

APPENDIX

**United States Court of Appeals
for the Second Circuit**

AUGUST TERM 2024

No. 24-1943-cr

UNITED STATES OF AMERICA,
Appellee,

v.

STEVEN GOMEZ,
Defendant,

ADAM GOMEZ
Defendant-Appellant.

ARGUED: MAY 22, 2025

DECIDED: NOVEMBER 17, 2025

Before: KEARSE, JACOBS, and LOHIER, *Circuit Judges.*

Defendant-Appellant, Adam Gomez, appeals the judgment of the United States District Court for the Northern District of New York (Scullin, J.) entered following his guilty plea to receiving and possessing a firearm with an obliterated serial number. On appeal, Gomez challenges the constitutionality of his statute of conviction, 18 U.S.C. § 922(k), as facially unconstitutional under the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022).

We conclude that 18 U.S.C. § 922(k) is facially constitutional. Forbidding possession of a firearm with a removed, obliterated, or altered serial number does not infringe upon the right to bear arms because no person is thereby prevented from possessing any type of firearm, and because such a firearm is not a weapon in common use for lawful purposes. Moreover, Gomez asserts a facial challenge to § 922(k) but makes no attempt to show that it is unconstitutional as applied to anyone other than himself. Accordingly, we affirm the judgment of conviction.

AFFIRMED.

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DENNIS JACOBS, *Circuit Judge*:

Defendant-Appellant, Adam Gomez, appeals the judgment of the United States District Court for the Northern District of New York (Scullin, J.) entered following the denial of his motion to dismiss the indictment and his subsequent guilty plea to receiving and possessing a firearm with an obliterated serial number. On appeal, Gomez argues that the statute under which he was convicted, 18 U.S.C. § 922(k), is rendered facially unconstitutional by the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022).

We reject Gomez's challenge. Section 922(k) is facially constitutional. It provides:

It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(k). Section 922(k) does not infringe upon the right to

bear arms because (i) no person is thereby prevented from possessing any type of firearm, and (ii) a firearm with a removed, obliterated, or altered serial number is not a weapon in common use for lawful purposes. Accordingly, we affirm the judgment of conviction.

I

“[T]he Second Amendment confer[s] an individual right to keep and bear arms.” *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). However, the Second Amendment does not confer the “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626. An “important limitation on the right to keep and carry arms” is “that the sorts of weapons protected were those ‘in common use at the time.’” *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). The right also does not “protect those weapons not typically possessed by law-abiding citizens for lawful purposes.” *Id.* at 625. “Stated differently, the Second Amendment protects the right to keep and bear the sorts of weapons that are in common use—a limitation that

is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.” *Antonyuk v. James*, 120 F.4th 941, 961 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1900 (2025) (alterations adopted) (internal citation and quotations omitted).

Following *Heller*, this Circuit, as well as every other regional circuit, employed a two-part test to assess Second Amendment challenges that combined history with means-end scrutiny. *E.g.*, *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 118 (2d Cir. 2020). The Supreme Court resoundingly rejected that framework in *Bruen* and set out a new “test rooted in the Second Amendment’s text, as informed by history.” 597 U.S. at 17, 19. *Bruen* instructs: “[w]hen 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.” *Id.* at 24.

Bruen considered New York State’s proper-cause requirement

under which, before obtaining a license to carry a firearm outside the home for self-defense, applicants had to “demonstrate a special need for self-protection distinguishable from that of the general community.” *Id.* at 12 (internal citation and quotations omitted). The Court struck it down, holding in two steps (i) that the plain text of the Second Amendment protected the petitioners’ right to carry handguns outside the home for self-defense and (ii) that New York failed to demonstrate that the proper-cause requirement was consistent with the Nation’s historical tradition of firearm regulation. *Id.* at 32-33, 70. At the first step, the petitioners were ruled to be “ordinary, law-abiding, adult citizens” and “part of ‘the people’ whom the Second Amendment protects.” *Id.* at 31-32 (quoting *Heller*, 554 U.S. at 580). They wished to carry handguns, which were also understood to be “weapons ‘in common use’ today for self-defense.” *Id.* at 32 (quoting *Heller*, 554 U.S. at 627).

Nothing in *Bruen* casts doubt on the understanding of the Second Amendment’s scope. *See id.* at 81 (Kavanaugh, J.,

concurring). Instead, *Bruen* clarified the bounds of the Second Amendment as outlined in *Heller*. *See id.* at 20 (discussing the textual elements of the Second Amendment’s “operative clause” — whereby “the people” “keep and bear” “[a]rms” — all before moving to the historical inquiry).

Following *Bruen*, we have applied its holding—that law-abiding persons have a Second Amendment right to possess weapons that are in common use for self-defense—to various fact patterns. *See, e.g., Antonyuk*, 120 F.4th at 981 (citing *Bruen*, 597 U.S. at 31–32). *Gazzola v. Hochul* invoked the presumptive lawfulness of “laws imposing conditions and qualifications on the commercial sale of arms.” 88 F.4th 186, 195 (2d Cir. 2023) (quoting *Heller*, 554 U.S. at 626-27), *cert. denied*, 144 S. Ct. 2659 (2024). However, such “commercial regulations . . . cannot have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms.” *Id.* at 196. The *Gazzola* court affirmed the district court’s denial of preliminary injunctive relief from several New York commercial

regulations on firearm dealers that petitioners alleged would impose substantial costs on firearm dealers. *Id.* at 197-98. Nevertheless, the New York laws at issue were not “so restrictive that [they] threaten[ed] a citizen’s right to acquire firearms.” *Id.* at 196. “[G]un buyers have no right to have a gun store in a particular location, nor a right to travel no more than short distances to the most convenient gun store that provides what they deem a satisfactory retail experience.” *Id.* at 197-98 (internal citation and quotations omitted). The minimal burden imposed by those regulations was insufficient to deprive New Yorkers of “relatively easy access to sellers of firearms.” *Id.* at 198.

In *Antonyuk v. James*, this Court explained that the first step of the *Bruen* inquiry “requires courts to consider three issues” before undertaking a historical survey: “whether the conduct at issue is protected, whether the weapon concerned is ‘in common use,’ and whether the affected individuals are ‘ordinary, law-abiding, adult citizens’ and thus ‘part of “the people” whom the Second

Amendment protects.” 120 F.4th at 981 (quoting *Bruen*, 597 U.S. at 31-32). Because we conclude below that Gomez’s challenge fails at the first step of the *Bruen* analysis, we decline to consider whether § 922(k) is justified by the government’s evidence of historical laws regulating the commercial sale of firearms, gunpowder, and dangerous weapons.

