IN THE

Supreme Court of the United States

DEJUAN DION BRUNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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APPENDIX A

Opinion by the U.S. Court of Appeals for the Tenth Circuit
(June 2, 2025)

FILED
United States Court of Appeals
Tenth Circuit

June 2, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEJUAN DION BRUNER,

Defendant - Appellant.

No. 23-6122
(D.C. No. 5:22-CR-00518-SLP-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.**

This matter is before us on the United States' *Motion to Lift Abatement* and *Unopposed Motion for Summary Affirmance*.

The United States moves for summary affirmance based on this court's recent published decision in *United States v. Jackson*, No. 23-6047, ___ F.4th ___, 2025 WL 1509987 (10th Cir. May 28, 2025). In *Jackson*, this court rejected Mr. Jackson's facial challenge that 18 U.S.C. § 922(g)(9) violates the Second Amendment. Thus, the United States argues that *Jackson* forecloses Appellant Dejuan Dion Bruner's

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** Because this matter is being decided on an unopposed motion for summary affirmance, the panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

facial challenge to § 922(g)(9), the sole argument made by Mr. Bruner in this appeal. Mr. Bruner does not object to the motion for summary affirmance.

Upon consideration, we lift the abatement of proceedings in this appeal which were abated pending a decision in *Jackson*, and we grant the United States' unopposed motion for summary affirmance.

The judgment of the district court is affirmed.

Entered for the Court

Per Curiam

IN THE

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DEJUAN DION BRUNER,

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APPENDIX B

Opinion by the U.S. Court of Appeals for the Tenth Circuit
(May 28, 2025)

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at the same hearing).[7] Of course, if Puig had similarly breached his plea agreement only after the district court had accepted it, our above-described reasoning would not apply and the case would be very different.

The fifth case that the Government cites is *United States v. Washburn*, 728 F.3d 775 (8th Cir. 2013). But the language of the plea agreement in that case specifically provided that Washburn's Rule 410 waiver would be effective "*regardless of whether the plea agreement has been accepted by the Court.*" *Id.* at 780. That makes *Washburn* readily distinguishable, because Puig's agreement contains no such language. Similarly distinguishable is *United States v. Nelson*, 732 F.3d 504 (5th Cir. 2013). There, the Fifth Circuit enforced a Rule 410 waiver in a Type A agreement that was never presented to or approved by the district court, because the terms of the waiver "explicitly" stated that it would be triggered "if Nelson failed to plead guilty to the Bill of Information." *Id.* at 517. By contrast, as we have emphasized, Puig's Rule 410 waiver is not triggered by a mere failure to plead guilty but only by a "[c]ourt[ ] finding" that there was a valid "agreement" that he had "breach[ed]." *See supra* at 1239–40.

The last case the Government cites is *United States v. Perry*, 643 F.2d 38 (2d Cir. 1981), but the Second Circuit's one-paragraph discussion of the Rule 410 waiver issue does not describe the type of agreement at issue, whether court approval of the agreement was required, or what the relevant language of the agreement was. *Id.* at 52. *Perry* therefore provides no guidance with respect to the issues presented here.

In short, the Government has failed to cite any relevant persuasive out-of-circuit authority that would support its position.

* * *

For the reasons we have explained, the waiver of the protections of Rule 410 contained in Puig's plea agreement was not triggered here, leaving the provisions of that Rule undisturbed. The district court therefore properly held that the factual basis contained in Puig's plea agreement was inadmissible under Rule 410.

AFFIRMED.

UNITED STATES of America, Plaintiff - Appellee,

v.

Barry B. JACKSON, Jr., Defendant - Appellant.

No. 23-6047

United States Court of Appeals, Tenth Circuit.

FILED May 28, 2025

Background: Following the denial of defendant's motion to dismiss the indictment, 622 F.Supp.3d 1063, defendant pleaded guilty in the United States District Court for the Western District of Oklahoma, Timothy D. DeGiusti, Chief Judge, to knowingly possessing two firearms after

7. The minutes of the change of plea hearing in *Burch* further confirm that the court accepted the plea agreement, because the minutes expressly state that the counts the Government had agreed to drop were "to be dismissed at time of sentencing." *See United States v. Burch*, No. 1:95-cr-00225-PLF-1, minutes of status hearing (D.D.C. Oct. 25, 1995).

having been convicted of a misdemeanor crime of domestic violence, and he was sentenced to serve a 72-month term of imprisonment. Defendant appealed.

Holdings: The Court of Appeals, Murphy, Circuit Judge, held that:

(1) Second Amendment's plain text covered defendant's conduct of possessing two firearms as a domestic violence misdemeanant; but

(2) statute of conviction did not violate Second Amendment, as applied to defendant;

(3) defendant's possession of firearms at his residence on day of his arrest four months after offense of conviction, was relevant conduct under Sentencing Guidelines; and

(4) defendant's sentence, which fell within the properly calculated Sentencing Guidelines range, was substantively reasonable.

Affirmed.

1. Criminal Law ⚿1030(2)

Although defendant pleaded guilty to the charge of knowingly possessing two firearms after having been convicted of a misdemeanor crime of domestic violence, he preserved for appeal his Second Amendment challenge to the statute of conviction by raising it in the district court. U.S. Const. Amend. 2; 18 U.S.C.A. § 922(g)(9).

2. Criminal Law ⚿1139

Challenges to the constitutionality of a statute are reviewed de novo.

3. Constitutional Law ⚿990

The court begins its review of a challenge to the constitutionality of a statute with the presumption that the statute is constitutional.

4. Constitutional Law ⚿656

A facial constitutional challenge is the most difficult challenge to mount successfully because it requires the challenger to establish that no set of circumstances exists under which the challenged statute would be valid.

5. Constitutional Law ⚿656

To prevail on a facial constitutional challenge, the government only needs to demonstrate the challenged law is constitutional in some of its applications.

6. Constitutional Law ⚿656

The fact that a challenged statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid as facially unconstitutional.

7. Weapons ⚿107(2)

The Second Amendment confers an individual right to keep and bear arms. U.S. Const. Amend. 2.

8. Weapons ⚿103

Although the Second Amendment right to keep and bear arms is fully applicable to the States, it is not unlimited. U.S. Const. Amend. 2.

9. Weapons ⚿107(2)

The analysis of the individual right to keep and bear arms under the Second Amendment is conducted through a two-part, burden-shifting test, and at the first step, the party asserting the right must establish the plain text of the Second Amendment covers their conduct; failure to so establish amounts to a failure to present a claim of a Second Amendment violation. U.S. Const. Amend. 2.

