fifth Circuit precedent expressly forecloses Olivas's attacks on the constitutionality of Section 922(g)(1), and the Supreme Court's holding in *Bruen* did not unequivocally overrule that precedent, the Court denies the motion. ECF No. 23.

SO ORDERED.

November 16, 2023

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE