N.D.N.Y.
24-cr-252
D'Agostino, 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 30th day of December, two thousand twenty-five.

Present:

Joseph F. Bianco,
Michael H. Park,
Sarah A. L. Merriam,
Circuit Judges.

United States of America,

Appellee,

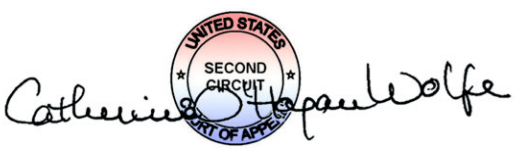
v. 25-935

Jesse Taber,

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,

vs. **1:24-CR-252 (MAD)**

JESSE TABER,

Defendant.

APPEARANCES: **OF COUNSEL:**

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Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Defendant is charged in a single count indictment, which alleges a violation of Title 18, United States Code, Sections 922(g)(a) and 924(a)(8). *See* Dkt. No. 16. In particular, the indictment alleges that on or about December 26, 2023, Defendant, a previously convicted felon, knowingly possess a 12 gauge Stoeger Coach Gun shotgun that was in and affecting commerce. *See id.*

Currently before the Court is Defendant's motion to dismiss the indictment. *See* Dkt. No. 27. Specifically, Defendant alleges that Section 922(g)(1) is unconstitutional following the United States Supreme Court's holding in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). For the reasons set forth below, Defendant's motion is denied.

II. DISCUSSION

In his motion, Defendant contends that the indictment is defective under Rule 12(b)(3)(B)(v) of the Federal Rules of Criminal Procedure for failure to state an offense because 18 U.S.C. § 922(g)(1) is unconstitutional both on its face and as applied. *See* Dkt. No. 27-1 at 1-2. Defendant bases his argument on the Supreme Court's recent decisions in *Bruen* and, to a lesser extent, *United States v. Rahimi*, 602 U.S. ___, 144 S. Ct. 1889 (2024). *See id.* Defendant argues that, under *Bruen*'s new framework for Second Amendment challenges, a total prohibition on firearm possession by felons presumptively violates the Second Amendment and Section 922(g)(1) is therefore unconstitutional. *See id.* Specifically, Defendant first argues that *Bruen* requires courts to consider whether the "plain text" of the Second Amendment protects an individual's conduct, and that this plain text protects his possession of a firearm. *See id.* at 4. Second, Defendant contends that the Government cannot, as required by *Bruen*, show that Section 922(g)(1) is consistent with this Nation's historical tradition of firearm regulation. *See id.* at 4-5. Finally, Defendant argues that the Second Circuit's decision in *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013) does not survive *Bruen* and *Rahimi*. *See id.* at 5-7.

In response, the Government argues that while *Bruen* may have changed how courts are to approach Second Amendment challenges, binding Second Circuit precedent holds that Section 922(g)(1) is a constitutional restriction on the rights of convicted felons. *See* Dkt. No. 28 at 7-10. The Government further argues that even if *Bruen*'s framework were applied to this case,

prohibitions on possession of firearms by felons are consistent with the Nation's history and tradition. *See id.*

"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.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting U.S. Const. amend. II); *see also Gazzola v. Hochul*, 88 F.4th 186, 195 (2d Cir. 2023) (same). In *Heller*, the Supreme Court held for the first time that "the Second Amendment codifies a pre-existing individual right to keep and bear arms for self-defense in case of confrontation — a right that is not limited to service in an organized militia." *Gazzola*, 88 F.4th at 195 (citing *Heller*, 554 U.S. at 592, 595). The Supreme Court clarified, however, that the "individual right to keep and bear arms" under the Second Amendment is "not unlimited." *Heller*, 554 U.S. at 595, 626. In particular, the Supreme Court in *Heller* made clear that its decision should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," or on other such "presumptively lawful" regulations. *Id.* at 626-27 & n.26. Two years later, in holding that the Second Amendment applies to the states via the Fourteenth Amendment, the Supreme Court reaffirmed its holding in *Heller*, along with its support for "such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626).