II

There is appellate jurisdiction over a judgment of conviction pursuant to 28 U.S.C. § 1291. This Court reviews preserved “challenges to a statute’s constitutionality *de novo*.” *United States v. Desposito*, 704 F.3d 221, 229 (2d Cir. 2013).

Bruen and *Antonyuk* require us to consider whether the conduct regulated by § 922(k) is covered by the “plain text of the [Second] Amendment as historically understood.” *Antonyuk*, 120 F.4th at 968. The answer to that question depends on how precisely to characterize the conduct that is regulated. Gomez argues that “the conduct regulated by Section 922(k) is the keeping of arms.” Appellant Br. at

9. That characterizes the regulated conduct at too high a level of generality. Properly considered, § 922(k) regulates possession of a firearm *with an obliterated serial number*.

In *Bruen*, the Court considered the conduct at issue as “carrying handguns *publicly for self-defense*.” 597 U.S. at 32 (emphasis added). Defining § 922(k)’s regulated conduct as mere possession is thus even broader than *Bruen*’s holding that “[t]he Second Amendment’s plain text thus presumptively guarantees petitioners . . . a right to ‘bear’ arms *in public for self-defense*.” *Id.* at 33 (emphasis added). Similarly, *Zherka v. Bondi* recently held that the conduct regulated by § 922(g)(1)—defined as possession of a weapon *by a convicted, non-violent felon*—fell within the plain text of the Second Amendment. *See* 140 F.4th 68, 76-77 (2d Cir. 2025). If bare possession of a firearm were enough to invoke the plain text of the Second Amendment, virtually every Second Amendment challenge would elide *Bruen* step one—rendering it largely superfluous.

Having determined that § 922(k) regulates the possession of a

firearm with an obliterated serial number, we turn to whether “the Second Amendment’s plain text covers [that] conduct.” *Antonyuk*, 120 F.4th at 981 (internal citation and quotations omitted). We conclude that it does not for two reasons: (A) the conduct at issue does not implicate the right to armed self-defense, *Bruen*, 597 U.S. at 29, and (B) the weapons at issue are not “weapons in common use today for self-defense,” *id.* at 32 (internal citation and quotations omitted).

III

Self-Defense. “[I]ndividual self-defense is the *central component* of the Second Amendment right.” *Id.* at 29 (internal citation and quotations omitted). The constitutionality of § 922(k) therefore depends on whether prohibiting the possession of a firearm with a removed, obliterated, or altered serial number “burden[s] a law-abiding citizen’s right to armed self-defense.” *Id.* It does not. Section 922(k) merely regulates a nonfunctional feature: the serial number. A functionally identical firearm remains available: Gomez, who had not previously been convicted of a felony, *see* 18 U.S.C. §

922(g)(1), would be free to possess and carry a serialized firearm for self-defense, and his ability to protect himself is in no way impaired by the presence of a serial number.

Gomez argues that the availability of functionally identical firearms is immaterial, relying on *Heller's* ruling that the availability of long guns was insufficient to allow a ban on handguns. Instead, Gomez infers that no burden is permissible unless the government proves that the restriction is consistent with a robust historical tradition of firearm regulation. We are not persuaded by Gomez's attempt to circumvent *Bruen's* first step.

As the Supreme Court explained in *Heller*, long guns were not a sufficient alternative to handguns because substantial functional differences (size, weight, and accessibility) make handguns the superior self-defense weapon. 554 U.S. at 629 (“[T]he American people have considered the handgun to be the quintessential self-defense weapon.”). In *Gazzola*, we considered regulations on the commercial sale of firearms that undoubtedly burdened a citizen's

ability to purchase firearms, but upheld the regulations because they did not “have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms.” 88 F.4th at 196.

Unlike the challenger in *Heller*, Gomez would be free to purchase a functionally identical firearm that is far more common, easier to obtain, and provides identical self-defense protection. And like the challenged regulations in *Gazzola*, § 922(k) is not “so restrictive that it threatens a citizen’s right to acquire firearms.” *Id.* Some burden on the commercial sale of firearms is “presumptively lawful” and is acceptable so long as the regulation does not *meaningfully* infringe on the right to self-defense. *Heller*, 554 U.S. at 627 n.26.

IV

Common Use. Handguns have long been considered a “quintessential self-defense weapon.” *Id.* at 629. But *Heller* instructs us that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful

purposes, such as short-barreled shotguns.” *Id.* at 625 (discussing *Miller*, 307 U.S. at 179). A firearm with a removed, obliterated, or altered serial number is not a weapon in common use for lawful purposes. The Fourth Circuit—the only other circuit to decide a § 922(k) challenge in a published opinion post-*Bruen*—came to the same conclusion. See *United States v. Price*, 111 F.4th 392, 397 (4th Cir. 2024) (en banc), *cert. denied*, 145 S. Ct. 1891 (2025); see also *United States v. Lopez*, No. 22-13036, 2024 WL 2032792, at *3 (11th Cir. May 7, 2024) (per curiam) (rejecting a constitutional challenge to § 922(k) on plain-error review). “[T]here is ‘no compelling reason why a law-abiding citizen’ would use a firearm with an obliterated serial number.” *Price*, 111 F.4th at 406 (quoting *United States v. Marzzarella*, 614 F.3d 85, 95 (3d Cir. 2010), *overruled on other grounds by Bruen*, 597 U.S. 1).

All available evidence reflects “that such weapons would be preferable only to those seeking to use them for illicit activities.” *Id.*; see David M. Kennedy, Anne M. Piehl & Anthony A. Braga, *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-*

Reduction Strategy, 59 L. & Contemp. Probs. 147, 174-75 (1996) (observing that the only reasons to obliterate a serial number are to avoid connection with a firearm that was stolen, involved in a crime, or gained via a straw purchase). So the burden of “conceiv[ing] of a lawful purpose” for possessing these firearms “will almost always fall only on those intending to engage in illicit behavior.” *Marzzarella*, 614 F.3d at 99. Gomez has presented no non-speculative evidence that law-abiding citizens use firearms with obliterated serial numbers for lawful purposes. Section 922(k), which thus regulates the possession of “weapons not typically possessed by law-abiding citizens for lawful purposes,” is not proscribed by the Second Amendment. *Antonyuk*, 120 F.4th at 961 (internal citation and quotations omitted).