10. Weapons ⚿106(3)

If the party challenging a firearms regulation is successful in showing that the plain text of the Second Amendment covers their conduct, the burden shifts to the

government to justify the regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation; if the challenged regulation fits within the nation's historical tradition of firearm regulation, it is lawful under the Second Amendment. U.S. Const. Amend. 2.

11. Weapons ⚿106(3)

The inquiry at the first step of the *Bruen* two-part, burden-shifting test for determining whether a firearm regulation violates the Second Amendment comprises three elements: (1) whether the party challenging the regulation is part of the people whom the Second Amendment protects, (2) whether the item at issue is an arm that is in common use today for self-defense, and (3) whether the proposed course of conduct falls within the Second Amendment. U.S. Const. Amend. 2.

12. Weapons ⚿106(3)

The text of the Second Amendment is given its normal meaning, as it would have been understood by ordinary citizens in the founding generation, when determining whether a firearm regulation violates the individual right to keep and bear arms under the Second Amendment; the reach of the Second Amendment may nevertheless extend to modern contexts and applications. U.S. Const. Amend. 2.

13. Weapons ⚿106(3), 180(3)

Second Amendment's plain text covered defendant's conduct of possessing two firearms as a domestic violence misdemeanant, as required for defendant to prevail on his Second Amendment challenge to statute prohibiting knowingly possessing firearms after having been convicted of a misdemeanor crime of domestic violence; defendant was a United States citizen, his prior criminal convictions did not exclude him from the being a member of the political community, pistols, the possession of which led to his conviction, fell squarely within the Second Amendment's definition of "arms," and defendant affirmatively asserted his inherent right to possess a weapon for self-defense. U.S. Const. Amend. 2; 18 U.S.C.A. § 922(g)(9).

14. Weapons ⚿107(2)

The "people," as referred to in the Second Amendment, denotes a class of persons who are part of a national community or who have otherwise developed sufficient connection with the country to be considered part of that community. U.S. Const. Amend. 2.

See publication Words and Phrases for other judicial constructions and definitions.

15. Weapons ⚿107(2)

The inherent right of self-defense is central to the Second Amendment right to keep and bear arms. U.S. Const. Amend. 2.

16. Weapons ⚿106(3)

At the second step of the *Bruen* two-part, burden-shifting test for determining whether a firearm regulation violates the Second Amendment, the government bears the burden of establishing the regulation is consistent with the principles that underpin the nation's regulatory tradition; why and how the regulation burdens the right are central to this inquiry. U.S. Const. Amend. 2.

17. Weapons ⚿105

Congress enacted statute prohibiting knowingly possessing firearms after having been convicted of a misdemeanor crime of domestic violence to close the dangerous loophole in felon disarmament laws, which were not effective in preventing domestic abusers from accessing firearms because, notwithstanding the harmfulness of their conduct, many perpetrators were convicted

of only misdemeanors or not charged at all. 18 U.S.C.A. § 922(g)(9).

18. Weapons ⚿106(3), 180(3)

Statute prohibiting knowingly possessing firearms after having been convicted of misdemeanor crime of domestic violence was consistent with the nation's tradition of firearm regulation and thus did not violate Second Amendment, as applied to defendant who had been convicted of misdemeanor domestic battery and misdemeanor domestic assault and battery, regardless of the supposed remoteness of these offenses or the absence of a firearm in their commission; defendant's convictions represented judicial determinations he engaged in violence against a family member or intimate partner and demonstrated his propensity for using physical violence against others, and given the various ways by which his Second Amendment right may be restored, his penalty was conditional, and not necessarily permanent. U.S. Const. Amend. 2; 18 U.S.C.A. § 922(g)(9).

19. Weapons ⚿106(3), 180(3)

Even in the absence of identical historical antecedents, the statute prohibiting knowingly possessing firearms after having been convicted of a misdemeanor crime of domestic violence may be constitutionally applied under the Second Amendment if consistent with the principle of disarming individuals who pose a clear threat of physical violence to another. U.S. Const. Amend. 2; 18 U.S.C.A. § 922(g)(9).

20. Weapons ⚿105

Congress intended statute prohibiting knowingly possessing firearms after having been convicted of a misdemeanor crime of domestic violence to operate as a preventive measure to curb the escalation of the severity of domestic violence to homicides. 18 U.S.C.A. § 922(g)(9).

21. Criminal Law ⚿1042.3(1, 2), 1156.2

Defendant's challenges on appeal to the procedural and substantive reasonableness of his sentence for knowingly possessing two firearms after having been convicted of a misdemeanor crime of domestic violence were reviewed under an abuse of discretion standard for procedural and substantive reasonableness, where defendant raised his objections at the district court. 18 U.S.C.A. § 922(g)(9).

22. Sentencing and Punishment ⚿651

Procedural reasonableness of a sentence requires, among other things, a properly calculated Sentencing Guidelines range. U.S.S.G. § 1B1.1 et seq.

23. Criminal Law ⚿1134.77, 1139, 1158.34

When evaluating a district court's interpretation and application of the Sentencing Guidelines, the Court of Appeals reviews legal questions de novo and factual findings for clear error, giving due deference to the district court's application of the Guidelines to the facts. U.S.S.G. § 1B1.1 et seq.

24. Sentencing and Punishment ⚿40

Substantive reasonableness of a sentence requires the sentence to be reasonable given all the circumstances of the case in light of the statutory sentencing factors. 18 U.S.C.A. § 3553(a).

25. Sentencing and Punishment ⚿30

A sentence is substantively unreasonable if it exceeds the bounds of permissible choice, given the facts and the applicable law. 18 U.S.C.A. § 3553(a).

26. Sentencing and Punishment ⚿705, 726(3)

Defendant's possession of three firearms at his residence, one of which was a pistol loaded with a large-capacity magazine, on the day he was arrested for pos-

sessing firearms after having been convicted of a misdemeanor crime of domestic violence was relevant conduct to his offense of possessing two firearms as a domestic violence misdemeanant, which in turn supported enhancements to his sentence for that offense, for possessing firearm capable of accepting large-capacity magazine and for an offense involving five firearms; possession of other firearms was conduct significantly similar to misdemeanant-in-possession charge, and gap of four months that separated offense of conviction and discovery of additional firearms upon defendant's arrest was not too remote. 18 U.S.C.A. § 922(g)(9); U.S.S.G. §§ 1B1.3, 2K2.1(a)(4)(B), 2K2.1(b)(1)(A).

