N.D.N.Y.
23-cr-187
Nardacci, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of November, two thousand twenty-five.

Present:

Debra Ann Livingston,
Chief Judge,
Barrington D. Parker,
Susan L. Carney,
Circuit Judges.

United States of America,

Appellee,

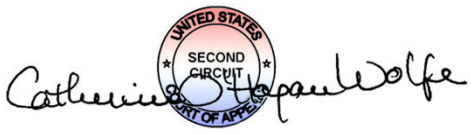
v. 25-289

Richard Brundige,

Defendant-Appellant.

The Government moves for summary affirmance. Upon due consideration, it is hereby ORDERED that the motion is GRANTED. *See Zherka v. Bondi*, 140 F.4th 68, 74–96 (2d Cir. 2025).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff, 8:23-CR-187 (AMN)

v.

RICHARD BRUNDIGE,

Defendant.

APPEARANCES:

HON. CARLA FREEDMAN
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Northern District of New York
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OF COUNSEL:

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Assistant Federal Public Defender

Hon. Anne M. Nardacci, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Defendant Richard Brundige ("Defendant") is charged with one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). *See* Dkt. No. 1 (the "Indictment"). Currently before the Court is Defendant's pretrial motion to dismiss the Indictment for failure to state an offense pursuant to Rule 12(b)(3)(B)(v) of the Federal Rules of Criminal Procedure ("Fed. R. Crim P."), on the ground that 18 U.S.C. § 922(g)(1) is both facially unconstitutional and

unconstitutional as applied to Defendant because it violates the Second Amendment of the United States Constitution. Dkt. No. 19 (the "Motion"). The Government filed an Opposition, Dkt. No. 20, and Defendant filed a Reply, Dkt. No. 23.

For the reasons set forth below, Defendant's Motion is denied.

II. BACKGROUND

Defendant has four felony convictions. First, in 2004, Defendant was convicted of Attempted Assault in the Second Degree, New York Penal Law ("NYPL") §120.05(9). Dkt. No. 19 at 2; Dkt. No. 20 at 2.[1] Second, on January 20, 2012, Defendant was convicted of Criminal Possession of a Weapon in the Third Degree, NYPL §265.02, and sentenced to an indeterminate term of 2 to 4 years' imprisonment. *Id.* Third, on May 12, 2014, Defendant was convicted of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, New York Vehicle and Traffic Law §511(3), and sentenced to an indeterminate term of 1 to 3 years' imprisonment. *Id.* Finally, on March 3, 2019, Defendant was convicted of Possession of a Forged Instrument, NYPL §170.25, and received an indeterminate sentence of 42 months to 7 years' imprisonment. Dkt. No. 19 at 2; Dkt. No. 20 at 2-3.

On May 10, 2023, a grand jury in the Northern District of New York returned an indictment charging Defendant with the instant offense of one count of possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8) ("Sections 922(g)(1) and 924(a)(8)").[2]

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[1] Defendant's Motion alleges that he was convicted upon a plea of guilty on April 20, 2004 and was sentenced to "five years' probation," Dkt. No. 19 at 2, while the Government's Opposition alleges that Defendant was convicted on August 20, 2004, and sentenced to "6 months' imprisonment," Dkt. No. 20 at 2.

[2] Section 922(g)(1) provides: "It shall be unlawful for any person . . . 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." Section 924(a)(8) provides: "[w]hoever knowingly violates

See Dkt. No. 1. The Indictment alleges that Defendant "knowing he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed a firearm and ammunition, that is, a Marlin Mode 336W lever action rifle bearing serial number 97007490, and seventeen (17) rounds of Winchester .30-30 ammunition, and the firearm and ammunition were in and affecting interstate commerce." *Id.*