V

Facial Challenge. Finally, Gomez’s facial challenge fails. To mount a successful facial challenge to § 922(k), a litigant “must establish that no set of circumstances exists under which the law

would be valid, or show that the law lacks a plainly legitimate sweep.” *Id.* at 983 (alterations adopted) (internal citation and quotations omitted). “Facial challenges are disfavored because they often rest on speculation, raise the risk of premature interpretation of statutes on the basis of factually barebones records, and threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Id.* at 987 (internal quotations omitted) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008)). Gomez makes no attempt to show that § 922(k) is unconstitutional as applied to conduct other than his own. For that reason alone, his facial challenge must be dismissed.

CONCLUSION

For the foregoing reasons, we affirm the judgment of conviction.

FILED

Oct 31 - 2023

John M. Domurad, Clerk

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

v.

ADAM GOMEZ,

**1:23-CR-107
(FJS)**

Defendant.

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SCULLIN, Senior Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Defendant is charged in Count 2 of a two-count Indictment with possession of a firearm with an obliterated serial number. Specifically, Count 2 of the Indictment charges as follows:

On or about September 8, 2022, in Albany County in the Northern District of New York, the defendant, **ADAM GOMEZ**, knowingly possessed and received a firearm that had been shipped and transported in interstate and foreign commerce, that is, a Glock 17 handgun, which had the importer's and manufacturer's serial number removed, obliterated, and altered, in violation of Title 18, United States Code, Sections 922(k) and 924(a)(1)(B).

See Dkt. No. 24.

Pending before the Court is Defendant's motion to dismiss the Indictment on the ground that 18 U.S.C. § 922(k) is unconstitutional after the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (hereinafter "*Bruen*"). See Dkt. No. 43. The Government opposes the motion.

II. BACKGROUND

In *Bruen*, the Supreme Court began its analysis by noting that, "[i]n *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and *McDonald v. Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), [it had] 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." *Bruen*, 142 S. Ct. at 2122. In *Bruen*, the Court also agreed with the parties that "ordinary, law-abiding citizens have a similar right to carry handguns publicly for self-defense." *Id.* Therefore, the Court held, "consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id.*

The Court explained that in *Heller* and *McDonald*, it had "held that the Second and Fourteenth Amendments protect[ed] an individual right to keep and bear arms for self-defense" and, "[i]n doing so, [had] held unconstitutional two laws that prohibited the possession and use of handguns in the home." *Id.* at 2125. The Court noted that, in the years since those decisions, "the Courts of Appeals [had] coalesced around a 'two step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Id.* In *Bruen*, however, the Court stated that it declined to adopt that two-part approach and, "[i]n keeping with *Heller*,

[the Court held] that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. Thus, "[t]o justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* Therefore, "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961)) (footnote omitted).

The Court further found that "*Heller* and *McDonald* [did] not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition and delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. The Court explained that "*Heller*'s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history . . . [and] did not invoke any means-end test such as strict or intermediate scrutiny." *Id.* at 2128-29. The Court then

Reiterate[d] that the standard for applying the Second Amendment is as follows: 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 "unqual." command."

Id. at 2129-30 (quoting *Konigsberg*, 366 U.S. at 50 n.10, 81 S. Ct. 997).

With regard to the historical analysis, the Court admitted that it could "'be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.'" *Id.* at 2130 (quoting *McDonald*, 561 U.S. at 803-804, 130 S. Ct. 3020 (Scalia, J. concurring)). However, the Court explained that "reliance on history to inform the meaning of constitutional text – especially text meant to codify a *pre-existing* right – is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field." *Id.* at 2130 (quoting [*McDonald*, 561 U.S.] at 790-91, 130 S. Ct. 3020 (plurality opinion)) (footnote omitted).

The Court explained that the test it had "set forth in *Heller* and appl[ies in *Bruen*]" requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 2131. The Court noted that in some cases the courts' inquiry would be "fairly straightforward." *Id.* The Court supplied three examples: (1) "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation is relevant evidence that the challenged regulation is inconsistent with the Second Amendment"; (2) "if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional"; and (3) "if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." *Id.* at 2131.

The Court noted that it had used this kind of straightforward historical inquiry in *Heller*. The Court explained that, in *Heller*, one of the District's regulations "'totally ban[ned] handgun

possession in the home." *Id.* (quotation omitted). Furthermore, the District "addressed a perceived societal problem – firearm violence in densely populated communities – and it employed a regulation – a flat ban on the possession of handguns in the home – that the Founders themselves could have adopted to confront the problem." *Id.* However, "after considering 'founding-era historical precedent,' including 'various restrictive laws in the colonial period,' and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional." *Id.* (quoting [*Heller*, [554 U.S.] at 631, 128 S. Ct. 2783; *see also id.*, at 634, 128 S. Ct. 2783 (describing the claim that "there were somewhat similar restrictions in the founding period" a "false proposition")]).

The Court explained, however, that, unlike in *Heller* and *Bruen*, "other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Id.* at 2132. The Court also noted that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id.* Fortunately, however, "the Founders created a Constitution – and a Second Amendment – 'intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.'" *Id.* (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 415, 41 L. Ed. 579 (1819) (emphasis deleted)). "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.* (citations omitted).

The Court noted that it had "already recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century.'" *Id.* (quoting

[*Heller*,] 554 U.S. at 582, 128 S. Ct. 2783). "Thus, even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense." *Id.* (citation omitted).

Furthermore, the Court stated that "history guide[s] our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy – a commonplace task for any lawyer or judge." *Id.* The Court explained that "determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Id.* (quotation omitted). "And because '[e]verything is similar in infinite ways to everything else,' . . ., one needs 'some metric enabling the analogizer to assess which similarities are important and which are not[.]'" *Id.* (quotations omitted).

The Court noted that, although it would not provide "an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, [it did] think that *Heller* and *McDonald* point[ed] toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132-33. First, "'individual self-defense is 'the *central component*' of the Second Amendment right.'" *Id.* at 2133 (quoting *McDonald*, 561 U.S. at 767, 130 S. Ct. 3020 (quoting *Heller*, 554 U.S. at 599, 128 S. Ct. 2783; *see also id.* at 628, 128 S. Ct. 2783 ("the inherent right of self defense has been central to the Second Amendment right))). "Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are "'*central*'" considerations when engaging in an *analogical* inquiry." *Id.* at 2133

(quoting *McDonald*, 561 U.S. at 767, 130 S. Ct. 3020 (quoting *Heller*, 554 U.S. at 599, 128 S. Ct. 2783)) (footnote omitted).