27. Criminal Law ⚿1139, 1158.34

A district court's factual findings supporting the determination of relevant conduct under the Sentencing Guidelines is reviewed for clear error; however, the ultimate determination of relevant conduct is reviewed de novo. U.S.S.G. § 1B1.3.

28. Sentencing and Punishment ⚿668

Determination of relevant conduct under the Sentencing Guidelines is based on whether there is a strong relationship between the uncharged conduct and the convicted offense. U.S.S.G. § 1B1.3.

29. Sentencing and Punishment ⚿668, 973.3

The government must demonstrate, by a preponderance of the evidence, a significant similarity, regularity, and temporal proximity between uncharged conduct and the offense of conviction for the uncharged conduct to be considered relevant conduct under the Sentencing Guidelines. U.S.S.G. § 1B1.3.

30. Weapons ⚿343

Defendant's 72-month sentence for knowingly possessing two firearms after having been convicted of a misdemeanor crime of domestic violence, which fell within the properly calculated Sentencing Guidelines range of 63 to 78 months as determined by the district court, was substantively reasonable. 18 U.S.C.A. § 922(g)(9); U.S.S.G. § 1B1.1 et seq.

31. Criminal Law ⚿1144.17

A within-guideline-range sentence that the district court properly calculated is entitled to a rebuttable presumption of reasonableness on appeal. U.S.S.G. § 1B1.1 et seq.

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:22-CR-00059-D-1)

David B. Autry, Oklahoma City, Oklahoma, for Defendant – Appellant.

Steven W. Creager, Assistant United States Attorney (Robert J. Troester, United States Attorney, and Jacquelyn M. Hutzell, Assistant United States Attorney, with him on the briefs), Oklahoma City, Oklahoma, for Plaintiff – Appellee.

Before ROSSMAN, KELLY, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

After the district court denied his motion to declare 18 U.S.C. § 922(g)(9) unconstitutional, Barry Jackson pleaded guilty to one count of illegally possessing two firearms as a domestic violence misdemeanant. Following the commission of the offense of conviction but before pleading guilty, Jackson was found in possession of three additional firearms, one of which was loaded with a large-capacity magazine.

At sentencing, the district court determined Jackson's two separate instances of firearm possession were part of the same course of conduct and, thus, constituted

relevant conduct. Accordingly, the calculation of Jackson's advisory United States Sentencing Guidelines range was based on offense conduct involving five firearms, one of which was capable of accepting a large-capacity magazine. On appeal, Jackson challenges both the judgment of conviction and the reasonableness of his sentence.

Jackson's conviction is consistent with the principles laid out by the Supreme Court, *see United States v. Rahimi*, 602 U.S. 680, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024), and this court's precedent, *see United States v. Rogers*, 371 F.3d 1225 (10th Cir. 2004). The district court did not err in its relevant-conduct determination. Therefore, exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), this court **affirms** the district court's judgment of conviction and sentence.

II. BACKGROUND

On December 30, 2021, reacting angrily to what he perceived as aggressive driving, Jackson fired multiple gunshots at another vehicle on the John Kilpatrick Turnpike in Oklahoma. The victims reported seeing a man—later identified as Jackson—pointing and shooting a handgun at them from the passenger seat of a white vehicle. Based on reports from a third-party witness to the incident, officers were able to locate and stop the white vehicle. There were five individuals inside: Jackson, his wife, and three minor children. Upon a search, officers found two 9mm handguns inside the backpack of one of the children. After waiving her *Miranda* rights, Jackson's wife told the officers it was Jackson who shot at the other vehicle. Due to a prior domestic violence misdemeanor conviction, Jackson was indicted on a single count of unlawfully possessing two firearms in violation of § 922(g)(9).[1] A warrant for his arrest was issued.

On April 20, 2022, Jackson was arrested on the federal charge in a Tulsa residence in which he lived. In executing the arrest warrant, law enforcement officers observed a shotgun propped against a wall. Jackson waived his *Miranda* rights and told officers the shotgun was in his wife's name and kept for protection. Law enforcement returned to the residence later that day with a search warrant. A search of the residence uncovered, among other things, three additional firearms, one of which was a pistol loaded with a large-capacity magazine.

Jackson filed a motion to declare 18 U.S.C. § 922(g)(9) unconstitutional and dismiss his indictment. His motion was denied. *See generally United States v. Jackson*, 622 F. Supp. 3d 1063 (W.D. Okla. 2022). Jackson pleaded guilty thereafter, without a plea agreement.

The Presentencing Investigation Report ("PSR") determined Jackson's possession of firearms on the day of his arrest was conduct relevant to the offense of his conviction. The PSR recommended a Guidelines range which reflected this determination: The base offense level was calculated to be twenty because Jackson had possessed a firearm capable of accepting a large-capacity magazine. *See* U.S.S.G. § 2K2.1(a)(4)(B). The offense level was further increased by two because Jackson's offense was determined to involve five firearms. *See* U.S.S.G. § 2K2.1(b)(1)(A). Jackson objected to the PSR's relevant-conduct determination, arguing the firearms found

1. Following the incident, Jackson was charged in Oklahoma state court for use of a vehicle in discharge of a weapon. *See* Okla. Stat. tit. 21, § 652. He eventually pleaded guilty to the charge.

on April 20, 2022, were not connected to the offense of conviction.

At sentencing, the district court overruled Jackson's objections and adopted the Guidelines range recommended by the PSR. The district court reasoned Jackson's conduct in possessing firearms at the time of his arrest was the same status-based offense as the offense of conviction. Hence, the two incidents were determined to be parts of the same course of conduct and, thereby, constituted relevant conduct. Combined with other enhancements and adjustments not at issue on this appeal, the district court concluded Jackson's Guidelines range was 63 to 78 months. He was ultimately sentenced to serve a 72-month term of imprisonment.

III. DISCUSSION

A. Second Amendment Challenge

[1] Jackson challenges the constitutionality of § 922(g)(9) under the Second Amendment. Although he pleaded guilty to the charge, Jackson preserved his constitutional challenge to § 922(g)(9) by raising it in the district court. *Class v. United States*, 583 U.S. 174, 178, 138 S.Ct. 798, 200 L.Ed.2d 37 (2018).