III. STANDARD OF REVIEW

Rule 12(b)(1) of the Fed. R. Crim. P. allows a defendant to raise by pretrial motion "any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Such a pre-trial motion includes a motion alleging a "defect in the indictment" such as "failure to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v); *see United States v. Grimes*, No. 22-CR-297(KAM), 2023 WL 8473761, at *2 (E.D.N.Y. Dec. 7, 2023) ("A pre-trial motion to dismiss the indictment is a proper vehicle to raise a constitutional challenge to the charging statute.") (citation omitted). In evaluating a motion to dismiss the indictment under Rule 12(b), a court generally "accept[s] as true all of the allegations of the indictment." *See United States v. Greenberg*, No. 21-cr-92, 2022 WL 827304, at *1 (S.D.N.Y. Mar. 9, 2022) (quoting *United States v. Goldberg*, 756 F.2d 949, 950 (2d Cir. 1985)).

IV. DISCUSSION

Although Defendant concedes that he has prior felony convictions, he has moved to dismiss the Indictment charging him with a violation of Section 922(g)(1) as an unconstitutional restriction on his Second Amendment right to keep and bear arms. *See* Dkt. No. 19. Specifically, Defendant argues that in light of the recent Supreme Court case, *New York State Rifle & Pistol Ass'n, Inc. v.*

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subsection . . . (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both."

Bruen, 597 U.S. 1 (2022) ("*Bruen*"), the Second Circuit case *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013), which upheld the constitutionality of Section 922(g)(1) under the Second Amendment, is no longer "binding precedent," and instead, the Court must apply the two-step framework set forth in *Bruen.* Dkt. No. 23 at 2-3. In Opposition, the Government argues, *inter alia*, *Bogle* continues to apply even after *Bruen*, and therefore *Bogle* forecloses Defendant's challenge to the validity of Section 922(g)(1). Dkt. No. 20 at 4-9.

A. Supreme Court and Second Circuit Precedent

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court found that "the Second Amendment confer[s] an individual right to keep and bear arms," and held unconstitutional a District of Columbia law that "ban[ned] handgun possession in the home." *Id.* at 595, 598-99, 635. Thereafter, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the individual Second Amendment right to keep and bear arms applies to state and local governments through the Fourteenth Amendment and invalidated a set of municipal statutes that banned handguns in the home. *Id.* at 767-68, 778.

Although both *Heller* and *McDonald* invalidated laws that banned handguns in the home, the Supreme Court cautioned that the Second Amendment right is not unlimited and regulatory measures such as a ban on felons possessing firearms remained constitutional. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited," and "nothing in [this] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."); *McDonald*, 561 U.S. 786 ("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 …. We repeat those assurances here.") (internal quotation marks omitted).

Following *Heller* and *McDonald*, the Second Circuit in *Bogle* addressed whether Section 922(g)(1) violates the Second Amendment. A unanimous panel "join[ed] every other circuit to consider the issue in affirming that [Section] 922(g)(1) is a constitutional restriction on the Second Amendment rights of convicted felons." *Bogle*, 717 F.3d at 281-82. In reaching this conclusion, the Second Circuit noted that the Supreme Court "clearly emphasized that [*Heller* and *McDonald*] should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.'" *Id*. at 281 (quoting *Heller,* 554 U.S. at 626).

Nearly a decade later in *Bruen*, the Supreme Court considered the validity of New York's pistol licensing scheme for carrying a handgun in public under the Second Amendment. *Bruen*, 597 U.S. 1. The Court held that an "individual's right to carry a handgun for self-defense [extends] outside the home," and found New York's licensing scheme unconstitutional because it required individuals to demonstrate "a special need for self-defense" before the state would provide a public-carry license. *Id.* at 10-11. At the same time, the Court reconfirmed *Heller* and *McDonald,* finding that "the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *Id*. at 8-9.