The Court clarified that "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.'" *Id.* (quoting *Drummond v. Robinson*, 91 F.4th 217, 226 (CA3 2021)). "On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.*

Applying this standard, the Court went on to explain that "when it comes to interpreting the Constitution, not all history is created equal. 'Constitutional rights are enshrined with the scope they are understood to have *when the people adopted them*.'" *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634-635, 128 S. Ct. 2783 (emphasis added)). "The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years." *Id.* Courts "must also guard against giving postenactment history more weight than it can rightly bear." *Id.* at 2136. The Court noted that "in *Heller* [it had] reiterated that evidence of 'how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century' represented a 'critical tool of constitutional interpretation.'" *Id.* (quoting [*Heller*], 554 U.S. at 605, 128 S. Ct. 2783). Therefore, the Court "examined 'a variety of legal and other sources to determine *the public understanding* of [the Second Amendment] after its . . . ratification.'" *Id.* (quoting [*Heller*, 554 U.S. at 605, 128 S. Ct. 2783]). In other words, the Court

explained that it recognized that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide [the Court's] interpretation of an ambiguous constitutional provision." *Id.* at 2137 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014) (Scalia, J., concurring in judgment)) (other citations omitted). However, the Court explained that "to the extent later history contradicts what the text says, the text controls." *Id.* "Thus, 'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.'" *Id.* (quoting *Heller*, 670 F.3d at 1274 n.6 (Kavanaugh, J., dissenting)) (other citation omitted).¹

III. DISCUSSION²

A. Does the Second Amendment protect the conduct that 18 U.S.C. § 922(k) prohibits?

In light of *Bruen*, the first question that the Court must answer is whether the Second Amendment protects the conduct that § 922(k) prohibits, *i.e.*, possession of a firearm with an obliterated serial number. Of the courts that have addressed this issue post-*Bruen*, an overwhelming majority of them have concluded that it does not. *See, e.g., United States v. Dixon*, No. S2-4:21CR0054 AGF (JSD), 2023 WL 7102115 (Oct. 26, 2023) (adopting

¹ In his concurrence, Justice Alito explained what the Court's holding did not decide. Specifically, he explained that the Court's holding "decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor [has the Court] disturbed anything that [it] said in *Heller* or *McDonald v. Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), about restrictions that may be imposed on the possession or carrying of guns." *Bruen*, 142 S. Ct. at 2157 (Alito, J. concurring).

² References to page numbers in documents filed in this case are to the page numbers that the Court's electronic filing system generates, which can be found in the top right corner of those pages.

Magistrate Judge's finding that "the conduct regulated by Section 922(k) is not protected by the plain text of the Second Amendment"); *United States v. Dangleben*, No. 3:23-MJ-0044, 2023 WL 6441977, *6 (D.V.I. Oct. 3, 2023) (finding that § 922(k) "does not prohibit certain types, calibers, or even functional characteristics of guns, the only loss a person suffers from losing access to a specific gun is the sentimental value of a particular gun – a loss not covered under the Second Amendment"); *United States v. Patton*, No. 4:21-CR-3084, 2023 WL 6230413, *4 (D. Neb. September 26, 2023) (holding that the defendant's possession of a gun without a serial number "is not protected by the Second Amendment, based on the original understanding of that right" [and, therefore,] "[t]he challenged regulation, § 922(k), does not unjustifiably burden the defendant's constitutional right"); *United States v. Avila*, No. 22-cr-224-WJM-1, 2023 WL 3305934, *5 (D. Colo. May 8, 2023) (holding that "the kinds of firearms § 922(k) prohibits are not 'Arm[s]' within the meaning of the Second Amendment, and as a consequence Defendant's constitutional challenge to this statutory provision fails"); *United States v. Serrano*, No. 21-CR-1590 JLS, 2023 WL 2297447, *13 (S.D. Cal. Jan. 17, 2023) (finding that "§ 922(k) regulates conduct outside the scope of the Second Amendment"); *United States v. Reyna*, No. 3:21-CR-41 RLM-MGG, 2022 WL 17714376, *5 (N.D. Ind. Dec. 15, 2022) (finding that "§ 922(k)'s regulated conduct is outside the scope of the Second Amendment" and declining "to consider whether the government's evidence of historical gun and gunpowder regulations justify § 922(k)").

The Court finds the *Reyna* court's reasoning with regard to this first question very persuasive. In *Reyna*, the court began its analysis by noting that "[t]he Second Amendment's text doesn't protect keeping and bearing any weapon in every way possible." *Reyna*, 2022 WL 17714376, at *3 (citing *District of Columbia v. Heller*, 554 U.S. at 626-627, 128 S. Ct. 2783).

Moreover, the court explained that "[a] weapon generally is covered if a person can carry it, . . . , but not if the weapon is uncommon or unusually dangerous or not typically used by law abiding people for lawful purposes." *Id.* (citing *N.Y. Rifle v. Bruen*, 142 S. Ct. at 2128 (citing *District of Columbia v. Heller*, 554 U.S. at 626, 627, 128 S. Ct. 2783; *United States v. Miller*, 307 U.S. 174, 179, 59 S. Ct. 816, 83 L. Ed. 1206 (1939))).

Next, the court explained that the first step under *Bruen* required the court to "determine how specifically or generally to define § 922(k)'s regulated conduct: is it mere 'possession of a firearm' or 'possession of a firearm *with an obliterated serial number*'?" *Id.* The *Reyna* court concluded that "[r]eading § 922(k)'s regulated conduct as mere possession is inconsistent with how the Supreme Court evaluates Second Amendment challenges." *Id.* at *4. For example, "[i]n *Heller*, the challenged regulation prohibited handgun possession in the home, so the Court defined the regulated conduct as handgun possession in the home." *Id.* (citing *District of Columbia v. Heller*, 554 U.S. at 628, 128 S. Ct. 2783). "In [*Bruen*], the challenged regulation prohibited publicly carrying a handgun, so the Court defined the regulated conduct as publicly carrying a handgun." *Id.* (citing *N.Y. State Rifle v. Bruen*, 142 S. Ct. at 2134). The court explained that "[i]n neither case did the Supreme Court distill the challenged regulation to so abstract a level as mere possession or mere carrying of a firearm." *Id.*

In addition, the court explained that it would not "make sense to define regulated conduct as mere possession in light of the comparator – the Second Amendment's plain text." *Id.* The court noted that, "[i]f § 922(k)'s regulated conduct is mere possession, any number of other challenged regulations would similarly boil down to mere possession, then promptly and automatically proceed to Step Two." *Id.* The court noted, however, that "[f]or Step One to have any meaning, the regulated conduct must be defined specifically enough that it can meaningfully

compare to the Second Amendment's plain text – a plain text that is more complex than mere possession. To do otherwise would be to compare the regulated conduct to the Second Amendment's bare and oversimplified text – keeping and bearing arms, without the original public meaning emphasized in *Heller* and [*Bruen*]." *Id.*