[2, 3] "Challenges to the constitutionality of a statute are reviewed de novo." *United States v. Lynch*, 881 F.3d 812, 817 (10th Cir. 2018). "The court begins its review with the presumption that the statute is constitutional." *Id.*

1. Nature of the Challenge

Jackson moved the district court to declare "§ 922(g)(9) is facially unconstitutional" and to dismiss his indictment as a charge under an unconstitutional statute. *Jackson*, 622 F. Supp. 3d at 1065. During oral argument on appeal, his counsel similarly claimed to be raising a facial challenge by which he sought to vacate his conviction.[2]

[4, 5] A facial challenge "is the most difficult challenge to mount successfully because it requires a defendant to establish that no set of circumstances exists under which the [challenged statute] would be valid." *Rahimi*, 602 U.S. at 693, 144 S.Ct. 1889 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)); *see Salerno*, 481 U.S. at 745, 107 S.Ct. 2095 (holding the overbreadth doctrine has not been recognized outside the context of the First Amendment). To prevail, the government only needs to demonstrate § 922(g)(9) is "constitutional in some of its applications." *Rahimi*, 602 U.S. at 693, 144 S.Ct. 1889.

[6] In this case, the government prevails by demonstrating the statute is "constitutional as applied to the facts of [the defendant's] own case." *Id.* "The fact that the [challenged statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095. Because § 922(g)(9) withstands the as-applied challenge, it neces-

2. To be sure, during oral argument on appeal, Jackson also claimed to be raising what he called an "implied" as-applied challenge. He raised an as-applied challenge for the first time, however, in his supplemental briefing which was filed after this court lifted the abatement in the matter pending the Supreme Court's issuance of a decision in *United States v. Rahimi*, 602 U.S. 680, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024). This belated challenge is contrary to the clear and solitary facial challenge he had raised at the district court. *See United States v. Jackson*, 622 F. Supp. 3d 1063, 1065 (W.D. Okla. 2022) ("Defendant seeks a determination that § 922(g)(9) is facially unconstitutional ... and, if successful, he seeks a dismissal of the charge against him under an unconstitutional statute."). Jackson does not object to the district court's construction of the nature of his challenge.

sarily survives his facial challenge as well. *Rahimi*, 602 U.S. at 693, 144 S.Ct. 1889.

2. *Bruen* Test

[7, 8] 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. "[T]he Second Amendment confers an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 622, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Although this right is "fully applicable to the States," *McDonald v. City of Chicago*, 561 U.S. 742, 749, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), it is not "unlimited," *Heller*, 554 U.S. at 626, 128 S.Ct. 2783.

[9, 10] In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022), the Supreme Court held that the scope of the individual right to keep and bear arms is determined by analyzing constitutional text and history. *See id.* at 17-19, 142 S.Ct. 2111 (interpreting *Heller*). The analysis is conducted through a two-part, burden-shifting test. At the first step, the party asserting the right must establish the plain text of the Second Amendment covers their conduct. *See id.* at 17, 142 S.Ct. 2111. Failure to so establish amounts to a failure to present a claim of a Second Amendment violation. *See id.* If the challenging party is successful, however, the burden shifts to the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24, 142 S.Ct. 2111. If the challenged regulation fits within the nation's "historical tradition of firearm regulation," it is lawful under the Second Amendment. *Id.*

a. Holding of Rahimi

Following *Bruen*, the Supreme Court in *Rahimi* addressed a constitutional challenge to 18 U.S.C. § 922(g)(8). 602 U.S. at 685-86, 144 S.Ct. 1889. Section 922(g)(8) prohibits the possession of a firearm while subject to a domestic violence restraining order. To be prosecuted under § 922(g)(8), an individual must be subject to a restraining order that 1) was issued after a hearing for which the individual received actual notice and had an opportunity to participate; 2) restrains the individual from harassing, stalking, or threatening an intimate partner or a child of the intimate partner; and 3) includes a finding that the individual represents a credible threat to the physical safety of such intimate partner or child. *See* 18 U.S.C. § 922(g)(8)(A)-(C); *see also Rahimi*, 602 U.S. at 688, 144 S.Ct. 1889.

Rahimi held § 922(g)(8) withstands the *Bruen* two-part test because this nation's "tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." 602 U.S. at 700, 144 S.Ct. 1889.[3] The Court identified "two distinct legal regimes" that regulated individuals who physically threatened others with firearms: surety laws and "going armed" laws. *Id.* at 695, 697, 144 S.Ct. 1889.

Surety laws were invoked as a "preventive" measure against all forms of violence. *Id.* at 695-96, 144 S.Ct. 1889 (explaining the applicability of surety laws against spousal abuse and misuse of firearms). Upon a complaint establishing reasonable fear of violence, judicial officers were em-

3. Section 922(g)(8) provides two independent bases for liability. *See* 18 U.S.C. § 922(g)(8)(C)(i), (ii). The Supreme Court limited its analysis to § 922(g)(8)(C)(i), declining to address "whether regulation under Section 922(g)(8)(C)(ii) was also permissible." *Rahimi*, 602 U.S. at 693, 144 S.Ct. 1889.

powered to order the accused to post bond. *See id.* at 696-97, 144 S.Ct. 1889.

"Going armed" laws, on the other hand, represented a restriction upon those who had threatened others with firearms. *See id.* at 697, 144 S.Ct. 1889. Going armed laws proscribed "riding or going armed, with dangerous or unusual weapons, [to] terrify[ ]" others. *Id.* (quotation omitted). Those who violated going armed laws could be ordered to forfeit their firearms. *See id.*

Although neither surety nor going armed laws were "dead ringers" or "historical twins" of § 922(g)(8), *id.* at 692, 144 S.Ct. 1889, they were "relevantly similar" in ways which illustrated the traditional "principles that underpin our regulatory tradition," *id.* at 698, 144 S.Ct. 1889. Taken together, the Court explained, these laws established the tradition of disarming those "found by a court to pose a credible threat to the physical safety of another." *Id.* at 702, 144 S.Ct. 1889.