The Supreme Court in *Bruen* set forth a two-step framework to determine whether a government regulation restricting firearms violates 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. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

Id. at 24.[3]

B. Section 922(g)(1) is Constitutional

The Court finds that Section 922(g)(1) is constitutional and does not violate the Second Amendment under the Second Circuit's decision in *Bogle*, which is binding on this Court. The Supreme Court in *Bruen* reaffirmed *Heller* and *McDonald*, stating that in those cases "we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *See Bruen*, 597 U.S. at 8. The Supreme Court "did not state in *Bruen* that either *Heller* or *McDonald* or both were abrogated in any way." *See Warren*, 2023 WL 5978029, at *4 (citation omitted). In fact, "throughout the opinion, the *Bruen* majority repeatedly referred to the petitioners before it as two 'ordinary' and 'law-abiding' citizens with 'ordinary self-defense needs' and repeatedly characterized its Second Amendment jurisprudence as providing 'law-abiding' citizens with the right to possess handguns." *Id.* (quoting *Bruen*, 597 U.S. at 1-3, 15, 38, 60, 70-72, 74-75, 78-79).[4] Therefore, "it is clear that

[3] In *Bruen*, the Supreme Court noted that following *Heller* and *McDonald*, the Courts of Appeals, including the Second Circuit, adopted a two-step "framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Bruen*, 597 U.S. at 17. The Supreme Court "decline[d] to adopt that two-part approach." *Id.*; *see also United States v. Hampton,* No. S2 21-CR-766 (JPC), 2023 WL 3934546, at *10 n.15 (S.D.N.Y. June 9, 2023) (explaining that, under the old "two-step" framework, courts first would "'determine whether the challenged legislation impinges upon conduct protected by the Second Amendment,' and, if so, 'the appropriate level of scrutiny to apply and evaluate the constitutionality of the law using that level of scrutiny'") (quoting *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018)); *United States v. Warren*, No. 22-CR-231(DLI), 2023 WL 5978029, at *2 (E.D.N.Y. Sept. 14, 2023) (noting that *Bruen* "put an end" to the two-step approach used by the Courts of Appeals following *Heller* and *McDonald*).

[4] Moreover, the concurring and dissenting opinions of six justices specifically reiterated that *Bruen* did not abrogate *Heller*'s and *McDonald's* determination that restrictions may be imposed on who can lawfully possess a firearm. *See Bruen*, 597 U.S. at 72 (Alito, J., concurring) (the Court's holding "decide[d] nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun," or "disturbed anything that [the Court] said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns"); *id.* at 80-81 (Kavanaugh, J., joined by Roberts, C.J., concurring) ("Properly interpreted, the Second

Bruen did not overrule *Bogle* . . . [or] cast[] doubt on *Bogle* . . . such that there is a conflict, incompatibility, or inconsistency between *Bruen* and Second Circuit precedent." *See United States v. Mingues*, 5:23-CR-00081 (BKS), Memorandum Decision and Order at 10 (N.D.N.Y. filed December 23, 2023).

Following *Bruen*, district courts in this Circuit have repeatedly found that *Bruen* did not abrogate *Heller's* and *McDonald's* determinations regarding government regulation of felons possessing firearms. *See, e.g.*, *Hampton*, 2023 WL 3934546, at *11 ("*Bruen* reaffirms the holdings of *Heller* and *McDonald*"); *United States v. Garlick*, No. 22-CR-540 (VEC), 2023 WL 2575664, at *4 (S.D.N.Y. Mar. 20, 2023) ("the majority stressed that *Bruen* is 'consistent' with [*Heller* and *McDonald*]"); *United States v. King*, 634 F. Supp. 3d 76, 83 (S.D.N.Y. 2022) ("the *Bruen* majority opinion makes abundantly clear that *Heller* and *McDonald* stand as controlling precedents"); *United States v. Delima*, No. 2:22-CR-00111, 2023 WL 6443925, at *3 (D. Vt. Oct. 3, 2023) ("The majority in *Bruen* explained that its decision not only did not abrogate *Heller* but was consistent with *Heller* and *McDonald*") (internal quotation marks and citation omitted).