Having concluded that § 922(k)'s regulated conduct was "'possession of a firearm with an obliterated serial number' and not 'mere possession,'" the *Reyna* court turned to the question of whether the Second Amendment's plain text covered that conduct. *Id.* The court began by noting that "[t]he *Heller* Court made clear that the Second Amendment excludes 'those weapons not typically possessed by law-abiding citizens for lawful purposes.'" *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. at 625, 128 S. Ct. 2783 (discussing short-barreled shotguns in *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939)); see also *id.* at 623, 128 S. Ct. 2783 ("*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.")). The court further noted that "the *Heller* Court explained that the plain meaning of 'militia' and the relationship between the Second Amendment's operative clause and prefatory clause show that the Second Amendment protects common weapons used for lawful purposes." *Id.* (citing [554 U.S.] at 624-625, 128 S. Ct. 2783). The court concluded that, because "[t]his limitation comes from the text of the Second Amendment, . . . whether a particular type of gun is typically used by law-abiding citizens for lawful purposes is a proper question at the first step of the [*Bruen*] analysis." *Id.* (footnote omitted).

Finally, the court rejected the defendant's argument that § 922(k) reduced the pool of guns available to him for self-defense because this argument did not change the outcome. See *id.* at *5. The court reasoned that "[p]rohibiting a possession or use of a particular type of gun

might bring a regulation within the Second Amendment's scope if the class of firearms is defined by its functionality. . . . [but] the § 922(k) prohibition applies to a class of guns defined solely by a nonfunctional characteristic: the serial number." *Id.* (citation omitted). Based on this analysis, the court concluded by stating that "§ 922(k)'s regulated conduct is outside [the] scope of the Second Amendment." *Id.*³; *see also, e.g. United States v. Serrano*, No. 21-CR-1590 JLS, 2023 WL 2297447, *11 (S.D. Cal. Jan. 17, 2023) (explaining that "[a] law requiring that firearms have serial numbers does not infringe a law-abiding citizen's right to keep and bear arms for self-defense and other lawful purposes" and noting that, "[u]nder § 922(k), law-abiding citizens are free to possess and carry a firearm for self-defense, provided that firearm has a serial number. In other words, § 922(k) merely restricts 'one manner in which individuals may keep and carry firearms'" (quotation omitted)); *United States v. Bradley*, No. 2:22-cr-00098, 2023 WL 2621352, *3 (S.D. W.Va. Mar. 23, 2023) (finding that "[t]he Second Amendment protects a citizen's right to possess firearms for self-defense and similar lawful purposes. A serial number does not alter the functionality of a firearm and therefore a 'person is just as capable of defending himself with a marked firearm as with an unmarked firearm.'" (quotation omitted)); *id.* (stating that "[t]he Second Amendment 'is not a right to keep and carry any weapon whatsoever in any manner whatsoever'" (quotation omitted)); *id.* (stating that "[i]t is when the regulation impacts the functional characteristics of a firearm that the Second Amendment is implicated" (citation omitted)); *id.* (concluding that "[b]ecause § 922(k) regulates 'a class of guns defined solely by a nonfunctional characteristic,' the regulation is outside the scope or text of the Second

³ Unlike the other courts that have concluded that the conduct that § 922(k) regulates is outside the scope of the Second Amendment, the *Reyna* court declined "to consider whether the government's evidence of historical gun and gunpowder regulations justify § 922(k)." *Reyna*, 2022 WL 17714376, at *5.

Amendment. . . . It would make 'little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility.'" (quotation omitted)).

The Court agrees with the *Reyna* court's analysis as well as that of other courts that have concluded that the conduct that § 922(k) regulates – possession of a gun without a serial number – is outside the scope of the Second Amendment. There is nothing in the Court's decision in *Bruen* that changes the Court's earlier discussion in *Heller* that there is nothing in the Second Amendment that requires that citizens should be able to possess and carry any gun – even the most popular gun – without restrictions. Moreover, the Court finds that the restriction that § 922(k) places upon the possession of guns – that they must have a serial number – does not burden a citizen's right to possess a gun for self-defense. Therefore, the Court concludes that § 922(k) does not violate a law-abiding citizen's Second Amendment right to possess a firearm for self-defense; it merely regulates a non-functional requirement of any such firearm – that it possess a serial number. Accordingly, the Court concludes that 18 U.S.C. § 922(k) is constitutional.

B. Is § 922(k) consistent with this Nation's historical tradition of firearm regulation?

Even if the Second Amendment covered conduct that § 922(k) regulates, which it does not, the Government has presented sufficient evidence to demonstrate that § 922(k) is consistent with this Nation's historical tradition of firearm regulation.

First, the Government notes that "[c]olonial and early state governments regulated many aspects of the firearms trade and, notably, two states in the early 1800s required that gun barrels be proved and marked, imposing criminal penalties for altering or removing the proof marks." *See* Dkt. No. 50 at 13. Moreover, the Government asserts that, "[w]ell before serial numbers

became common, colonial and state legislatures regulated firearms and firearms trade." *See id.* (citing *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (en banc) ("[C]olonial governments substantially controlled the firearms trade.")). The Government also cites other examples of colonial and early state government regulation of firearms. For example, Connecticut banned residents from selling firearms outside the colony; Virginia provided that people were at "liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony" and at least six colonies made it a crime, with severe penalties, to sell or provide firearms or ammunition to Native Americans. *See id.* at 13-14 (quoting *Teixeira*, 873 F.3d at 685, 685 n.18 (parentheticals omitted)). Admittedly, these regulations are not identical to § 922(k) but they "do show that colonial legislatures were concerned about the movement of firearms between private parties and the dangers of firearms falling into the wrong hands." *See id.*

Moreover, the Government points to the fact that "several states had laws relating to the inspection and marking of gunpowder, which 'was essential to the operation of firearms at that time,' meaning that gunpowder regulations 'necessarily affected the ability of gun owners to use firearms for self-defense.'" *See id.* at 14 (quotations omitted). For example, in 1795 Pennsylvania enacted a law requiring gunpowder stored in the public magazine to be proved and marked and prohibited import, transfer, or sale of any gunpowder that was not appropriately marked. *See id.* (citation omitted). The Government notes that, similarly, in 1809, Massachusetts required the inspection of all gunpowder manufactured in the commonwealth or stored in a public magazine, with the inspector marking each cask as either "Massachusetts Inspected Proof" or "Condemned" and adding his name and the year. *See id.* (quotation omitted). This law imposed a fine of between \$200 and \$500 on any person who sold any condemned

powder or "fraudulently alter[ed], or deface[d] any mark, or marks, placed by an inspector upon any cask or casks containing gunpowder." *See id.* at 14-15. In addition, New Hampshire adopted a very similar law in 1820. *See id.* at 15 (citations omitted). Furthermore, the Government notes that colonial and early state governments prohibited the manufacture and transportation of gunpowder without a license. *See id.* at 15 (citations omitted).