The *Rahimi* Court then held the application of § 922(g)(8) to the defendant, Zackey Rahimi, was consistent with these principles. *See id.* at 698-700, 144 S.Ct. 1889. Rahimi was subject to a restraining order which satisfied the requirements of § 922(g)(8). *See id.* at 688-89, 144 S.Ct. 1889. The Court held Rahimi's restraining order was a "judicial determination" that he "represent[ed] a credible threat to the physical safety of another." *Id.* at 698-99, 144 S.Ct. 1889 (quotation omitted). Rahimi's penalty was consistent with historical tradition because "going armed laws provided for imprisonment" and "if imprisonment was permissible," the "lesser restriction" of temporary disarmament was also permissible. *Id.* at 699, 144 S.Ct. 1889; *see id.* (observing Rahimi would only be disarmed while his restraining order was active).

b. Bruen *Test – First Step*

[11, 12] The inquiry at the first step of the *Bruen* test comprises three elements: "(1) whether the challenger is part of the people whom the Second Amendment protects, (2) whether the item at issue is an arm that is in common use today for self-defense, and (3) whether the proposed course of conduct falls within the Second Amendment." *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 114 (10th Cir. 2024) (quotations omitted). The text of the Second Amendment is given its "[n]ormal meaning," as it would have been understood by "ordinary citizens in the founding generation." *Id.* (quotation omitted); *see Heller*, 554 U.S. at 634-35, 128 S.Ct. 2783 ("Constitutional rights are enshrined with the scope they were understood to have when people adopted them ...."). The reach of the Second Amendment may nevertheless extend to modern contexts and applications. *See Heller*, 554 U.S. at 582, 128 S.Ct. 2783 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."); *Rocky Mountain Gun Owners*, 121 F.4th at 114.

[13–15] The government concedes the Second Amendment's plain text covers Jackson's conduct. First, "[t]he people, as referred to in the Second Amendment, denotes 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." *Rocky Mountain Gun Owners*, 121 F.4th at 114 (quotation omitted). This includes Jackson, who is a United States citizen. *See id.* at 116-17. His prior criminal convictions do not exclude him from the being a member of the political community. *See id.* at 116; *see also Rahimi*, 602

U.S. at 701, 144 S.Ct. 1889.[4] Second, pistols, the possession of which led to Jackson's conviction, fall squarely within the Second Amendment's definition of "arms." *See Bruen*, 597 U.S. at 32, 142 S.Ct. 2111. Finally, in his motion to declare § 922(g)(9) unconstitutional, Jackson affirmatively asserted his inherent right to possess a weapon for self-defense. The United States did not contest that assertion or claim the issue of intent was factual in nature and subject to the corresponding burdens of proof. *See Jackson*, 622 F. Supp. 3d at 1066. The "inherent right of self-defense [is] central to the Second Amendment right." *Heller*, 554 U.S. at 628, 128 S.Ct. 2783.

c. Bruen *Test – Second Step*

[16] The government, at this second step, bears the burden of establishing § 922(g)(9), as applied to Jackson, is consistent with the "principles that underpin" this nation's regulatory tradition. *Rahimi*, 602 U.S. at 692, 144 S.Ct. 1889. "Why and how the regulation burdens the right are central to this inquiry." *Id.*

[17] "Domestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide." *United States v. Castleman*, 572 U.S. 157, 160, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014) (citations omitted). Felon disarmament laws, however, were not effective in preventing domestic abusers from accessing firearms because, "notwithstanding the harmfulness of their conduct," many perpetrators were convicted of only misdemeanors or not charged at all. *Voisine v. United States*, 579 U.S. 686, 689, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016); *see United States v. Hayes*, 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009). Congress enacted § 922(g)(9) to close this "dangerous loophole." *Hayes*, 555 U.S. at 426, 129 S.Ct. 1079 (quotation omitted).

In *Rogers*, this court analyzed the bases for § 922(g)(9) and § 922(g)(8)'s limitations on an individual's Second Amendment rights. *See* 371 F.3d at 1230. The "possession of a firearm while subject to a domestic protection order and possession of a firearm following a misdemeanor conviction of domestic violence *both* involve a substantial risk ... that physical force may be used against the person or property of another." *Id.* at 1228 (emphasis added). Those whose "background includes domestic violence which advances to either a criminal conviction or the imposition of a protection order [have] a demonstrated propensity for the use of physical violence against others." *Id.* at 1228-29. These "credible threats of violence" led to the Second Amendment "prohibitions [set forth] in § 922(g)(8) and (9)." *Id.* at 1230. Under *Rogers*, the reason § 922(g)(9) burdens an individual's Second Amendment right is therefore relevantly similar to that of § 922(g)(8): to disarm those who pose a clear threat of physical violence to another. *See id.*; *Rahimi*, 602 U.S. at 698, 144 S.Ct. 1889; *see also Bruen*, 597 U.S. at 3, 142 S.Ct. 2111 (explaining analogical reasoning).

Section 922(g)(9) makes it "unlawful for any person ... who has been convicted in any court of a misdemeanor crime of domestic violence ... to ... possess in or affecting commerce, any firearm or ammu-

4. Neither party presents any reason that domestic violence convictions should be treated any differently at this step. The Supreme Court presumed, without any analysis, persons with an outstanding domestic violence restraining order were part of the people. *See id.* at 708, 144 S.Ct. 1889 (Gorsuch, J., concurring) (recognizing how "no one question[ed]" that possession of a firearm by individuals against whom there is a domestic violence restraining order is conduct covered by the text of the Second Amendment).

nition." "Misdemeanor crime of domestic violence," in turn, is defined as "a misdemeanor under Federal, State, Tribal, or local law" which has an element of "use or attempted use of physical force, or the threatened use of a deadly weapon," 18 U.S.C. § 921(a)(33)(A), by a "person with a specified domestic relationship with the victim," *Voisine*, 579 U.S. at 689, 136 S.Ct. 2272. Section 922(g)(9) does not disarm those whose domestic violence misdemeanor convictions were expunged, set aside, or pardoned, unless the expungement or pardon expressly prevents access to firearms. *See* 18 U.S.C. § 921(a)(33)(B)(ii).

[18] Although his indictment references a single conviction of misdemeanor domestic violence, Jackson's criminal history reflects two separate convictions. First, he was charged after grabbing the neck of his domestic partner following an altercation. He applied enough force in his grip to leave visible lacerations on the victim's neck. Before a state court, Jackson pleaded nolo contendere and was convicted of misdemeanor domestic battery under Kansas law. In the second instance, Jackson was charged with misdemeanor domestic assault and battery under Oklahoma law after he punched the face of a woman he was dating, while she was holding the couple's minor child. He was convicted after pleading guilty before a state court.

Both convictions represent "judicial determinations" Jackson engaged in violence against a family member or an intimate partner. *Rahimi*, 602 U.S. at 698-99, 144 S.Ct. 1889. Jackson's acts of domestic violence and his subsequent convictions demonstrate his "propensity for the use of physical violence against others." *Rogers*, 371 F.3d at 1229. By possessing a firearm, Jackson poses a "substantial risk" of using physical force against the person or property of another. *Id.* at 1228. Section 922(g)(9) restrictions are for the purpose of mitigating "demonstrated threats of physical violence." *Rahimi*, 602 U.S. at 699, 144 S.Ct. 1889. Jackson was disarmed for reasons consistent with this nation's tradition of firearm regulation.