In 2022, the Supreme Court announced a new framework for analyzing challenges to restrictions on Second Amendment rights. In *Bruen*, the Supreme Court concluded that the second step of the two-step test that "Courts of Appeals ha[d] developed to assess Second Amendment claims" was "inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny," and established a new standard for applying the Second Amendment. *Bruen*, 597 U.S.

at 18, 24. Under *Bruen*, the proper test must be "rooted in the Second Amendment's text, as informed by history," and the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 19, 24. After *Bruen*, the Supreme Court decided *United States v. Rahimi*, rejecting a challenge to 18 U.S.C. § 922(g)(8). *See Rahimi*, 144 S. Ct. at 1894, 1897. Section 922(g)(8) "prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he 'represents a credible threat to the physical safety of [an] intimate partner,' or a child of the partner or individual." *Id.* at 1894 (alteration in original) (quoting 18 U.S.C. § 922(g)(8)). In upholding Section 922(g)(8), the Supreme Court held that it was analogous to "surety" and "going armed" laws in effect at the time of the Founding, and thus "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 1899-1901.

Prior to *Bruen* and *Rahimi*, in *United States v. Bogle*, the Second Circuit issued a short *per curiam* opinion based on *Heller* and *McDonald* upholding the constitutionality of Section 922(g)(1) in the face of a challenge similar to the one Defendant now raises. *See United States v. Bogle*, 717 F.3d 281, 281-82 (2d Cir. 2013). In *Bogle*, the Second Circuit avoided engaging in the type of means-end scrutiny, *i.e.*, strict or intermediate scrutiny, that the *Bruen* Court described as constituting "one step too many" in adjudicating Second Amendment challenges. *Bruen*, 597 U.S. at 19. Instead, in *Bogle*, the Second Circuit's analysis relied on the Supreme Court's caution in *Heller* and *McDonald* that those decisions should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Bogle*, 717 F.3d at 281 (quoting *Heller*, 554 U.S. at 626); *see also McDonald*, 561 U.S. at 786 (quoting the same). Relying only on such language, the Second Circuit "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 & n.1 (citing cases).

In the present matter, the Court concludes that it is bound by *Bogle*'s holding – one that resulted from reasoning in *Heller* and *McDonald* that *Bruen* upheld – that Section 922(g)(1) is constitutional under the Second Amendment, and Defendant's challenge accordingly fails. The Court is unpersuaded by Defendant's argument that *Bruen* abrogated the one-paragraph decision in *Bogle*. *See* Dkt. No. 27-1 at 5 (arguing "[t]hat holding was based solely on a stray comment from the Supreme Court in *Heller* that its decision should not "'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons'") (quotations omitted). Defendant also notes that there are several cases pending before the Second Circuit that challenge the constitutionality of Section 922(g)(1) and that the Second Circuit was presumably awaiting the Supreme Court's decision in *Rahimi*. *See id.* at 5-6, n.4. Regardless of whether the Second Circuit chooses to revisit *Bogle*'s holding in light of *Bruen* and *Rahimi*, this Court remains bound by squarely applicable precedent. *See United States v. Steinberg*, 21 F. Supp. 3d 309, 319 (S.D.N.Y. 2014) ("[A lower court] should follow the case which directly controls, leaving to [reviewing courts] the prerogative of overruling [their] own decisions") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)), *abrogated on other grounds by United States v. Newman*, 773 F.3d 438 (2d Cir. 2014). If and when the Second Circuit eventually considers whether *Bruen* requires reversing *Bogle*, it will depart from *Bogle* only if it finds some "conflict, incompatibility, or 'inconsisten[cy]'" between its decision and the Supreme Court's decision in *Bruen*. *See In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 155 (2d Cir. 2015) (quoting *Wojchowski v. Daines*, 498 F.3d 99, 109 (2d Cir. 2007)). Where, as here, "the Second Circuit has spoken directly to the issue," this Court is required to follow that ruling "unless a subsequent decision of

the Supreme Court so undermines it that it will almost inevitably be overruled by the Second Circuit." *United States v. Smith*, 489 F. Supp. 3d 167, 172-73 (S.D.N.Y. 2020) (quotation omitted).