Most importantly, according to the Government, "at least two states in the early republic required gun barrels to be proved and marked, and prohibited the obliteration of the proof marks." *See id.* (citing *Heller*, 554 U.S. at 605 (observing that examining the "public understanding of a legal text in the period after its enactment or ratification" is "a critical tool of constitutional interpretation" (emphasis omitted))). For example, "[i]n 1805 Massachusetts adopted a law for the appointment of 'provers of fire arms' to 'prove all musket barrels and pistol barrels' presented to them in exchange for a set fee." *See id.* (citation omitted). This law was adopted to prevent firearms from being "'introduced into use which are unsafe, and thereby the lives of the citizens be exposed.'" *See id.* (quotation omitted).

According to the Government, "[u]nder the Massachusetts law, the prover was required to 'stamp' the barrel 'within one and a half inches of the breech' with the prover's initials, the letters "P." and "M.," and the year – all in 'letters and figures . . . so deeply impressed . . . as that the same cannot be erased or disfigured.'" *See id.* at 16 (quotation omitted). This Act "imposed a ten-dollar fine on any person who manufactured within the Commonwealth 'any musket or pistol, without having the barrels proved and stamped as aforesaid.'" *See id.* (quotation omitted). "It also imposed a ten-dollar fine for selling, delivering, or purchasing any unmarked musket or pistol manufactured in the Commonwealth . . . [a]nd it imposed a fine of between \$20 and \$50

for any person who 'shall falsely forge or alter the stamp of any prover of the fire-arms . . . impressed on any musket or pistol barrel.'" *See id.* (quotation omitted).

Similarly, according to the Government, "Maine in 1821 passed a law requiring the appointment of 'suitable persons, to be provers of the barrels of all new, or unused firearms.'" *See id.* (quotation omitted). "Each prover was required (in exchange for compensation) to 'prove and try the strength of the barrels of all firearms which shall be offered to him for that purpose, and number every barrel by him so proved,' and to provide a certificate attesting to the proof." *See id.* (quotation omitted). The statute imposed a ten dollar fine on any person who "'shall sell or offer for sale within this State, any new, or unused musket, rifle or pistol barrel, without having the same first proved, marked and certified.'" *See id.* (quotation omitted). In addition, it imposed a fine of "'not more than one hundred dollars, nor less than twenty dollars,' for any person who 'shall falsely after the stamp or mark or the certificate of any prover of firearms.'" *See id.* at 16-17 (quotation omitted).

The Government acknowledges that, "these statutes are not identical to § 922(k)," but argues that "they are 'relevantly similar.'" *See id.* at 17 (quoting *Bruen*, 142 S. Ct. at 2132). The Government contends that the ultimate question under *Bruen* is "'whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.'" *See id.* (quoting [*Bruen*, 142 S. Ct.] at 2133). The Government asserts that "§ 922(k) imposes a minimal 'burden on the right of armed self-defense' because marked firearms are ubiquitous and just as effective for self-defense as unmarked firearms." *See id.* The Government contends that this "burden is no greater than the burdens imposed by historical laws relating to the sale and marking of firearms and gunpowder. And neither the historical laws nor § 922(k) deprive[s] citizens of the use of firearms for self-defense." *See id.*

(citing *Holton*, 2022 WL 16701935, at *5 (observing that "[n]ot removing the serial number from a firearm is a 'negligible burden' compared to historical restrictions on firearm possession (emphasis omitted))).

Alternatively, the Government asserts that § 922(k) is also "comparably justified." *See id.* According to the Government, "[t]he historical regulations on commerce in firearms were designed to keep firearms out of the hands of those who might be dangerous, such as (in view of legislators at the time) Native Americans. And the laws requiring marking of gun barrels and gunpowder were designed to protect citizens from explosions and to allow unsafe barrels or powder to be traced to the inspector who first affixed the markings." *See id.* The Government argues that § 922(k) "serves similar purposes by allowing authorities to recover stolen firearms and trace firearms that have been used in a crime." *See id.* (citations omitted). The Government acknowledges that "§ 922(k) does not reflect precisely the same legislative priorities as these historical regulations, [however,] it nevertheless imposes a 'comparable burden' that is 'comparably justified.'" *See id.* 17-18 (quoting *Bruen*, 142 S. Ct. at 2133).

Furthermore, the Government notes that "*Bruen* also recognized that 'unprecedented societal concerns or dramatic technological changes may require a more nuanced approach' and that '[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791.'" *See id.* at 18 (quoting *Bruen*, 142 S. Ct. at 2132). Moreover, *Bruen* recognized that, "[a]lthough the Second Amendment's 'meaning is fixed,' its text 'can, and must, apply to circumstances beyond those the Founders specifically anticipated.'" *See id.* (quoting [*Bruen*, 142 S. Ct. at 2132]).

In this regard, the Government asserts that § 922(k) addresses the societal problems of gun violence and the attendant difficulties in investigating and prosecuting such violence. *See id.*

Notably, however, the Government notes that, although similar problems existed to some degree at the time of the Founding, that did not "preoccup[y] the Founders." *See id.* (quoting *Bruen*, 142 S. Ct. at 2132) (other citation omitted). Moreover, the Government notes that "[f]irearms were less commonly used for murders in the eighteenth century in part because of their technological limitations. Eighteenth century firearms ordinarily fired only one shot, took a long time to load (from the muzzle), were subject to misfires, and could not be kept loaded for long periods because black powder absorbed moisture." *See id.* (citation omitted). However, according to the Government, "the advent of metallic cartridges and inexpensive and ubiquitous firearms (including revolvers) led to increased gun use in homicides. . . . Along with changed societal concerns such as a rise in homicide rates, these 'technological changes' may explain why founding-era legislatures did not enact measures identical to § 922(k)." *See id.* (quoting *Bruen*, 142 S. Ct. at 2132). Thus, according to the Government, it is not surprising Congress and founding-era legislatures did not combat gun violence in the same way and to the same degree as in later eras." *See id.* at 18-19.