Section 922(g)(9) prohibited Jackson from possessing a firearm unless and until one of the conditions identified in § 921(a)(33)(B)(ii) was satisfied. Given the various ways by which his Second Amendment right may be restored, Jackson's penalty was conditional, and not necessarily permanent. *See United States v. Gailes*, 118 F.4th 822, 829 (6th Cir. 2024) (explaining, for the same reason, the "purported permanent ban in § 922(g)(9) may not always be so"). His conditional disarmament is clearly a "lesser restriction" than a permanent ban, the constitutionality of which was upheld by this court post-*Rahimi*. *See Vincent v. Bondi*, 127 F.4th 1263, 1266 (10th Cir. 2025). The burden imposed by § 922(g)(9) is consistent with the nation's tradition of firearm regulation. In sum, § 922(g)(9), as applied to Jackson, is "relevantly similar to [the] founding era regimes in both why and how it burdens [his] Second Amendment right." *Rahimi*, 602 U.S. at 698, 144 S.Ct. 1889. Section 922(g)(9) therefore survives Jackson's constitutional challenge.

[19] Jackson raises several arguments to the contrary. He first argues § 922(g)(9) lacks relevant historical analogues because there is no tradition of disarming misdemeanants. Drawing a categorical distinction between felons and misdemeanants, he claims the district court erred by relying on dicta from *Heller* which recognized the "longstanding prohibition" of disarming felons. 554 U.S. at 626-27, 128 S.Ct. 2783. Put differently, Jackson's position is that there must be a historical tradition of disarming misdemeanants for § 922(g)(9) to be constitutional as applied to him. This argument fails to analyze the "principles

underlying the Second Amendment," and erroneously points out the lack of a "historical twin." *Rahimi*, 602 U.S. at 692, 144 S.Ct. 1889. Jackson's argument is at odds with *Rahimi* which recognized § 922(g)(8) was "by no means identical" to surety or going armed laws but found them to be relevantly similar. *Id.* at 698, 144 S.Ct. 1889. Even in the absence of identical historical antecedents, § 922(g)(9) may be constitutionally applied to Jackson if consistent with the principle of disarming individuals who pose "a clear threat of physical violence to another." *Id.*

[20] Jackson also asks this court to adopt a construction of *Rahimi* in which only those presenting an immediate threat to the physical safety of others may be disarmed. This position does not find support in *Rahimi* which, in declining to "undertake an exhaustive historical analysis," held "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 702, 144 S.Ct. 1889. Nothing about this holding suggests only those posing an immediate threat may be disarmed.[5]

To the extent that Jackson asserts his conviction should be treated differently from other misdemeanor domestic violence convictions, such an argument also falls short. In *Vincent*, this court upheld the constitutionality of § 922(g)(1), which disarms convicted felons. *See* 127 F.4th at 1264. *Vincent* squarely rejected the argument that those who are convicted of nonviolent felonies could not constitutionally be disarmed, thereby refusing to draw "constitutional distinctions" based on the nature of the offense underlying the conviction. *Id.* at 1266; *see United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024) (concluding "that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)"). In an unpublished opinion, this court similarly rejected the contention that "§ 922(g)(9) allows for individual assessments of the risk of violence." *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (citing *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (unpublished disposition attached as an appendix to a published dissent)).[6] Regardless of the supposed remoteness of the offense or the absence of a firearm in the underlying conduct, Jackson remains a convicted domestic violence misdemeanant.

B. Reasonableness of the Sentence

[21] Next, Jackson challenges the procedural and substantive reasonableness of his sentence. Because he raised his objections at the district court, his sentence is reviewed "under an abuse of discretion standard for procedural and substantive

5. Indeed, Congress intended § 922(g)(9) to operate as a preventive measure to curb the escalation of the severity of domestic violence to homicides. *See United States v. Castleman*, 572 U.S. 157, 160, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014) (holding domestic violence has a tendency to escalate over time); *United States v. Hayes*, 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009) (''Firearms and domestic strife are a potentially deadly combination nationwide.''); *see also Rahimi*, 602 U.S. at 695, 144 S.Ct. 1889 (explaining surety laws also functioned as a form of ''preventive justice''). To limit the scope of § 922(g)(9) to only those defendants who pose an immediate threat would be inconsistent with the purpose of the provision.

Even supposing, solely for the sake of argument, that only those who pose an immediate threat could be disarmed, the record facts do not favor Jackson. He fired multiple gunshots at another vehicle on the road and hid firearms in a minor's backpack.

6. *In re United States*, 578 F.3d 1195 (10th Cir. 2009) (unpublished) is cited as a persuasive, but not precedential, authority. 10th Cir. R. 32.1(A).

reasonableness." *United States v. Lucero*, 747 F.3d 1242, 1246 (10th Cir. 2014).

[22–25] Procedural reasonableness "requires, among other things, a properly calculated Guidelines range." *United States v. Saavedra*, 523 F.3d 1287, 1289 (10th Cir. 2008). "When evaluating the district court's interpretation and application of the Sentencing Guidelines, we review legal questions de novo and factual findings for clear error, giving due deference to the district court's application of the guidelines to the facts." *United States v. Zamora*, 97 F.4th 1202, 1207-08 (10th Cir. 2024) (quotation omitted). Substantive reasonableness, on the other hand, requires the sentence to be "reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *United States v. Chavez*, 723 F.3d 1226, 1233 (10th Cir. 2013) (quotation omitted). A sentence is substantively unreasonable if it "exceed[s] the bounds of permissible choice, given the facts and the applicable law." *Id.* (quotation omitted).

[26] Although Jackson disputes multiple aspects of his sentence, the basis for his dispute boils down to a single issue. He argues the district court erred by determining his possession of the firearms on the day of his arrest was conduct relevant to the offense of his conviction. Jackson asserts this purported error resulted in a procedurally unreasonable sentence because it led to an improperly calculated Guidelines range. He also argues his resulting sentence was substantively unreasonable because it, being based on an incorrectly high Guidelines range, went unreasonably beyond what a correct Guidelines range would recommend.

[27] The district court's factual findings supporting the determination of relevant conduct is reviewed for clear error; however, the "ultimate determination of relevant conduct" is reviewed de novo. *United States v. Damato*, 672 F.3d 832, 838 (10th Cir. 2012).