Likewise, district courts in this Circuit have also repeatedly found that *Bogle* '"turned what [Defendant] characterizes as 'dicta' in *Heller* and *McDonald* into binding precedent.'" *See Warren*, 2023 WL 5978029, at *5 (quoting *Hampton*, 2023 WL 3934546, at *12); *compare* Dkt. No. 23 at 2 (arguing that *Bogle* is no longer binding on this Court as to the constitutionality of

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Amendment allows a 'variety' of gun regulations. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." (alteration in original) (quoting *Heller*, 554 U.S. at 626, 636)); *id.* at 2189 (Breyer J., joined by Sotomayor, and Kagan, JJ., dissenting) ("Like Justice Kavanaugh, [we] understand the Court's opinion today to cast no doubt on that aspect of *Heller's* holding . . . [that does not prohibit], for example, firearms possession by felons."); *see also United States v. Craft,* No. 23-CR-00178 (PMH), 2023 WL 6215326, at *2 n.3 (S.D.N.Y. Sept. 25, 2023) (noting that "six justices in *Bruen* expressed support for the bar on felons possessing firearms").

Section 922(g)(1) because it relied on dicta from *Heller*), *with United States v. Harrison,* No. 3:22-CR-455 (DNH), 2023 WL 4670957, at *6, *8 (N.D.N.Y. July 20, 2023) (observing that "about 140 district courts" and "multiple circuits have already considered and rejected" *Bruen*-based challenges to Section 922(g)(1), and agreeing that "*Bogle* remains binding precedent in this Circuit on the constitutional question of felon disarmament under [Section] 922(g)(1)"). This Court agrees.

The principal case cited by Defendant, *Range v. Att'y Gen*., 69 F.4th 96 (3d Cir. 2023) (*en banc*), does not change this Court's conclusion that Section 922(g)(1) is constitutional. In *Range*, the Third Circuit, sitting *en banc*, held that Section 922(g)(1) was unconstitutional as applied to a defendant convicted of making a false statement to obtain food stamps. *Id.* at 106. The Court noted that its decision was "a narrow one," based on the particular facts of the case. *Id*. Moreover, district courts in this Circuit have declined to follow *Range*. For example, the *Warren* court noted that *Range* "(1) is not binding in [the Second] Circuit; (2) is an outlier amongst courts across the country analyzing post-*Bruen* constitutional challenges to [Section] 922(g)(1); and (3) most importantly, was limited in precedential value by the *Range* [c]ourt itself to the specific and unusual facts of that case." 2023 WL 5978029, at *6; *see also Harrison*, 2023 WL 4670957, at *8 (declining to extend *Range* to a defendant with a "federal drug conviction"); *United States v. Sternquist*, No. 22-CR-473 (DLI), 2023 WL 6066076, at *6 (E.D.N.Y. Sept. 15, 2023) (recognizing that the *Range* decision "was limited in precedential value by the *Range* [c]ourt itself to the specific and unusual facts of that case"); *United States v. Davila*, No. 23-CR-292 (JSR), 2023 WL 5361799, at *1-5 (S.D.N.Y. Aug. 22, 2023) (rejecting *Range* and denying a motion to dismiss the indictment under Section 922(g)(1)).

Here, Defendant has four prior felony convictions for attempted assault, criminal

possession of a weapon, aggravated unlicensed operation of a motor vehicle, and possession of a forged instrument, each of which was "punishable by imprisonment for a term exceeding one year." Dkt. No. 19 at 2; Dkt. No. 20 at 2-3. The Indictment alleges that Defendant knowingly possessed a firearm and ammunition in violation of Section 922(g)(1). *See Craft*, 2023 WL 6215326, at *3 ("Defendant's prior felony convictions, which are punishable by a term of imprisonment exceeding one year, place him 'squarely within [Section] 922(g)(1).'") (quoting *Sternquist*, 2023 WL 6066076, at *5).