The Court cannot conclude that the Second Circuit will "almost inevitably" overrule *Bogle* in light of *Bruen*. As discussed, *Heller* explained that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626. *McDonald* reaffirmed this statement, describing *Heller* as making "clear" that its holding "did not cast doubt on such longstanding regulatory measure as 'prohibitions on the possession of firearms by felons.'" *McDonald*, 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626). The Second Circuit in *Bogle* relied on this language to reach its holding, *see Bogle*, 717 F.3d at 281, and this language has not been undercut by *Bruen*.[1] *Rahimi* further reinforces this conclusion. The *Rahimi* Court first reiterated that the Second Amendment does not prohibit "the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse," and then specified that under *Heller*, "many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *Rahimi*, 144 S. Ct. at 1901-02 (quoting *Heller*, 554 U.S. at 626-27 & n.26). *Bogle* did not apply means-end scrutiny and instead relied solely on this same language in *Heller* that highlighted historical, "'longstanding prohibitions on the possession of firearms by felons.'" *Bogle*, 717 F.3d at 281 (quoting *Heller*, 554 U.S. at 626).[2] *Bogle* therefore remains good law following *Bruen*.[3]

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[1] In addition, the *Bruen* Court abrogated the decisions of several circuit courts — including the Second Circuit's decision in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) — faulting them for applying means-end scrutiny to determine the constitutionality of a firearms regulation. *See Bruen*, 597 U.S. at 19 & n.4. The Supreme Court did not, however, abrogate *Bogle*. *See id.*

[2] The Court also finds the Fifth Circuit's decision in *United States v. Diaz*, 116 F.4th 458 (continued...)

Finally, Defendant argues that Section 922(g)(1) is unconstitutional as applied to him. As the Government notes, however, Defendant only makes this argument in passing and does so in an entirely conclusory manner. *See* Dkt. No. 28 at 11. Defendant's cursory invocation of an as-applied challenge without any attempt to develop the argument means that Defendant has waived that argument. *See United States v. Malka*, 602 F. Supp. 3d 510, 529 (S.D.N.Y. 2022) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived") (quoting *United States v. Botti*, 711 F.3d 299, 313 (2d Cir. 2013)).

Defendant contends "that the indictment does not identify a prior conviction that renders [his] alleged firearm possession unlawful, which ... renders an as-applied challenge impossible at this stage." Dkt. No. 27-1 at 5 n.3. While the indictment does not specifically identify a prior

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[2](...continued)
(5th Cir. 2024) persuasive. In that case, the court rejected the defendant's Second Amendment challenge to his Section 922(g)(1) conviction and discussed in some detail relevant historical analogues in support of its conclusion. *See id.* at 465-67.