The district court determined Jackson's possession of multiple firearms—including one capable of accepting a large-capacity magazine—to be relevant conduct. *See* U.S.S.G. § 1B1.3. The district court explained Jackson kept firearms at the residence as part of the same course of conduct as his offense of conviction. *See* U.S.S.G. § 1B1.3 cmt. n.5(B)(ii). According to the district court, Jackson "repeated" the same status-based offense within four months of the offense of conviction.

Jackson argues the district court erred because there is not a sufficient nexus between the two instances of conduct. He insists the firearms found at the residence were not related to his offense of conviction and claims four months is sufficient enough time to dissociate these two occurrences. He, however, does not contest the district court's finding that he, in fact, possessed the three firearms. The government responds by pointing to the factual similarity between the two instances of conduct. It also notes how the two instances were separated only by a short period of time.

[28, 29] Determination of relevant conduct is based on "whether there is a strong relationship between the uncharged conduct and the convicted offense." *United States v. Allen*, 488 F.3d 1244, 1255 (10th Cir. 2007) (quotation omitted). The government must demonstrate, by a preponderance of the evidence, "a significant similarity, regularity, and temporal proximity" between the uncharged conduct and the offense of conviction. *Id.* (quotation omitted). In the absence of one of these factors, "a stronger presence of at least one of the other factors is required." U.S.S.G. § 1B1.3 cmt. n.5(B)(ii).

Possession of other firearms is conduct significantly similar to a misdemeanant-in-possession charge. *See United States v. Garcia*, 946 F.3d 1191, 1204 (10th Cir. 2020). As a defendant convicted of a § 922(g)(9) crime, Jackson's "additional instances of firearm possession may be found 'not merely similar but identical.'" *See id.* (quoting *United States v. Windle*, 74 F.3d 997, 1000 (10th Cir. 1996)). A gap of four months, which separated the offense of conviction and the discovery of additional firearms upon Jackson's arrest, is not too remote for a same-course-of-conduct determination. *See id.* at 1210 (holding a gap of one year between instances of conduct was not too remote). The "minimum requirement" of regularity, which is "two instances of conduct," is also satisfied here. *United States v. Svacina*, 137 F.3d 1179, 1183 (10th Cir. 1998); *see also Garcia*, 946 F.3d at 1206-07 (acknowledging the likelihood the defendant possessed a firearm "each and every day" during the time between the purported relevant conduct and the offense of conviction). Thus, the district court did not err in determining Jackson's possession of firearms at the residence was relevant conduct.

[30, 31] All three of Jackson's challenges to the reasonableness of his sentence fail as a result. The district court did not abuse its discretion by calculating Jackson's base offense level to be twenty upon its assessment that, as part of his offense, he possessed a firearm capable of accepting a large-capacity magazine. *See* U.S.S.G. § 2K2.1(a)(4)(B). Nor did the district court abuse its discretion by further increasing the offense level by two based on its assessment that his offense involved five firearms. *See* U.S.S.G. § 2K2.1(b)(1)(A). Because Jackson fails to establish the Guidelines range was incorrectly calculated, his sentence falls within the range as determined by the district court. "A within-guideline-range sentence that the district court properly calculated is entitled to a rebuttable presumption of reasonableness on appeal." *United States v. Wireman*, 849 F.3d 956, 964 (10th Cir. 2017) (quotation omitted). Because Jackson does not raise any arguments to rebut this presumption, his substantive challenge falls short.

IV. CONCLUSION

The judgment of conviction and sentence of the district court are **affirmed**.

Ernestina CRUZ, as personal representative of the Estate of Gilbert Valencia; G.R.V., a minor, through next friend Marianna Wheeler, Plaintiffs - Appellants,

v.

CITY OF DEMING; Lee Cook Jordan; Sergio Quezada; Cristobal Paz; Adam Aragon; Robert Chavez; Benjamin Sanchez; David Acosta; Ashley Standridge, Defendants - Appellees,

and

New Mexico Department of Public Safety; Luna County; Arturo Baeza Defendants.

No. 24-2091

United States Court of Appeals,
Tenth Circuit.

May 28, 2025

Background: Estate of suspect, who was fatally shot by officers who responded to

IN THE

Supreme Court of the United States

DEJUAN DION BRUNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX C

Order Denying Motion to Dismiss Indictment Based on the Unconstitutionality of 18 U.S.C. § 922(g)(9) (March 27, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CR-22-518-SLP
	)	
DEJUAN DION BRUNER,	)	
	)	
Defendant.	)	

O R D E R

Before the Court is Defendant's Motion to Dismiss the Indictment Based on the Unconstitutionality of 18 U.S.C. § 922(g)(9) with Brief in Support [Doc. No. 21]. The Government has filed its Response [Doc. No. 27] and Defendant has filed a Reply [Doc. No. 31]. The matter is fully briefed and at issue. For the reasons that follow, Defendant's Motion is DENIED.

I. Introduction

Defendant is charged by Indictment under 18 U.S.C. § 922(g)(9) with Prohibited Person in Possession of a Firearm. Specifically, § 922(g)(9) makes it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess any firearm or ammunition shipped or transported in interstate or foreign commerce. Relying on *N.Y. State Rifle & Pistol Assn. v. Bruen*, 142 S.Ct. 2111 (2022), Defendant brings a Second Amendment facial challenge to the constitutionality of § 922(g)(9).

Across the country, Defendants charged with various offenses under § 922(g) have raised similar challenges. Post-*Bruen*, to date, the clear weight of authority has upheld the constitutionality of § 922(g)(9).[1] For the reasons that follow and based on the record presented, the Court finds no reason to reject that clear weight of authority.