Moreover, the Government argues that "§ 922(k) had no reason to exist until serial numbers began to be broadly used, and this did not occur until 'technological changes' occurred after the founding." *See id.* at 19 (quoting *Bruen*, 142 S. Ct. at 2132). The Government notes that "[t]he mass production of firearms led both to the increased availability and potential misuse of firearms, as well as the widespread use of serial numbers." *See id.* The Government explains that, "[a]lthough Samuel Colt began using serial numbers on his firearms as early as 1837, other manufacturers did not begin to adopt them until the 1850s and 1860s. States began to prohibit the obliteration of serial numbers in the 1920s. And Congress first required that firearm manufacturers and importers mark all firearms with serial numbers in the Gun Control Act of

1968." *See id.* (citation and footnote omitted). Therefore, the Government argues that "gun manufacturing technology at the time of the Second Amendment would have made a statute exactly like § 922(k) unrealistic." *See id.* Finally, the Government asserts that, "[a]lthough founding-era legislatures could have required all firearms to be surrendered to a centralized authority to be marked, the prospect of sequentially numbering mass-produced firearms at the time of manufacturing was decades away. But *Bruen* makes clear that a regulation is not unconstitutional merely because it would have been 'unimaginable at the founding' or is not a 'dead ringer for historical precursors.'" *See id.* at 19-20 (quoting *Bruen*, 142 S. Ct. at 2132-33).

Defendant disagrees with the Government's arguments, noting that "[t]he societal problems Congress sought to address through Section 922(k) were firearm violence and solving firearm crimes. These problems existed in 1791, and certainly were not 'unprecedented' or 'unimaginable at the founding.'" *See* Dkt. No. 55 at 12. Furthermore, Defendant argues that the Government's reliance on a handful of colonial, pre-constitution, and post-1805 commercial gunpowder and gun barrel statutes as being "relevantly similar" historical analogues to § 922(k) is misplaced because, "[r]ather than requiring marking and serialization procedures to aid in solving crimes or keeping gunpowder away from 'dangerous people', the cited gunpowder laws regulated commerce as a matter of consumer and product safety. Thus these laws were not 'comparably justified' relative to § 922(k), which is meant to reduce the use of firearms for unlawful purposes and aid in solving crimes." *See id.* at 14 (quoting *Bruen*, [142 S. Ct.] at 2133). Furthermore, Defendant notes that "[t]he penalties for violating any of these statutes did not result in firearm disarmament or imprisonment, and instead typically resulted in a nominal forfeiture of non-conforming gunpowder and in the imposition of various fines – some as low as \$5." *See id.* at 15 (citations omitted).

Defendant also argues that "[b]arrel proofing and barrel proofing marks . . . were also consumer product safety measures, expressly adopted to protect firearm end-users and to improve firearm safety." *See id.* at 16. Thus, Defendant asserts that "barrel proofing statutes were not 'comparably justified' with Section 922(k), which is intended to facilitate crime-solving." *See id.* (citing *Bruen*, [142 S. Ct.] at 2133). Defendant contends that "[t]he manufacturer name stamped on a modern firearm is the modern analog of the proofing stamps on firearms in the Founding era. Barrel proofing statutes, therefore are not 'relevantly similar' – much less 'distinctly similar' – to Section 922(k)'s prohibition against possessing an unserialized firearm." *See id.* Thus Defendant argues that "there is no fit – much less a tight fit – between Section 922(k) and the collection of statutes presented by the United States." *See id.*

Furthermore, Defendant asserts that, "[m]ore important than any similarity of fit . . . is the scope of the tradition represented by the gun barrel stamp and gun powder statutes cited by the Government under the relevantly similar inquiry." *See id.* at 16 (citing *Bruen*, [142 S. Ct.] at 2133). Defendant concedes that "*Bruen* does not require a historical twin, [however,] a historical analogue must still be 'well-established and representative'". *See id.* at 16-17 (quoting [*Bruen*, 142 S. Ct. at 2133]). Defendant argues that none of the statutes on which the Government relies fit that bill. *See id.*

Moreover, Defendant contends that, "[e]ven assuming the existence of comparable burdens and comparable justifications, the regulations cited by the Government are not 'representative' of the United States." *See id.* at 17. Defendant notes that "[t]he gunpowder regulations consist of laws from two colonies, three states (one of which was one of the previous colonies) and a single city. The barrel proofing statutes come from only two states (again including one of the same with commercial gunpowder regulations)." *See id.* Defendant argues

that, "[w]hether considered separately or collectively, these outlier statutes do not demonstrate a robust historical tradition of anything – much less any comparable historical tradition of firearm regulation infringing on protected Second Amendment conduct." *See id.* (citing *Bruen*, [142 S. Ct.] at 2156). Defendant notes that "[t]he *Bruen* Court said it 'doubt[ed] that three colonial regulations could suffice to show a [historical] tradition.'" *See id.* (quoting [*Bruen*, 142 S. Ct.] at 2143). Defendant contends that, "[b]y any measure, the Government's statutes come up well short. In 1791, this country consisted of thirteen states. By 1821 it had increased to twenty-three. Three out of thirteen states regulating gunpowder, and two out of twenty-three requiring barrel proof stamps, simply do not – under any metric – establish a 'well-represented and representative' historical tradition of firearm regulation placing Section 922(k) outside the Second Amendment's 'unqualified command.'" *See id.* (quoting *Spencer v. Nigrell*, 2022 WL 17985966, at *12 (W.D.N.Y. 2022) (holding "a handful of . . . enactments involving a small minority of jurisdictions governing a small minority of population" are insufficient to establish a tradition under *Bruen*)).

In *United States v. Holton*, 639 F. Supp. 3d 704 (N.D. Tex. 2022), the government presented very similar historical evidence. After reviewing that evidence, the court found that such "historical regulations and § 922(k), while effected by different means, address[ed] similar goals: (1) controlling and tracing the sale of firearms and (2) ensuring dangerous individuals did not obtain firearms." *Id.* at 711-12. Furthermore, the court stated that "Section 922(k) and these historical regulations place 'comparable burden[s] on the right of armed self-defense.'" *Id.* at 712 (quoting *Bruen*, 142 S. Ct. at 2133). The court explained that "[n]ot removing the serial number from a firearm requires no action from the firearm's owner and thus imposes an arguably negligible burden, especially because 'the presence of a serial number does not impair the use or

functioning of a weapon in any way." *Id.* (quotation omitted). "Similarly, because 'a person is just as capable of defending himself with a marked firearm as with an unmarked firearm,' requiring individuals to purchase firearms with serial numbers imposes little to no burden on individuals' right to bear arms." *Id.* Therefore, the court concluded that, "because § 922(k) [was] 'consistent with the Second Amendment's text and historical understanding,' . . . § 922(k) is constitutional." *Id.* (quoting *Bruen*, 142 S. Ct. at 2131).