[3] Other courts in the Second Circuit to have addressed *Bogle* post-*Bruen* have similarly concluded that *Bogle* remains binding precedent. *See United States v. Gavalo*, No. 24-cr-80, 2024 WL 4118468, *3 (E.D.N.Y. Sept. 9, 2024) (holding that the court is bound by *Bogle* since it relied on the reasoning in *Heller* and *McDonald* that *Bruen* upheld); *United States v. Gary*, No. 3:22-cr-116, 2024 WL 4025287, *2 (D. Conn. Sept. 3, 2024) (same); *United States v. Carter*, No. 23-CR-74, 2024 WL 3785366, *3 (D. Conn. Aug. 13, 2024) ("*Bruen* did not disturb the precedents upon which *Bogle* relies and *Bogle* therefore remains binding upon this [c]ourt"); *United States v. Pankey*, No. 24-CR-122, 2024 WL 3522138, *4 (S.D.N.Y. July 23, 2024) (concluding that even after *Bruen*, "*Bogle*'s holding remains binding upon this [c]ourt and Section 922(g)(1) is constitutional on its face"); *United States v. Montanez*, No. 23-CR-186, 2024 WL 3360534, *3 (E.D.N.Y. July 10, 2024) (same); *United States v. Sanders*, 707 F. Supp. 3d 239, 241 (E.D.N.Y. 2023) ("Second Circuit precedents bind this [c]ourt, including the Second Circuit's decision in [*Bogle*], holding that '[Section] 922(g)(1) is a constitutional restriction on the Second Amendment rights of convicted felons'") (quotation omitted); *United States v. Sternquist*, 692 F. Supp. 3d 19, 26 (E.D.N.Y. 2023) ("[T]his [c]ourt joins the other district courts in this Circuit that have considered post-*Bruen* challenges to [Section] 922(g)(1)'s constitutionality in light of *Bogle* in finding that 'nothing in *Bruen*[ ] alters the rationale of *Bogle*' and, '... *Bogle* remains binding precedent within this Circuit on the constitutionality of [Section] 922(g)[(1)]") (quotations omitted); *United States v. Garlick*, No. 22-CR-540, 2023 WL 2575664, *5 (S.D.N.Y. Mar. 20, 2023) (same); *United States v. Hampton*, 676 F. Supp. 3d 283, 301 (S.D.N.Y. 2023) (same).

felony conviction, the affidavit in support of the criminal complaint does. *See* Dkt. No. 1. According to the affidavit, Defendant has at least three prior felony convictions. *See id.* at ¶ 7. On April 8, 2013, Defendant was convicted in Schenectady County Court of Criminal Sale of a Controlled Substance in the Third Degree, in violation of New York Penal Law § 220.39(0l), a Class B felony. *See id.* For that crime, Defendant was sentenced to four years of imprisonment, and two years of post-release supervision. *See id.* On November 19, 1997, Defendant was convicted in Schenectady County Court of Attempted Burglary in the Third Degree, in violation of New York Penal Law § 140.20, a Class E felony. *See id.* For that crime, Defendant was sentenced to two-to-four years of imprisonment. *See id.* Finally, on April 17, 1996, Defendant was convicted in Schenectady County Court of Grand Larceny in the Fourth Degree, in violation of New York Penal Law § 155.30(05), a Class E felony. *See id.* For that crime, Defendant was sentenced to six months of imprisonment and five years of supervised release. *See id.* Even assuming Defendant sufficiently raised his as-applied challenge, such challenge is without merit. Defendant has multiple prior felony convictions, one of which is for a serious drug crime, which puts him firmly within the heartland of felons whose disarmament serves a clear public safety interest. *See United States v. Gary*, No. 3:22-cr-116, 2024 WL 4025287, *3 (D. Conn. Sept. 3, 2024). Further, "[c]ourts in this Circuit have rejected the need to consider constitutional challenges to [Section] 922(g)(1) based upon the nature of the defendants' underlying felony convictions." *United States v. Carter*, No. 3:23-cr-74, 2024 WL 3785366, *4 (D. Conn. Aug. 13, 2024) (citing cases); *United States v. Mingues*, No. 5:23-CR-81, 2023 WL 9604697, *6 (N.D.N.Y. Dec. 23, 2023) (holding that, "with specific regard to [Section] 922(g)(1), there is no precedent requiring the Court 'to conduct an individualized inquiry by felony'") (quoting *United States v. Mitchell*, No. 1:23-CR-00198, 2023 WL 8006344, *7 (S.D.N.Y. Nov. 17, 2023)); *United States v.*

Hairston, No. 3:23-cr-20, 2024 WL 326667, *7 (D. Conn. Jan. 29, 2024) ("Nothing in *Bogle* or *Bruen* suggest that as-applied challenges, or a felony-by-felony individualized inquiry, is required").

Accordingly, Defendant's motion to dismiss the indictment is denied.

III. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the reasons set forth above, the Court hereby

ORDERS that Defendant's motion to dismiss the indictment (Dkt. No. 27) is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: October 29, 2024
Albany, New York

Mae A. D'Agostino
U.S. District Judge