II. Governing Standard

Rule 12(b)(1) of the Federal Rules of Criminal Procedure provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can

[1] *See United States v. Porter*, No. CR-22-00277, 2023 WL 2527878 (W.D. La. Mar. 14, 2023) ("Section 922(g)(9) is a constitutional limitation on Porter's Second Amendment right to bear arms."); *United States v. Hammond*, No. 4:22-cr-00177-SHL-HCA, 2023 WL 2319321 at *7 (S.D. Iowa Feb. 15, 2023) (rejecting defendant's facial and as-applied constitutional challenges to § 922(g)(9) finding that nothing in *Bruen* undermines the core holding of Eighth Circuit precedent that "there is sufficient historical precedent from the Founding era to justify the constitutionality of firearm restrictions on those who have committed, or are found through a judicial process to be at risk of committing, acts of domestic violence"); *United States v. Farley*, No. 22-cr-30022, 2023 WL 1825066 at *3 (C.D. Ill. Feb. 8, 2023) (upholding constitutionality of § 922(g)(9) post-*Bruen* and noting that "every court that has been asked to invalidate § 922(g)(9) on constitutional grounds has declined to do so"); *United States v. Gleaves*, No. 3:22-cr-00014, 2023 WL 1791866 at *4 (M.D. Tenn. Feb. 6, 2023) (concluding, like the "majority of courts to address the issue post-*Bruen*" that § 922(g)(9) is constitutional); *United States v. Bernard*, No. 22-CR-03-CJW-MAR, 2022 WL 17416681 at *8 (N.D. Iowa Dec. 5, 2022) ("This Court joins every other court thus far in addressing Section 922(g)(9) in finding it constitutional."); *United States v. Anderson*, No. 2:21CR00013, 2022 WL 10208253 at *1 (W.D. Va. Oct. 17, 2022) (Applying *Bruen* and concluding that "the government has provided sufficient evidence of historical tradition, that, by analogy, applies to uphold § 922(g)(9)."); *United States v. Nutter*, No. 2:21-cr-00142, 2022 WL 3718518 at *8 (S.D. W. Va. Aug. 29, 2022) (upholding constitutionality of § 922(g)(9) post-*Bruen* and concluding that "[n]othing in the historical record suggests a popular understanding of the Second Amendment at the time of founding that extended to preserving gun rights" for persons convicted of domestic violence offenses). In addition to the cited authority, two post-*Bruen* decisions from this judicial district have upheld the constitutionality of § 922(g)(9). *See United States v. King*, No. CR-22-488-J (W.D. Okla.) (Order Mar. 9, 2023); *United States v. Jackson*, No. CR-22-59-D, 2022 WL 3582504 at *4 (W.D. Okla. Aug. 19, 2022).

determine without a trial on the merits." Further Rule 12(b)(3) permits a defendant to challenge an indictment before trial where a "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010). In reviewing such a challenge, the court assesses the indictment solely on the basis of the allegations made on its face and takes those allegations as true. *United States v. Todd*, 446 F.3d 1062, 1067 (10th Cir. 2006). As stated, Defendant brings a facial challenge to 18 U.S.C. § 922(g)(9). Thus, the Court may consider Defendant's challenge as a matter of law.

III. Discussion

In *Bruen*, the Supreme Court announced a new standard governing the relevant inquiry as to the constitutionality of regulated conduct under the Second Amendment.[2] The Court held that "the government must affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*., 142 S.Ct. at 2127. As the Court further instructed:

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

Id. at 2129-30.

[2] The Second Amendment provides that: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

In seeking dismissal of the Indictment, Defendant argues that under *Bruen's* new standard, the Second Amendment's plain text covers Defendant's conduct and that no historical tradition of firearm regulation supports the prohibition contained in § 922(g)(9).

In response, the Government does not directly address whether the Second Amendment's plain text covers Defendant's conduct. The Court, therefore, assumes that it does.

But the Court finds, even making such an assumption, the Government has met its burden to show that the prohibition contained in § 922(g)(9) is consistent with the Nation's historical tradition of firearm regulation. To make this assessment, *Bruen* instructs that district courts should consider historical precedent from before, during, and after the founding to see whether it "evinces a comparable tradition of regulation" as the challenged regulation, in a process that often involves "reason by analogy." *Id*., 142 S.Ct. at 2131-32.

Post-*Bruen*, courts to address the constitutionality of section 922(g)(9) have turned to the long-standing prohibition, supported by historical tradition, of the possession of firearms by felons. *See, e.g., Jackson*, 2022 WL 3582504 at *3 (relying on *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) for the proposition that disarming felons is not inconsistent with the Second Amendment); *Bernard*, 2022 WL 17416681 at *7 ("Prohibiting violent criminals from possessing firearms, such as those who have been convicted of a misdemeanor crime of domestic violence, is consistent with and analogous to prohibiting felons from possessing firearms."). The Court concurs with the conclusion reached in *Jackson*, that "the government's reliance on general historic tradition is

sufficient to satisfy its burden to justify the firearm regulation of § 922(g)(9)" and that "[d]omestic violence misdemeanants can logically be viewed as relevantly similar to felons who should be denied weapons for the same reasons." *Jackson*, 2022 WL 3582504 at *3 (cleaned up).[3]

IV. Conclusion

The Court joins those other courts to address the constitutionality of § 922(g)(9) and declines to hold that the statutory provision is unconstitutional.[4]

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss the Indictment Based on the Unconstitutionality of 18 U.S.C. § 922(g)(9) with Brief in Support [Doc. No. 21] is DENIED.

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[3] In *Jackson*, the court further found notable that "the Supreme Court has repeatedly addressed the reach of § 922(g)(9) without questioning its constitutionality," including, most recently, *Voisine v. United States*, 579 U.S. 686, 692 (2016). *Id*. at *3.

[4] In his Reply, Defendant relies on the Fifth Circuit's recent decision in *United States v. Rahimi*, 59 F.4th 163 (5th Cir. Feb. 2, 2023), withdrawn and superseded, -- F.4th --, 2023 WL 2317796 (5th Cir. Mar. 2, 2023), to argue there is no historical analogue. In *Rahimi*, the Fifth Circuit held, under *Bruen*, that 18 U.S.C. § 922(g)(8), which prohibits possession of a firearm while under a domestic violence restraining order, is unconstitutional. *Rahimi* is not binding precedent on district courts within the Tenth Circuit. And significantly, *Rahimi* involves the interpretation of a different statutory provision than that at issue here. As at least one court upholding the constitutionality of § 922(g)(9) and distinguishing *Rahimi* has noted: "the Fifth Circuit heavily emphasized that Rahimi had *not been criminally convicted* nor was he accused of any offense" and that the "domestic abuse proceeding that served as the basis for Section 922(g)(8)'s application was *purely civil*." *Porter*, 2023 WL 2527878 at *3 (emphasis added). Conversely, section 922(g)(9) restricts the Second Amendment rights of those guilty of a criminal misdemeanor conviction. As the Fifth Circuit stated in *Rahimi*: "[t]he distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history. . . . It is therefore significant that § 922(g)(8) works to eliminate the Second Amendment right of individuals subject to merely civil process." *Rahimi*, 2023 WL 2317796 at *7, n. 7.

IT IS SO ORDERED this 27th day of March, 2023.

SCOTT L. PALK
UNITED STATES DISTRICT JUDGE