Similarly, the court in *United States v. Tita*, No. RDB-21-0334, 2022 WL 17850250 (D. Md. Dec. 22, 2022), found that the government's evidence that "'many of the colonies enacted laws regarding the registration of firearms as part of legislative schemes regarding the sale, transfer, and taxation of firearms"; that "laws from the 17th Century in New York, Virginia, and Connecticut regulated trading and selling firearms outside of each respective colony"; and that "[s]tates continued to regulate the manufacture, sale, and transport of guns and ammunition in the 18th and 19th centuries, notably in Massachusetts and New Hampshire where guns and storage facilities had to be inspected" constituted "'a representative historical analogue" to support the constitutionality of § 922(k). *Id.* at *7 (quotations and footnote omitted).

Taking a different route to the same conclusion, the court in *United States v. Bradley*, No. 2:22-cr-00098, 2023 WL 2621352 (S.D. W.Va. Mar. 23, 2023), found § 922(k) constitutional "because there [were] relevant historical analogues that offer comparable burdens on the right to bear arms." *Id.* at *4. First, the court noted that "[t]he mass production of firearms and the corresponding advent of serial numbers [were] 'circumstances beyond those the Founders specifically anticipated.'" *Id.* (quoting *Bruen*, [142 S. Ct.] at 2132). The court explained that, "[l]argely, firearm manufacturers did not begin using serial numbers until the nineteenth century, and serial numbers did not become more common until later." *Id.* (footnote omitted).

Furthermore, the court noted that "[i]t was not until the Gun Control Act of 1968 that manufacturers and importers were even required to mark firearms with serial numbers." *Id.* (citing Pub. L. No. 90-618, § 101, 82 Stat. 1213, 1223). Furthermore, the court noted that "[t]he stated purpose of the Gun Control Act of 1968 'is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence.'" *Id.* (quoting Pub. L. No. 90-618, § 101). The court found that "Section 922(k) bolsters that goal by punishing 'one who possesses a firearm whose principal means of tracing origin and transfers in ownership – its serial number – has been deleted or made appreciably more difficult to make out.'" *Id.* (quoting *U.S. v. Adams*, 305 F.3d 30, 34 (1st Cir. 2002)). It appeared to the court "self-evident that the purposes [of] § 922(k) are to prophylactically preserve a system of serial numbers and 'to assist law enforcement by making it possible to use the serial number of a firearm recovered in a crime to trace and identify its owner and source.'" *Id.* (quotation omitted).

The court explained that "[e]arly legislatures and Founders did not shy away from regulating the trade and movement of firearms." *Id.* (footnote omitted). For example, "[f]irearms were not to be sold to certain people." *Id.* Furthermore, "[i]n colonial Virginia, straying into an Indian town or more than three miles from an English Plantation, while possessing more firearms than needed for personal use, was a crime." *Id.* (citations and footnote omitted). "Colonial Virginia also required 'the recording not only of all new arrivals to the colony, but also 'of arms and munitions.'"" *Id.* at 5 (quotation omitted). "'A 1652 New York law outlawed illegal trading of guns, gun powder, and lead by private individuals." *Id.* (citation omitted). In addition, the court noted that "[t]he Founders also implemented militia laws that required militiamen and other householders to bring their guns to 'the muster field twice a year so that militia officers could record which men in the community owned guns.'" *Id.* (quotation

omitted). Moreover, "regulations in New Hampshire, New Jersey, and Rhode Island authorized door-to-door firearm censuses." *Id.* (citation omitted).

The court also noted that, "[d]espite some differences between these historical regulations and § 922(k), founding-era legislatures were concerned about the illegal trading and movement of firearms, while also concerned about preventing the sale of firearms to those deemed dangerous – a shared purpose of § 922(k)." *Id.* In addition, the court stated that, "[c]omparing § 922(k) with relevant historical analogues reveals that the historical analogues often tackled these problems in ways more onerous to a citizen than § 922(k) does." *Id.* Furthermore, "[b]efore the advent and widespread implementation of serial numbers, there was no identifying mechanism to tack the transfer of discrete firearms. Rather, legislatures had to craft broad, often crude, prohibitions on the firearms trade in order to keep firearms out of the hands of those deemed dangerous or to track a firearm's ownership and movement." *Id.*

In conclusion, the court stated that "Section 922(k) reflect[ed] Congress' intent to utilize and protect serial numbers, to enable a more fine-tuned approach to regulating the trade and movement of firearms." *Id.* Furthermore, "[a]ny perceived burden of not possessing a firearm with an obliterated serial number, or not removing the serial number from a firearm, is quite negligible when compared to the burden imposed by gun censuses, mustering to a field, or wholesale prohibitions on trade with certain individuals or in certain areas." *Id.* (citations omitted). For all these reasons, the court found that the Government had "satisfied its burden to 'affirmatively prove that its firearms regulation is part of the [or analogous to a] historical tradition that delimits the outer bounds of the right to keep and bear arms.'" *Id.* (quoting *Bruen*, [142 S. Ct.] at 2127). For all these reasons, the court found that § 922(k) was "'consistent with

the Second Amendment's text and historical understanding' and [was] therefore constitutional."
Id.

Finally, the Court finds, as have other courts that have reviewed many of the same regulations that the Government has relied on in this case, that the Government has met its burden to demonstrate that § 922(k) is consistent with the Second Amendment's text and historical understanding. Therefore, the Court concludes that 18 U.S.C. § 922(k) is constitutional.

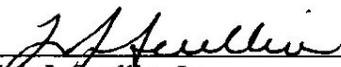
IV. CONCLUSION

Having reviewed the entire file in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant's motion to dismiss the Indictment on the ground that 18 U.S.C. § 922(k) is unconstitutional after the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Brown*, 142 S. Ct. 2111 (2022), *see* Dkt. No. 43, is **DENIED**.

IT IS SO ORDERED.

Dated: October 31, 2023
Syracuse, New York



Frederick J. Scullin, Jr.
Senior United States District Judge