Therefore, this Court joins the other district courts in this Circuit which have considered a defendant's post-*Bruen* challenge to the constitutionality of Section 922(g)(1) in finding that *Bogle* remains binding precedent in this Circuit.[5] As a result, the Court finds that Section 922(g)(1) is constitutional on its face and as applied to Defendant and does not violate the Second Amendment under established Second Circuit precedent. *See Fayton,* 2023 WL 8275924, at *3 (noting that a district court is bound by published decisions of the Second Circuit unless the decision is overruled by the Second Circuit *en banc* or by the Supreme Court) (citing *United States v. Afriyie*, 27 F.4th

[5] Every in-circuit district court that this Court is aware of which has considered a post-*Bruen* challenge to the constitutionality of Section 922(g)(1) has found that *Bogle* remains binding. *See, e.g.*, *United States v. Fayton,* No. 1:23-CR-00001 (JLR), 2023 WL 8275924, at *5 (S.D.N.Y. Nov. 30, 2023) ("[T]he Court is aligned with every other Judge in this District who . . . concluded that *Bogle* survives *Bruen*") (collecting cases); *Davila*, 2023 WL 5361799, at *2 ("*Bogle*'s holding thus remains binding on this Court."); *Hampton*, 2023 WL 3934546, at *12 (explaining that *Bruen* "does not disrupt or abrogate *Heller* and *McDonald's* endorsements of felon-in-possession laws" and did not disturb the Second Circuit's binding precedent in *Bogle*); *Garlick*, 2023 WL 2575664, at *5 ("*Bruen* does not alter the holding of *Bogle*[.]"); *United States v. Barnes*, No. 22-CR-43 (JPO), 2023 WL 2268129, at *2 (S.D.N.Y. Feb. 28, 2023) ("Because *Bruen* did not disturb either of those two precedents, the Second Circuit's holding in *Bogle* continues to govern this issue."); *King*, 634 F. Supp. 3d at 83 (upholding Section 922(g)(1) as constitutional in light *of Bogle); Sternquist*, 2023 WL 6066076, at *5 ("[T]his Court finds that [Section] 922(g)(1) is constitutional on its face and does not violate the Second Amendment under established Second Circuit precedent."); *United States v. Lane*, No. 5:22-CR-132, 2023 WL 5614798, at *6 (D. Vt. Aug. 24, 2023) (collecting cases and citing *Bogle* to support conclusion that Section 922(g)(1) is constitutional after *Bruen*).

161, 168 (2d Cir. 2022); *United States v. Diaz*, 122 F. Supp. 3d 165, 179 (S.D.N.Y. 2015), *aff'd*, 854 F.3d 197 (2d Cir. 2017)).

Accordingly, Defendant's Motion to dismiss the Indictment is Denied.[6]

V. CONCLUSION

Accordingly, the Court hereby

ORDERS that Defendant's motion to dismiss the Indictment, Dkt. No. 19, is **DENIED;** and the Court further

ORDERS that the Clerk serve a copy of this Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: January 4, 2024
Albany, New York

Anne M. Nardacci
U.S. District Judge

[6] Because the Court finds that Section 922(g)(1) is constitutional under Second Circuit precedent, the Court will not address Defendant's arguments related to *Bruen's* two-step approach. *See, e.g., Warren,* 2023 WL 5978029, at *6 ("In finding [Section] 922(g)(1) constitutional under Second Circuit precedent, this Court joins the courts in this Circuit that have ended their analysis of [Section] 922(g)(1)'s constitutionality based on *Bogle*'s binding effect and it need not engage in *Bruen*'s textual and historical inquiries."); *Hampton,* 2023 WL 3934546, at *13 (finding that the court "need not address" the two-step framework in *Bruen* because "binding Second Circuit precedent, which followed *Heller* and *McDonald*, holds that section 922(g)(1) is constitutional"); *Barnes*, 2023 WL 2268129, at *2 (same); *Delima*, 2023 WL 6443925, at *2 (same).